CORRESPONDENCE

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LOSS OF PROFITS AS DAMAGES.

Editor, CANADIAN BAR REVIEW.

SIR,—Perhaps a few words may be allowed by way of supplement to Mr. Gushue's very interesting article in the February number.

The recent judgment of Salter, J., in *Patrick* v. *Russo-British Grain Export Co.*[1] is an additional authority on the right to recover loss of profits as damages for non-delivery within the second rule in *Hadley* v. *Baxendale.*[2]

Mr. Gushue discusses fully the cases of (1) delayed delivery, and (2) non-delivery, but dismisses perhaps too summarily the case of (3) delivery of inferior goods. The decisions on this third case throw some light on the first and second cases, especially on the question in what circumstances the fact that the buyer has made a sub-contract for the sale of goods (either the very goods which are the subject of the principal contract or goods of similar description) may affect the measure of damages under the principal contract. Mr. Gushue seems to be satisfied that there is a real distinction between (1) delayed delivery, and (2) non-delivery sufficient to justify the distinction between (1) the Privy Council decision in *Wertheim* v. *Chicoutimi Pulp Co.*[3]—buyer's damages under the principal contract affected by the price of the goods under a sub-contract—and (2) the House of Lord's decision in *Williams* v. *Agius,*[4] approving *Rodocanachi* v. *Millburn*[5]—buyer's damages under the principal contract not affected by the price of the goods under a sub-contract. He may be right, but if he had discussed the decisions relating to (3) delivery of inferior goods, he would at least have referred to the judgment of Scrutton, L.J. in *Slater* v. *Hoyle,*[6] in which that acknowledged expert in commercial law expresses obiter the opinion that the same principles should be applied to (1) delay in delivery, (2) non-delivery, and (3) delivery of inferior goods, and that the Privy Council decision was erroneous in departing from those principles. Bankes, L.J., points out in the same case that in any event the doctrine of *Wertheim* v. *Chicoultmi Pulp Co.* is to be limited to the case of a sub-contract for the sale of the identical goods which are the subject of the principal contract.

[1] [1927] 2 K.B. 535. Since this letter was written, a note on Salter, J.'s decision by Mr. Gushue has appeared in the March number.
[2] (1854) 9 Exch. 341.
[3] [1911] A.C. 301.
[4] [1914] A.C. 510.
[5] (1886) 18 Q.B.D. 67.
[6] [1920] 2 K.B. 11, at p. 24.

It is to be hoped that Mr. Gushue will attempt to elucidate the whole question, partly outside the scope of the title of his article, but analogous to the question discussed in his article, how far transactions between the buyer and third parties can affect the damages sought by the buyer against his seller, and how far they should be excluded as being matters personal to the buyer in which the seller has no concern.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.

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RE-ARRANGEMENT OF COMPANY SHARES.

Editor, CANADIAN BAR REVIEW.

SIR.—The provision in the Companies' Act, Canada (now sec. 144 R. S., 1927, cap. 27), has been successfully invoked in several cases to authorize a re-arrangement of the shares of solvent companies.

It is submitted there is no authority given by sec. 144 or 145 to the Court to authorize any arrangement which is not in the interests or for the benefit of all the shareholders of the class voting on the proposal.

No authority is given to the majority of shareholders or of a class of shareholders to change the contractual rights or the status of any shareholder unless it is for his benefit, and it is submitted that all the "re-arrangements of stock" which injuriously affect or which alter the position of any stockholder are unauthorized. The principles, enunciated in *British American Nickel* v *O'Brien*,[1] are applicable to cases under this statute. "The object of this section is not confiscation; it is not that one person shall be a victim, and that the rest of the body shall feast upon his rights." *In re Alabama.*[2]

This letter is written to you because the writer is aware of more than one case where "re-arrangements" have been made to the great injury of the class of shareholders affected, and apparently it has not been drawn to the attention of the Court that such re-arrangements are illegal.

Yours very truly,

GEORGE LYNCH-STAUNTON.

Hamilton.

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NEGLIGENCE IN LAW.

Editor, CANADIAN BAR REVIEW.

SIR:—Mr. Masters, in his excellent article on "Negligence in Law," in the March number of the CANADIAN BAR REVIEW, states:—"I have said, that in the law of negligence there is no such thing as extraordinary care, in every case *ordinary* care is only to be considered."

I do not think the term "ordinary care" is an apt phrase, although it has the authority of countless judgments and dicta.

There is no such thing as *ordinary* care.

[1] 43 T.L.R. 195.
[2] 1 Chy. 243.

Mr. Masters rightly says:—"The care required in any given case is care according to the circumstances."

The care required according to the circumstances is that care which it is proper to exercise under the circumstances.

It is not *ordinary* care; it is not a degree of care; it is simply that care which the circumstances, existing at the time, require.

The existing circumstances require that care should be exercised which is necessary to avoid injury or damage to the person, or property of another, and is not *ordinary*, or of a greater or less degree, but is the *proper* care to be exercised on the occasion.

The fact that a certain state of circumstances exist, may possibly create a duty to employ special precautions and to take special care, but nevertheless, the measure of care required is in all cases, "proper care."

No one knows what *ordinary* care means, because there is no standard of circumstances to which the term can be applied.

Yours very truly,

C. E. GREGORY.

Regina.