Canada Law Journal.

VOL. XXXIX. MARCH 1, 1903. NO. 5.

EMPLOYER'S LIABILITY ACT.

I. LIABILITY FOR THE NEGLIGENCE OF CERTAIN SPECIFIED RAILWAY EMPLOYÉS.

1. Generally.
2. Person having "the charge or control of signal points" or a "switch."
3. Person in "charge or control of a locomotive engine."
   (a) *What is an engine under the statute*
   (b) *What employés are deemed to be in "charge or control" of engines*
4. Person having "charge or control of a train."
   (a) *What constitutes a train, generally.*
   (b) *How many cars constitute a train*
   (c) *What employés are deemed to have "charge or control" of a train—Conductors.*
   (d) *Employés other than conductors.*
5. Person having "charge or control" of a car.
6. "On a railway" or "railroad": effect of these words.

II. SERVICE OF NOTICE UPON THE EMPLOYER.

7. Notice a condition precedent to the maintenance of an action under the statute.
8. —but not if the facts constitute a cause of action at common law.
9. Notice must be in writing.
10. Service of the notice.
    (a) *Service on corporations.*
    (b) *Service through the Post Office.*
    (c) *Service in case of death.*
    (d) *Excuses for failing to serve the notice.*
11. Sufficiency of the particulars contained in the notice.
    (a) *Generally.*
    (b) *Inaccuracies which do not invalidate a notice.*

III. DEATH OF EMPLOYER OR INJURED EMPLOYÉ, HOW THE RIGHT OF ACTION IS AFFECTED BY.

12. Scope of this Sub-title.
13. Death of employer, effect of.
14. Death of plaintiff, pending action abated by.
15. Suit by executors or administrators.

I. LIABILITY FOR THE NEGLIGENCE OF CERTAIN SPECIFIED RAILWAY EMPLOYÉS.

1. Generally.—The English Employers Liability Act of 1880, and the Colonial and American statutes which are modeled upon similar lines, contain a provision for the especial benefit of railway servants.

By sec. 1, sub-sec. 5, of the original Act, a servant may recover, where his injury is caused by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway.

The Acts of Newfoundland and the Australian Colonies are to the same effect.

The Ontario Act gives a remedy where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine, or train, upon a railway, tramway, or street railway." (Rev. Stat. 1897, sec. 3, sub-sec. 5.)

The Acts of British Columbia and Manitoba are to the same effect as that of Ontario from which they are copied.

Under the corresponding clause of the Alabama Act a servant may recover damages when his injury "is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway." Code, sec. 2590, sub-sec. 5.

The employés for whose negligence the employer is made liable by the Massachusetts Act are those who have the charge or control of any signal, switch, locomotive engine, or train upon a railroad. (Sec. 1, sub-sec. 3.)

The words of the Colorado Act are the same as those of the Massachusetts Act. (Sec. 1, sub-sec. 3.)

In Indiana servants of corporations may recover for the negligence of any employé who "has charge of any signal, telegraph office, switch yard (*a*), shop, round-house, locomotive engine, or train upon a railway." (Rev. Stat. 1894, sec. 7083, sub-sec. 4.)

(*a*) As to this phrase, see sec. 2, note (c), post.

It will be observed that the virtual effect of these provisions is to abolish the master's immunity for railway accidents in all, or nearly all instances in which the injury was caused by the negligence of subordinate agents engaged in directing the movements of the rolling stock. Taken in connection with the preceding subsections, they supplement a railway servant's right of action of railway servants in such a manner that the Act, as a whole, may be regarded as being, for practical purposes, the equivalent, so far as such servants are concerned, of the statutes of those American States in which the doctrine of co-service is declared to be no defence in cases where the injury was caused by negligence in the operation of a railway (*b*).

2. Person having "the charge or control of signal points" or a "switch."—The only English case in which these words have been discussed discloses so much diversity of opinion as to their import, that the decision, except as a determination that there is no right of action for the negligence of the particular employé who caused the injury, is not of much service as a precedent. (*a*) The

(*b*) Iowa, Kansas, Minnesota.

(*a*) *Gibbs* v. *Great Western R. Co.* (C.A. 1884) 12 Q.B.D. 208, 53 L.J. Q.B. Div. 343, 50 L.T.N.S. 7, 32 W.R. 329, 48 J.P. 230, aff'g S.C. (1884) 11 Q.B.D. 22, 48 L.T.N.S. 640, 31 W.R. 722. There it was held that the defendant could not be held responsible where the evidence shewed that it was the duty of one Fisher, the employé whose act was the immediate cause of the injury, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the proper condition of the points and locking gear, which were moved and worked by men in the signal boxes; and that Fisher having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, and so injured a fellow workman. In the Divisional Court, Mathew, J. said: "I find a difficulty in ascertaining what was precisely meant by the general language used in sub-s. 5, but, upon the best interpretation I can give, I think the legislature had in contemplation the negligence of some person having charge or control of the points for the purposes of traffic and of movement. As Fisher did not answer that description, but was merely employed to oil, clean, and adjust that which was moved by some other thing in the charge and control of some other person, I am of opinion that there was no evidence to bring the case within the provisions of sub-s. 5." Field, J. doubted whether the words "charge or control" are intended to mean different things. In the Court of Appeal, Brett, M.R., expressed his views as follows: "I cannot think that there is any colour for saying he had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment. Now what evidence is there that Fisher was a person who had such general charge? It is true that he himself said he had the charge, but to act upon such evidence would be to make him the judge of the law and not the

Alabama and Massachusetts cases, so far as they go, seem to make the railway company liable for the negligence of all employés who for any space of time, however short, have the power to adjust a switch for the purposes of traffic (*b*). Negatively, therefore, these cases are authorities against the theory propounded by Brett, M.R., that the statute contemplates a "general charge." Further doubt is thrown upon the correctness of that theory, if we consider the context of the provision. The most natural construction of the words describing the other employés who are declared to be vice-principals in respect to particular functions is that the legislature had in view the employés who actually operate the instrumentalities specified. If this conception be the true one, it is clear that the maxim, Noscitur a sociis, furnishes a strong reason against limiting the application of the phrase now under discussion to employés who have a general charge of points. Upon the whole, therefore, it is submitted that the non-liability of the employer in the *Gibbs Case* may be more properly referred to the theory announced by Matthew, J., viz., that the statutes are intended to cover only cases in which the control of the points is exercised in regulating the movements of cars (*c*).

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witness of facts. The plaintiffs were bound to shew by evidence what were the duties of this man, when it would be for the court to say whether having such duties he was a person who had the charge of the points as intended by the statute. Fisher himself, when cross-examined, said what his duties were: 'my duties are,' he said, 'to clean and oil the locking bars and apparatus. I had several places to go to, I worked under Inspector Saunders.' The meaning of working under Saunders, is that Saunders might order him at any moment to go to such and such a place and oil the bars and apparatus there, or not to go to the place he had intended to go to for the purpose of oiling the bars. The evidence which was given, shewed, I think, that Fisher was only a little above a labourer, that he had to do manual work on what he was told to look to; and that he was not a person who had the charge of those things upon which he had to do such work under such circumstances." Bowen, L.J. thought it was "sufficient to say that Fisher was only at the most employed to do certain work on and in respect to the points under the order of somebody else."

(*b*) Engineers and conductors provided with keys to a switch, with the duty of opening and fastening which no one is especially charged, for the purpose of using the spur track attached to enable trains to pass each other, are in charge of the switch ad hanc vicem. *Birmingham R. & Electric Co.* v. *Baylor* (1893) (Ala.) 13 So. 793. A railroad company is liable for negligence of a tower man, whose duty it was to move switches by levers in a tower on signals from the men on the tracks below, in throwing a different switch than that directed by a signal, an approaching train being thus caused to run on a wrong track, and collide with a switchman who gave the signal. *Welch* v. *New York, N.H. & H.R. Co.*, 176 Mass. 393, 57 N.E. 668. The court declined to hold that the fact that the negligent employé received directions from the other servants took him out of the category of vice-principals. See also *Coughlan* v. *Cambridge* (1896) 166 Mass. 268.

(*c*) In Indiana it has been held that an employé in charge of a switch is not a person "who has charge of any signal, telegraph office, switch yard," since the

3. Person in "charge or control of a locomotive engine."—(*a*) *What is an engine under the statute*—The word "engine" is construed as meaning a "machine used to move trains" (*a*). An engine of an essentially stationary type is not brought within the purview of the statute by the fact that, together with the machinery operated by it, it is mounted upon a truck, and its power can be applied so as to move the truck along a set of rails to some other part of the employer's premises (*b*).

(*b*) *What employés are deemed to be in "charge or control" of engines*—It is not disputed that this description is applicable to the employés who actually operate the locomotive engines which move trains. It is a question of fact who was in charge of an engine at any particular time, (*c*) and whether the act alleged as

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section is to be read as punctuated, and no comma is to be inserted between "switch" and "yard." *Baltimore & O.S.W.R. Co.* v. *Little* (1897) 149 Ind. 167, 48 N.E. 862. These particular words occur only in the statute of that State, and their construction is, therefore, not at present a matter of practical interest in any other jurisdiction. But the writer ventures, in passing, to express his strong doubt whether this rule is correct. In the first place the expression is not in common use. The only authority cited by the court is 5 Rap. & M. Ry. Dig. p. 60, where one of the divisions of subjects is entitled "Switch Yards." The expression is also found, though not very frequently in the reports. See for example *Hurst* v. *Kansas City &c. R. Co.* (Mo. 1901) 63 S.W. 695; *Illinois C.R. Co.* v. *Cozby* (1898) 174 Ill. 190, 50 N.E. 1011; *Fay* v. *Chicago &c. R. Co.* (1898) 72 Minn. 192, 15 N.W. 15; *Williams* v. *Louisville &c. R. Co.* (Ky. 1901) 63 S.W. 758; *Walker* v. *Atlanta &c. R. Co.* (1898) 103 Ga. 820. But it is omitted in the Century, Standard, or the other dictionaries to which the writer has access. It seems very improbable that an expression which, as this omission indicates, is far from being a familiar one, should have been used in a statute of this character. But the most fatal objection to the theory of the court is that, in all the acts of a tenor similar to that of Indiana, "switches" are specifically mentioned, and that it is therefore more likely that the Indiana legislators intended to add "yards" to the list of the specified parts of the plant, than that they intended to omit one which is expressly mentioned in the other acts, and substitute another word which, as this very decision shews, is construed as absolving a railway company from liability for a class of accidents which are peculiarly destructive and in which the victims are peculiarly helpless.

(*a*) *Murphy* v. *Wilson* (1883) 52 L.J.Q.B.N.S. 524, 48 L.T.N.S. 788, 48 J.P. 505, 48 J.P. 24. A person in charge of a stationary engine operating a tramway on a mining slope is *not in* "charge of an engine" on a "track of a railway," and is therefore merely a fellow servant with the engineer of a pump engine located in the mine. *Whatley* v. *Zeniah Coal Co* (1898) 122 Ala. 118, 26 So. 124. (Demurrer sustained to count alleging negligence of such an engineer.)

(*b*) *Murphy* v. *Wilson* (1883) 52 L.J.Q.B.N.S. 524, 48 L.T.N.S. 788, 47 J.P. 505, 48 J.P. 24. (Truck supporting a steam crane ran over plaintiff's hand while he was grasping a rail to steady himself in pulling at a stone.)

(*c*) *Louisville & N.R. Co.* v. *Richardson* (1893) 100 Ala. 232, 14 So. 200. An engineer who is in the employment of a railway company, and in charge of an engine which is at the time running upon the company's tracks, is *prima facie* in the discharge of his duties as engineer, and in a complaint based on this subsection it is not necessary to aver that the engineer was in the discharge of the

the cause of the injury amounted to a breach of a duty imposed on the person answering this description (*d*).

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duties imposed by his employment, when the injury was inflicted. *Woodward Iron Co.* v. *Herndon* (1896) 114 Ala. 191, 21 So. 430. A complaint is good, where it states that the engineer, while in the service of the company in charge of a locomotive negligently injured the plaintiff, at a time when both were acting in the line of duty as employés of the company. *Pittsburgh, C.C. & St. L.R. Co.* v. *Montgomery* (1898) 152 Ind. 1, 49 N.E. 582.

(*d*) Evidence that a trackman was run down by a train and that the engineer did not whistle, as the rules required him to do when passing trackmen, is sufficient to require the submission of the question of the master's negligence to the jury. *Barker* v. *London &c. R. Co.* (1891) 8 Times L.R. 31. The blowing of a whistle by the engineer of a railroad train 50 yards or more before reaching a place where the track is obscured by dense smoke for 250 or 300 yards is not, as matter of law, a sufficient exercise of care as to other employés who may be coming on the track in a hand-car from the opposite direction. *Woodward Iron Co.* v. *Herndon* (1896) 114 Ala. 191, 21 So. 430. For an engineer to run a railway train at a rapid rate of speed at a place where the statute does not regulate and prescribe the rate is not negligence per se. Whether or not such running is negligence, so as to render the company liable for the death of a brakeman who fell from the top of the train, depends upon the particular conditions and circumstances. *Perdue* v. *Louisville & N.R. Co.* (1893) 100 Ala. 535, 14 So. 366. Evidence that the plaintiff, a switchman, was struck, while walking close to a track, by an engine which was moving at an excessive rate of speed and without sounding the bell, will justify a verdict against the company. *Canada Southern R. Co.* v. *Jackson* (1890) 17 Can. S.C 316. It is not error to admit in evidence a rule from a railroad company's book of rules providing that "a lamp swung across the track is the signal to stop," where the issue involved is whether the engineer was negligent in failing to perceive upon the track an emyloyé who had fallen down and became unconscious by reason of sickness. *Helton* v. *Alabama Midland R. Co.* (1893) 97 Ala. 275, 12 So. 276. In an action brought in Kentucky for injuries received in Alabama, recovery may be had for the killing of a railroad employé by the negligence of those in charge of a locomotive, although the negligence was neither "gross" nor "wilful," as it must be to make the action sustainable in the former State. *Louisville & N.R. Co.* v. *Graham* (1896) 98 Ky. 688, 34 S.W. 229. A railroad engineer is not negligent towards a switchman on a switch engine, so as to charge the company with liability for injuries to the latter, in running by an oil box, near the track, but far enough away to permit the engine to pass safely, unless he knows or has reason to believe that the switchman is in such a position that he may be injured in passing such box. *Louisville & N.R. Co.* v. *Bouldin* (1895) 110 Ala. 185, 20 So. 325. An engineer who propels a train with such force and violence against standing cars as to injure a brakeman attempting to make a coupling between such cars and another car on the other side thereof is guilty of negligence, although he may not have known that the brakeman was between the cars. *Alabama Midland R. Co.* v. *McDonald* (1895) 112 Ala. 216, 20 So. 472. Whether a "running" or "flying" switch is or is not to be regarded as negligence per se, a railway company cannot successfully assail the propriety of a verdict which finds that it is not negligence to switch cars at a speed of eight or ten miles an hour on to a repair track. *Louisville & N.R. Co.* v. *Davis* (1890) 91 Ala. 487, 8 So. 552. Compare *Devine* v. *Boston & A.R. Co.* (1893) 159 Mass. 348, 34 N.E. 539, where one of the alternative theories suggested by the evidence was that cars had been "kicked" at too great a speed by the engineer, and the case was held to be one for the jury. The conduct of an engineer in applying the airbrake and bringing the train to a sudden stop without giving any signal or warning does not necessarily constitute actionable negligence on the part of the company as to an employé injured by being thrown off from a flat car by such stoppage. *Cooper* v. *Wabash R. Co.* (1894) 11 Ind. App. 211, 38 N.E. 823. No recovery can be had for the death of a fireman caused by an explosion due to the want of

4. Person having "charge or control of a train."—*(a) What constitutes a train, generally.*—The view of the Supreme Court of Massachusetts is that the word "train" was used by the legislature in the ordinary sense which it bore at the time when the Employers' Liability Act was passed in that State, and that this sub-section is therefore only applicable where the train is one which is operated by steam (*a*). In the case cited it was held that an action could not be maintained for an injury caused by the management of a street railway car operated by electricity in the usual manner. This doctrine seems to the present writer to be of very dubious correctness, in so far as it is based on the theory that a train must be propelled by steam to be within the meaning of the statute. The peculiar dangers to which railroad employés are exposed from moving cars are essentially the same, whether the motive power be steam or electricity, and an injury of the kind which was denied to be actionable is, therefore, within the spirit, if not the letter, of the statute. And once it is conceded that the statute covers trains operated by electricity, the further result would appear to follow, that it can make no difference, as regards the master's liability, whether the motive power is transmitted by wire from some central point or generated or stored in an engine travelling with the train. This is certainly the effect of an English case which embodies the principle, that' if the other elements of a "train" are present, the employer is liable for injuries caused by its being carelessly transferred from one point to another whether the motive power be fixed or movable (*b*). In the course of his opinion Cave, J., emphasized the fact that the danger of putting cars in motion without proper warning is equally great, however they were moved, and upon whatever part of the line.

(*b*) *How many cars constitute a train?*—In a recent case Lord Halsbury doubted very much whether the applicability of the word "train" depends upon "the number of carriages or the

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sufficient water in the boiler, where the evidence is that, although the company held the driver responsible as regards the engine, it was the fireman's duty to attend to the water supply. *Brunnell* v. *Canadian P.R. Co.* (1888) 15 Ont. Rep. 375.

(*a*) *Fallon* v. *West End Street R. Co.* (1898) 171 Mass. 249, 50 N. E. 536.

(*b*) *Cox* v. *Great Western R. Co.* (1882) 9 Q.B.D. 106, 30 W.R. 816. [Jury held to be warranted in finding that an employé whose duty it is to apply the hydraulic power by which a capstan is made to haul freight cars coupled together is "a person in charge of a train upon a railway."]

number of vehicles going upon wheels which the locomotive is taking along the railway." He thought the legislature intended a "very wide scope" to be given to the language used, and that, "speaking in a general way, the legislature meant that a locomotive engine by itself, or anything that was drawn along a railway, or was in course of being drawn along a railway by that locomotive engine," should be included in the word (*c*). The actual extent of the decision cited is that several temporarily detached cars constitute a "train," but, as there is nothing in the opinions of the other Law Lords to indicate that they were inclined to put a less liberal construction upon the statute than the Lord Chancellor, his theory of its meaning may perhaps be regarded as the one judicially accepted in England.

In a Massachusetts case involving facts closely analogous to those under review by the House of Lords, a similar conclusion was arrived at, the statutory word being held applicable to a number of cars coupled together, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic, under an impetus imparted to them by a locomotive which shortly before the accident had been detached (*d*). That this court is prepared to accept, if it has not already accepted, a construction of the statute not less favourable to the servant than that adopted by Lord Halsbury, is also inferable from two other decisions holding that a locomotive and a single car connected together and run upon a railroad constitute a "train" (*e*).

(*c*). *What employés are deemed to have "charge or control" of a train—Conductors.*—A conductor is the employé to whom the statutory description is most obviously applicable, and it is not disputed that a railway company is prima facie responsible for his negligence (*f*). This presumption may be rebutted by shewing

(*c*) *McCord* v. *Cammell* (1896) A.C. (H.L.E.) 57, 65 L.J.Q.B. 202, 73 L.T.N.S. 634.

(*d*) *Caron* v. *Boston &c. R. Co.* (1895) 164 Mass. 523.

(*e*) *Lacey* v. *Old Colony R. Co.* (1891) 153 Mass. 112, 26 N.E. 437, followed in *Shea* v. *New York, N.H. & H.R. Co.* (1899) 173 Mass. 177, 53 N.E. 396.

(*f*) *In Chicago & E.I.R. Co.* v. *Richards*, (Ind. App. 1901), 61 N.E. 18, it was held that a complaint was not demurrable, which alleged in substance that a brakeman, while climbing up to the top of a car, was struck by another car which had been negligently left by the conductor of another train on an adjoining side track at a place where the two tracks were only five feet apart, and, owing to the transverse slope on which the side track was laid, the stationary car leaned over towards the other track.

that, at the time the injury was received, he was not, as a matter of fact, in control of the train in question. It cannot be said, as a matter of law, that a conductor is not in charge of a train during a temporary absence therefrom (*g*). Nor can any cessation of his controlling functions be predicated from the mere fact that the portion of the train which caused the injury had been detached from the engine and the other cars at the time when the plaintiff was hurt (*h*).

The conductor of a switch engine which is drawing several cars under his direction may be properly found to be, for the time being, in charge of a train consisting of the engine and cars (*i*). But such a conductor is not deemed to be in charge of a train which he merely has to make up. His duties are ended as soon as the cars are connected so as to compose a train, and he never has charge of those cars as a train (*j*).

(*g*) *Donahue* v. *Old Colony R. Co.* (1891) 153 Mass. 356, 26 N.E. 868. There the conductor left his train at a certain station and allowed it to proceed to the next station without him. A brakeman had occasion to make a coupling while the conductor was still absent from his post, and was injured by a defective draw-bar, of the condition of which the conductor had failed to notify him. It was held that the jury was justified in finding that the conductor was in charge of the train when the injury was received, since nothing was done that was contrary to his orders, or not reasonably to be expected. It was also contended without success that the omission of the conductor to warn the plaintiff with regard to the defective draw-bar was not negligent for the reason that the movements of the train and the coupling and uncoupling of cars were wholly under his direction, and that a brakeman was not expected to uncouple cars without his orders. The court said, that when the conducter left the train and permitted it to proceed without him, it might properly be inferred by a jury that he expected and permitted such things to be done as were necessary in the management of the train until he should rejoin it, without a specific order from himself for each particular act; and, if so, the omission in question might properly be found to have been negligence on his part.

(*h*) *Devine* v. *Boston & A.R. Co.* (1893) 159 Mass. 348, 34 N.E. 539. There two cars which had been "kicked" ran against a post at the end of a stub switch. It was held that, on the evidence, the jury might properly find that the conductor was the person who gave the stop motion for the cars, and that, taking into account the speed at which they were moving, he was negligent in not giving the motion sooner than he did.

(*i*) *Ducey* v. *Old Colony R. Co.* (1891) 153 Mass. 112, 26 N.E. 437. There it was held that, in view of the use to which a freight yard is put in making up trains and receiving cars from incoming trains, and the dangers attendant on moving cars and making up trains in the night-time, when a car is standing so near the point where tracks come together, that the space between it and the adjoining track is unusually narrow, a court cannot say, as a matter of law, that it was not a negligent act to leave the car in such a position.

(*j*) *Thyng* v. *Fitchburg R. Co.* (1892) 156 Mass. 13, 30 N.E. 169. The court said: "The statute, in referring to a 'signal, switch, locomotive engine, or train,' seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who,

(d). Employés other than conductors.—It has been laid down by the Supreme Court of Massachusetts that by the words, "any person . . . who has the charge or control" of a train is meant a "person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it" (*k*). A railway company, therefore, is responsible for the negligence either of an engineer or of a brakeman, if, as a matter of fact, either of them was in charge of the train (*l*). But the mere fact that a brakeman has been put in such a position that for the moment he physically controls and directs its movements under the eye of his superior does not of itself constitute him a person who has charge or control of the train (*m*).

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either wholly or in part, control its movements. The charge or control is of that whose characteristic is rapid and forceful motion. It relates to the train or locomotive engine as a whole, and not to the individual parts which make up the train or engine. The statute might have been made to include those who have charge of the construction of the engine or the cars or who inspect them. Neglect of their duties would be likely to cause an accident to the train while in motion. But the legislature in this part of the statute has gone no further than to include those whose duties relate to the charge of a locomotive engine or the train when complete." In another case it was doubted whether a switching foreman who merely designated the track on which it is to be shunted a part of the cars of a train which is controlled by a conductor could be said to have had "charge or control" of the train. *Caron* v. *Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N.E. 112. In view of the earlier decision, it is hard to see why the court should have felt any doubt on this point.

(*k*) *Caron* v. *Boston & A.R. Co.* (1895) 164 Mass. 523, 42 N.E. 112.

(*l*) *Shea* v. *New York, N.H. & H.R. Co.* (1899) 173 Mass. 177, 53 N.E. 396, holding it warrantable to find negligence, where the evidence was that the engine with a car attached was pushed, while the plaintiff was in the car, and a brakeman was standing on the front platform, against other cars with such force as to break the platforms of the cars and throw the employé from his seat.

The engineer of a railroad train must be regarded as the person in charge, for the purpose of giving signals or slackening speed at the approach of danger, although for most purposes the conductor has control of the train. *Davis* v. *New York N.H. & H.R. Co.* (1893) 159 Mass. 532, 34 N.E. 1070, followed in *Fairman* v. *Boston & A.R. Co.* (1897) 169 Mass. 170, 47 N.E. 613.

See also *Baltimore & O.R. Co.* v. *Peterson* (1901) 59 N.E. 1044, 156 Ind. 364, where it was held proper to refuse an instruction that, if the persons in charge of a train were fellow-servants of the injured person, or track-repairer, he could not recover.

(*m*) *Caron* v. *Boston & A.R. Co.* (1895) 164 Mass. 523, 42 N.E. 112, where it was denied that the statute was applicable to a brakeman whose duty it was to take charge of a train of cars which was being shunted on to a siding under the supervision of the conductor. The court said: "If 'control' is one thing and 'charge' is another, then, inasmuch as to some extent every brakeman upon a train would have 'control' of it, every employé injured by an accident resulting from the carelessness of a brakeman would have a right of action against the corporation which employed him, and the defence of common employment as to brakemen would be done away with, even though the brakeman might be acting under an immediate superior. The statute is to be fairly construed, and, while

The English doctrine would seem to be virtually the same as that established by the Massachusetts decisions, the House of Lords having held that the case was for the jury where some detached cars were left by the engineer on a steep gradient, and, being inadequately blocked, ran away and struck the plaintiff (*n*). The members of the court were unanimous in declaring that the action could be maintained upon the theory that the engine-driver was in charge of the train when it stopped at the point where the runaway cars were left, and that he did not cease to be in charge of it because some of the carriages were uncoupled from one another and from the engine in order that they might be separately dealt with in operations all directed to one end, namely the discharging of the freight (*o*). It was also considered that there was another and independent ground which rendered it proper to

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it removes the defence of common employment in some cases, it does not extinguish it altogether, and we do not think that the Legislature intended that it should be abolished in all cases where injuries were sustained by the carelessness of a brakeman. If it had, it would have used language more truly descriptive of a brakeman's usual occupation than the words, 'any person in the service of the employer who has the charge or control of any train upon a railroad.' It is *the* charge or control of which the statute speaks, and not *a* charge or control, and it is the charge or control of the train as a connected whole which is meant. *Thyne* v. *Fitchburg R. Co.* (1892) 156 Mass. 13, 30 N.E. 169."

(*n*) *McCord* v. *Cammell* [1896] A.C. 57, 65 L.J.Q.B.N.S. 202, 73 L.T.N.S. 634, 60 J.P. 180.

(*o*) The following passage from Lord Herschell's opinion (p. 66) sufficiently indicates the reasoning upon which this conclusion was based: "When he removed, or before he removed, the engine from the train, unless he wanted the rest of the train to follow, or was content that it should follow, it was absolutely essential that something should be done to detach that part of the train, and to make it stationary, while the rest of the train went on. That was a dealing with the train under his charge; and it seems to me that it was his duty to take care that all that was necessary for the operation with which he was concerned, namely, conveying these carriages severally and successively to the place where their contents were discharged, was done. It was not necessarily his duty to do it himself. If that duty had been left to some other servant of the company, and if he had every reason to believe that the duty was being properly performed, then it might well be that there could not be said to be negligence on his part—he would have discharged the obligation resting upon him by seeing that the work was being done by the person whose duty it was in that sense to do it. But in the present case there is evidence that he knew the method which was being employed to sprag the wheels; there is evidence that he knew that it was a method which on previous occasions had proved ineffectual; there was the evidence of witnesses who were called before the jury that the use of this slag at all was an improper method that the proper method was to use wood. Under these circumstances it seems to me impossible, when once the conclusion is arrived at that he was in charge of the train, to say there was no evidence of negligence upon his part." Lord Watson took the ground that the disengaging of the cars from the engine and securing them in order that they might remain stationary until the engine returned to take them up, was an act done in the conduct of the train with which that engine started, and that, if that act was negligently done, (which was a matter for the jury to determine), the plaintiff was entitled to recover if the person guilty of negligence had at the time

send the case to the jury, viz., that the evidence adduced in behalf of the plaintiff went to shew that the foreman was negligent in regard to the blocking of the cars after they had been detached. The words "any person having charge or control of the train," did not, it was said, necessarily point to one person who was in charge of the whole train. Different duties in connection with different parts of the train might be assigned to different persons, and, in that case, each and all of those persons were charged with the conduct of the train ; and, if any one of them were negligent in his own department, that would constitute negligence, bringing the case within the terms of the sub-section (*p*). This case also lays down the doctrine that the question, who was in charge of a train, is to be determined, as between two or more employés, by considering what duty was violated by the act which caused the injury.

The statutory words are applicable only to cases in which the control exercised over the train is direct. A railway company is not liable, under this particular provision, for the negligence of an employé who has control of a switch, or of a station agent who merely transmits orders to the man in charge of a train (*q*).

"charge or control of the train." Lord Davey agreed in thinking that the engine-driver, was "in charge of the train," and remained "in charge of the train" till the duties with which he was entrusted were fully completed; he considered it a strange thing to say that, when the engine-driver who was thus in charge of the train left three-fourths of it in an exposed and dangerous position, and it turned out that insufficient precautions had been taken to secure the safety of that portion which was so left behind, there was no evidence to go to the jury of negligence on the part of the "person in charge of the train."

(*p*) At p. 66 of the Law Reports the following passage is found in the opinion of Lord Watson:—"It is plain that Hooper was the person who insufficiently scotched the wagon which ran down the incline and killed the deceased; but it may be that, although he was the direct cause of the accident, the engine-driver was also negligent in his duty, if he was charged with that duty. And I think, if that view were taken, he knew quite well the kind of sprag that was being used, and had reason to know that, although for some purposes sufficient, the use of it was attended with danger. On the other hand, if the duty of spragging was properly delegated to Hopper, he was, to that extent, in charge of the train, and was negligent. But on whichever of these alternatives negligence be found, whether it be fixed on the engine-driver or upon the fireman, I think it follows that such person is also fixed in the position of the 'person having control of the train.' It has been suggested by one of the learned judges in the Court of Appeal that the duty having been committed to a great many persons, any one of whom might have performed it, therefore the person actually performing it was not 'in charge.' To my mind these considerations are very immaterial. I think the statute points directly to the person having 'the charge or control of the train' as being that person who, at the time when the negligent act is committed, has the duty laid upon him of performing that act with reasonable care."

(*q*) *Fairman* v. *Boston & A. R. Co.* (1897) 169 Mass. 170, 47 N.E. 613. See also *Devine* v. *Boston, &c. R. Co.* (1893) 159 Mass. 348, when the company's non-liability for the negligence of a switchman seems to be assumed in the opinion.

5. Person having "charge or control" of a car.—It is held that the word "car," which is found only in the Alabama Act, is not confined to those cars which are intended to be hauled by locomotives, but is applicable to hand-cars also (*a*). The question whether an employé actually had charge or control of such a car can very rarely cause any doubt, and, as a matter of fact, the only points discussed, apart from those of mere pleading, have been, whether the conduct of an employé conceded to be in charge of a car was negligent in handling (*b*).

6. "On a railway" or "railroad": effect of these words.—The word "railway" is used in its popular sense, viz., as meaning a way upon which trains pass by means of rails, and is not confined to railways belonging to those companies which are subject to the provisions of the English Railway Regulation Acts. Hence this sub-section applies to a temporary railway laid down by a contractor for the purposes of the construction of works (*a*). A similar doctrine is held in Massachusetts where a plaintiff has been allowed to recover for an injury received on a short railway track intended for temporary use by a city in transporting gravel (*b*).

(*a*) *Kansas City, M. & B. R. Co.* v. *Crocker* (Ala.) (1892) 11 So. 262.

(*b*) The inference of negligence has been held to be "sure and certain," where a foreman in charge of a hand-car, with knowledge that the operators are at times in the habit of turning loose the lever on a down grade and standing without support, suddenly applies the brakes on such a grade without notice to the operators and without looking to see whether they are holding to the lever. *Kansas City, M. & B. R. Co.* v. *Crocker* (1891) 95 Ala. 412. The foreman of a hand-car is, as matter of law, guilty of negligence in entering at full speed a place on the track obscured by dense smoke without sending a flagman ahead to ascertain if any train is on the track in accordance with a custom regulating the running of hand-cars through smoke. *Woodward Iron Co.* v. *Andrews* (1896) 114 Ala. 243, 21 So. 440. A railway company is liable for an injury received by a labourer on a railroad in jumping from a hand-car to avoid a collision occasioned by the failure of a foreman to give signals required by the rules of the road. *Richmond & D. R. Co.* v. *Hammond* (1890) 93 Ala. 181, 9 So. 577. A jury is properly directed to find for the plaintiff if they find from the evidence that a foreman ran two cars close together at a high rate of speed on a trestle; that, without warning to the men on the rear car, he signalled to those on the front car to slacken speed; that one of the employés on the rear car, seeing the signal, applied the brake on that car so suddenly that the lever was jerked out of the hands of the plaintiff's decedent, and that when the cars came into collision immediately afterwards, he was thrown to the ground. The facts thus set forth shew negligence on the foreman's part and exclude the hypothesis of contributory negligence *Jones* v. *Alabama M. R. Co.* (1895) 107 Ala. 400, 18 So. 30, second appeal, sub nom. *Alabama Mineral R. Co.* v. *Jones* (1896) 114 Ala. 519, 21 So. 507.

(*a*) *Doughty* v. *Firbank* (1883) 10 L.R. 10 Q.B.D. 358, 52 L.J.Q.B.D. 480, 48 L.T.N.S. 530, 48 J.P. 55. [Driver injured by a collision.]

(*b*) *Coughlan* v. *Cambridge* (1896) 166 Mass. 268, 44 N.E. 218.

The location of the rails is not material, so long as the injury was caused by a moving engine or car. Thus cars are on a "railway" while they are being moved on the lines in a freight shed with a view to their being loaded or unloaded (*c*). On the other hand, an engineer is not in charge of an engine "on a railroad" while it is stalled in a roundhouse for repairs (*d*).

II. SERVICE OF NOTICE UPON THE EMPLOYER.

7. Notice a condition precedent to the maintenance of an action under the statute.—Nearly all the Acts with which we are now concerned provide that the employer shall be served before the expiration of a specified period with notice that the employé in question has sustained an injury (*a*). Compliance with the statutory requirement is as a condition precedent to the plaintiff's right to avail himself of the remedial rights conferred by the legislature. This rule the courts have construed strictly for the reason that the manifest object of inserting the provisions as to notice was to insure that the master should have a sufficient opportunity to prepare his case. See sec. 11 (a), post. No action can be maintained where the notice is not served until after the writ is made, although it was left at the defendant's house on the day the writ is dated (*b*).

It has also been held that the provision in the English (sec. 4) and Colonial Acts, by which it is declared that the want of notice shall be no bar to the maintenance of the action if the trial judge shall be of opinion that there was a reasonable excuse for such want of notice, applies only where due notice has not been given and not

(*c*) *Cox* v. *Great Western R. Co.* (1882) 9 Q.B.D. 106.

(*d*) *Perry* v. *Old Colony R. Co.* (1895) 164 Mass. 296. [Machinist making repairs was injured by the engineer's blowing down the engine into the ashpit in which the machinist was.]

(*a*) England, Newfoundland and Australian Colonies, sec. 1; Ontario, secs. 9, 13; British Columbia, sec. 9; Manitoba, sec. 7; Alabama, Code, sec. 2590; Massachusetts, sec. 3; Colorado, sec. 2; New York, sec. 2.

The Manitoba Act of 1893, as at first passed, contained the same provision with regard to notice as that of Ontario from which it was copied. But by 58 and 59 Vict. ch. 48, sec. 2, the original Act was amended by providing simply that the action could be brought at any time within two years after the occurrence of the accident. In this Province, therefore, the requirement as to notice has been abrogated altogether. Soon after the passage of this amendment it was held not to have any such retrospective operation as would extend the time for bringing in a case where the injury had been received before the amending Act had been passed. *Dixon* v. *Winnipeg El. St. R. Co.* (1897) 11 Man. 528.

The Acts of Alabama and Indiana contain no provision as to notice.

(*b*) *Vequsan* v. *Morse* (1893) 160 Mass. 143.

where no notice at all has been given. It does not empower the trial judge to proceed with the case on the ground that the writ and declaration gave the defendant notice, and that he had also actual notice because his manager saw the accident or saw the plaintiff immediately after the accident (*c*).

8. —but not if the facts constitute a cause of action at common law.—As these statutes do not deprive an injured servant of his common law rights of action, it follows that, if the circumstances alleged are such as will enable him to sue either at common law or under the statutes, he cannot be thrown out of court by proof that he has not complied with the statutory requirement as to notice, unless he insists on relying upon the statute alone (*a*). But an action at common law cannot be converted into one under the statute simply because it has been discovered that the notice required by the statute had been given within the prescribed period by a former agent of the plaintiff who had died before the common law action was instituted (*b*).

If the servant is relegated to his common law rights alone, by reason of the fact that the proper statutory notice was not given, his ability to recover will depend upon the doctrines applied in the jurisdiction where the cause of action arose (*c*).

9. Notice must be given in writing.—That the notice is not valid, unless it is given in writing, is deemed to be a necessary inference from the provisions in sec. 7 of the English Act, that notice of the injury shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date, and shall be served on the employer, and may be served by delivery

(*c*) *Thompson* v. *Southern R. Co.* (1894) 15 New So. Wales, L.R. (L.) 162. On a subsequent hearing of the case, 15 L.R. (L.) 166, it was further held that, where an application of the plaintiff to proceed notwithstanding that he gave no notice has been refused, he cannot turn round fifteen months after the accident and make another application to proceed, on the ground that a letter sent by his attorney after the expiration of the statutory period constituted a valid notice under the circumstances.

(*a*) *Ryalls* v. *Mechanics Mills* (1889) 5 L.R.A. 667, 150 Mass. 190, 22 N.E. 766.

(*b*) *Clark* v. *Adam* (1885) 12 Sc. Sess. Cas. (4th Ser.) 1092.

(*c*) In a Canadian case where the servant failed to satisfy the statutory requirements, it was held that the action could not be maintained, as the jury had found that there was no defect in the machinery, nor in the system used in operating it. *Dixon* v. *Winnipeg &c. R. Co.* (1897) 11 Man. 528.

or by post (*a*). In a later case the question was raised whether a sufficient notice could be made out from a reference to some document other than that relied upon as constituting a sufficient notice. Lord Coleridge thought that the question should be answered in the negative. Brett, M.R., and Holker, L.J., declined to express a definite opinion, but they seem—especially the former—to have been strongly inclined to adopt the contrary view. All the members of the court were agreed in holding that, whether such a reference was or was not permissible, a notice otherwise defective could not be eked out by a reference to a verbal statement previously made by the injured servant to an agent of the master. It was accordingly held that there is no notice in compliance with the Act where a workman, on the day he had been injured, makes a verbal report of such injury to his employer's inspector, who takes down the details in writing and sends them to the employer's superintendent, and the workman's solicitor afterwards writes a letter to the employer, stating that he is instructed by such workman to apply for compensation for injuries received on the employer's premises, "particulars of which have already been communicated to your superintendent" (*b*).

The Acts of Massachusetts and Colorado expressly provide

(*a*) *Moyle* v. *Jenkins*, 8 Q.B.D. 116, 51 L.J. Q.B. Div. 112; 46 L.T.N.S. 472, 30 W.N. 324; S. P. *Keen* v. *Millwall Dock Co.*, infra.

(*b*) *Keen* v. *Millwall Dock Co.* (C. A. 1882) 8 Q.B.D. 482; 51 L.J.Q.B. Div. 277, 30 W.R. 503. As regards the point left undetermined in this case, Lord Coleridge based his opinion on the words of the Act which, as he considered "described the notice as one and single, containing in it the incidents which the statute has required it to contain as a condition precedent to maintaining the action." The following passage from the opinion of Brett, M. R., shows that arguments of no small weight may be adduced for the other doctrine. "It seems to me that a notice might be available even if it should be defective in any of the natters required to be stated, as for instance, if it did not in terms name the day when the injury was sustained, but shewed it by reference, so also if it did not describe the cause of the injury with sufficient particularity but still did not describe it so as to mislead. I agree that as a general rule the notice must be given in one notice, but I am not prepared to say that it would be fatal if it were contained in more than one notice. Suppose for example a person in his letter written on one day should describe fully the injury he had sustained, but should leave out his address, and he should the next day send a letter stating that in the letter I wrote yesterday I omitted to give you my address, and I now give it. If both these letters were written in time, and both served on the employer, I am not prepared to say that the last might not be taken to incorporate the first, and therefore, though not an accurate but an informal notice, it must be considered a notice within the meaning of the statute. If in the present case the letter of Mr. Bradley had referred to a written report, and to the date and particulars there given of the injury, I should not at this stage have said that there had not been a notice within the Act, but should have desired a rule in order that the matter might be more fully discussed."

that the notice shall be in writing. The requirement in the former Act, that the notice is to be "signed by the person injured, or someone in his behalf," is satisfied by a notice signed by a firm of attorneys, as attorneys for the injured employé. In the absence of direct evidence to the contrary it will be presumed that they were authorized to sign it (*c*).

10. Service of the notice.—(*a*) *Service on corporations.*—Where the defendant is a corporation, the notice may be served on its general superintendent at the place where suit is brought, or, during his absence, on any of the subordinate officials in his office. Anyone who appears to be such an official is a proper person to receive the notice (*a*).

(*b*). *Service through the Post Office.*—A notice is not given as the statute requires unless it is actually received, or, if sent through the Post Office, should have been received in the ordinary course of delivery, within the period limited (*b*).

Service under the English Act is sufficient where the letter giving the notice actually reaches the master, though it is not registered. The provision as to registration merely means that it throws on the master the burden of proving that the letter never reached its destination (*c*).

It would seem that, if an agent sends the notice, he must register the letter containing it, or run the risk of being called to account by his principal, if the latter suffers damage from its not being registered (*d*).

(*c*) *Dolan* v. *Alley* (1891) 153 Mass. 380, 26 N.E. 989. [Construing Amendment in Mass. Stat. 188, ch. 155.]

(*a*) *Shea* v. *New York, N.H. & H. R. Co.* (1899) 173 Mass 177, 53 N.E. 396. A notice of an injury to a brakeman, given to a freight agent or to the attorney of the company by which he was employed, which had made no objection to the receipt of like notices for five years, is a sufficient compliance with the statute. *De Forge* v. *New York, N.H. & H. R. Co.* (1901) 178 Mass. 59, 59 N.E. 669.

(*b*) *M'Donagh* v. *Maclellan* (1886) 13 Sc. Sess. Cas. (4th Ser.) 1000. [Action held not maintainable under the English Act, where the notice was sent at such a time that it was impossible for it to reach the master until after the expiration of the six weeks specified in that.]

(*c*) *M'Govan* v. *Tancred* (1886) 13 Sc. Sess. Cas. (4th Ser.) 1033.

(*d*) An unreported case is mentioned in Ruegg on Employers' Liability Act, p. 66, where a solicitor who had omitted to give notice by registered letter was sued by his client for negligence and had to pay a considerable sum as damages and costs.

(*e*) *Service in case of death.*—Where suit is brought under sec. 2 of the Massachusetts Act, the notice may be given by the widow (*e*). The amendment added to that Act by Laws, 1888, ch. 155, provides for the service of notice, in case of the death of the injured perso.., by his executor or administrator (*f*). The construction placed upon this provision is that, where the action is brought under sec. 2 of the Act, the widow may give the notice, the ground taken being that, as the action there specified is not maintainable by the executor or administrator, it cannot be implied that one or other should be appointed merely for the purpose of giving the notice (*g*).

(*d*) *Excuses for failing to serve the notice.*—Under the English and Colonial statutes the want of notice is not fatal to the right of action if there was a "reasonable excuse" for the failure to serve it. Want of notice has been excused on the ground that the widow of the deceased man was in an advanced state of pregnancy, and so excited in mind that the doctor ordered that she should not be consulted on the subject (*h*); on the ground that the plaintiff had been a long time in the hospital, and was not in a fit state to proceed with the action (*i*); and on the ground that negotiations for a settlement between the widow of the injured employé and the employer within six weeks after the accident, and letters of administration were not granted to her till nearly eight months after the accident (*j*). On the other hand, it is clear that the plaintiff's ignorance of the fact that it was necessary to give the notice does not constitute a reasonable excuse within the meaning of the proviso (*k*). It has been held in Scotland that no action can be maintained, although the party bringing the suit alleges that he was an old man and illiterate, and that it was not known whether the deceased would survive and bring suit himself (*l*).

(*e*) *Gustafsen* v. *Washburn &c. Co.* (1891) 153 Mass. 468.

(*f*) See *Daley* v. *New Jersey &c. Co.* (1891) 155 Mass. 1; *Jones* v. *Boston &c. R. Co* (1892) 157 Mass. 51.

(*g*) *Gustafsen* v. *Washburn &c. Co.* (1891) 153 Mass. 468.

(*h*) *Bromley* v. *Oldham*, an unreported case cited in Ruegg on Empl. Liab. (3rd ed.) p. 60.

(*i*) *Miller* v. *Dalgety* (New So. Wales 1884) 1 W.N. 164, 2 W.N. 17.

(*j*) *Bulman* v. *Robertson* (New So. Wales 1887) 4 W.N. 131.

(*k*) *Ex parte Hannan* (1897) 18 New So. Wales, L.R. (L.) 422.

(*l*) *M'Fadgen* v. *Dalmellington* (1897) 24 Sc. Sess. Cas. (4th Ser.) 327. [Son died a fortnight after accident, and notice was three days too late.

This ruling is certainly a harsh one, if the servant's injury was so severe that there was merely a chance of his recovery.

In another Scotch case where the action was brought by the widow of the employé, her forgetfulness caused by the grief of mind which she had felt since the accident was held not to be a reasonable excuse for omitting to send a notice (*m*). Considering the remedial character of the Act, this decision also seems to be scarcely commendable. It is submitted that in construing this provision, a court should not refuse to recognize the fact that violent grief sometimes produces a temporary incapacity to attend to the ordinary affairs of life.

The amendment to the Massachusetts Act, (Laws of 1888, ch. 155, sec. 1), declares that employés are excused from giving notice within the thirty days prescribed in the original statute, whenever from "physical or mental incapacity" it is impossible for them to give the notice within that time. Whether an employé is entitled to claim the benefit of this provision is a question of fact to be determined according to the evidence introduced (*n*).

11. Sufficiency of the particulars contained in the notice.—(*a*). *Generally.*—A writing set up as a notice will not be construed with technical strictness, but its contents should at all events shew that it is intended as the basis of a claim against the defendant, and that the information is given on behalf of the person who brings the suit (*a*). Any notice is sufficient which contains such particulars as will give the employer substantial notice of what has occurred, and thus put him in a position to make such inquiries as will enable him to come to trial prepared to meet the plaintiff's

(*m*) *Connolly* v. *Youngs &c. Co.* (1804) 22 Sc. Sess. Cas. (4th Ser.) 80.

(*n*) In a recent case, where the servant had died from the effects of the injury, the widow of the decedent testified that he was in bed almost two months after the accident; that during most of this time he knew her and talked to her, and that a good deal of the time he was conscious and knew what he was doing. The decedent's son also testified that he saw his father almost every day after the accident, and that he was conscious nearly all the time. It was held that there was no valid excuse for the failure to serve the notice. *Ledwedge* v. *Hathaway*, (1898) 170 Mass. 348, 49 N.E. 636. An instruction with reference to this provision which stated that an employé was not excused unless he was both "mentally and physically disabled" has been held correct. *Cogan* v. *Burnham* (1900) 56 N.E. 585, 175 Mass. 391. But *quære*, considering that the disjunctive "or" is used in the statute.

(*a*) *Driscoll* v. *Fall River* (1895) 163 Mass. 105, 39 N.E. 1003.

case (*b*). A plaintiff is not bound to ascertain and inform the defendant of all the causes to which the defect which occasioned the injury is attributed. The notice satisfies the statute, if it states a cause which actually existed under such circumstances as would render the defendant responsible (*c*). A notice is not defective because it alleges different causes for the injury, where each is adequately stated (*d*). The provision that the plaintiff shall state the "cause of the injury" is not to be construed as a requirement that he shall state the "cause of action" (*e*). Nor will a motion be declared insufficient merely for the reason that, as the evidence adduced at the trial shews, the proximate cause of the injury was not stated with legal precision (*f*). Still less will it be necessary to set forth what is called in one of the cases the "cause of the cause" of the injury (*g*).

In the English and Colonial Acts, the intention of the legislature that the sufficiency of the notice shall be ascertained in accordance with extremely liberal canons of construction is unmistakably indicated by the provision that the statement shall be made in "ordinary language." This phrase is assumed to have reference

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(*b*) *Clarkson* v. *Musgrave* (1882) 9 Q.B.D. 386, 51 L.J.Q.B.D. 525, 31 W.R. 47; *Pervisi* v. *Gatti* (Q.B.D. 1888) 58 L.T.N.S. 760, 4 Times L.R. 487. A letter from plaintiff's solicitors stating that they had been instructed to commence an action without delay, and describing the injury was held sufficient in *Cox* v. *Hamilton &c. Co.* (1887) 19 Ont. Rep. 300. A notice that, at the time and place named, the servant was instantly killed by the falling of a derrick upon him, on account of its being improperly fastened, sufficiently states the cause of injury. *Buck* v. *Bozworth* (1894) 162 Mass. 334. A notice to a railroad company that a brakeman on a certain day was injured on the railroad, within "one hundred yards northerly" of a station named, by being caught between a car and a locomotive engine "by reason of a broken drawbar" upon the car, which permitted the tender of the engine to run up against the end of the car and crush his leg, is sufficient notice of the time, place, and cause of the injury. *Donahoe* v. *Old Colony R. Co.* (1891) 153 Mass. 356.

(*c*) *Dolan* v. *Alley* (1891) 153 Mass. 380, 26 N.E. 989.

(*d*) *Coughlan* v. *Cambridge* (1896) 166 Mass. 268, 44 N.E. 218.

(*e*) *Clarkson* v. *Musgrave* (1882) 9 Q.B.D. 386, per Field, J. (p. 390).

(*f*) *Clarkson* v. *Musgrave* (1882) 9 Q.B.D. 386, (notice held sufficient which stated that the plaintiff, a child, was injured in consequence of the defendants' negligence in leaving a certain hoist in their warehouse unprotected, whereby the plaintiff had her foot caught in the casement of the said hoist, was held sufficient, although the evidence shewed that the accident was proximately caused by the negligence of the plaintiff's mistress in allowing her to go into the hoist by herself.)

(*g*) In an action for an injury to an employee by the falling of a bank of earth owing to the negligence of the employer's superintendent, a notice to the employer, setting forth the cause of the injury to be "the falling of a bank of earth," is sufficient, although not referring to the superintendent or his conduct. *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N.E. 550.

to the fact that these Acts were passed for the special benefit of persons in a humble sphere of life and not possessed of much knowledge. The claimant "is to use his own untutored language" (*h*).

This provision is not inserted in the American Acts, but there is nothing in the reports to indicate that its absence has been regarded as a reason for applying a stricter rule of construction than that adopted by the English courts.

(b) Inaccuracies which do not invalidate a notice.—The language of the provisions by which it is secured that a plaintiff shall not be put out of court simply because his notice was inaccurate in some particulars is not quite the same in all the statutes. By those of England and of the Colonies the validity of the notice is made to depend upon the question whether the defendant was prejudiced by the inaccuracies complained of, and it is expressly declared that this question is to be determined by the trial judge. In those of Massachusetts and Colorado there is merely a categorical statement that certain specified inaccuracies shall not invalidate the notice, unless they were intended and actually did mislead the defendant; and in the absence of any designation of the tribunal which is to determine this question, the inference has necessarily been drawn that, like other questions of fact, it is primarily for the jury. But the practical results of each of these provisions appear to be virtually identical, when measured by the circumstances disclosed in cases where the actions have been allowed to proceed.

If the validity of the notice has been declared, either expressly by a specific finding, or impliedly by a verdict for the plaintiff, a judgment in his favour will not be set aside, unless the conclusion thus reached was manifestly unwarrantable (*i*).

(*h*) Cave, J. in *Stone* v. *Hyde* (1882) 9 Q.B.D. 76, 51 L.J.Q.B N.S. 452, 46 L.T.N.S. 421, 30 Week. Rep. 816, 46 J.P. 788. In the same case Mathew, J. remarked, "When we consider that the object of passing this Act was to confer a benefit on the working classes, I think it would be unreasonable and unjust, and contrary to the spirit and intention of the Act, to require these notices to be framed with all the particularity of a statement of a claim." Compare the statement of Field, J. in *Clarkson* v. *Musgrave* (1882) 9 Q.B.D. 386, 51 L.J.Q.B.N.S 525, 31 Week. Rep. 47, that "the statute was intended for the use of unlearned persons, for whom it was meant to provide a cheap and speedy remedy."

(*i*) A letter from the plaintiff's solicitor which merely gave the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg," has been held as a valid notice. *Stone* v. *Hyde* (1882) 9 Q.B.D. 76, 51 L.J.Q.B.N.S. 452, 46 L.T.N.S. 421,

There seems to be only one reported case bearing upon the question how far a court of review will go in overruling the action of a trial judge in denying recovery for the reason that the notice was insufficient to satisfy the statute, and the rationale of the decision is somewhat obscure (*j*).

III. DEATH OF EMPLOYER OR INJURED EMPLOYÉ HOW THE RIGHT OF ACTION IS AFFECTED BY.

12. Scope of this Sub-title.—It is not proposed in this subtitle to do more than state the result of the cases which have been decided with express relation to one of the Acts now under discussion For a more complete collection of cases dealing with the effect of

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30 Week. Rep. 816, 46 J.P. 788. In *Carter* v. *Drysdale* (1883) 12 Q.B.D. 91, 53 L.J.Q.B.N.S. 557, 32 Week. Rep. 171, a finding that the defendant was not prejudiced was declared to be warrantable, where the notice itself omitted the date of the injury, but the plaintiff's solicitor had sent a letter in which that particular was stated. Lord Coleridge remarked that he did not see how, under these circumstances, any other conclusion was possible than that no prejudice was shewn. In *Hearn* v. *Phillips* (Q.B.D. 1885) 1 Times L.R. 475, the plaintiff having been injured while in the employ of one "G. F. Van Camp," had served notice on "E. Van Camp," who carried on business at the same place. The county court judge found that the notice had been duly served, and having amended the inaccuracy in the initials allowed the trial to proceed holding that the employer was not thereby prejudiced in his defence thereby. *Held*, that a judgment in the plaintiff's favour ought not to be set aside. The omission of the plaintiff's name and address, and a wrong date are defects which are not fatal to the validity of the notice, if the trial judge can still say that, as a matter of fact, the defendant was not prejudiced in his defense by these inaccuracies, and that they were not for the purpose of misleading. *Previsi* v. *Gatti* (Q.B.D. 1888) 58 L.T.N.S. 762, 4 Times L.R. 487, distinguishing *Keen* v. *Millwall Dock Co.* 8 Q.B.D. (C.A.) 482, on the ground that the absence of prejudice to the defendant was not a factor in that case, nor made the subject of any argument, the plaintiff being held to have been rightly nonsuited simply for the reason that the notice was insufficient. The following letter from the wife of the injured servant is sufficiently specified: "I find I will need some more money, and will you please oblige me with ten shillings. It is now five weeks since Adam got his accident. His jaw is so badly smashed that he will never be the same man again. Adam has been advised to get damages from you." *Thompson* v. *Robertson* (1884) 12 Sc. Sess. Cas. (4th Ser.) 121. A jury is justified in finding that there was no intention to mislead, and that in fact the defendant was not misled by a notice of the death of an employé, stating that deceased was killed by a stone's being precipitated upon him from defendant's derrick as a result of the negligence of defendant or of some person for whose negligence he was liable, and that the notice was therefore sufficient, although the negligence was in failing to warn him of the raising of the stone. *Beaureguard* v. *Webb Granite & Constr. Co.* (1893) 160 Mass. 201, 35 N.E. 555. In Scotland where the issues are adjusted by a different court from that which tries the case, the question whether the excuse for not sending the notice was reasonable may be decided by the former court, or in its discretion postponed for the decision of the trial court. *Trail* v. *Kelman* (1887) 15 Sc. Sess. Cas. (4th Ser.) 4.

(*j*) In *Beckett* v. *Manchester* (Q.B.D. 1888) 52 J.P. 346, a nonsuit was set aside on the ground that the want of a name and address is not fatal to the notice, if the defendants are not taken by surprise in consequence of the defect. So far as the position of the court can be understood from the very meagre

death upon the right of action for personal injuries, the reader must consult the general treatises on the subject (*a*).

13. Death of employer, effect of.—In England it has been held that the maxim, Actio personalis cum persona moritur, which operates as a bar to an action at common law against the executors of the culpable party also precludes recovery in an action brought by a servant under the statute (*a*). The same doctrine would doubtless be applied in any American or Colonial jurisdiction, unless it is otherwise provided by a local statute, as is the case in Ontario. See sec. 11 of the Workmen's Compensation Act.

(*a*) *Gillett* v. *Fairbank* (Q.B.D. 1887) 3 Times L.R. 618.

14. Death of plaintiff, pending action abated by.—If a plaintiff dies after an action under the statute is commenced, but before judgment, the action already commenced abates. The death may give a right of action under the Damage Act, but this is a different action and must be prosecuted separately (*a*).

15. Suit by executors or administrators.—Nearly all the statutes now under consideration expressly provide that the right of action given by them may be enforced by the "personal representatives" of a servant who dies as a result of the injury in suit (*a*).

By Mass. Pub. Stat. ch. 112, sec. 212, as amended by Stat. 1883, ch. 243, a right of action is given to an administrator in any case where the intestate could have recovered, but recovery is not allowed for the negligence of a fellow-servant. In a later case than the one cited in note (*d*) infra, it was argued that the combined effect of this provision and of sec. 2, of the Employers'

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report of the case, absence of prejudice seems to have been viewed as a legal inference from the mere fact that the defendant come into court. But, in view of the decisions cited above, this seems not to be maintainable as an unqualified proposition. The report probably omits to mention the factor which was really regarded as decisive.

(*a*) In Roberts and Wall. Empl. Liab. pp. 380, et seq., will be found an excellent summary of the English cases A full review of the English decisions under Lord Campbell's Act is given in Beven's Empl. Liab. (2nd Ed.) pp. 84, et seq., and Chap. VI of the same author's work on Negligence. (Vol. 1, p. 208.) See also Ruegg on Empl. Liab., p. 128. In Shearm. & Redf. Negl. secs. 124, et seq., the American decisions are collected.

(*a*) *McCarthy* v. *Jacob*, an unreported decision of the English Court of Appeal, mentioned in Ruegg on Empl. Liab., p. 121, note (n).

(*a*) England, Newfoundland and Australian Colonies: Sec. 1; Ontario, Sec. 3, sub-sec. 5; British Columbia, Sec. 15; Alabama, Code, sec. 2591; Massachusetts, Sec. 1, sub-sec. 3; secs. 2, 3; Colorado, Sec. 1, sub-sec, 3; New York, Sec. 1.

Liability Act, (see infra), was to give an action to the administrator, free from the defence arising out of the relation of fellow servants, in a case where death has resulted without conscious suffering, and where there is no widow nor dependent next of kin. But this contention did not prevail (*b*).

Under the Alabama Code, it has been held not to be necessary to aver in the complaint that he left any heirs at law surviving him, though the damages recovered are to be distributed according to the statute of distribution (*c*).

In most of the statutes no special provision is made for a suit by a widow as distinguished from other personal representatives; but in Massachusetts, sec. 2 of the Act gives a widow or dependent next of kin the right to sue in the special case where the employé is instantly killed or dies without conscious suffering. Under this provision, the right of recovery exists only under such circumstances as would have created a liability in favour of the employé if he had survived (*d*). The effect of secs. 1 and 2 of the Act, is, therefore, simply this—that, if death is not instantaneous, and there is conscious suffering, the action must be brought by the person injured, or his executor or administrator, while, if there is instantaneous death, or death not preceded by conscious suffering, the action must be brought by the widow or next of kin (*e*).

(*b*) *Clark* v. *New York, P. & B. R. Co.* (1893) 160 Mass. 39, 35 N.E. 104. Some remarks on the inaptness of the phraseology used in sec. 3 were added at the end of the opinion.

(*c*) *Columbus & W. R. Co.* v. *Bradford* (1888) 86 Ala. 574, 6 So. 90.

(*d*) *Dacey* v. *Old Colony R. Co.* (1891) 153 Mass. 112. The court said: "The provisions of this section would be inconsistent with those of the Stat. of 1883, chap. 243, (see above), if that were held to include cases where the deceased might have maintained an action under the Employers' Liability Act if death had not resulted. It could not have been intended that, where an employé is instantly killed or dies without conscious suffering, the widow or next of kin shall have a right of action for the death under the Employers' Liability Act, and that the administrator also, by virtue of the same statute, shall be enabled to maintain an action for the death which could not otherwise be maintained under the Stat. of 1883. We are of opinion that the Stat. of 1887, chap. 270, cannot be invoked to relieve a case brought under the Stat. of 1883, chap. 243, from the defence that the injury was caused by the negligence of a fellow servant. Section 2 of the first mentioned statute, which gives a remedy to the widow or next of kin, instead of to the administrator, where death results without conscious suffering, must be held to be exclusive as to the cases of death where the aid of the statute is invoked."

(*e*) *Gustafsen* v. *Washburn &c. Co.* (1890) 153 Mass. 468. If the deceased left a brother and a sister, and the latter alone was dependent on him, the action should be brought in her name alone. *Daley* v. *New Jersey &c. R. Co.* (1891) 155 Mass. 1. To be "dependent" within the meaning of the statute the next of kin

The phraseology of the various Acts as to suits by personal representatives differs considerably ; but, presumably, the doctrine laid down in Massachusetts is universally applicable, viz., that there is only one cause of action under them. Hence they do not give the administrator of an employé a right of action against an employer for causing the employé's death, in addition to the right as legal representative to recover damages accruing to the intestate in his lifetime (*f*).

The phraseology of the Damage Act which happens to be in force in the particular jurisdiction where the injury determines what parties shall be deemed "personal representatives" for the purposes of the Employers' Liability Act in that jurisdiction. If the Damage Act provides that the action must be brought by the executors or administrators of the deceased person, the wife of a servant who has been killed in the course of his employment cannot bring a suit in her own name under an Employers' Liability Act (*g*).

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need not be one of the class of persons whom the deceased was legally bound to support. Dependence, if proved as a fact, is sufficient. *Daley* v. *New Jersey &c. R. Co.* (1891) 155 Mass. 1 ; *Hodnett* v. *Boston &c. R. Co.* (1892) 156 Mass. 86. Whether the deceased died without "conscious suffering" is a question primarily for the jury. See *Maher* v. *Boston &c. R. Co.* (1893) 158 Mass. 36; *Mears* v. *Boston &c. R. Co.* (1896) 163 Mass. 150, for cases involving evidence deemed to be sufficient to justify the inference of death without such suffering.

(*f*) *Ramsdell* v. *New York &c. R. Co.* (1890) 151 Mass. 245. After quoting the provision in question, the court said : "This plainly authorizes an executor or administrator to proceed in the right of his testator or intestate, and recover all damages which the deceased person suffered to the time of his death. It does not purport to make the death a substantive cause of action. It gives only 'the right of compensation and remedies' and it gives them to the employé, or to his legal representative in case of his death. It implies that his representatives are merely to succeed to his rights and remedies. But the law recognizes no 'right of compensation' for the death of a person, and gives to a deceased person no remedies founded on his death." These considerations are of general applicability and therefore independent of the following additional argument by which the court went on to fortify its position : "If this clause (sec. 1, sub-sec. 3) gave a right of action for the death of an employé as an extension to his representatives of a right which under one or two statutes belongs to the representatives of others who are not employés, it would necessarily include the right where death is instantaneous. But manifestly that was not intended. The next section of the statute (2) deals expressly with such cases in a different way. It is quite apparent that clause 3 of sec. 1 gives the legal representatives of a deceased employé merely a right to recover the damages to which he was entitled at the time of his death."

(*g*) *Pearson* v. *Canadian Pac. R. Co.* (1898) 12 Man. 112.

In a short article, entitled "The Bench and the Bar," we recently referred to a difficulty which had arisen between one of the County Judges at Hamilton and a member of the Bar there. It was not clearly stated, as it should have been, that it was the Junior Judge of the County who had crossed swords with the City Solicitor. The matter was so fully ventilated in the daily papers that there could scarcely be any misunderstanding on the subject; but it is only right for us to correct any possible misapprehension by noting that the judge concerned was His Honour Judge Monk, and not His Honour Judge Snider, the Senior Judge, whose relations with his Bar have uniformly been of the most pleasant character.

In the recent case of *Black* v. *Imperial Book Co.* which was brought to restrain the infringement of a copyright, Mr. Justice Street decided that the Imperial Statute, 39 & 40 Vict., c. 36, s. 152, is not in force in Canada. The provision, however, is included in Part IV of the appendix to R.S.O. (1897), vol. 3, as being one of the Imperial enactments in force in Canada. It is not often that surgery and law run in parallel lines, but it is obvious that Mr. Justice Street's judgment in this case is a sort of legal operation for "appendicitis." We are rather inclined to think that the legal decision of the part of the appendix in question may turn out a case of bad surgery.

The following curious announcement of a decision of the Supreme Court was telegraphed to one of the Toronto daily papers from Ottawa: "*Blackburn* v. *McCallum*—Ontario Appeal, direct from the judgment of Meredith, C.J.C.P. Appeal allowed. Held, that a general restraint upon action alienation attached to device in fee which, if unlimited would be bad common law, is not rendered valid by being limited as to time." The ingenious lawyer will no doubt be able from this curious jumble of words to learn that the very interesting and important point of law decided was, "that a general restraint upon alienation attached to a devise in fee, which if unlimited would be bad at common law, is not rendered valid by being limited as to time;" and therefore that the decision of the Ontario Court of Appeal to the contrary in *Earls* v. *McAlpine*, 6 Ont. App. 145, is overruled, and the conclusion of Pearson, J., in *Re Kosker*, *Kosker* v. *Kosker*, 26 Ch. D., 801, as to the true state of the law on this point, which are referred to in vol. 20, p. 295, has been at length vindicated by our Supreme Court.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CONTRACT—ASSIGNABILITY OF CONTRACT—INCREASE OF BURDEN ON CONTRACTOR BY ASSIGNMENT OF CONTRACT BY CONTRACTEE.

In *Tolhurst* v. *The Associated Portland Cement Manufacturers* (1902) 2 K. B. 660, the Court of Appeal (Collins, M. R., Jeune, P. P. D., and Cozens-Hardy, L.J.) have reversed the decision of Mathew, J., (1901) 2 K.B. 811 (noted ante vol. 38, p. 16). The case turned on the question whether a contract for the supply of at least 750 tons of chalk a week and so much more as the contractees may require, was an assignable contract. The original contractees were in a small way of business, but the company to which the contract was assigned was doing a large business and capable of consuming a much larger quantity of chalk than the original contractors. Mathew, L. J., thought that as the effect of assignment would be to impose a larger liability on the contractors than was contemplated by the contract, the assignment was invalid as against the contractor, and that he was consequently entitled to recover from the company the value of chalk supplied by him to the company at its market value, and was not limited to the price named in the contract. There was a cross action by both the assignees of the contract and their assignor against the contractor Tolhurst, claiming that the contract was subsisting and that one or other of the plaintiffs in that action were entitled to have the contract performed by the defendant. The Court of Appeal argued that there was a personal element in the contract which prevented its assignment so as to entitle the assignee to sue in his own name to enforce it, but that notwithstanding the assignment and notwithstanding the original contractees had gone into liquidation, the contract was a subsisting one and could be enforced by the original contractees for the benefit of their assigns. The appeals were therefore allowed in both cases.

TRADE UNION—INDUCING BREACH OF CONTRACT—MISTAKEN BELIEF IN EXISTENCE OF RIGHT.

Read v. *Friendly Society of Stonemasons* (1903) 1 K.B. 732, was an action by a workman against a trade union for having by pressure on the plaintiffs' masters induced them to dismiss him from their employment. The defendants bonâ fide believed that the employment by the masters of the plaintiff was a breach of the rules of the union of which the masters were members; but in this, as the Court found, they were mistaken. The Judge who tried the action thought that the bonâ fide mistake was an excuse for the defendants' action. The Divisional Court held it was not, and granted a new trial (1902) 2 K.B. 88 (noted ante vol. 38, p. 645). Both parties appealed, and the Court of Appeal (Collins, M.R., and Stirling, and Cozens-Hardy, L.JJ.) have now varied the decision of the Divisional Court by setting aside the order for a new trial, and giving judgment for the plaintiff for £50.

PARTNERSHIP—POWER OF PARTNER TO NOMINATE A SUCCESSOR—REFUSAL OF CONTINUING PARTNERS TO ACCEPT NOMINEE OF RETIRING PARTNER—RIGHTS OF NOMINEE—SPECIFIC PERFORMANCE.

Byrne v. *Reid* (1902) 2 Ch. 735, was an action by a partner of a firm who had nominated his son as his successor in the partnership pursuant to a power in that behalf contained in the articles of partnership, against the continuing partner, who refused to accept the son as a partner, and the plaintiff sought to compel them to do so. Joyce, J., who tried the action, held that the defendant partners could not be compelled to accept the son as a partner, and that he had not become a partner, although he found that he had been duly nominated under the articles of partnership. The plaintiff and his son, a defendant, appealed from so much of the judgment as declared that the son had not become a partner and that his acceptance as a partner by the defendant partner, could not be enforced. The Court of Appeal (Williams, Romer, and Stirling, L.JJ.) agreed with Joyce, J., that the Court could not decree specific performance; but it appearing that upon an interlocutory motion made by the defendants to stay proceedings in the action, and upon a motion by the plaintiff for a receiver, an order had been made by consent, directing certain questions to be tried, and that the defendant partners had undertaken to execute all such deeds, etc., with reference to the introduction of the son into the business as might be necessary to give effect to the

judicial decision on the questions to be tried, the Court of Appeal considered that the findings of Joyce, J., entitled the plaintiff to the enforcement of the undertaking, and they therefore allowed the appeals. Both Romer and Stirling, L. JJ., intimate that even if there had been no such undertaking the Court would not have been powerless in the matter—and Stirling, J., suggests that the effect of the nomination was to create a trust of a share of the partnership in favour of the son.

WATER SUPPLY—"DOMESTIC PURPOSES"—SWIMMING BATH FOR SCHOOL.

Barnard Castle v. *Wilson* (1902) 2 Ch. 746, may be briefly noticed here, as dealing with a matter of general interest, although the case, it is true, turns upon the construction of a particular statute, the point in dispute being whether under the statute in question which required plaintiffs to supply water on certain terms for "domestic purposes," they could be compelled to supply water for a swimming bath for a school on those terms. The bath was in a separate building from the school, but connected with it by a corridor. A swimming master was kept to teach the boys swimming, and a fee was charged for the use of the bath. The Court of Appeal (Williams, Romer, and Stirling, L.JJ., Williams, J., doubting) held that the water supplied to the bath was not for "domestic purposes," but for the purposes of the business of the school. As to what are strictly "domestic purposes" a variety of views are expressed.

RAILWAY—"ACCOMMODATION WORKS"—GRANT OF EASEMENT—LEVEL CROSSING—EXTENT OF USER OF EASEMENT.

Great Western Railway Co. v. *Talbot* (1902) 2 Ch. 759, deals with an important point of railway law. The plaintiff had provided for the accommodation of the defendants' predecessor in title, whose land had been severed by the construction of the plaintiff's railway, a level crossing for a tramway to enable him to get access from one part of his land to the other, which crossing the plaintiffs covenanted to maintain. The defendant transported over the crossing goods and traffic from her land to a neighboring port. She had also allowed coals to be conveyed along the tramway to the port from a colliery not situate on her land. The action was brought to restrain the latter user of the crossing, as being an illegitimate extension of the defendant's right to the easement, and

the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) reversing Kekewich, J., held that the defendant was not entitled to use the crossing for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature or extent as enjoyed at or previously to the date of the covenant, or as since enjoyed by the defendant's predecessors in title, provided such subsequent enjoyment, by reason of acquiescence or otherwise, was binding on the plaintiffs, and a declaration was made accordingly.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B. C.] PITHER *v.* MANLEY. [Nov. 17, 1902.

Debtor and creditor—Payment—Accord and satisfaction—Mistake—Principal and agent.

On being pressed for payment of the amount of a promissory note the defendant offered to convey a lot of land, which he then shewed to the plaintiffs' agent, to the plaintiffs in satisfaction of the debt. The agent, after inspecting the land, made a report to the plaintiffs, but gave an erroneous description of the property to be conveyed. On being instructed by the plaintiffs to obtain the conveyance, the plaintiffs' solicitor observed the mistake in the description and took the conveyance of the lot which had actually been inspected at the time the offer was made. More than a year afterwards the plaintiffs sued the defendant on the note, and he pleaded accord and satisfaction by conveyance of the land. In their reply the plaintiffs alleged that the property conveyed was not that which had been accepted by them, and at the trial the plaintiff recovered judgment. On appeal to the full Court the trial Court judgment was reversed and the action dismissed.

Held, affirming the judgment appealed from (9 B.C. Rep. 257), that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt, and could not recover on the promissory note. Appeal dismissed with costs.

Davis, K.C., for appellants. *Duff*, K.C., for respondent.

B. C.] PAULSON *v.* BEAMAN. [Nov. 17, 1902.

Mines and minerals—Adverse claim—Form of plan and affidavit—Condition precedent—Necessity of actual survey—Blank in jurat.

The plan required to be filed in an action to adverse a mineral claim under the provisions of s. 37 of the "Mineral Act" of British Columbia, as amended by s. 9 of the "Mineral Act Amendment Act, 1898," need not be based on an actual survey of the location made by the provincial land surveyor who signs the plan.

The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to the right of the adverse claimant to proceed with his adverse action.

The jurat to an affidavit filed pursuant to the section above referred to did not mention the date upon which the affidavit had been sworn.

Held, that the absence of the date was not a fatal defect and that, even if it could be so considered at common law, such a defect would be cured by the "British Columbia Oaths Act" and the British Columbia Supreme Court Rule 415 of 1890. Appeal allowed with costs.

Taylor, K.C., for appellant. *Davis*, K.C., for respondent.

Ont.] [Dec. 9, 1902.

CHAUDIERE MACHINE CO. *v.* C. A. R. W. CO.

Nuisance—Trespass—Continuing damage.

In 1888 the C. A. R. W. Co. ran their line through Britannic Terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on said street, on which they have since carried on their foundry business. In 1900 they brought an action against the Company, alleging that the embankment was built and level raised unlawfully and without authority, and claiming damages for the flooding of their premises and obstruction to the egress in consequence of such work.

Held, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiffs' action was taken, the same could not be maintained.

Aylesworth, K.C., and *McVeity*, for appellants. *Shepley*, K.C., and *Christie*, for respondents.

Ex. Court.] [Dec. 11, 1902.

GILBERT BLASTING AND DREDGING CO. *v.* THE KING.

Contract—Public work—Abandonment and substitution of work—Implied contract.

The suppliants contracted with the Crown to do certain work on the Cornwall Canal, the contract providing that they should provide all labour,

plant, etc., for executing and completing all the works set out or referred to in the specifications, namely, "all the dredging of the Cornwall Canal on section No. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other, and to make the whole consistent; and if it be found that anything has been omitted or mis-stated, which is necessary for the proper performance and completion of any part of the work contemplated, the contractors will, at their own expense, execute the same as though it had been properly described;" and that the engineer could, at any time before or during construction, order extra work to be done, or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By sec. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract, or from the position of the parties at the time. After a portion of the work had been done the Crown abandoned the scheme of constructing dams contemplated by the contract, and adopted another plan, the work on which was given to other contractors. After it was completed the suppliants filed a petition of Right for the profits they would have made had it been given to them.

Held, affirming the judgment of the Exchequer Court, 7 Ex. C.R. 221, that the contract contained no express covenant by the Crown to give all the work done to the suppliants and sec. 34 prohibited any implied covenant therefor. Therefore the petition of right was properly dismissed. Appeal dismissed with costs.

Aylesworth, K.C., and *Belcourt*, K.C., for appellants. *Newcombe*, K.C., Deputy Minister of Justice, for respondent.

Ont.] [Dec. 12, 1902.

SAULT STE. MARIE PULP CO. *v.* MYERS.

Negligence—Injury to workman—Proximate cause—Ontario Factories Act.

A workman in a pulp factory whose duty it was to take the pulp away from a drier, had to climb up a step ladder to get on a plank in front of the drier. The step-ladder was movable and placed close to a revolving cog wheel. On returning from the drier on one occasion another workman accidentally or intentionally, removed the ladder as he was about to step upon it and before he could recover his balance his leg was caught in the cog wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded, and the ladder fastened to the floor; and that the non-guarding and fastening was negligence of the defendants.

Held, affirming the judgment of the Court of Appeal, 3 Ont. L. R. 600, that the evidence justified the findings; and that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor, for which the defendants were liable.

Riddell, K.C., and *Colville*, for appellants. *Douglas*, K.C., for respondents.

Ont.] GRANT *v.* FULLER. [Dec. 12, 1902.

Will—Devise for life—Remainder to devisee's children—Estate tail.

Land was devised to D. for life, "and to her children if any, at her death," if no children to testator's son and daughter. B. had no children when the will was made.

Held, that the devise to D. was not of an estate in tail, but on her death the children took the fee.

J. A. Robinson and *M. J. O'Connor*, for appellant. *Riddell*, K.C., and *Cowan*, K.C., for respondent.

Ex. Court.] [Dec. 12, 1902

DAVIDSON *v.* GEORGIAN BAY NAVIGATION CO.

Admiralty law—Navigation—Narrow channels—"White law," R. 24—Right of way.

Rule 24 of the "White law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one half mile of each other, give the signal necessary to indicate which side she elects to take."

Held, that this rule had no reference to the general course of vessels navigating the waters mentioned, but applies only to meeting vessels. Therefore, a steamer ascending the St. Clair with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore.

The "Shenandoah" with a tow was ascending the St. Clair River in a fog and hugging the United States shore. The "Carmona" was coming down the river and they sighted each other when a few hundred yards apart. They simultaneously gave the port signal, which was repeated by the "Carmona." The "Shenandoah" then gave the starboard signal and steered accordingly. The "Carmona" thinking there was not room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "Shenandoah," but on going ahead again collided with the vessel in tow.

Held, reversing the judgment of the local judge (8 Ex. C. R. I.), that the "Shenandoah" was not in fault, and that as the local judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels, was committed while in the agonies of collision, his judgment as to her should be affirmed. Appeal allowed with costs.

Nesbitt, K.C., and *Hough*, for appellant. *Mulvey*, K.C., (*M. J. O'Connor* with him), for respondents.

Ex. Court.] POWER *v.* GRIFFIN. [Dec. 15, 1902.

Patent of invention—Manufacture—Extension of time.

A patent of invention expires in two years from its date, or at the expiration of a lawful extension thereof, if the inventor has not commenced and continuously carried on its construction or manufacture so that any person desiring to use it could obtain it or cause it to be made.

A patent is not kept alive after the two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it; if he has not commenced to manufacture. *Smith* v. *Barter*, 2 Ex. C. R. 474, overruled on this point.

The power of extension beyond the two years given to the Commissioner of Patents or his Deputy can only be exercised once.

Quære. Can it be exercised by an Acting Deputy Commissioner?

W. Cassels, K.C., and *Anglin*, for appellant. *Ridout*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Falconbridge, C.J.K.B.] [Jan. 26.

FITZGERALD *v.* FITZGERALD.

Dower—Equitable estate—Voluntary conveyance by husband.

It is only when the husband dies beneficially entitled thereto that the wife acquires any right to dower in an equitable estate, and the husband can therefore deal as he pleases with such an estate, a voluntary conveyance thereof, even though made with the object of preventing the wife acquiring any right to dower, being unimpeachable by her.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

Aylesworth, K.C., and *W. G. Bennett*, for appellant. *Watson*, K.C., and *Edwards*, K.C., for the respondent.

HIGH COURT OF JUSTICE.

Boyd, C.] [Dec. 11, 1902.

ATTORNEY-GENERAL *v.* TORONTO GENERAL TRUSTS CORPORATION.

Revenue—Succession Duty Act—Income only payable for life or years—When duty payable on corpus.

The scheme of the Succession Duties Act R.S.O. 1897, c. 24, is to provide a duty on succession to property by persons succeeding to estates and interests in property by testate or intestate title.

A testator by his will devised his estate to trustees upon trust to collect the income and apply it or such part as the trustees thought proper for the benefit of children and grandchildren for the period of 21 years after his death and to pay over to the beneficiaries the whole income without accumulations for the period between the end of the 21 years and the death of the last surviving child.

Held, that there was a plainly marked out period in the future not sooner than 21 years when the corpus of the estate was to be divided; that there was a prior interest for life or years according to the event in fact, during which the trustee standing in loco parentis was entitled to the present income of the property until the time arrived when the corpus was to be divided; that when there is a present enjoyment there should be present payment of the duties based upon the estate or interest which is enjoyed; that there was a prior estate for years or for life after which came the future estate in fee, not now to be levied upon for duty and that only the income was presently liable to the payment of succession duty.

Shepley, K.C., for Attorney-General. *Foy*, K.C., for trustees. *Johnston*, K.C., for beneficiaries.

Britton, J.] KING *v.* CITY OF TORONTO. [Dec. 29, 1902.

Plebiscite—On question by municipal corporation—Aid to sanatorium—Not within powers of corporation—Object of—Legislative sanction.

There is nothing in the Municipal Act permitting a municipal council taking a plebiscite and there is no express prohibition against their doing so.

Taking a vote of the electors upon questions or upon authorized by-laws is open to grave objections. And where a council sought to take such a vote on the question of a money grant in aid of a sanatorium which they had not power to make with a view to inform the Legislature of the result, and if favourable to use the result as an argument in attempting to obtain for the council legislative authority to make the grant was restrained by injunction.

Helm v. *Town of Port Hope* (1875) 22 Gr. 273, followed.

Wallace Nesbitt, K.C., and *J. H. Denton*, for plaintiffs. *Fullerton*, K.C., for defendants.

Trial—Britton, J.] CAREY *v.* SMITH. [Jan. 6.

Penalties—Ontario Election Act—Bribery—Recovery of penalty by action—Agent at poll—Certificate—Neglect to take oath of qualification—Reduction of penalty.

An action will not lie under s. 195 of the Ontario Election Act, R.S.O. 1897, c. 9, for the pecuniary penalty for the offence of bribery prescribed by s. 159, sub-s. 2, as amended by 63 Vict., c. 4, s. 21, until after conviction. The defendant was found guilty of bribery on the evidence and a claim for a penalty was dismissed without costs.

The defendant was held liable to a penalty of $400 under s. 94, sub-s. 5, of the Act, for voting at a polling place where he was acting as an agent of a candidate, under a certificate of the returning officer without having taken the oath of qualification, but the penalty was reduced to $40 as in the preceding case.

Whiting, K.C., and *J. M. Mowat*, for plaintiff. *McIntyre*, K.C., and *E. H. Smythe*, K.C., for defendant.

Trial—Boyd, C.] [Jan. 10.

ATTORNEY-GENERAL OF ONTARIO *v.* BROWN.

Revenue—Succession duty—"Dutiable" property—Transfer of property before death—Donatio mortis causa—Contract for valuable consideration—Estoppel—Survivorship.

The aggregate value of the estate of an intestate was $12,877, and of this $7,540 passed to the hands of his niece by virtue of an agreement between them, given effect to by a donatio mortis causa, as established in *Brown* v. *Toronto General Trusts Corporation*, 32 O.R. 319.

Held, that the $7,540 was not dutiable under the Succession Duty Act, R.S.O. 1897, c. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but one made in pursuance of a contractual obligation for value; and the niece not being estopped by the form of the judgment in her action against the Toronto General Trusts Corporation, from setting up in this action, brought on behalf of the Crown to recover succession duty, that the transfer was not a gift, but the implementing of a contract.

Held, also, that the $7,540 did not pass by survivorship within the meaning of s. 4 (*d*) of R.S.O. 1897, c. 24.

Aylesworth, K.C., for plaintiff. *Arnoldi*, K.C., for Amanda Brown. *Colville*, for other defendants.

Street, J.] IN RE HANNAH HUNT. [Jan. 26.

Will—Legatee predeceasing testatrix—Right of husband and children of deceased legatee.

A testatrix by will dated March 23, 1901, directed her estate to be divided into four equal shares and one share to be paid to each of her four

children. One of the four children predeceased her intestate, leaving a husband and two infant children.

Held, that by virtue of s. 36 of the Wills Act, R.S.O. 1897, c. 128, the husband took one-third of one-fourth share in the estate of the testatrix, the two infant children taking the rest.

Mearns, for husband and executors. *Harcourt*, for infants.

Trial—Street, J.] PERRY *v.* CLERGUE. [Jan. 29.

Constitutional law—Right to create and license ferries—Jura regalia—B.N.A. Act, s. 109—Dominion and Province—Ultra vires—Public harbour—River improvements.

The right to create and license a ferry having been one of the jura regalia, or royalties, which belonged to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, continued to belong to the several provinces after confederation, as declared by s. 109 of the B.N.A. Act; and therefore the lease of a ferry between the town of Sault Ste. Marie in the Province of Ontario and the town of Sault Ste. Marie in the State of Michigan, granted by the Dominion Government in 1897, declared to be invalid.

The fact that sub-s. 13 of s. 91 of the B.N.A. Act gives exclusive legislative authority to the Parliament of the Dominion over ferries between a province and any British or foreign country or between two provinces does not carry with it any right to grant ferries.

Held, also, that even if the St. Mary's River at the point in question were a public harbour which passed under sec. 108 of the B.N.A. Act to the Dominion, as far as the centre of the river where the international boundary was, nevertheless this would not give the Dominion Government any right to grant any exclusive right over it such as the ferry in question.

Held, however, that the St. Mary's River at the point in queston is not a public harbour. It is difficult to say what it is that constitutes a harbour, but something more is necessary to constitute an open river front into a public harbour, within the meaning of the B.N.A. Act, than the erection along it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods.

Held, likewise, that the existence of improvements in the river bed in front of the town of Sault Ste. Marie by the bridging operations carried on by the Dominion Government, which river improveance belonged to the Dominion Government, afforded no reason for the entire control of the ferry across the river being held to be in the Dominion Government.

The Dominion Parliament or Government have undoubtedly a right to make laws or rules with regard to the ferry in question or other ferries for the purpose of regulating them and of preventing them from interfering with public harbours and river improvements of the Dominion.

The Dominion statute incorporating the Algoma Central and Hudson Bay R.W. Co. authorizes it for the purposes of its undertaking to acquire and run steam and other vessels for cargo and passengers upon any navigable water which its railway may connect with.

Held, that under the very large and general words of this clause the railway company was not bound to restrict the passengers and cargo transported by its vessels to persons and goods intended to be carried on its railway line.

Watson, K.C., for plaintiff. *Nesbitt*, K.C., and *Irving*, for defendant. *Riddell*, K.C., for the Province of Ontario.

Street, J., Britton, J.] REX *v.* HAYES. [Feb. 9.

Conviction—Certiorari—Importing foreigner on labour contract—"Knowingly"—Mere irregularity or informality.

Conviction of the defendant for that he did unlawfully prepay the transportation, and assist and encourage the importation and immigration of an alien and a foreigner from the United States into Canada under contract and agreement made previous thereto to perform labour and service in Canada by working at a factory, quashed as clearly bad on its face, inasmuch as the conviction did not state that the defendant "knowingly" did the acts charged, nor in fact did the information charge him with having "knowingly" done them, as required under 1 Edw. VII., c. 13, s. 3.

Held, also, that this omission from the information and conviction of one of the essential elements of the offence was not a mere irregularity or informality or insufficiency within the meaning of s. 889 of the Criminal Code.

It was not a matter of form merely, but of substance, and a fatal and incurable defect in the conviction.

Watson, K.C., for defendant. *O'Donoghue*, for prosecutor.

Divisional Court]. HEIGHT *v.* DANGERFIELD. [Feb. 9.

Will—Construction—Estate for life—Remainder to heirs—"Then surviving."

A testator devised land to his wife "during the full term of time that she remains my widow and unmarried" and subject thereto to two sons "during the full term of time of their natural lives, and if either of my said sons should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share of the said lands for the time being, and after the decease of both my said sons, the beforementioned land and premises

shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respective lawful heirs then surviving them share and share alike";

Held, that the will gave a life estate for the joint lives of the two sons with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest liver of the two sons.

James Bicknell, K.C., and *G. C. Thomson*, for plaintiffs. *Barnum*, for adult defendants. *Harcourt*, for infant defendants.

Meredith, C.J.C.P.] REX EX REL. WARR *v.* WALSH. [Feb. 12.

Municipal corporations—Election of councillors—Time of holding nomination.

Notwithstanding the Municipal Amendment Act, 1898, the nomination of candidates for the office of councillor, in towns having a population of not more than five thousand persons and where the election is to be by general vote, may take place at the same time and place as the nomination for mayor, and therefore at ten o'clock in the forenoon.

Semble, an error in this respect as to the time and place of the nomination would come within the curative provisions of section 204 of the Municipal Act, R.S.O. 1897, c. 223, and would not be a fatal objection to the validity of the subsequent election.

Judgment of the Masters in Chambers reversed.

T. J. Blain, and *D. O. Cameron*, for appellants. *E. G. Graham*, for relator.

MacMahon, J.] DAIGNEAU *v.* DAGENAIS. [Feb. 14.

Mortgage—Costs—Excessive demand—Tender.

Demanding much more than is afterwards found to have been due is not such misconduct on the part of a mortgagee as will deprive him of his costs. To relieve the mortgagor from liability to costs he must make an unconditional tender of the amount actually due.

Province of British Columbia.

SUPREME COURT.

Full Court.] D'AVIGNON *v.* JONES. [April 16, 1902.

Evidence—Relevancy—Evidence to contradict.

Appeal from the judgment of CRAIG, J., in the Territorial Court of the Yukon Territory.

In an action to set aside a bill of sale of a mineral claim, on the ground that it was a forgery by one of the defendants, evidence was given by plaintiff and his witnesses as to matters which, whether material or not, were intended to make the judge give a reaider credit to the plaintiff's case. For the defence witnesses were allowed to give evidence shewing that the plaintiff and his witnesses in respect of the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury and conspiracy and tending to shew that a like fraudulent scheme was being attempted in this case, and the result was that the judge was so influenced by this evidence that he gave judgment for the defendants.

Held, that the said evidence on behalf of defendants was properly admitted. Appeal dismissed.

Peters, K.C., and *A. G. Smith* (of the Yukon bar), for plaintiff. *Davis*, K.C., and *F. C. Wade*, K.C., (of the Yukon Bar), for defendants.

Full Court.] [Dec. 3, 1902.

IN RE VANCOUVER INCORPORATION ACT AND ROGERS.

Assessment—Vancouver Incorporation Act, 1900—Valuation of improvements—Mode of decision of judge on appeal from Court of Revision—No appeal from.

Appeal from judgment of IRVING, J., refusing, on an appeal from the Court of Revision, to reduce the assessment of a certain lot and the improvements thereon in the City of Vancouver, being the property of the appellant, B. T. Rogers.

Held, no appeal lies from the decision of a judge on an appeal from the Court of Revision, had under s. 56 of the Vancouver incorporation Act.

An objection to an appeal on the ground that the Court has no jurisdiction to hear it is not a preliminary objection within s. 83 of the Supreme Court Act.

Although the full Court has no jurisdiction to hear an appeal, it has jurisdiction to award costs in dismissing it.

Under s. 38 of the Vancouver incorporation Act, 1900, all ratable property for assessment purposes shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor.

Held, per IRVING, J., that in estimating the value of an expensive residence built by its owner, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive. Appeal dismissed.

McPhillips, K.C., for appellant. *Davis*, K.C., for respondent.