CASE AND COMMENT.

STATUTE OF FRAUDS — PART PERFORMANCE — FRAUD — ACQUIESCENCE IN INACTIVITY.—If one party to a contract does nothing and the other party acquiesces in, and even induces, that state of inactivity, it is not possible for the former to invoke successfully the doctrine of part performance. Hawke, J., in *Hawkesworth* v. *Turner*[1] said: "As to the point with regard to part performance, the Court does not always give relief where there had been moral fraud. . . . Mere sitting still is not enough to constitute sufficient part performance to take a case out of the statute; the plaintiff must do some act or make some change in his position."[2]

In order to withdraw a contract from the operation of the Statute of Frauds four circumstances must concur:[3] first, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other;[4] secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing;[5] thirdly, the contract to which they refer must be such as in its own nature is enforceable by the court;[6] and fourthly, there must be proper parol evidence of the contract which is let in by the acts of part performance.[7] The decision in *Hawkesworth* v. *Turner* illustrates the nature of the fraud that is required for part performance, and emphasizes once again the doctrine laid down by Selborne, L.C., in the leading case of *Maddison* v. *Alderson*,[8] when he said: "In a suit founded on such part performance the defendant is really charged upon the equities

[1] (1930), 46 T.L.R. 389.

[2] (1930), 46 T.L.R. 389 at p. 390.

[3] See Fry on Specific Performance, 6th ed., 276; *Chapronière* v. *Lambert*, [1917] 2 Ch. 356, particularly at p. 361; *Rawlinson* v. *Ames*, [1925] Ch. 96, particularly at p. 114.

[4] See *Wills* v. *Stradling* (1797), 3 Ves. 378; *Frame* v. *Dawson* (1807), 14 Ves. 386; *Jennings* v. *Robertson* (1852), 3 Gr. 513; *Magee* v. *Kane* (1885), 9 O.R. 475; *Rawlinson* v. *Ames*, *supra*.

[5] *Mundy* v. *Jolliffe* (1839), 5 My. & Cr. 167; *Morley* v. *Bolan* (1852), 3 Nfld. L.R. 277; *Johnson* v. *The Canada Co.* (1856), 5 Gr. 558; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *Moses* v. *French* (1914), 43 N.B.R. 1; *Township of King* v. *Beamish* (1916), 36 O.L.R. 325; *Chipuke* v. *Shandro*, [1930] 2 D.L.R. 567.

[6] See *Britain* v. *Rossiter* (1879), 11 Q.B.D. 123; *Maddison* v. *Alderson*, (1883), 8 App. Cas. 467 at p. 474; *McManus* v. *Cooke* (1887), 35 Ch. D. 681 at p. 697; *Connell* v. *Bay of Quinte Country Club* (1923), 24 O.W.N. 264.

[7] See *Kearney* v. *Kean* (1879), 3 Can. S.C.R. 332, particularly at p. 343; *Morley* v. *Bolan*, *supra*.

[8] (1883), 8 App. Cas. 467 at pp. 475-6.

resulting from the acts done in execution of the contract and not (within the meaning of the statute) upon the contract itself. . . . The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone." In other words, the doctrine of part performance is founded upon an equity in the person seeking to enforce the contract arising from acts done in the execution of the contract, resulting in a change in his position. In the instant case, as the plaintiff who was seeking specific performance had not changed his position, there was not present that kind of fraud which would move the court to decree the completion of the contract. In short, the person seeking specific performance must give, at least, partial performance of the contract.[9]

S. E. S.

* * *

CONTRACT—NON EST FACTUM.—In view of the pronouncement of the Court of Appeal in *Carlisle and Cumberland Banking Co.* v. *Bragg*[1] the refusal of that Court to give effect to a plea of *non est factum* in the recent case of *Blay* v. *Pollard and Morris*[2] is noteworthy. The decisions in the two cases, however, are reconcilable. In the *Bragg* case the facts were that Bragg, who could read, was induced by the fraudulent misrepresentation of one, Rigg, to sign a guaranty of the latter's debts, thinking all the while that it was a document relating to insurance. In an action brought by Rigg's creditor, a bank, upon the guaranty, Bragg pleaded *non est factum.* The jury found that the defendant did not know that the instrument was a guaranty and that he was negligent in signing. The Court of Appeal, nevertheless, held that, in contemplation of law, Bragg had never signed the guaranty and that his negligence did not estop him from setting up the defence of *non est factum.*[3] The negligent act of a person in signing a document does not preclude the defence of *non est factum* except in the case of negotiable instruments.[4] Text-writers have severely criticized the doctrine of the *Carlisle*

[9] Cf. *Jennings* v. *Robertson, supra.*

[1] [1911] 1 K.B. 489.

[2] [1930] 1 K.B. 628.

[3] Cf. *Thoroughgood's* Case (1854), 2 Co. Rep. 9; Anonymous (1683), Skin 159; *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 711; *Hunter* v. *Walters* (1871), L.R. 7 Ch. 75, particularly at p. 84; *Mayor, etc.* v. *Governor and Company of the Bank of England* (1887), 21 Q.B.D. 160, particularly at p. 167; *Howatson* v. *Webb,* [1908] 1 Ch. 1, particularly at pp. 3-4.

[4] See *Foster* v. *Mackinnon, supra, Lewis* v. *Clay* (1897), 77 L.T. 653; *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175 at p. 184.

case.[5] The Canadian courts have unhesitatingly accepted it and applied it on every possible occasion.[6]

In *Blay* v. *Pollard and Morris* an agreement with respect to the dissolution of a partnership was handed to M. who was asked to read it. He looked through it and signed it although he said that he could not understand it. In an action for indemnification in respect of certain liabilities in accordance with a provision in the signed agreement, MacKinnon, J., found that M. signed the document with practically no consideration of its terms, and, as a stipulation had been inserted which he had not orally agreed to, that term could not be replied upon. The trial judge accordingly directed that the written agreement should be rectified to make it conform with the oral agreement. In reversing the judgment of MacKinnon, J., the Court of Appeal held that, as M. knew that the agreement which he signed related to the dissolution of the partnership, it was not open to him, in the absence of fraud or misrepresentation by the other party as to its legal effect, to rely on the plea of *non est factum*. It was not sufficient for the defendant to allege merely that if he had carefully read and understood the document he would have objected to one of its terms as not being in accordance with the oral agreement. Furthermore, there was no evidence of mutual mistake to support a claim for rectification.

In the *Carlisle* case the defendant was mistaken as to the nature of the document; he understood that it was an insurance paper whereas it was a guaranty. In the *Blay* case the defendant knew that the document related to the dissolution of the partnership; he was mistaken only as to its contents. The distinction between nature and contents was drawn by the Court of Appeal three years before the *Carlisle* case in *Howatson* v. *Webb*.[7] To this extent the *Carlisle* and *Blay* cases are consistent. Bragg had no thought of giving a guarantee, Morris had not thought of giving an indemnity; Bragg was not bound, and Morris was. "The distinction between character and contents is perhaps intelligible in the abstract, but in practice it leads to different decisions in cases which common sense

[5] See article, Anson: *Carlisle and Cumberland Banking Co.* v. *Bragg* (1912), 28 Law Q. Rev. 190; Anson on Contracts, 17th ed., 167-9; Pollock on Contracts, 9th ed., 503; Salmond and Winfield on Contracts, 182-4; Beven on Negligence. 4th ed., 1538-9. Benjamin on Sale, 6th ed., 124.

[6] See *Rose* v. *Mahoney* (1915), 34 O.L.R. 238; *Cooil* v. *Clarkson*, [1925] 2 D.L.R. 493; *Bradley* v. *Imperial Bank*, [1926] 3 D.L.R. 38; *Watkins* v. *Hannah*, [1926] 4 D.L.R. 93; *Watkins* v. *Jansen*, [1928] 1 D.L.R. 1073; *Watkins* v. *Minke*, [1928] S.C.R. 414; *Canadian Bank of Commerce* v. *Dembeck*, [1929] 4 D.L.R. 220; *Royal Bank* v. *Wannamaker*, [1929] 4 D.L.R. 999; note: 8 C.B. Rev. 313.

[7] *Supra.*

seems to suggest ought to be governed by the same rule."[8] The doctrine of *Carlisle and Cumberland Banking Co.* v. *Bragg* deserves reconsideration.

S. E. S.

* * *

BURDEN OF PROOF—NEW LIGHT ON AN OLD PROBLEM.—To the Saskatchewan Court of Appeal goes the honour of being the first provincial court in the Dominion to grapple with the two-fold meaning of that most elusive of legal phrases, "burden of proof." For, until the reporting of the recent case of *Rex* v. *Primak*,[1] the obscurity and the doubt which surrounded that well-worn phrase, cannot be said to have been lifted by any provincial court, and the seed sown by the careful words of Duff, J., in *Smith* v. *Nevins*[2] and Newcombe, J., in *Ontario Equitable Life and Accident Insurance Co.* v. *Baker*,[3] seemed to have fallen on barren ground. Few phrases have been used with more abandon and with less exactitude; and as one gropes through the maze of cases on the subject, one can only gasp at the sanguinity of that American court which thirty-three years ago declared: "Every student of the law fully understands the exact import of the phrase 'burden of proof.'"[4]

In *Rex* v. *Primak* the accused was on trial for his life. He was convicted upon the verdict of a jury of having committed murder; but the Court of Appeal set aside the conviction, largely because of the failure of the trial judge, in his summing up, to distinguish between the burden of proof in the sense of the burden of establishing a proposition of fact which, according to the substantive law, it is for a party to establish in order to succeed in his case, and that lesser, or minor, or secondary burden of producing evidence at any stage of the trial in order to avoid an adverse ruling of the presiding judge.[5]

Now in *Rex* v. *Primak*, at the outset of the trial, both these burdens rested upon the Crown. The burden of establishing the case, or what Wigmore[6] calls "the risk of non-persuasion of the jury," was, here, a matter of substantive law. As was said by the Court of Appeal, "the burden rests upon the Crown to prove every

[8] Anson on Contracts, 17th ed., 168.

[1] [1930] 3 D.L.R. 345.
[2] [1925] S.C.R. 619.
[3] [1926] S.C.R. 297.
[4] See *State* v. *Thornton* (1897), 10 S.D. 349.
[5] See D. A. MacRae on Evidence, p. 752, where the distinctions in the use of the phrase are discussed carefully. This appears to be the only Canadian work which has thus far dealt with the problem.
[6] Evidence, Canadian ed., vol. 4, § 2485.

ingredient necessary to the offence charged. It moreover remains upon the Crown throughout the case and never shifts." But in *Rex* v. *Primak* this burden was not met by the Crown. The evidence was sufficient to prove the killing, but not the *animus* with which the killing was done. And the trial judge should not have said that "once the jury found that the deceased man came to his death from blows of the accused, the law imposed upon the prisoner the obligation or onus of satisfying the jury and bringing forward any extenuating, mitigating or alleviating circumstances . . . ." The Crown produced sufficient evidence in the second sense. That is to say, it had "passed the gauntlet of the judge,"[7] and had reached the jury; the burden of adducing further evidence had shifted to the prisoner. But then, when that was accomplished, the original burden still remained undischarged; and the trial judge should "have given them, the jury, to understand that if, in view of such circumstances, they entertained any reasonable doubt as to the prisoner having a murderous intent, they could not properly find him guilty of the offence charged." And the Court held that as a result of this failure so to direct, "they, the jury, were seriously misled with a resultant substantial miscarriage of justice."

The distinction is most significant. "We would direct attention," modestly runs the Saskatchewan judgment, "to the fact that the term burden of proof may be applied to cases like this in two distinct senses;" and in doing so, the Saskatchewan Court earns the prophetic commendation of Thayer, that "He would do a great service to our law who should thoroughly discriminate, and set forth the whole legal doctrine of the burden of proof."[8] The judgment, of course, does not attempt to do that, but it at least follows in the lone footsteps of Duff and Newcombe, JJ., in endeavouring to "thoroughly discriminate."

The two meanings of "burden of proof" are as far apart as the poles. The one is a matter of substantive law or of the pleadings; the other is a matter of the law of evidence. The former is fixed and unchanging; the latter varies and shifts as the trial proceeds. The one is essentially for the jury; the other belongs peculiarly to the judge. It is due to this failure to discriminate, as Thayer points out, that the all important question of burden of proof is dismissed with a chapter or two in most of our books on evidence, when it is treated of at all. "The result is that it is little discussed for it does not belong there,"[9] save in its secondary sense.

[7] Wigmore, *op. cit.* § 2487.
[8] Thayer: Preliminary Treatise on Evidence at the Common Law, (1898), p. 354.
[9] Thayer, *op. cit.* p. 358.

Although the dual meanings of the phrase have only recently been recognized in our Supreme Court, and until the *Primak* case, scarcely recognized at all in our provincial courts, the phrase itself bears an honourable antiquity. According to Thayer, the *onus probandi* of the Roman law comprised both meanings; and the same failure to discriminate, existed there.

It is difficult to predict whether the phrase will ever disappear from legal terminology, in either sense. Certainly, as Thayer points out, "it seems impossible to approve a continuance of the present state of things, under which such different ideas, of great practical importance and of frequent application, are indicated by this single ambiguous expression."[10]

The writer of this article submits that the phrase should be confined to its primary meaning, as a part of substantive law, and that some different group of words might well connote the secondary sense. Perhaps the phrase "weight of evidence" would be as convenient, as any, for this latter sense. That seems to have been the thought in the mind of the Court in *Central Bridge Co.* v. *Butler*,[11] where it was said: "The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established."

But whatever be the solution, the important thing is to recognize the dual role which the phrase at present plays; and to realize that the satisfaction of the one burden by no means necessarily entails the satisfaction of the other. In the words of the writer, who has been most zealous in this particular field, "Whoever has a definite conception to express and is at the same time aware of the danger of being misunderstood when he uses an ambiguous phrase, will be likely to choose an expression, calculated without danger of mistake, to convey his meaning clearly."[12]

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* * *

CONTRACTS—FRUSTRATION AND RESTITUTIO IN INTEGRUM. The judgment of Masten, J.A., in *Fong* v. *Kerwin*,[1] reiterates the doctrine that, when frustration of a contract occurs, the rights and liabilities

[10] Thayer, *op. cit.* p. 384.
[11] (1854), 2 Gray 130.
[12] Thayer, *op. cit.* p. 386.
[1] [1929] 3 D.L.R. 612.

of the parties crystallize as they are at the moment of the frustration. This view is accepted by the Court of Appeal in England[2] and it had already been applied by the Appellate Division in Ontario in the case of *Goulding* v. *Rabinovitch*.[3] Some members of the House of Lords in the case of *Cantiare San Rocco etc.* v. *Clyde, etc.*[4] looked rather askance at the English doctrine as expounded in the Court of Appeal in such cases as *Chandler* v. *Webster*[5] and it was held to be at variance with the law of Scotland which, on this point, was derived from the Roman law.[6] In the *Fong* case the plaintiff and the defendant, on March 14, 1928, became parties as lessee and lessor, respectively, to a written lease of certain premises in the city of Ottawa. The term was to commence on May 1, following, and was to continue for five years thereafter. The plaintiff paid four months' rent in advance on the execution of the lease. It was understood by the parties that the premises were intended to be used as a laundry. It was further understood by both parties that the user of the premises for laundry purposes depended on the grant of a municipal license. Apparently the defendant (the lessor) did not undertake that a license would be obtained and there was no express or implied agreement to the effect that the money paid in advance should be refunded if the license was refused. Extensive alterations were made by the defendant to make the premises suitable for the plaintiff's purposes. The plaintiff put some wiring in and painted his name on the premises. He also put in some laundry tubs which were kept on the premises for three weeks. A municipal license was ultimately refused and the plaintiff now sues to recover the amount he had paid the defendant as rent in advance. The facts stated in the report do not make it clear on the critical point whether the plaintiff went into possession under the lease, or whether his acts in wiring, painting his name and putting in the tubs, etc. were done under a license from the defendant in anticipation of the term commencing on May 1st. Masten, J.A., stated his conclusions as follows:

> The findings, however, clearly establish that the essential basis of the agreement as understood by both parties was that the premises should be available for use by the tenant as a laundry.
>
> By an overruling act of the municipal authority this became impossible, that is, the performance of the agreement became impossible from a cause for which neither party was responsible; viz., the refusal of the munic-

[2] See *Chandler* v. *Webster*, [1904] 1 K.B. 493; *Graves* v. *Cohen* (1930), 46 T.L.R. 121.
[3] (1927), 60 O.L.R. 607; [1927] 3 D.L.R. 820.
[4] [1924] A.C. 226.
[5] *Supra.*
[6] See 2 Cambridge Law Review, 215.

ipal authorities to license the operation of a laundry on the premises in question.

That being so, both parties were relieved from the performance of the agreement and the well-established rule applies that each party must rest in the position in which he is found when the event occurs which makes the fulfillment of the agreement impossible. . . .

Neither can recover from the other.

See *Goulding* v. *Rabinovitch* (*supra*) and cases there referred to.

If the plaintiff (the lessee) had not entered into possession under the lease at the time of the alleged frustration and he had then merely an *interesse termini*, it may well be that his interest was entirely contractual and not proprietary and that the case was therefore one for the application of the frustration doctrine as enunciated in *Krell* v. *Henry*[7] and the other Coronation cases. If, on the contrary, the plaintiff had entered into possession *under the lease* before the license was refused and an estate had thereby vested in him, it is extremely doubtful whether the frustration cases have any application at all. The cases hitherto have dealt with frustration *of contract*. They have not gone so far as to divest a *proprietary* interest already vested and legally complete. A tenancy agreement under which entry has been made pursuant to the lease is a contract, and something more. It creates a vested chattel interest which is a matter of *dominium* and not of *obligatio* exclusively. The courts hitherto do not seem to have applied the doctrine of the frustration cases to such a situation.[8] In the present case it would have made no difference in the result of the actual litigation if there had been no resort to the frustration doctrine, and Riddell, J.A., reaches the same immediate result as Masten, J.A., on other grounds. The question of "frustration or no frustration" would be material in determining, in the future, whether the lease and its obligations continue. The reasoning of Masten, J.A., has the effect of extinguishing the lease or the contract to take the lease, as from the date of the refusal of the license. In reaching that conclusion it may well be that a view of the facts was taken according to which there was no entry under the lease and that therefore there was merely an *interesse termini* in the plaintiff at the date of the alleged frustration. The facts, as

[7] [1903] 2 K.B. 740. See also *May* v. *May*, [1929] 2 K.B. 386; 7 C.B. Rev. 419; *Hyman* v. *Hyman*, [1929] P. 1; [1929] A.C. 601 (speech of Lord Atkin); *Graves* v. *Cohen* (*supra*). See as to the nature of an *interesse termini* the judgment of Lord Esher in *Joynes* v. *Weeks*, [1891] 2 Q.B. 31 at p. 44; cf. *Gillard* v. *Cheshire, etc.*, (1884), 32 W.R. 943; *Mann, etc.* v. *Land Registry, etc.*, [1918] 1 Ch. 202.

[8] See *London & Northern, etc.* v. *Schlesinger*, [1916] 1 K.B. 20; *Whitehall Court, Ltd.* v. *Ettlinger*, [1920] 1 K.B. 680; *Matthey* v. *Curling*, [1922] 2 A.C. 180; *Vancouver Breweries* v. *Dana* (1915), 52 Can. S.C.R. 134 at p. 142; cf. *Cherrier* v. *McCreight*, 11 Alberta L.R. 270; *Curry* v. *Farrell*, [1925] 4 D.L.R. 145.

reported, are not clear on that point and a reader, as a consequence, may have some difficulty in appreciating the true situation.

Assuming that *restitutio in integrum* is the proper relief available in the event of frustration, it is clear that to allow the plaintiff in the present case to recover the total amount which he had paid by way of rent in advance would work only a one-sided *restitutio*. The defendant had bound himself to make extensive repairs to fit the demised premises for use as a laundry and he had in fact made substantial expenditures for that purpose before the frustration. The defendant, it is true, has his premises in an improved condition but the improvements effected were designed to fit the premises for a special purpose which failed through no fault of his. It may well be that expenditures incurred to make the premises suitable for laundry purposes had only a very slight effect on the market value for use generally. The injustice of allowing recovery by the plaintiff in view of these facts is recognized by Riddell, J.A., who did not find it necessary to deal with the question of frustration specifically.

J. A. Weir.

University of Alberta.

* * *

Dissolution of Personal Contract by the Death of One of the Contracting Parties—Right of the Survivor to Recover in Respect of Performance Already Rendered at the Date of Dissolution. The case of *Graves* v. *Cohen and others*[1] reiterates the doctrine that the death of one of the parties to a contract involving bilateral *dilectus personæ* terminates the contract as from the date of the death. Rights already vested at the date of the death remain. Potential rights which are not completely vested at the date of the dissolution but which depend upon the further effluxion of time or upon further performance by the survivor are disregarded although the deceased has derived substantial benefits from the survivor's acts or abstentions before the death upon which the dissolution of the contract has occurred. The plaintiff, a jockey, entered into a written agreement with the defendant's testator whereby the plaintiff bound himself to act as first jockey for the deceased during the racing season of 1928. The agreement was entered into on December 17, 1927. Five hundred pounds were to be paid to the plaintiff on March 26, 1928, and a further five hundred pounds were to be

[1] (1930), 46 T.L.R. 121.

paid to the plaintiff on the termination of the 1928 racing season. In addition to this agreement for a "first retainer" of the plaintiff's services during the 1928 season, the deceased agreed to pay the plaintiff certain fees and percentages for races actually run, etc. The deceased died on March 7, 1928. The plaintiff had debarred himself from accepting employment as a jockey in any capacity incompatible with his agreement with the deceased, and this incapacity had extended from the date of the execution of the agreement until the 7th of March following. Wright, J., thought that the value of the plaintiff's abstention in this respect was at least five hundred pounds. The question is whether the plaintiff is entitled to anything under the contract in these circumstances, it being observed that nothing was due to the plaintiff under the terms of the contract at the time of the death of the employer and that there was no specific provision in the contract itself to meet the situation arising on the death of either of the parties before the date at which the first five hundred pounds were to be paid to the plaintiff. Wright, J., held that the continued existence of the original employer was an essential condition upon which the continuance of the contractual tie was to depend. It was conceded that the death of the jockey before the 26th of March would have brought the contract to an end but it was urged that the death of the employer had not a similar dissolutive effect. This view was not received with favour. It was held that the contract was a personal one in the narrow and strict sense of the term and that it depended for its operative effect upon the continued existence of both of the parties. The personality of the employer was not irrelevant as far as the jockey was concerned. The relation between the plaintiff and his employer was so close and confidential that the employer's personality could not be treated as immaterial. The value of the plaintiff's rights under the contract depended largely on the employer's probity and financial position and upon his willingness and ability to own and race his horses.[2] This being so, the contract became extinct as to the future as from the moment of the employer's death. The question then remained as to whether the plaintiff was entitled to recover anything under the contract, or otherwise, in respect of his performance up to the date of the dissolution.

On this point Wright, J., thought the authorities were conclusive:

> The rule has often been laid down that where a contract is terminated by some contingency which renders it impossible of further performance according to its tenor, and that contingency has not been provided for by

[2] See *Farrow* v. *Wilson* (1869), L.R. 4 C.P. 744; *Tasker* v. *Shepherd* (1861), 6 H. & N. 575; cf. *Phillips* v. *Alhambra Palace Co.*, [1901] 1 Q.B. 59; 17 T.L.R. 40.

any special stipulation in the contract, the contract is avoided from that date. That does not mean that it is avoided *ab initio*, it does not mean that rights which have already accrued under it are not still enforceable, but it does mean that as from that date no claim can be maintained in respect of rights which only accrue and can only accrue after the dissolution of the contract. This case, where the contract, in my judgment is dissolved by the death of one of the parties, is simply one illustration or one type of the many conditions of impossibility under which a contract may be dissolved. One such condition is illustrated by those cases which are often called the Coronation cases, where it was held on the facts of those cases that the contract was conditional for its continuance and for its completion on a certain event taking place. Another case is such as *Taylor* v. *Caldwell*[3] where the existence of the contract depended upon the continued existence of some specific thing. For instance, in *Taylor* v. *Caldwell* (*supra*) the contract could not be performed unless a particular music hall remained in existence, but where you have this dissolution of the contract under all those circumstances, the rule under such circumstances is now well established in the sense that I have stated—(referring to *Chandler* v. *Webster*).[4] There is here an entirely unanticipated event, an event for which there is no provision in the contract has occurred, the occurrence of that event, as in that case (i.e., *Chandler* v. *Webster* (*supra*)), involves no default on either side, but it has the effect of dissolving the contract. In that particular case (i.e., *Chandler* v. *Webster* (*supra*)) the Court held that the money due under the contract was payable at a date before the contract was dissolved, and therefore it was held that the money remained due and so much of it as was paid could not be recovered back and the balance had to be paid. In the same way, if this five hundred pounds had been payable when the contract was signed and Mr. Cohen (the employer) had died, as he did, some time after that, the liability to pay the money would have remained. If Mr. Cohen had died not on March 7th but on March 27th, the plaintiff would have had a right to recover the five hundred pounds, but he had no vested right, in my judgment, to recover this money at the date when Mr. Cohen did die, and that being so has no right to do so now.[5]

J. A. Weir.

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* * *

Revocability of Acceptance in Correspondence Contracts.—One of the open questions in contract law—open in the sense that there is no express judicial decision on the point—is the question of revocability of acceptance in a contract made by post. For example, offeror makes an offer by post; offeree accepts the offer by posting a letter of acceptance. Is this contract final and absolutely binding upon both parties and for all purposes, irrespective of any subsequent development? Or, is it open to the offeree to

[3] (1863), 3 B. & S. 826.
[4] [1904] 1 K.B. 493.
[5] (1930), 46 T.L.R. 121 at p. 124. See further on the latter point article, (1929), 7 C.B. Rev. 419; *Goulding* v. *Rabinovitch* (1927), 60 O.L.R. 607; *Fong* v. *Kerwin*, [1929] 3 D.L.R. 612; 2 Cambridge Law Review, 215.

annul the operation of his letter of acceptance by a telegram of revocation, despatched subsequently, but which reaches the offeror before the acceptance?

As intimated above, there is no English or Canadian decision that expressly settles the point. A New Zealand case, *Wenkheim* v. *Arndt*,[1] holds that a subsequent telegram of revocation is inoperative to kill a contract made by a previously posted letter of acceptance. On the other hand, *Dunmore* v. *Alexander*,[2] a case decided by the Court of Sessions in Scotland, in 1830, apparently upholds the contrary view. In that case, the letter accepting a proposed contract and a letter revoking the acceptance arrived simultaneously and the majority of the Court held that there was no contract. In Halsbury's Laws of England the principle, that if a letter of acceptance is overtaken by a revoking letter or telegram no contract is formed, is laid down, but the only authority cited for this statement of the law is *Dunmore* v. *Alexander*.[3] It is submitted that this case cannot be regarded as good law, to-day. In the first place, it is very difficult to decipher from the language used just what the Court had in mind. Sir Frederick Pollock,[4] referring to this case says: "It was held that no contract was concluded, but it is not clear whether the majority of the Court meant to decide that an acceptance sent through the post is neutralized by a revocation arriving at the same time though posted later, or that the first letter was only a proposal." Leake on Contracts[5] cites the case as authority for the proposition that a posted acceptance is revocable before actual delivery, but points out that the case is apparently in conflict with the cases that decide that a contract is complete from the moment of posting the letter of acceptance. Moreover, Benjamin on Sales[6] asserts that the case was wrongly decided.

Leaving the cases,[7] we turn to an examination of the text-book authorities. Those that would allow the telegram of revocation to operate are Halsbury (above referred to) and Leake on Contract. Leake states the proposition as follows:[8] "Until an acceptance has

[1] 1 J.R. 73.
[2] (1880), 9 Ct. of Sess. 190.
[3] Halsbury: Laws of England, vol. 7, p. 354.
[4] Contracts, 8th ed., p. 85.
[5] 6th ed., p. 25.
[6] 6th ed., p. 94, note.
[7] The only other case on the point seems to be a case decided in the French Court of Cassation, *S.* v. *F.*, (Merlin Repertoire de Justice, Tit. Vente, l'Art. III, no. II). It is in the favour of *Dunmore* v. *Alexander*, but because of its wording and antiquity it is of little importance.
[8] 6th ed., p. 25.

been communicated to the party making the offer, it may be withdrawn or intercepted. Where a letter of acceptance has been posted, it is sufficient that the sender has done all in his power to recover the letter where that course is possible and, where the letter cannot be withdrawn by reason of the regulations of the Post Office, the sender may annul its operation as an acceptance by any other means, if possible, before it is actually delivered." In support of this proposition the learned author cites Cockburn, C.J., in *Ex parte Cote,*[9] and *Newcombe* v. *De Roos.*[10] It is, respectfully, submitted that the cases cited are not in point. The dictum of Cockburn, C.J., occurred during the argument, and he was there referring to the revocation of an offer and not the revocation of an acceptance. In the case of *Newcombe* v. *De Roos,* the Court was not dealing with the revocation of an acceptance at all.

As against these text writers, a formidable weight of authority may be arrayed. Benjamin on Sales,[11] Salmond and Winfield on Contract,[12] Pollock on Contract,[13] Anson on Contract,[14] and Chitty on Contracts,[15] all state the rule that a subsequent revocation of a previously posted letter of acceptance would be inoperative, even though it arrived before the letter of acceptance. But, although this unanimity of opinion exists, the learned authors confine themselves to a short statement of the law without citing authority or advancing comment, or else state the arguments on each side of the question, and favour in the result the irrevocability doctrine. Absence of judicial authority renders an emphatic postulation impossible.

It is submitted, however, that the terms used by the majority of the Court of Appeal in the case of *Household Fire Insurance Co.* v. *Grant*[16] are sufficiently broad to cover this point and were intended to do so. In that case, the Court said:[17] "As soon as the letter of acceptance is delivered to the post office the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance." To say that a telegram of revocation may be operative would be to engraft a serious and most unnecessary limit-

[9] (1873), 43 L.J. Bk. 19.
[10] (1859), 29 L.J.Q.B. 4.
[11] 6th ed., p. 100 and p. 94.
[12] 1927 ed., p. 73.
[13] 8th ed., p. 39.
[14] 17th ed., p. 36.
[15] 17th ed., p. 18.
[16] (1879), 4 Ex. D. 216.
[17] (1879), 4 Ex. D. 216 at p. 221.

ation upon the rule in the *Grant* case. Chitty on Contracts[18] points this out: "It has been said, and with much cogency, that if the rule in *Grant's* case is to prevail it will comprehend the case not only of a rejecting telegram overtaking a posted acceptance, but a rejection by word of mouth immediately after posting a letter of acceptance."

This is the state of the authorities upon this branch of the law. The conclusion which may properly be drawn from them is this: If a letter of acceptance has once been posted, a telegram revoking such acceptance is inoperative though it reaches the offerer long before the letter arrives. And, upon principle, this view is perfectly tenable. It has been said that the rule is harsh upon the acceptor; but there is no reason for giving him an advantage that he would not have been entitled to if the contract had been made by word of mouth. Moreover, the acceptor can make his letter of acceptance revocable, if he wishes, by inserting in it an appropriate clause. Again, it has been urged that the rule has little except logic to support it, for it is hard to see that the offerer has suffered any harm. But there must be some one instant of time when the contract becomes absolute and liability thereunder attaches to both parties. It is settled law that the contract is complete in cases of contracts by correspondence, at the moment of posting the acceptance. There is no reason for creating an exception to this rule. What really matters in commercial transactions is to have a definite, settled rule (whatever it may be) and not to render it obscure by engrafting upon it a multiplicity of ultra-refined exceptions.

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MISTAKE—IMPROVEMENTS ON A NEIGHBOUR'S LAND—BONA FIDE BELIEF.—A tiny lot and a ruinous shack in a poor district on the outskirts of Regina have given us the leading case of *Schiell and Hunt* v. *Morrison*[1] on the ambiguities of mistake of title.

Mr. and Mrs. Morrison needed a house in 1923, when even small accommodation was hard to find. They discovered an abandoned shack, resting (as they supposed) on lot 30. Going to the City Hall, they searched the assessment of lot 30, which showed a house as well as the lot, the lot being valued at $100, and the building at $110. The assessed owner lived in England. The Morrisons wrote him, and he communicated with financial agents in Regina

[18] 17th ed., p. 18.
[1] [1930] 2 W.W.R. 737.

who sold the building to the Morrisons for $40. The buyers found that the shack would not stand moving, and were forced to purchase lot 30. This also was arranged by the financial firm, but not before they had searched the city records. The Morrisons then began to make improvements, and in four years had spent over $1,000 on the house. Then the plaintiffs asserted that the house was not on lot 30, but on lot 31, and claimed the possession of the property. Their claim was defeated before the trial judge, who awarded lot 31 to the Morrisons, conditional on their paying $140 and taxes.

Appeal was taken on two main grounds: (1) that the mistake of the improvers must be one of title, and not of identity; and (2) that the squatters must have taken all reasonable precautions against errors in title.

As against the first contention, the statute itself was clear. The essential element was that lasting improvements had been made under a belief by the occupier that the land was his own,[2] not a belief founded upon a mistake in title. True, the title of the statute which reads, "An Act respecting Improvements under Mistake of Title", goes further than in its operative clause. The pertinent problem before the Court was—does that caption limit the scope of the Act? Despite the weight of Ontario, Manitoba and English cases, the Court of Appeal decided that the words of the clause were clear. That being so, the title could not prevail to make necessary a mistake in title. The improver's belief, if genuine, need not arise from the accuracy of his title. As to the reasonableness of the belief of the defendants, the Court apparently considered that, although the purchasers had taken no steps to identify their purchase by survey, or to register a title, they, by visiting the City assessor, by dealing through a business firm, by corresponding with the assessed owner, and by paying taxes regularly, had acquired that bonâ fide belief which was sufficient.

Swift Current, Sask. G. C. THOMSON.

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BAILIFFS.—The remark of Boyle, J., in *Re Ayling, Royal Bank* v. *Heyler*[1] shows clearly that the learned judge is not unfamiliar with the mentality and capacity of bailiffs and their assistants. He said: "C., who appears to be an exceptionally ignorant and stupid fellow, *even for a bailiff*, swears that he proceeded to seize all the goods and chattels assembled at the sale." There are few solicitors who would be disposed to take an appeal from this judicial pronouncement. S. E. S.

[2] See also *Hiller* v. *Rural Municipality of Shamrock*, [1930], 2 W.W.R 680.

[1] [1930] 1 D.L.R. 68 at p. 69.