

employee and manager. The defendant set up that the relation created by the agreement was that of master and servant only, that he has duly accounted for the share of profits to which the deceased was entitled, that the account rendered to the administratrix shewing a balance of \$585.41 coming to the defendant is correct, and that, at all events, the plaintiff was bound by sub-sec. 2 of sec 3 of the Master and Servant Act (1910), and must be content to accept the share of profits appropriated to the estate by the statement or return made by the defendant of the net profit of the business.

HON. MR. JUSTICE LENNOX:—This is a drastic provision and should be construed strictly. It is a provision for the benefit of the employer, and the employer must bring himself clearly within its provisions. The agreement was prepared by the defendant's solicitors, and it speaks in the language of the defendant. Under the present statute the statement is impeachable for fraud. A similar provision in R. S. O. ch. 157 did not contain this qualification, in words, but Mr. Justice Anglin held in *Cutten v. Mitchell* (1905), 10 O. L. R. 734, that this was to be inferred as the intent of the legislature. The learned Judge said: "Notwithstanding the sweeping terms in which the statute declares the finality of statements furnished by the employer, I cannot conceive that it was thereby intended to render fraudulent statements conclusive and unimpeachable;" and when the case subsequently came on before him for trial he found actual fraud in that the defendant contrary to the agreement, had withdrawn \$5,000 from the sum appropriated as profits. A similar condition of things is presented in this case.

This is not an ordinary case of master and servant. The business carried on as "Washburn & Co." after the execution of the agreement was the continuation, though on a more extensive scale, of a business carried on in the same premises for many years before the making of the contract by Benjamin Washburn alone. The statute declares that an arrangement of the kind here made shall not constitute a partnership, "unless the agreement otherwise provides, or a contrary intention may be reasonably inferred therefrom." I have come to the conclusion that a "relation in the nature of a partnership" was not created.

The statutory provision upon which the defendant relies is as follows: "(2) Any statement or return by the employer