CASE AND COMMENT.

CONSTITUTIONAL LAW—CRIMINAL PROVISION CREATING CIVIL LIABILITY.—The recent case of *Wasney* v. *Juraẓsky*[1] decided by the Court of Appeal of Manitoba raises a point of prime importance. The question propounded and considered by three of the four judges before whom the case was heard is: Does the violation of a provision of the *Criminal Code, per se,* give rise to an action sounding in tort?[2] Under sec. 91(27) of the *British North America Act* the Dominion Parliament has jurisdiction to make laws in relation to criminal law, while to the provincial legislatures there is assigned by sec. 91(13) property and civil rights in the province. It would appear that the Dominion Parliament in relation to criminal law has no jurisdiction to create a new civil liability, a subject-matter committed exclusively to the provincial legislatures.

In *Wasney* v. *Juraẓsky*[3] the defendant sold cartridges to the infant plaintiff who was about twelve years old. The sale, in the circumstances to a person of that age, was in violation of sec. 119 of the *Criminal Code.* When a rifle with which the boy and a friend were playing was loaded with one of these cartridges, he, standing in front of the rifle, attempted to fix the foresight. The rifle went off and he was injured. In an action brought by the boy for damages for injuries sustained, the Court held that the boy's contributory negligence prevented his recovering. In the same action, the boy's mother recovered from the defendant for hospital and medical expenses.

Prendergast, C.J.M., in holding that the violation by the plaintiff of the provision in the *Criminal Code* with respect to selling ammunition to a person under the age of sixteen years gave rise to an action for tort, quoted the following passage from Pollock on Torts:[4]

> The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the wrongful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment . . . Even if the mischief to be prevented is not such as an ordinary man would foresee as the probable consequence of disobedience, there is some default in the mere fact that the law is disobeyed.

[1] [1933] 1 W.W.R. 155, [1933] 1 D.L.R. 616.
[2] See comment: (1931), 9 C.B. Rev. 761.
[3] *Supra.*
[4] 12th ed., p. 25. See also *Fowell* v. *Grafton* (1910), 22 O.L.R. 550.

The learned Chief Justice was of the opinion that the *Criminal Code* armed the infant plaintiff with a tort, but he decided that the plaintiff was left to fight his battle conformably with the common law principles governing delictual liability. As there was a finding that the boy was contributorily negligent, Prendergast, C.J.M., dismissed the action brought by him. The learned writer on torts,[5] of course, was not addressing himself to a federal jurisdiction where criminal responsibility and civil liability are matters for different legislative bodies. It may further be pointed out that the Dominion Parliament in enacting the provision of the *Criminal Code* in question was not purporting to deal with civil liability. Assuming that the Dominion Parliament had power so to do it has not accomplished that purpose in this instance.[6]

Trueman, J.A., with whom Dennistoun, J.A., concurred in this respect, it is submitted, made the correct approach to this problem originating in constitutional law when he said:

> It is obvious that under our system of divided legislative jurisdiction sec. 119 of the Criminal Code, *although it can be referred to as setting up a standard of care which must be recognized in civil proceedings,*[7] gives no right of action to a person injured through its breach, and that if civil redress is sought the rights of the parties must be determined by common law rules.

The Dominion Parliament has no authority under its constituent Act to create directly or indirectly a civil liability sounding in tort merely by virtue of its jurisdiction to make laws in relation to criminal law. It cannot be disputed that the Dominion Parliament may create rights when legislating in relation to a subject-matter other than criminal law, as, for example, inter-provincial railways, banks and banking, or bankruptcy.[8] It is difficult to imagine how the Dominion Parliament could enact criminal legislation, punitive in character, and validly tack on to it a provision relating to the creation of a new tortious liability. Jurisprudentially these two objects are not ancillary or supplementary to each other.[9]

S. E. S.

[5] Pollock: *op cit.*

[6] See also *Blamires* v. *Lancashire and Yorkshire Ry. Co.* (1873), L.R. 8 Ex. 283.

[7] Italics inserted.

[8] Cf. correspondence (1932), 10 C.B. Rev. 153.

[9] Cf. *Dowsett* v. *Edmunds,* [1926] 4 D.L.R. 796, where it was held that sec. 734 of the *Criminal Code,* providing that no action will lie for an assault after a conviction has been had for the offence and the accused has paid or suffered the penalty, is valid. This provision is truly ancillary to a determination of the penalty.

PERPETUITIES—METHOD OF INTERPRETING INSTRUMENT.—A re-recent decision of the Court of Appeal for Ontario, *Re Corcoran*,[1] is particularly interesting as it reflects the possibility of another inroad by the Ontario Courts on the rule of *stare decisis*. There is evidence in it of an inclination on the part of the Court to depart from the prevailing decisions on construction of instruments in relation to the rule against perpetuities.

Middleton, J.A., who wrote the judgment of the Court, is reported to have observed[2] that:

> While a Court has no right to misconstrue a will with the object of avoiding the rule against perpetuities, nevertheless, if the language of a will is ambiguous, it is proper to lean rather to a construction which will carry out the intention of the testator, in the sense that it will make his will effectual and not render it void by means of a doctrine from which, if he had known, he would certainly have desired to steer clear. The observation of Viscount Cave in *Ward* v. *Van der Loeff*,[3] that, in considering whether a testamentary gift is void for remoteness, the proper course is, first, to construe the gift without regard to perpetuities, and then to consider whether the gift so construed offends against the rule, must be taken with some qualification. Lindley, M.R., in *In re Turney*,[4] said, where a will is ambiguous "if the one construction tends to carry out the testator's intention while the other tends to defeat it, we ought to adopt that construction which carries it out."

These observations form part of an attempt to abrogate some of the injustices that may in the future be caused by the rule against perpetuities, which has so often been fatal to the intention of testators and even the most innocuous of gifts. The legal basis for the statement of the learned justice of appeal affords some scope for critical interest for, although, as Lord Phillimore[5] has observed, the rule is "judge-made law," it is too well authenticated to be modified by any court. That is a task for the legislature.

If Lord Cave had been the only Law Lord who had expressed the particular view it might be very proper to consider carefully the justification of putting a purely literal construction upon his words but it is interesting to note that Viscount Haldane, L.C., in the same case[6] also stated without any qualification that the proper rule of construction should be as follows:

> The principle to be applied in construing instruments for the purpose of ascertaining whether the direction they contain infringes the rule against perpetuity is a well settled one. It was repeated with emphasis in this House in *Pearks* v. *Moseley*, where it was laid down that in construing the words the effect of the rule must in the first instance be left out of sight, and then,

[1] (1932), 41 O.W.N. 333.
[2] (1932), 41 O.W.N. 333 at p. 334.
[3] [1924] A.C. 653 at p. 662.
[4] [1899] 2 Ch. 739 at p. 747.
[5] [1924] A.C. 635 at p. 672.
[6] [1924] A.C. 635 at p. 660.

having in this way defined the intention expressed, the Court had to test its validity by applying the rule to the meaning thus ascertained. It is only therefore if, as a matter of construction, the words in the codicil, taken in the natural sense in which the testator used them, do not violate the rule that they can be regarded as giving a valid direction.

The case of *Pearks* v. *Moseley*[7] referred to by Lord Haldane is a unanimous decision of the House of Lords and was decided as far back as the year 1880. This case, like *Ward* v. *Van der Loeff*, involved the consideration of whether or not a particular bequest was void as being too remote, and two of the learned Lords dealt specifically with the proper method of construing an instrument alleged to infringe the rule. Lord Selborne[8] said:

> The rule which has always been applied in cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; . . . So understanding the rule, the first question in every case of this kind is that of pure and simple construction—what is the meaning of the words which the testator has used? What would their effect be, if there was no law of remoteness?

It will be noted that Lord Selborne, in the foregoing quotation, is considering the same qualification as that suggested in the reasons for judgment of the Ontario Court but he suggests that it be used "sometimes" and goes back again to state definitely that the instrument must be construed as "if there was no law of remoteness."

Lord Blackburn[9] said:

> Secondly, I think it has been established by a long series of authorities that we are to construe the will just as if there was no such rule of law as that of perpetuity or remoteness, and see whether the gift is to a class, and afterwards ascertain whether the class is one, part of which is beyond the limits of remoteness.

The Court of Appeal for Ontario goes even further than Parker, J., who in *In re Hume*[10] said:

> It is not permissible to construe the gift otherwise than according to its natural meaning because if construed according to its natural meaning it would offend against the rule, though *possibly* if the gift might *equally* well be construed in two ways, one of which only would offend against the rule, the court might because of the rule be led to adopt the other construction.

[7] (1880), 5 App. Cas. 714.
[8] (1880), 5 App. Cas. 714 at p. 719.
[9] (1880), 5 App. Cas. 714 at p. 733.
[10] [1912] 1 Ch. 693 at p. 698.

In *Re Corcoran*[11] the Ontario Court was considering the decisions of two English Courts and suggested that the view expressed in the House of Lords be qualified by that expressed in a lower and subservient court. The question of the binding effect of a decision of the House of Lords in the Ontario Courts has been dealt with exhaustively in two recent articles[12] and it would be useless to repeat here the observations made in those articles, except to point out that it was the view of both the late Chief Justice Anglin in *Stuart* v. *Bank of Montreal*[13] and of Viscount Dunedin in *Robins* v. *National Trust Company*[14] that a decision of the House of Lords is binding on a colonial court.

D. G. FARQUHARSON.

Toronto.

* * *

TORT—COMMON LAW LIABILITY OF MASTER FOR DEFECTIVE PLANT OR SYSTEM OF WORK.—The recent case of *Fanton* v. *Denville*[1] has again raised (and to some extent disposed of) a point on which authorities were to be found in abundance and variety. In that case an actor who took the part of the principal in an execution scene, incurred a broken ankle in dropping through the trap to a floor beneath. It was established that the appliances to prevent accident were not reasonably safe, as was also the fact that the defendant (the owner) took no part in the production but had delegated all duties of superintendence to a competent manager. At the trial the jury found for the plaintiff in the sum of £93 1*s.* 6*d.* and costs, and judgment was entered accordingly. On appeal, heard by Scrutton, Greer and Slesser, L.JJ., the judgment of the Court below was set aside and judgment entered for the defendant with costs of trial and appeal.

The action was taken at common law and the defendant relied on the doctrine of common employment. The question for the Court, put in the words of Scrutton, L.J.,[2] was:

> Whether an employer warrants that the plant and property of his business is safe or only promises that he will use reasonable care to see that they are safe, and whether he fulfils that promise by using reasonable care to appoint competent persons to undertake that duty and, if he does so, is not liable for negligence of his delegate, the servant injured not being entitled to complain of the negligence of a fellow servant by reason of the doctrine of common employment.

[11] *Supra.*
[12] 11 C.B. Rev. 281 and 287.
[13] (1909), 41 Can. S.C.R. 516 at p. 548.
[14] [1927] A.C. 515 at p. 519.

[1] [1932] 2 K.B. 309; 48 T.L.R. 433.
[2] (1932), 48 T.L.R. 433 at p. 435.

Numerous authorities were discussed, *Laubach* v. *Cooptimists Entertainment Syndicate, Ltd.*[3] being expressly followed, while the Privy Council case of *Toronto Power Co., Ltd.* v. *Paskwan*[4] was regarded as inconsistent with the trend of English decisions. Since the latter case was a decision of the Privy Council the Court of Appeal was not bound to follow it, and the respect with which they would traditionally regard such a decision, evidently did not inspire them to do so.

From the *Fanton* case, however, an interesting situation presents itself. Presumably it sets at rest the question outlined above as regards English Courts, although the House of Lords may conceivably hold otherwise. On the other hand, the Privy Council seems to be credited with having arrived at an opposite result in the *Toronto Power* case. In the *Fanton* case the Court of Appeal expressed a doubt as to whether the actual decision in the *Toronto Power* case was strong enough to justify the head-note, but the principle expressed in the judgment seems at any rate to dispel any doubt as to whether "plant" is to come within the common employment rule or not. There the Judicial Committee[5] said:

> The providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than his servants . . . The supplying of that which is in the opinion of the jury a proper plant stands on rather different footing. It is true that the master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and further the master is not bound at once to adopt all the latest improvements and appliances. It is a question of fact in each case, was it in the circumstances a want of reasonable care not to have adopted them?

The Judicial Committee went on to discuss the facts and said further[6] "The jury might perhaps under the circumstances have found that there was no want of reasonable care and only an error of judgment but this jury have not done so." This decision may be cited as authority for the proposition that the doctrine of common employment cannot be raised in the case of defective plant, but that the master is liable for any but a latent defect which existed or was created and of which he neither knew nor ought with reasonable diligence to have known. Lord Cairns in *Wilson* v. *Merry*[7] was quoted as follows:

[3] (1926), 43 T.L.R. 30.
[4] [1915] A.C. 734.
[5] [1915] A.C. 734 at p. 738.
[6] [1915] A.C. 734 at p. 739.
[7] (1868), 19 L.T. 30 at p. 33.

What the master is, in my opinion, bound to his servant to do in the event of his not personally supervising and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has done all that he is bound to do.

There is therefore a two-fold obligation set out in *Wilson* v. *Merry* and approved in the *Toronto Power* case, as follows: (1) to select proper and competent persons to direct the work; and (2) to provide (and *semble* this would include to maintain) adequate materials and resources for the work. The *Toronto Power* case may however, as shown above, be regarded as qualifying this rule slightly, and in *Laubach* v. *Cooptimists*,[8] Finlay, J., said of that case:

It is said that the later authorities, particularly the *Toronto Power* case go to show that where the matter is a matter of supplying plant, then the master cannot relieve himself of responsibility, merely by delegating it to a person who is incompetent for the task. My impression is that it is to some extent a question of degree. I think that there may be cases where it would be correct to arrive at the same conclusion as in the *Toronto Power* case.

The above, by way of introduction, shows, it is submitted, three distinct lines of thought as regards defective plant or system of work.

(1) *That the defence of common employment is applicable to cases involving a defective plant or system of work.*

It is proposed to examine the doctrine of common employment as it applies to this question. That doctrine, known as the rule in *Priestly* v. *Fowler*[9] first discussed with particularity in *Hutchinson* v. *York, Newcastle & Berwick Railway Company*,[10] has been firmly established by a long line of cases. From that rule we may glean the following points: (1) a master is not liable to a servant for a tort committed by a competent fellow-servant in the course of their employment; (2) the basis of the immunity is entirely consent, the injured servant being regarded as impliedly consenting to run the risk of his fellow servant's negligence—an application of the doctrine, *volenti non fit injuria*; (3) this rule must be qualified in the case of tort by an incompetent fellow-servant where the master omitted to use reasonable care in his selection or in dismissing a servant who proved incompetent.[11]

Under this heading the *Fanton* case, which has already been dealt with, may undoubtedly be cited and it expressly follows a long line of cases, among them being *Laubach* v. *Cooptimists*,[12] *Wig-*

[8] *Supra.*
[9] (1837), 7 L.J. Ex. 42.
[10] (1850), 19 L.J. Ex. 296.
[11] See *Tarrant* v. *Webb* (1856), 25 L.J.C.P. 261.
[12] *Supra.*

more v. *Jay*,[13] *Hedley* v. *Pinkney*,[14] *Coldrick* v. *Partridge*,[15] *Searle* v. *Lindsay*,[16] *Potts* v. *Port Carlisle*,[17] *Brown* v. *Accrington*,[18] *Cole* v. *De Trafford*,[19] *Seymour* v. *Maddox*,[20] *Lloyd* v. *Woolland Brothers*,[21] *Gallagher* v. *Piper*.[22]

It is unnecessary to enter into a detailed discussion of these cases here but most, if not all, were expressly approved in the *Fanton* case. If these cases are followed the plaintiff in an action involving a defective plant or system of work must show: (a) that the master as manager was personally negligent, or (b) that he failed to use reasonable care in securing a competent manager. If he fails to establish one or other of these points his case must fall to the ground.

(2) *That the defence of common employment does not apply, and that the master's liability is one which cannot be delegated, even to a competent manager.*

This proposition, which might well imply that the master's liability is almost if not quite absolute, is not without authority. Particularly is this true of a line of Canadian cases, some of which will be dealt with here. It may be well to preface these with a reference to some English cases.

Wilson v. *Merry*, as quoted above, is indirectly in support of this proposition; *Toronto Power* v. *Paskwan* is apparently also regarded as an authority, but the propriety of doing so may be questioned. One finds also that passages from *Smith* v. *Baker*[23] are quoted frequently in the various cases. In that case Lord Halsbury said:

> I think that the cases cited at your Lordship's Bar, *Sword* v. *Cameron*[24] and *Bartonshill Coal Co.* v. *McGuire*,[25] established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act.

And Lord Watson, said:

> It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound

[13] (1850), 19 L.J. Ex. 300.
[14] [1894] A.C. 222.
[15] [1910] A.C. 77.
[16] (1861), 31 L.J.C.P. 106.
[17] (1860), 2 L.T. 283.
[18] (1865), 34 L.J. Ex. 208.
[19] (1918), 87 L.J.K.B. 1254.
[20] (1851), 20 L.J.Q.B. 327.
[21] (1902), 19 T.L.R. 32.
[22] (1864), 33 L.J.C.P. 329.
[23] [1891] A.C. 325 at pp. 339, 353 and 362.
[24] (1839), 1 D. 439.
[25] (1858), 3 Macq. 300.

to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth, and other noble and learned Lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act, 43 and 44 Vict. c. 42, that a master is no less responsible to his workman for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself.

Similarly Lord Herschell said:

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

These of course are dicta, and lose some of their force from the facts of the cases. In *Lloyd* v. *Woolland Brothers*,[26] Collins, M.R., said:

It is perfectly clear that the master was bound to supply fit and proper machinery, and to supply competent persons to superintend it, and equally in a case where it might be machinery was not used at all he was responsible for the system under which the business was conducted if that system itself involved danger, and he was the author of, or was responsible for, the system.

Turning now to an examination of some Canadian authorities we find a number of cases dealing with this, as with most industrial problems.

In *Ainslie Mining & Railway Co.* v. *MacDougall*[27] the facts show that this was a case arising out of operation of a mine, where a competent overseer had been appointed, but the system of work was inadequate. Davies, J., said:

Defective places in which to work, defective machinery with which to work, defective system of carrying on work, are none of them, I hold, within the exception grafted upon the rule holding an employer liable for the negligence of the men in his employ. That exception as defined by Lord Cairns in his celebrated dictum in *Wilson* v. *Merry* does not cover the duties owing by the employer to the employed in these respects, but does cover all risks which the workmen assume when they enter into their master's employment against the wrongful acts or the negligence of their fellow-servants.

Webster v. *Foley*[28] was a case where injuries received by a workman in a sawmill were found to be caused by use of defective blocks. Lord Watson in *Smith* v. *Baker*[29] was quoted, and the Court held that at common law notice to an employer of the unsafe state or unsafe working of appliances was not necessary. He was bound at his peril to make proper provision in that respect.

[26] *Supra.*
[27] (1909), 42 Can. S.C.R. 420 at p. 426.
[28] (1892), 21 Can. S.C.R. 580.
[29] *Supra.*

Coming to a more recent line of cases we have *Brooks, Scanlon and O'Brien Co.* v. *Fakhema*[30] where conduct of the business was left entirely to a superintendent and foreman. Anglin, J., said:

In either case the defendants are, in my opinion, liable at common law, for the injuries sustained by their employee, the duty, a breach of which the jury have found them to have been guilty, being a duty which they could not delegate so as to substitute liability under the Employers' Liability Act for liability at common law in the event of injury resulting to an employee from failure to discharge it.

Scotney v. *Smith Brothers*[31] is a Saskatchewan case in which there is a carefully reasoned judgment of Brown, J., dealing with two main points: (1) liability for defective plant or system; and (2) *volenti non fit injuria.* On the first point, (to which we shall restrict ourselves) in the course of his judgment, Brown, J., said:

Dealing with the first question; it is the duty of the master to provide fit and proper places for the workmen to work in and a fit and proper system and suitable materials with which to work; *Ainslie Mining & Railway Co.* v. *McDougall,*[31a] *Lindsay* v. *Davidson.*[31b]

The learned judge then quoted Lord Halsbury and Lord Watson in *Smith* v. *Baker,* and referred further to Dawbarn on Employers' Liability[32] as follows:

A further duty of a master is to conduct his business on a proper system, and with due and reasonable care for the safety of his servants, and judging from the remarks of Lord Cranworth in the case of *Sword* v. *Cameron,* it would appear that this is a duty cast upon him whether he personally attend to his business or otherwise.

He then proceeded:

I have no hesitation in holding that the system or mode or method of constructing this wall was of a negligent character. The men who were responsible for the system or method of construction adopted were the servants of the defendants, other than the plaintiffs or Lloyd, and because of this negligence on the part of their servants, the defendants, under the above auhority would in my opinion be liable.

The Canadian case of *Ainslie Mining Co.* v. *MacDougall*[33] was cited with approval; apparently the *Brooks, Scanlon* case[34] was then too recent to attract attention. In *Hicks* v. *Smith's Falls Electric Power Co.,*[35] tried before Latchford, J., without a jury, he disposed of the matter by saying (*inter alia*):

I, therefore, find that there was in use by the defendants a defective and negligent system which caused the death of Hicks . . . The plaintiffs being

[30] (1911), 44 Can. S.C.R. 412 at p. 417.
[31] (1912), 4 D.L.R. 134 at p. 139.
[31a] *Supra.*
[31b] (1911), 19 W.L.R. 433.
[32] 4th ed., at p. 15.
[33] *Supra.*
[34] *Supra.*
[35] (1913), 10 D.L.R. 653 at p. 655.

entitled to recover at common law. I fix the compensation to which they are thus entitled at $4,000.00 . . . Hicks' death was caused by a defect in the condition of the machinery and premises used in the business of his employers.

Hooper v. *Beairsto Plumbing Co.*[36] sets out the duty to an employee as that defined by Lord Herschell in *Smith* v. *Baker*[37] for a breach of which the employer was held liable. *Velasky* v. *Western Canadian Power Co.*,[38] although cited in the *English & Empire Digest*[39] as authority for the proposition that the mere contracting with a competent person for supervision does not absolve the master, is not, it is submitted, a satisfactory authority. The British Columbia Court of Appeal, consisting of MacDonald, C.J.A., Irving, Martin and Galliher, JJ.A., divided equally, and the case seems to go on the grounds of the duty falling on occupiers of premises to an invitee or otherwise, rather than as cited in the Digest.

In *Proctor* v. *Parsons Building Co.*,[40] a Saskatchewan case for injuries received by a servant as the result of the breaking of a defective chain, Lamont, J., said in part:

> At common law there was from the earliest times a duty cast upon the master of seeing that the machinery and tackle supplied by him to his servants for the performance of their duties were suitable and proper. A failure to provide suitable equipment and to maintain the same in proper condition when provided was in case of injury to a servant resulting from such failure held to be negligence on the part of the master.

There was no discussion of authorities, and the case is valuable only for the direct statement of law given herein.

In *Hurley* v. *Boyce*[41] the same line of thought is adopted and a duty placed on the master of taking reasonable care to provide proper appliances and to maintain them in proper condition and to carry on his work in a manner which would not subject those employed by him to unnecessary risks. The dissenting judgment of Ferguson, J.A., is of special interest particularly where he laid down a four-fold proposition as follows: (1) that the master is not an insurer of his servant's safety and does not guarantee the safety of the place in which the servant works; (2) that the master's duty is limited to taking reasonable care to provide proper appliances and a safe place and to taking reasonable care to maintain the place or appliances in a proper condition; (3) that what is reasonable care depends on the circumstances of each case; (4) that, where the master

[36] (1913), 11 D.L.R. 245.
[37] *Supra.*
[38] (1913), 12 D.L.R. 774.
[39] Vol. 34, p. 196.
[40] (1913), 14 D.L.R. 40 at p. 41.
[41] [1928] 1 D.L.R. 1053 at pp. 1062-3.

employs a contractor to erect a building or to do the work, and does not personally interfere with the work, he is not responsible for the negligence or want of skill of the contractor in doing the work, unless it is made to appear that the master knew or ought to have known that the contractor was incompetent or that the master knew or ought to have known that the work done by the contractor was improper work and such as rendered the appliances or the premises unsafe. This, it is submitted, is an admirable analysis of the principles prevailing in this field of the liability of a master.

Under this heading it would therefore seem that the plaintiff would succeed merely where he establishes that a defective plant or system exists. A defence that the master had done all that a reasonable man would do, either in providing a plant or system of work or the appointment of a competent foreman would not be applicable.

(3) *That while the doctrine of common employment does not apply, the employer's liability is based on want of reasonable care, and this is a question of fact in each case.*

It may be submitted that *Toronto Power* v. *Paskwan*[42] is authority for this proposition. *Laubach* v. *Cooptimists*,[43] while supposedly against it, is so mild in its strictures as to enable us to coin a converse of the well-known phrase "dammed by faint praise" and say that it has been "commended by faint criticism." To quote Finlay, J., again: "My impression is that it is to some extent a question of degree. I think that there may be cases where it might be correct to arrive at the same conclusion as in the *Toronto Power* case." *Sword* v. *Cameron*[44] is regarded as authority to the effect that there must be a want of due and reasonable care on the part of the master, whether he personally attends to the business or not. *Paterson* v. *Wallace*[45] which deals with "reasonable precautions" and *Potts* v. *Port Carlisle Dock & Railway Co.*[46] may be generally cited, and the judgment of Ferguson, J.A., in *Hurley* v. *Boyce*[47] is excellent in its reasoning. This defence is obviously very different from that of common employment and leaves the question between the master and the servants. At the same time, its ramifications may well embrace the very facts that would be used as a defence under the

[42] *Supra.*
[43] *Supra.*
[44] *Supra.*
[45] (1854), 1 Macq. H.L. 748.
[46] *Supra.*
[47] *Supra.*

common employment rule, but that is an incident which would not always be inevitable.

The plaintiff here would have to establish that the plant or system of work was defective and that the master knew or ought, in the exercise of reasonable care and discretion, to have known of such defect. This being found, liability would follow.

The cases dealt with in this comment are not intended as an exhaustive list but merely for the purpose of illustrating each heading, but it will be apparent that they are by no means in complete accord.

In a position such as the bewildering array of authority leaves the student, it is doubtful whether a detailed discussion of the cases would be of any distinct value. Rather would it be desirable to discover wherein a common statement of principle might be evolved which, while perhaps not on all fours with all cases, would embrace the substance of many which are now regarded as conflicting. One might, of course, take the attitude that as regards Dominion Courts *Toronto Power* v. *Paskwan* is binding and that is the end of it. But while it may be so for the advocate it most decidedly is not for the student. By way of digression it might be said that such treatment would be the converse of the reasoning of Greer, L.J., in the *Fanton* case, which with all respect, is rather difficult to follow, where he said: "The decision of the Privy Council in *Toronto Power Co. Ltd.* v. *Paskwan* seems to me inconsistent with the whole trend of the English decisions, and *being a decision on the Law of Canada* is not an authority which we are bound to follow." The latter part of the learned Lord Justice's remarks is beyond criticism, but the statement as to the law of Canada is more open to comment. The Courts, including the Court of Appeal, in the *Fanton* case were interpreting the common law—similarly with the Courts, including the Privy Council in the *Toronto Power* case, and it is an accepted fiction that the common law is not subject to change or decay but has existed since the time whereof the memory of man runneth not to the contrary. It is a well-known general principle of English constitutional law, subject of course to the exception of obvious inconsistence, that on settlement or conquest, all the common law becomes applicable to the settled or ceded colony. Can the remark of Greer, L.J., then be used as authority for the proposition that if the Privy Council were faced with appeals from Australia and Canada on the same facts involving an interpretation of the common law, it would seek to discover the common law of Canada and that of Australia, and possibly come to different conclusions?

Revenons à nos moutons and assume that a case of this sort is before us and we are obliged to leave certain questions to the jury. What ought these questions to be? (1) Was the plant or system of work defective? (2) Was there personal negligence on the part of the master relating to the plant or system of work? (3) Did the master fail to use reasonable care to select a competent manager? Or, should we ask: (1) Was the plant or system of work defective? (2) If so, was the defect one of which the master neither knew nor under the circumstances could be reasonably expected to have known? (In discussing these alternatives, it is to be understood that cases wherein the servants' knowledge or consent may be a factor are not considered.)

The first question to be asked is if it is reasonable or proper to attempt to saddle a master with absolute liability in respect of plant or system of work? Looking at the matter from any of the angles of contract, negligence or that of nuisance, into which it might conceivably fall, it is difficult to justify an affirmative answer to this question. If we may be allowed to generalize it can without offence be said that the liability of a defendant in contract rests upon breach of its terms, expressly agreed or necessarily implied; that of a defendant in the tort of negligence upon breach of some duty to take care, and in nuisance upon some act of the defendant in causing offence to the plaintiff by which he suffers damage. Applying all of these to the problem of defective plant or system of work, it is submitted that it is inconceivable that absolute liability in every case could be made out. That doctrine may be regarded as an outgrown relic of the days of early industrialism. Its application today, in the complexities of modern commerce would be dangerous, illogical and unjust.

Should a master's liability for plant or system of work be regarded as incapable of delegation? There are reasons, not altogether negligible, why it should be. A servant can sometimes take steps to protect himself against the negligence of a fellow-servant, and where that fellow-servant is incompetent the master may be held liable. Even where the master cannot be successfully sued, would not the fellow-servant still be liable for his own negligence? In the case of plant or system of work, the servant cannot treat either as he could a person and it can readily be seen that the rule of non-delegation may, because of the relative positions of the parties, have much to commend it. A rule that such liability is also absolute is a different matter, and has been dealt with. But it is submitted that because of the fact that the master is master, there are many sound and substantial reasons why his liability for defects in

plant or system of work should not be within the rule of common employment.

Since to apply the doctrine of common employment there must be an act of a fellow-servant, the doctrine cannot be extended to cases where none exists. In all cases where there has been a delegation of duties the employer can say: "You must to render me liable, establish the act of an incompetent servant in the selection of whom I was not sufficiently careful. That is the extent of my liability." Such a case must be of the nature of the *Fanton* case where there was negligence on the part of the manager, in whose selection the master exercised reasonable care. There may conceivably be many cases where its strict application would work an injustice.

The problem is therefore, inconveniently, and it is submitted unnecessarily, sectionalized. Where there was a manager, we must establish that the plant or system was defective and are faced with many problems among which are the following:

(1) Can the master delegate liability for plant or system of work?

(2) Is he absolutely liable or is there a presumption to that effect which may be displaced?

(3) Is he under certain circumstances, liable for the tort of a manager, whether competent or incompetent? Here it must be remembered that some cases have gone so far as to suggest that there may be circumstances under which the manager can be regarded as a sort of deputy master. This point was expressly raised in *Gallagher* v. *Piper*[48] and *Murphy* v. *Smith*.[49]

(4) Is he completely absolved from liability for defective plant or system of work where he is reasonably careful in appointing a competent manager? Or, does his liability at common law depend on the extent to which he actively interferes in the control and management? Are there cases where he may be deemed to have adopted the act of the manager?

(5) Is there a duty on a master to inspect? *Murphy* v. *Phillipps*.[50] Or to make reasonable inquiries? Has the servant a right to expect the machinery to be in good condition?[51]
And can he sue for any breach of that right?

(6) Is the test—did the master know or ought he in the reasonable use of his position as such to have known of the defect?

[48] *Supra.*
[49] (1865), 12 L.T. 605.
[50] (1876), 35 L.T. 477.
[51] See *Clarke* v. *Holmes* (1862), 31 L.J. Ex. 356.

The purpose of the foregoing is not to quarrel with any of the two main lines of cases, either of which may result in substantial justice being done. Rather is it to inquire whether it should be necessary to have to deal repeatedly with such a multitude of cases in the solution of similar problems. Cannot a sufficiently clear statement of principle be worked out to cover the situation in its various ramifications? There can be little doubt at any rate that such a statement reconciling *Toronto Power Co., Ltd.* v. *Paskwan, Laubach* v. *Cooptimists* and the *Fanton* case might be evolved. It might be that it would be found inadequate for all manifestations of this problem, but that too may be doubted. Would not the following or a similar statement of principle be sufficient as regards the common law liability of a master for plant or system of work?

A master does not warrant the plant or system of work, nor is his liability that of an insurer. His liability for injuries to a servant arising out of a defect in plant or system of work must be based on a want of reasonable care on the part of the master himself. The question is, "Was the defect one of which the master actually knew, or ought by the exercise of reasonable care to have known?" If so, he is liable.

Where the master personally superintends the plant or system of work a direct answer to the above question is sufficient. Where superintendence has been delegated to a manager or foreman certain guides may be followed. The *prima facie* rule that there is no liability where the master has exercised reasonable care in the appointment of a competent foreman may be adopted. The plaintiff may however displace this *prima facie* rule. Where there is under the circumstances of the particular case a duty in the master acting as a reasonable man to inspect or interfere and such action, properly exercised, would have revealed the defect; where the special facts are strong enough to constitute an adoption by the master of the act of his manager, and conceivably under other circumstances, which establish that the master actually knew or ought as a reasonable man to have known of the defect, the plaintiff would succeed.

Would such a statement of principle illuminate a situation wherein multiplicity of theories and decisions are rife, and confusion abounds, or would it merely tend to make such confusion worse confounded? It is submitted that the former might well be the case.

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LANDLORD AND TENANT—IMPLICATION OF FITNESS FOR HABITATION OF DEMISED PREMISES.—It is well settled that both a warranty and a condition are to be implied in a lease of furnished premises that the premises are fit for habitation at the time of the commencement of the tenancy.[1] It is equally well settled that there is no such warranty

[1] See the authorities collected in *Davey* v. *Christoff* (1916), 36 O.L.R. 123; 28 D.L.R. 447. See also *Collins* v. *Hopkins*, [1923] 2 K.B. 617.

or condition in a lease of unfurnished premises,[2] with the possible exception of an unfurnished house let for immediate occupation.[3]

An ambitious, but abortive, attempt to apply to an unfurnished flat the rule applicable to furnished premises was made in *Cruse* v. *Mont*,[4] before Maugham, J. The plaintiff took a long lease of an unfurnished flat, and after he had entered he discovered that the premises were not fit for occupation by reason of structural weaknesses. He was forced to leave the premises while they were being repaired. In an action to have the lease set aside, the plaintiff's contention was that the case of a flat was mid-way between that of a furnished and an unfurnished house. The ingenious argument was made that "the practice is not for intending tenants of flats to send a surveyor to examine the building, since a surveyor could not make a proper examination of the structure in a case where other flats are in the possession of other tenants. Further . . . if the building is structurally in bad repair, the tenant under an ordinary tenancy of a flat has no power to rebuild or reconstruct the premises. To do that he would have to go into flats which belong to other tenants and to attempt to do work on the premises which he has no power to do."[5]

The learned judge stated in answer to this contention: "I should not have felt any serious reluctance in holding, if it were open to me to do so, that the case of a flat is one of a special character, and that there was in this case an implied condition that the flat was fit for habitation, or, at any rate, that the flat was not part of a dangerous structure. I am, however, bound, as it seems to me, by the decision of the Common Pleas Division in *Manchester Bonded Wharehouse Co.* v. *Carr*[6] . . . I am unable on any ground which seems to me to be satisfactory to distinguish that case from the present one. It was a lease of part of a building where all the considerations I have mentioned as applicable in the case of a flat were, to some extent, applicable, and the Court, one composed of very eminent judges, came to the conclusion that it would be to extend the law to hold that any warranty could be implied in such a case."[7]

The existence of the implication of habitableness was also negatived in the case of an unfurnished apartment in *St. George Mansions Ltd.* v. *Hetherington*.[8]

[2] *Ibid.*
[3] See *Bunn* v. *Harrison* (1886), 3 T.L.R. 146; *Davey* v. *Christoff* (1916), 36 O.L.R. 123 at p. 129; 28 D.L.R. 447 at p. 452; *McIntosh* v. *Wilson* (1913), 14 D.L.R. 671 at p. 675.
[4] [1933] 1 Ch. 278.
[5] See [1933] 1 Ch. 278 at p. 283.
[6] (1880), 5 C.P.D. 507.
[7] [1933] 1 Ch. 278 at pp. 283-4.
[8] (1918), 42 O.L.R. 10; 41 D.L.R. 614.

The rule applicable to unfurnished premises, thus so firmly intrenched, undoubtedly works hardship on unsuspecting tenants. Fortunately, however, for them, there is not as yet a precise definition of what are "furnished" premises. As a result the term has been more than once extended in recent years to cover premises which would not seem normally to fall within it.

One such case is *Davey* v. *Christoff*.[9] The subject-matter of the lease in question was a moving picture theatre with its contents "including . . . seats . . . piano, machines, and all other necessary equipment, for the operation of the theatre." The heating appliances were found inadequate to heat the premises, and the Appellate Division of the Supreme Court of Ontario held after an elaborate examination of the authorities that as the demise resembled in its essential features that of a furnished house, the tenant was entitled to repudiate his tenancy.

An even more extreme instance is the recent case of *Bowes* v. *Fec* (or *Fecz*).[10] The defendant leased from the plaintiff premises which were then being used as a restaurant and rooming-house, and by a separate agreement, executed on the same day, the defendant purchased from the plaintiff the goods and chattels used on the premises for the conduct of the businesses referred to. After he had gone into possession, the defendant discovered that the premises were infested with rats and bed bugs and he repudiated the tenancy. The Saskatchewan Court of Appeal held that the tenant's action was justified. Martin, J.A., who was the only member of the Court giving reasons, stated: "In the present case, the property demised was realty only, but at the same time, although by different instrument, the defendant purchased the equipment and furniture of the restaurant and rooming-house. The leasing of the premises and the sale of the furniture were parts of the one transaction; the premises had been used for the conduct of a restaurant and rooming-house; a tenant had recently moved out, and the defendant desired to move in at once, and did in fact move in, and immediately commenced carrying on business on the premises. The defendant would not have leased the premises without the furnishings, and he would not have purchased the chattels had he not been able to lease the premises; the contract was entire. Had the defendant merely rented the premises with the furniture, there can be no doubt but that there would be an implied condition of fitness; and I can see no reason

[9] (1916), 36 O.L.R. 123; 28 D.L.R. 447.
[10] [1933] 1 W.W.R. 101.

why the condition should not be implied because, instead of renting the furniture, he purchased it."[11]

On the other hand, the premises were not deemed to be furnished in *St. George Mansions Ltd.* v. *Hetherington.*[12] There were on the premises a refrigerator, and also window blinds or curtains, but the Appellate Division of the Supreme Court of Ontario stated that "the premises did not purport to be furnished premises, nor were they in fact."[13] The Court also held that the case was not taken out of the rule applicable to unfurnished premises merely because the lessors had covenanted to supply the premises with necessary heat and hot and cold water, and such janitor service as was necessary for the proper care of the building.

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[11] [1933] 1 W.W.R. 101 at pp. 107-8.
[12] (1918), 42 O.L.R. 10; 41 D.L.R. 614.
[13] (1918), 42 O.L.R. 10 at p. 12; 41 D.L.R. 614 at p. 615.