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The *Canada Gazette* of Dec. 13 announces that his Honour B. L. Doyle, Junior Judge of the County Court of Huron, has been appointed Judge of that county in the place of his Honour Judge Masson, resigned; Mr. Phillip Holt, K.C., of Goderich, taking the place of Mr. Doyle as Junior Judge. We are glad to know that the course we ventured to urge as the proper one, viz., that a County Judge should be taken from a county other than the one in which he lives is becoming the rule. Why an exception was made in this case we are not informed.

The following gentlemen have been gazetted as the commission for the revision and consolidation of the public statutes of Canada: Rt. Hon. Sir Samuel Henry Strong, Kt. P.C., President; E. L. Newcombe, K.C., Deputy Minister of Justice; Augustus Power, K.C., of Ottawa, Chief Clerk in the Department of Justice; W. E. Roscoe, K.C., of Kentville, N.S; E. R. Cameron, K.C., Registrar of the Supreme Court, Ottawa; Henry Robertson, K.C., of Collingwood; Thomas Metcalfe, Barrister-at-law, Winnipeg; and L. P. Sirois, of Quebec, Notary Public. The Minister of Justice and the Solicitor-General are to be members of the Commission, ex-officio. The following have been appointed as joint secretaries of the commission: Charles Murphy, Barrister-at-law, Ottawa; and Horace St. Louis, of Montreal, Advocate.

The appointment of Mr. T. B. Flint to the position of Clerk of the House of Commons, in the place of the late Sir John Bourinot, meets with general acceptance. Mr. Flint's name is the latest addition to the notable list of names which the small province of Nova Scotia has contributed to the public service of the Dominion. He is in the prime of life, and by his training and natural gifts ought to make a distinctive name for himself even in an office surrounded with such intellectual traditions as mark that of the Clerk of the Commons. Mr. Flint is an M.A. of Mount Allison University, N.B., and a law graduate of Harvard. He was called to the bar of Nova Scotia in 1872. He has represented Yarmouth in the Commons since 1891.

We recently called attention (vol. 38, p. 739) to the system in vogue in the United States of selecting judges by popular vote, and referred especially to the hoped for re-election of Mr. Justice Gray. We are glad to hear that this learned and excellent judge has been re-elected to the Bench of the Court of Appeal of the State of New York by a large majority, "despite the organized and powerful opposition of a great political party." As we learn from the *Albany Law Journal* there seemed to be but little chance of his re-election; but, as our contemporary says: "The people again shewed themselves to be trusted in a great and crucial issue. That issue was the preservation of the character, authority and usefulness of the bench, free from the contamination of party politics. The result shews that the popular standard of judicial selection is as high as ever, and that it only needs full information and arousing to make sure that the standard will be applied fearlessly. The verdict of the people at the polls is that the parcelling out of places to the 'faithful' shall stop short of the bench; that there shall be no division of seats in the high courts as 'spoils' of office." We commend the above observations to those who are responsible for the selection of the judiciary of this Dominion. Objectionable as is the plan of electing judges, it seems in many ways to have its advantages, at least where there is an intelligent appreciation of the fitness of things in the popular mind, as there seems to be in the State of New York. In that country this important matter is left to the direct vote of the people, whilst in Canada the power of appointment is in the hands of men chosen by the people as their representatives and responsible to them.

It is asserted by those who are in a position to form an opinion that the judiciary in the highest courts in many of the States is on the whole superior to that of Canada. It is also said that the reason why such good men are selected by popular vote is because the leaders of the two great political parties very generally agree that their respective "machines" shall not interfere in such elections; and that the public largely follow the lead of the profession in their selection. We understand, however, that the principle above referred to did not come into play in the election of Judge Gray; but that that was, as stated, "the verdict of the people," as opposed to the politicians. If this be so, does it or does it not mean that the people by direct vote are in this matter to be trusted

to make a better selection than is made under our system? The incident we have referred to certainly gives food for thought. We have little hesitation in advancing the opinion that the proper body to select the judges, or at least to make nominations for the Government to choose from, would be those who are in the best position to know who would make the best judges, viz., the profession itself. Political patronage would of course suffer by any change in either of the above directions, but the country would gain. Without offering any opinion upon the subject ourselves there are many who think that a referendum on some such scheme would result in as great a surprise to the politicians as has been the vote recently taken on the prohibition question.

ICE AND ACCIDENTS.

One of the most objectionable enactments of these latter days is to be found in the Municipal Act, s. 606, sub-s. 3, which provides that no action shall be brought to enforce a claim for damages arising from ice or snow on sidewalks, unless notice in writing of the accident and its cause shall have been served upon the head of the corporation within thirty days thereafter, when the action is against a township or county, or within seven days, when the action is against a city, town or village. This is a hard and fast rule. Under 57 Vict. c. 50, s. 13 (1894) the judge had power of ruling as to the reasonableness of an excuse for the insufficiency of such notice. In 1896, however, he was deprived of that power.

It may often happen, and frequently has, that the person injured cannot possibly, by reason of inability caused by the accident, give the required notice, and is thus deprived of his right of action; this is a most unjust state of things, and should be remedied at once. A somewhat similar enactment is in force in the State of New York. In a case referred to in the *Albany Law Journal* (vol. 64, p. 11), the plaintiff failed to give the necessary notice, and in his statement of claim gave as a reason for such failure that he was confined to his bed and unable to transact any business, and was by the act of the defendant prevented from giving the notice in writing within the proper time. Mr. Justice Woodward of the second Appellate Division of the State, after

quoting the Magna Charta and the Constitution of the State, which say that no citizen shall be deprived of life, liberty or property without due process of law, unless by law of the land or the judgment of his peers, held that this enactment requiring notice was under the circumstances referred to a denial of the rights of the plaintiff, and that the enactment was ultra vires.

Without going into the question as to whether this would be law in this country it is very manifest that the law should be brought back to what it was before the alteration made in 1894.

THE ALASKAN BOUNDARY.

We should have thought that after so fair, able, and dignified presentment of the Canadian case in respect of the Alaskan Boundary dispute as that of Mr. Thomas Hodgins, K.C., published in the September number of this journal, no American paper of the standing of the New York *Evening Post* could permit the following to appear in its columns: "A process of myth-making, by reiteration, has for several years been in progress in Canada regarding the question of the Alaskan boundary, and bids fair to produce, sooner or later, serious consequences. . . . . It is unquestionable that the public in Canada, including many of the more intelligent and influential classes, have been assiduously supplied with articles on the boundary which, notwithstanding their essential falsity, have created a body of opinion with which, mistaken as it is, it will be difficult to deal."

But whilst all this is extremely weak reading to those who are fairly conversant with the merits of the case on either side, we are prepared to forgive the sudden fall of the *Post* from the sane and dignified plane upon which it usually stands, on account of its counsel to the American people to submit the case to the decision of the Permanent Arbitration Court at the Hague, when that Court shall have demonstrated its ability to deal with an International question of some such magnitude.

Of course the condition which tempers the honour and fairmindedness of the concession reminds us that the Americans are not yet able to practice all they preach about the duty of international arbitration; but it almost assumes the character of pure altruism when contrasted with the utterances of some other representative journals in the United States in connection with this question

Not only do the latter advise against a reference of the case to any tribunal of arbitration whatsoever, but they print column after column of coarse abuse of the Canadian claims, and utterly baseless imputations upon the good faith of the Government of this country. For instance, a short time ago the New York *Tribune* followed up a series of unfriendly and chauvinistic articles on this subject by printing a letter from one F. W. Seward in which such phrases and epithets as "Canadian schemers," "hope to extort from us by threats or cajolery," "preposterous and absurd claim," "specious pretences to outwit the Yankees" are strewn—

"Thick as leaves in Vallombrosa."

Now, we protest that we have always been prompt to commend our cousins across the border for their good international deeds, and we indulged the hope that with the advent of the twentieth century a new and better feeling would mark their attitude towards the British people whenever their national interests might conflict with ours. We are reluctant to abandon that pleasant hope even in view of the facts here commented upon. We believe them to be only the expiring echoes of an unlovely phase of a great nation's youth. And so under the benign influences of the Christmas season we will conclude our remarks by quoting the fine appeal to our separated kinsmen by one of the truest, and also one of the greatest, Britons that ever lived:

"Sharers of our glorious past,
Brothers, must we part at last?
Shall we not thro' good and ill
Cleave to one another still?"

The British Workman's Compensation Act comes in for some hard raps at the hands of the Law Lords in *Cooper* v. *Wright* (1902) A.C., pp. 306, 308, Lord Robertson saying that the enactments are "incoherent and almost contradictory." Lord Brampton saying "It is so framed as to provoke rather than minimize litigation." Should that tribunal be called upon to criticize some of our provincial statutes even stronger language might be expected.

EMPLOYERS' LIABILITY ACT.

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In previous issues of this Journal the decisions regarding the first and second sub-sections of the first section of the English Employers' Liability Act, and the corresponding provisions of the Colonial and American statutes framed upon the same lines as that Act, were analyzed and reviewed. In the present number it is proposed to discuss the sub-sections which, in the English Act, follow those already considered.

I. LIABILITY OF AN EMPLOYER FOR INJURIES CAUSED BY THE NEGLIGENCE OF A PERSON TO WHOSE ORDERS THE INJURED SERVANT WAS BOUND TO CONFORM.

1. **Introductory.**—In sec. 1, sub-sec. 3, of the English Act, it is provided that a servant shall have a right of action against his

employer, whenever "injury is caused to a workman by reason of the negligence of any person in the service of the employer, to whose orders or directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed."

This provision is inserted verbatim in all the Colonial statutes mentioned in our former articles, including that of Ontario (Rev. Stat. Ont. 1897, sec. 3, sub-sec. 3), and also forms a part of the statutes of Alabama and Indiana. No similar provision is found in the statutes which have been passed in Massachusetts, New York or Colorado.

This sub-section may be regarded as being, broadly speaking, declaratory of what is known to American lawyers as the "superior servant doctrine," (*a*) which, as we have had occasion to remark in our last article, is not embodied in the preceding sub-section. Even in the United States, however, the decisions based upon that doctrine have not, so far as appears, influenced the courts to any extent in their construction of this provision. The specific language used by the legislatures has alone been considered on ascertaining the extent of the master's statutory liability, and it is therefore merely from the standpoint of comparative jurisprudence that the decisions which apply the doctrine in question are of any interest or utility in the present connection.

2 **Conditions precedent to recovery.**—The establishment of the following propositions is an essential pre-requisite to the maintenance of an action under this provision:

(1) That the directing employé was invested by the master with authority to give orders which the injured employé was bound to obey.

(2) That the particular order given was one within the scope of the authority thus conferred on the directing employé.

(3) That the act of the injured employé which led his receiving the injury was done in compliance with an order actually or impliedly given.

(4) That there was a causal connection between the giving of the order and the injury received.

(*a*) The scope and nature of this doctrine have been explained in a note by the present writer which was published in 51 L.R.A. pp. 539, et seq.

(5) That the directing employé was wanting in due care either with respect to the order itself or with respect to some duty in the performance of which he represented the master.

These constituents of the plaintiff's right of action will be discussed in the following sections.

3. To what superior servants the sub-section is applicable.—As the fact that the injury resulted from conformity to an order is the sole pre-requisite to recovery under this provision, it would seem to be applicable to any employé who is authorized to give an order in respect to the subject-matter, whether he is or is not a superintendent or foreman, as that term is commonly understood. And on the whole this is the effect of the decisions on which the question has been directly raised, though, in reference to the facts involved, it can scarcely be said that they are entirely consistent (*a*). On

(*a*) Recovery has been allowed for the negligence of the following employés: A carman under whose directions the plaintiff was unloading a van. *Millward* v. *Midland Railway Co.* (1884) 14 L.R.Q.B. 68; 54 L.J. Q.B. Div. 202; 52 L.T.N.S. 255; 33 W.R. 366; 49 J.P. 453. An employé who was sent with a small gang of men to construct an elevator, and who was the only person on the premises authorized to give orders about the work. *Wild* v. *Waygood* (C.A. 1892) 1 Q.B.D. 783. A machineman in a foundry who directed the workmen as to what they are to do, although he could not discharge them, and could only enforce his directions by an appeal to the foreman of the works. *Dolan* v. *Anderson* (1885) 12 Sc. Sess. Cas. (4th Ser.) 804, 22 Sc. Law Rep. 529. A complaint is not demurrable which in effect alleges that the injury was due to the negligence of the employer in appointing an incompetent person to superintend a work requiring such special skill in the pulling down of a building. *Flynn* v. *McGaw* (1891) 18 Sc. Sess. Cas. (4th Ser.) 555. In *Hooper* v. *Holme* (1897) 13 Times L.R. 6, affirming 12 Times L.R. 537, the defendant was held not to be liable for the negligence of a mere foreman of a small gang consisting of two masons and two mason's labourers told off to do some repairs on a railway viaduct. In the Divisional Court this decision was put by Mathews, J. upon the ground that, to make an employer liable, there must be someone who had authority to give orders – that is, who had a mandate from the employer. It may be that the decision in the Court of Appeal was really intended to rest upon the hypothesis that there was, as a matter of fact, no "mandate" from the employer. Or the theory of the ruling may be, in part at least, that there was no proof of any order influencing the plaintiff's action. See sec. 6, post, where the case is referred to. Unless these special reasons be regarded as the rationale of the conclusion arrived at, the effect of the decision, when taken in connection with that in *Wild* v. *Waygood*, supra, seems to little more than this—that the employé who is thus in a sense placed in charge of a small gang of this description is presumed not to be one of those to which this provision of the statutes is applicable, but that this presumption may be rebutted by shewing that, as a matter of fact, he was authorized to give orders. It would appear, however, that there is really some difference of opinion among English judges in regard to the applicability of this section of the statute to such employés, for we find Smith, J. remarking, obiter, in an earlier case that the master is not liable for the negligence of "a mere foreman of a gang of labourers." *Kellard* v. *Rooke* (1887) 19 Q.B.D. 585 (p. 588). Hawkins, J expressed no definite opinion in that case; nor did the Justices of Appeal (21 Q.B.D. 367). In an action for injuries resulting in plaintiff's death an instruction that, if the jury found that the decedent, while in the defendant's employ, was directed by the conductor in charge of

the other hand the master cannot be held liable for the negligence of an employé who has not been authorized, whether expressly or by implication, to give orders in respect to the subject-matter (*b*).

This section is applicable only to employés who are entrusted with the function of giving directions which are orders in the legitimate and ordinary acceptation of that term. An employé who merely tells another that the time has arrived for setting in motion a machine which they are both engaged in operating is not a representative of the master (*c*).

Where both the complainant and the negligent employé occupied positions which implied the possession of a power to control other employés, the master's liability must, of course, be determined with reference to the question, whether, as a matter of fact, the complainant was subject to the directions of the negligent employé (*d*).

Whether the defendant can be held liable under this provision for the negligence of an intermediate employer depends upon whether that employer is an independent contractor or a person who, with his workmen, has entered into the service of the defendant and is subject to his control (*e*).

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defendant's train to set the brake on a car, it was intestate's duty to obey such direction, using due caution, is not erroneous, where the evidence clearly shewed that intestate was under the conductor in charge of the train and subject to his orders at the time. *Hunt* v. *Conner*, Ind. App. (1901) 59 N.E. 50.

(*b*) As where a fellow-workman directed the plaintiff to take a load of iron stanchions on a trolley with sides unprotected. *Corcoran* v. *Coast Survey &c. Co* (Q.B.D. 1888) 5 Times L.R. 103; 58 L.J.Q.B. 145. In *Brown* v. *Furnival* (1896) 23 Sc. Sess. Cas 4th Ser. 492, the judges doubted whether a workman who calls other servants to his assistance and directs them as to the loading of a heavy piece of machinery on to a truck is within this section; but this seems to be beyond all question a case in which there was no mandate from the employer.

(*c*) *Howard* v. *Bennett* (1888) 58 L.J.Q.B. 129, 60 L.T. 152, 5 Times L.R. 136. Lord Coleridge said: "I do not think that such a communication as this as to starting a machine from one workman to another is an order or direction within the meaning of the words of the sub-section, which are more applicable in my view to a man in a superior position, and do not apply to fellow-workmen, who are not in the least in a position of superiority to each other, or amenable even to the suggestions of one another." Compare the common law decisions in the United States to the effect that employés whose function is to give signals are not performing a non-delegable duty. See the note contributed by the present writer to 54 L.R.A. pp. 124, 125.

(*d*) A man charged with the operation of the furnaces in a foundry cannot properly be held a person to whose orders a master mechanic is bound to conform, where the evidence is that each is supreme and of equal degree in his peculiar department. *Birmingham &c. Co.* v. *Gross* (1892) 97 Ala. 220.

(*e*) A mine-owner has been held answerable for the negligence of the employer of "butty" men, i.e. men who joined together to get out coal at so much a ton, the evidence shewing that the defendant had the right to discharge such employés. *Brown* v. *Butterly &c. Co.* (Q.B.D. 1885) 2 Times L.R. 159, 53 L.T. 964.

4. Temporary substitutes for regular foreman, position of.—It seems to be laid down, as an unqualified principle, in an Indiana case that, in the absence of specific evidence of authority to appoint a substitute, a court will presume that a superintendent or foreman exceeds his powers in temporarily delegating his functions of control to one of his subordinates, and that for this reason a workman who is injured by conforming to the orders of the delegate cannot recover damages from the master (*a*). This doctrine is a much more dubious application of the maxim, Delegatus non protest delegare, than the decisions which deny the servants' right to recover for injuries caused by the defaults of a temporary superintendent. (See sec. 8 of the article published in the October number of this journal). The only condition precedent to recovery under this provision of the statutes is that the plaintiff shall have been bound to conform to the orders of the negligent fellow-employé. The essential question, therefore, in such cases seems to be, not whether the delegation of powers was authorized, but whether employers, as a class, would accept, as a valid excuse for disobedience to the orders of the substituted foreman the plea that he was not a legally appointed deputy. If this question must, as seems inevitable, be answered in the negative, the theory of the court in this case is clearly erroneous, for the proposition that disobedience to such orders will, in the large majority of cases at least, draw down upon a servant the displeasure of the employer and even expose him to imminent risk of dismissal, may reasonably be said to involve the proposition that conformity to the orders is obligatory upon him. It is true that, if a servant was really justified in disobeying an order of a deputy foreman, the master would not be justified in dismissing him because the order was disobeyed, and it may therefore be urged that the law cannot test the existence or absence of a duty with reference to any other assumption than that the master will act as he ought to act in the premises. To this reasoning there is, it may be conceded, no direct answer, but its effect would seem to be adequately countervailed by the practical consideration that it is neither fair to the servants themselves, nor conducive to the interests of the master, to lay down a rule which would impose upon subordinates the duty of inquiring, in each particular instance of the appointment of a deputy by a foreman, whether or not the

(*a*) *Hodges* v. *Standard Wheel Co.* (1894) 152 Ind. 680, 52 N.E. 391.

appointment has actually been authorized by the master. Such a rule is open to the very same objections as those which have been deemed conclusive against the theory, that a master is exempt from responsibility if the order to which the plaintiff conformed was one which the directing employé was expressly forbidden to give. See next section. The most rational principle, it is submitted, which can be laid down for the solution of such cases is that subordinates are entitled to regard themselves as being bound to comply with an order of an employé temporarily acting as foreman, unless the delegation of authority has, to their knowledge, been expressly prohibited by the master, or the order which they are required to execute is manifestly beyond the scope even of the authority conferred upon the regular foreman himself.

5 **To what orders a servant is bound to conform.**—(See also the preceding section, ad finem, and sec. 7, post.) All the powers which are reasonably incidental to the exercise of his general power are deemed to have been impliedly conferred upon a supervising employé (*a*).

Where injury is caused to a workman by reason of his conforming to a negligent order of an employé whose orders he was bound to obey, the master is liable, although the order was to do something expressly forbidden by the employer's rules (*b*). But an exception to this application of a familiar principle of the law of agency to actions brought under the statute is admitted to exist, wherever the forbidden order was one which the plaintiff knew to be outside the scope of the authority of the directing employé (*c*).

(*a*) If the coupling of cars in a certain way will save time, a conductor is authorized to direct them to be coupled in that way. *Grand Trunk R. Co.* v. *Wercar* (1894) 23 Can. Sup. 422, per King, J. This point was not noticed by the other members of the court nor by the lower courts (23 Ont. R. 436, 20 Ont. App. 528).

(*b*) *Marley* v. *Osborn* (Q.B.D. 1894) 10 Times L.R. 388. Cave, J. said: "The Legislature did not intend to leave it to the workman to go into the question whether the order given was right if it was an order he was bound to obey, but intended that in every case in which a superior had given an order which an inferior would be bound to obey, the master would be liable for the consequences."

(*c*) In *Bunker* v. *Midland R. Co.* (1883) 47 L.T. N.S. 476, 31 W.R. 231, the plaintiff, a van guard in the service of the defendants, was at the time of the accident under the age of fifteen, and was aware that there was a rule of the company that no van guard under the age of fifteen was ever to drive a van. The defendant's foreman ordered him the plaintiff to drive a van load of fish to market, and said he would be paid extra money for so doing. The boy did drive the van, and in consequence was thrown down from his seat and seriously

6. When a servant is deemed to have acted under orders.—To entitle an injured servant to maintain an action it is not necessary to prove that an order was given by means of words. An order within the meaning of the statutes may be implied from circumstances, and it is primarily a question for the jury, whether it shall be so implied (*a*). Among the circumstances which may justifiably furnish a basis for the inference that the plaintiff was acting under orders is the customary course of proceeding on previous occasions when similiar work was to be done (*b*).

Where the injury resulted from the adoption of some particular method of doing the work assigned to the plaintiff, the master is responsible if that method was specifically designated by the superior servant in giving his order (*c*). In the absence of specific

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injured. *Held*, that he was properly non-suited, on the ground that, as he was not obliged to obey the order so given, that the foreman was not a person to whose orders in regard to the subject-matter he was bound to conform, and that the true cause of the accident was his own contributory negligence.

(*a*) *Millward* v. *Midland R. Co.* (1884) 14 Q.B.D. 68, per Day J. (p. 70.) According to Rigby L.J. in *Reynolds* v. *Holloway* (1898) 14 Times L.R. 551, one at least of the grounds of the decision in *Hooper* v. *Holme* (1897) 13 Times L.R. 6, where the plaintiff was injured while mixing cement in a place where he was liable to be struck by passing trains, was that an order could not be implied from the fact that the foreman of the gang was himself doing similiar work in an equally dangerous place. See further as to the case in sec. 3, ante. An express order to go between an engine and a car to uncouple them will be implied from a special order to uncouple at a time and under circumstances when it was necessary to go between them to conform to the special order. *Mobile & O.R. Co.* v. *George* (1891) (Ala.) 10 So. 145.

(*b*) *Millward* v. *Midland R. Co.* (1884) 14 Q.B.D. 68, 58 L.J. Q.B.D. 202, 52 L.T. N.S. 255, 33 W.R. 366, 49 J.P. 453, where the plaintiff was not expressly ordered to do the work in the manner which resulted in injury to him, but he testified that he did it in that manner without orders because he had done so on previous occasions, and that his superior saw what he was doing and made no objection. The contention of defendant's counsel that the Act did not apply because no direct order was given at the time the injury was received did not prevail. Day J. said: "Surely the order need not be by express words. The jury might think that an order was implied from the circumstances." Mathews J. said: "The plaintiff was doing what, according to his evidence, it was the ordinary course for him to do in unloading similar goods. Is it necessary that the sub-section may apply that an order should be verbally given to a man to do what it is the ordinary course of his duty to do every day in the week?" This case was followed in *Case* v. *Hamilton &c. Co.* (1887) 19 Ont. Rep. 300, where it was laid down that recovery is not dependent upon proof of the giving of a specific order at the time of the accident, general prior orders being sufficient. A verdict for the plaintiff will not be disturbed where the evidence was that he lost his hand, while taking some stuff out of a mixing machine while it was in motion, and that his foreman had taught him to do this, and it was the usual method of doing the work. *Medway* v. *Greenwood &c. Co.* (C.A. 1898) 14 Times L.R. 291.

(*c*) *Weegan* v. *Grand Trunk R. Co.* (1893) 23 Ont. R. 436, affirmed 20 Ont. App. 528 (No opinion) (1894) 23 Can. Sup. 422. [Conductor told a brakeman to arrange the coupling apparatus in a certain way for the purpose of coupling an

directions, a general direction is deemed to authorize the doing of a thing in the manner reasonably proper for doing it (*d*). A servant is deemed to have been injured by conforming to an order where, in carrying out a general direction, he uses the means which to a person possessing his limited knowledge of the conditions it might seem reasonable to adopt under the circumstances, though an expert would have adopted a different method (*e*).

7 Necessity of establishing a causal connection between the order and the injury.—To entitle a plaintiff to receive under this provision he must in fact have conformed to the order of the negligent co-employé in respect to the particular act which he was doing at the time when he was injured (*a*). Hence an action in which the plaintiff seeks to recover on the theory that he was injured by conforming to an order to take up the position which he occupied at the time of the accident is not maintainable, where the only possible inferences from the evidence are either that no such order was given at all or that the order actually given was to stand away from that position (*b*); nor where the superior servant, although he had authority to direct the plaintiff to perform the duty which brought him to the place where he was injured, had no authority to send him to that place rather than to any other (*c*).

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engine to a car, and then signalled for the engine to back up before he had ascertained whether or not the coupling had been completed]. In a case where there is evidence going to shew that the accident was caused by that form of negligence which consists in ordering one man to do work which cannot be safely done unless two are assigned to it, it is a misdirection to tell the jury that there was a "special" order within the Act, and a verdict for the defendant rendered after such a charge will be set aside. *Barber* v. *Burt* (Q.B.D. 1894) 10 Times L.R. 383.

(*d*) King J. in *Grand Trunk R. Co.* v. *Weegan* (1894), 23 Can. Sup. 422. [This point was not noticed in the Ontario Court of Appeal or Divisional Court.]

(*e*) *O'Connor* v. *Hamilton Bridge Co.* (1894) 24 Can. Sup. 598, affi'g 21 Ont. App. 596, 25 Ont. R. 12.

(*a*) *Hodges* v. *Standard Wheel Co.* 152 Ind. 680, 54 N.E. 383, 52 N.E. 391.

(*b*) *Kellard* v. *Rooke* (1888) 21 Q.B.D. 367. [Plaintiff struck by a bale, while standing under the hatchway of a ship.]

(*c*) One employed to work at a machine in a shed, who is subject to directions from a carpenter as to what work he shall do, but in no other respect, who while working overtime in the evening is injured by the negligence of the carpenter, who was stacking timber in the shed, in which it was not safe for them both to work at the same time, cannot recover against the employer. *Snowden* v. *Baynes* (1890) L.R. 24 Q.B.D. 568, affirmed in L.R. (1890) 25 Q.B.D. 193. In the Divisional Court, Wills J. argued thus: "It seems to us that there is no connection between his doing that piece of work rather than any other, and the accident. Sellick [the carpenter] had no authority to send him to any other place to work, or to exercise

It is not enough to prove that there was negligence in a servant of the defendant which caused the injury, nor that that negligence was the negligence of the person to whose orders the plaintiff was bound to conform. It must be proved that the injury arose, not alone from the negligence of such a person, but also from his having conformed to the order (*d*). If the only negligence charged is that which inheres in the order itself, the two ingredients of the

any discretion, or give any orders as to where he should go to do the work. Whatever work Sellick had told him to do, he would have been in the same place, so that it was in no sense the exercise by Sellick of an authority vested in him and exercised by him that brought the plaintiff into what ultimately proved to be a place of danger. We think the order which is contemplated by this sub-section must be one which is really that of the person in the position of Sellick, and which is the direct offspring of some choice or exercise of judgment and will on his part; if not, it is not his order at all. Sellick had authority to say, "You shall do this bit of work or that bit of work," but not "You shall do it at this place or that place." The choice of place rested with some one else. So far as the evidence goes upon this point, the shed in question was the plaintiff's regular place of work, and it has not been suggested that either he had any choice, or Sellick any control in respect of the place where the work should be done. * *

* We think it right to point out that, besides the broad distinction we have already dealt with, there is one obvious difference, (whether affecting the right of action or not), between a case in which the circumstances of danger are brought about by the performance on the part of the person injured of acts the direct result of obedience to an order then and there given, and which then expose him to immediate risk, if the person giving the order be careless, and a case in which obedience to the order is accompanied by no circumstance of present risk from the negligence of the person giving the order, and in which, if the mere fact that obedience to the order involves the presence of the workman in a spot where he is afterwards endangered by act of the person giving the order is sufficient to give a right of action, the liability may flow from an order given a week or a month before the accident happened. In such a case it is obvious that such an order might amount to very little more than the mere selection of a particular workman to be employed upon a particular job, and it is difficult to suppose that such a case could be within the Act." In the Court of Appeal Lord Esher thus tersely stated his view: "Unless the plaintiff can shew that Sellick had authority to tell him where he was to work and at what time, he cannot succeed in his action. I cannot see any evidence of such an authority. The evidence shews that the only authority of Sellick was to tell the plaintiff what work he was to do. There is no evidence that Sellick had any authority to tell the plaintiff to work overtime, or that under his agreement with the defendant the plaintiff was bound to work overtime if Sellick told him to do so. There is, therefore, no evidence of any order given to the plaintiff by Sellick which led to the accident." Fry, L.J. based his judgment on the ground that "the accident arose from the plaintiff's working overtime by his own voluntary act."

(*d*) *Wild* v. *Waygood* (1892) 1 Q.B.D. 783, per Lord Herschell. In the same case Lindley, J. expressed his views as follows: "Negligence must be proved, but something more must be proved, and when you come to examine the section, you must prove this much more, that the negligence was that of a person in the employ of the defendant to whose orders the plaintiff was bound to conform; and, secondly, that the injury to the plaintiff resulted from his having conformed to those orders. The whole I think comes to this; that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders. It will not do to prove one of these things only; the injury must be the result of the two, and if the two are so connected together as to cause the injury, then it appears to me that the case comes within this section."

right of action thus specified will, in the nature of the case, be merged in the single question, whether the injury was the consequence, in a legal sense, of the servant's obedience to the order. This question is one partly of fact and partly of law and is determined by the same tests as those ordinarily employed for the solution of similar problems (*e*).

But if the alleged breach of duty was in respect to something done or omitted after the servant had complied with an order which was not an improper one considering the circumstances under which it was given, the analysis of the causation is less simple. In a case involving this situation, it has been held by the English Court of Appeal, that the servant is not required to prove that the injury resulted from his conformity to orders, as its causa causans, but merely that such conformity was the causa sine quâ non of the injury. That this doctrine is subject to some limitation, and that it does not render the master liable for all subsequent delinquencies of the directing employé is apparent from the opinions of the Lord Justices. But neither this nor any other reported decision indicates with any clearness the principle upon which the line is to be drawn between the acts for which the master is or is not responsible (*f*).

(*e*) The order of a foreman to be quick is not the "cause" of an injury received by a workman through stumbling over some loose bricks, and falling under a car, where the expression was not used in such a manner to imply that extraordinary diligence was to be used, but merely in the ordinary sense of a direction to proceed with his work. *Martin* v. *Council Quay &c. Co.* (Q.B.D. 1885) 33 W.R. 216. See also *Harris* v. *Timm* (1889) 5 Times L.R. 221, the facts of which are started in the following section.

(*f*) In the case referred to, *Wild* v. *Waygood* (C.A. 1892) 1 Q.B.D. 783, the plaintiff was held entitled to recover for an injury resulting from the negligence of his foreman in starting an elevator, while he was standing, in compliance with the foreman's directions, on a plank extending across the elevator shaft. Lord Herschell said: "Now, in this case it appears to me, and I do not propose to lay down any general rule upon the subject, that it is quite clear the injury did result from the plaintiff having conformed to an order, when he was told to go to a place which was, and must have been known to be, a dangerous place if the person who told him to go there was guilty of negligence. That person having been guilty of negligence created the danger and caused the injury, it seems to me the case is within the very terms of the Act. It is not necessary to endeavour in the present case to determine or lay down any general rule as to the construction of this section beyond this, that I am quite clear it is not limited to an injury arising from an order which order is negligent in itself. That is one contention put before us. I think the words in the Act of Parliament are conclusive against any such construction. It would be limiting it far beyond what the words either require or will admit of. That is all I lay down as regards the construction of the section, beyond this: that I do not think it essential to shew that the conformity to the order was what has been called the causa causans of the injury. The negligence must be proved, and if you prove the negligence, then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conforming to the order." Kay, L.J. dis.

In Alabama the view is taken that the injured servant cannot recover unless the superior servant was negligent in giving the

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cussing the three possible constructions that might be put on the section said: "The first point that has been urged before us is that it only means an injury from conforming to a negligent order—the negligence being in the order itself. The second is that it means anything that may occur while conforming to an order; and the third is that it means only such direct or indirect results as are closely connected with the order that has been given. I think the first construction argued for is inadmissible. The section clearly shews, that it is not confined to an injury caused by a negligent order, but that it must be caused by the negligence of the person giving the order, and must result from conforming to the order given. I do not think that it would be the proper construction of that sub-section; I think it would be much too narrow to say that it refers merely to negligence in giving the order. Then I think the second construction would also be much too wide. To say that it includes every case of negligence after an order has been given which the workman was bound to conform to at the time, would make it extend to a case where the order was a general order to assist the person who gave it in certain work, and which might be given days or weeks before, and the accident might result from the negligent act of that person while the workman was assisting him. I am not prepared at present to say that the construction of the sub-section is so wide as that. It seems to me the third construction is the most reasonable construction of the section—that it relates to negligence which has an intimate connection with the conforming of the workman to an order given him at the time of the injury and to which he was conforming at the time of the injury. * * * The negligence was really a combination of those two things. If the workman had not been on the plank, there would have been no negligence in pulling the string. It was because the workman was there at the moment, conforming to the order given to him by Duplea, that the pulling of the string by Duplea was an act of negligence. Therefore, the injury may be said to have resulted from conforming to the order, the act being done by Duplea whilst the workman was conforming to his order." This decision overrules *Howard Bennett* (Q.B.D. 1888) 58 L.J.Q.B. 129, 60 L.T. 152, 5 Times L.R. 136, in so far as it was based on the proposition that conformity to orders was not the cause of an injury which resulted from the premature starting of a machine, while the plaintiff's hands were in a dangerous position in which he had placed them while in the act of complying with the order. In criticising the theory of Lord Coleridge in the earlier case, that the injury resulted, not from the directions, but from the machine being set off too soon and at too great a speed, Lord Herschell said: "I most respectfully express my dissent from the view of the Lord Chief Justice there indicated. Of course it may be that the person who started the machine was not a person to whose orders the plaintiff was bound to conform, but supposing the plaintiff was bound to conform, and that the person to whose orders he was bound to conform in working a machine tells him to put his hand in a certain part of the machine and then negligently starts it while the man's hand is there, I own I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and his hand being there, the negligence consists in starting the machine while his hand is there. Under such circumstances as those, there seems to me the most immediate and intimate connection that one can conceive between the negligence which caused the injury and the conforming to the order, because it is in truth one element of the negligence that he was conforming to the order at the time. Therefore, with great respect to the learned Chief Justice, I am unable to concur in the view that the conformity with the order must be in that sense the causa causans of the injury." But the denial of the right to recover in the earlier case was probably justifiable on the other ground assigned, viz., that the negligent employé was not a person to whose orders the plaintiff was bound to conform within the meaning of the statute. See sec. 3, ante. It is

directions which were conformed to (*g*). That this construction of the words of the statute is opposed to the weight of authority is apparent from the decisions already cited. The case in which it was adopted antedates *Wild* v. *Waygood*, and it may be questioned whether a different theory would not have commended itself to the court if the arguments of the English judges had been before it.

In one Indiana case the court proceeded upon the principle that an injury due to negligence of the superior servant committed subsequently to the giving of the order does not constitute a cause for action, the reason assigned being that under such circumstances the injury does not result from conforming to his orders, but from the subsequent act or omission (*h*). But this doctrine has been qualified by later decisions. One of these permits recovery where the direct cause of the injury was something done or omitted by the plaintiff's fellow-servants in compliance with a second order (*i*). In another the action was held maintainable where the injury was due to the negligence of a superintendent in bringing a naked lantern close to a place where gas was escaping and where the plaintiff was working by his orders. The court declined to accept the contention that the statutory provision was not applicable, for the reason that the injury occured long after the order had been given and obeyed, and as a result of the negligent handling of the lantern (*j*). If the Supreme Court should ultimately adopt the

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an error to take the case from the jury, where the evidence is that the plaintiff, while at work in the sweat-box of a sewer-pipe company and engaged in placing clay in the press, was injured by the act of the employé in charge of the press in causing the plunger to come down before the plaintiff had given the word. *Cox* v. *Hamilton &c. Co.* (1881) 14 Ont. R. 300, adopting the general principle that the servant may recover without shewing that the order was a negligent one.

(*g*) This is one of the four pre-requisites to the maintenance of the action mentioned in *Mobile & O. R. Co.* v. *George* (1891) 10 So. 145, 94 Ala. 199. It has been held, on the ground that it was perfectly proper to order the plaintiff to cut down a tree in which another has lodged, that the failure of the superior servant to inform the subordinate when it had become unsafe for him to further chop on the tree, does not authorize a recovery from the employer. *Postal Teleg. Cable Co.* v. *Hulsey* (1896) 22 So. 854, 115 Ala. 193.

(*h*) *Hodges* v. *Standard Wheel Co.* (0000) 152 Ind. 680.

(*i*) In *Louisville &c. R. Co.* v. *Wagner* (1899) 153 Ind. 420. 53 N.E. 927, the plaintiff assumed a dangerous position in obedience to his foreman's orders, and was injured in consequence of his fellow-workmen obeying the foreman's orders to let loose a truck. The court said: "The order to loose the truck was the proximate cause of plaintiff's injury. And it was both directing the plaintiff into a dangerous situation, that he was bound to enter, and then ordering the truck turned loose upon him without warning that constitutes the actionable wrong."

(*j*) *Indianapolis &c. Co.* v. *Shumack* (1899) 23 Ind. App. 87.

doctrine of this last case, the law in this State will, it seems, be virtually the same as it is in England, and the *Hodges Case*, which, strange to say, is not referred to in the later opinions, would be discredited.

It is clear that, under any theory of the effect of this provision, no action can be maintained where the evidence indicates that the efficient cause of the injury was a mere accident (*k*), or an act of negligence committed, while the plaintiff was executing a proper order, by a co-employé to whose directions he was not subject (*l*).

8. Necessity of shewing negligence on the part of the superior servant.—As pointed out in the preceding section, the negligence for which the master is required to answer under this provision of the statutes may be either in regard to the order to which the plaintiff conformed or in regard to some subsequent act or omission of the directing employé. In either case the question is simply, what would have been the conduct of a prudent person under the given circumstances (*a*).

(*k*) *Harris* v. *Timm*, (Q.B.D. 1889) 5 Times L.R. 221; *McManus* v. *Hay* (1882) 9 Sc. Sess. Cas. (4th Ser.) 425.

(*l*) *Elliott* v. *Tempest* (Q.B.D. 1888) 5 Times L.R. 154. A railroad company is not liable where a brakeman who assumed a position between cars separated from each other, for the purpose of coupling them, after the conductor should have made a coupling between the first car and the cars attached to the engine, is injured by reason of the failure of the conductor to make the first coupling, as he had stated he would do, if that failure was not due to negligence or recklessness, but to the speed at which the engine came back against the first car. *Alabama Midland R. Co.* v. *McDonald* (1896) 112 Ala. 216, 20 So. 472. [The court said that an action possibly lay for the negligence of the engineer under sub-sec. 4 of the Act.]

(*a*) (1) *Negligence in regard to the order itself.* In the absence of something in the context to qualify the statement, it is a misdirection to tell the jury that, if they were of opinion that the delinquent superintendent thought the conditions were such as to render it safe to give the order in question, he would not be guilty of negligence. The real test is, what would a sensible man have done under the circumstances. *Nash* v. *Cunard S. Co.* (C.A. 1891) 7 Times L.R. 597. In *Hooper* v. *Holme* (C.A. 1896) 13 Times L.R. 6, affirming 12 Times L.R. 53, it was assumed that putting a labourer to work on a railway viaduct without setting a look-out to warn him as to the approach of trains was negligence. A verdict for the plaintiff will not be disturbed where the evidence is that the servant was a "ganger" who knew nothing about pulling down houses; that he was ordered by his foreman to save a certain partition, that while engaged in this work the joists supporting the ceiling came down with the roof and killed him; and that the foreman had not examined the joists to see how they were fixed. *Reynolds* v. *Holloway* (C.A. 1898) 14 Times L.R. 551. No negligence is established by evidence showing merely that the foreman ordered the plaintiff to go into a hole which had been broken through a wall for the purpose of excavating a cellar, and that, while he was picking at the wall above him, it gave way and allowed the earth behind it to fall on him. *Booker* v. *Higgs* (Q.B.D. 1887) 3 Times L.R. 618. The mere fact that the plaintiff's foreman had ordered him lower a stack of planks before the time when it fell on him will not justify the inference that it was

Construing the subsequent provision of the Indiana Act which corresponds to sec. 1, sub-sec. 3, of the English Act, (Rev. Stat. Ont. 1897, c. 160, sec. 3, sub-sec. 5), the Supreme Court of that State has held that as it merely particularizes other and different classes of employés for whose negligence the master is to be responsible, the scope of the sub-section now under review is in no way limited by the restrictive phrase which, in the Indiana Act, declares the recovery of the plaintiff to be conditional upon proof that the negligent person was "performing a duty of the corporation" (*b*).

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top-heavy at the time the order was given, and that its condition was known to the foreman, especially when the plaintiff and his witness admitted that they had observed nothing unsafe in the stack. *Connell* v. *Surrey &c. Dock Co.* (Q.B.D. 1887) 3 Times L.R. 630. The plaintiff obeyed an order to insert a bar of iron under a flat piece of iron on which a roll of iron was laid, and lift the roll so as to get it into a furnace lengthwise. While it was being lifted, it fell off the piece of iron on which it lay, in consequence of its not being properly scotched, and striking the bar, threw the plaintiff backwards. *Held*, that the mere fact that the roll of iron fell was not sufficient evidence of negligence to submit to the jury, and that, for aught that appeared, the accident might have occurred owing to the manner in which the lifting was done by himself and his co-workers. *Harris* v. *Tenn* (1889) 5 Times L.R. 221. A foreman of one set of artisans working on a building is not negligent in sending them, without making an inspection, to work on a scaffold, built by a competent mechanic for the use of another set. *Kettlewell* v. *Paterson* (1886) 24 Sc. Law Reports 95. The plaintiff, who operated a machine in defendan 's factory, was ordered by the superintendent to start the machine. The superintendent had reason to know that plaintiff might understand the order as a command to see if the machine was all right, by resuming work. She so understood it, and was justified in such understanding. While starting the machine, in the exercise of due care, plaintiff's hand was thrown from its usual place by the unusual shaking of the machine and injured. *Held*, that under the circumstances, the order of the superintendent was negligent, and plaintiff might recover. *Eaves* v. *Atlantic Novelty Manufacturing Co.*, 57 N E. 669, 176 Mass. 369. To prescribe an improper method of unloading heavy articles from a vehicle is negligence. *Milward* v. *Midland R. Co.* (1884) 14 Q.B.D. 68. [Iron window frames were left standing unsecured on a van]. No negligence is predicable of the omission of a foreman to instruct a boy sent to perform hazardous work, where he understands how to do that work and what danger it involves. *Worthington* v. *Goforth* (Ala. 1899) 26 So. 531. For another illustrative decision see *Martin* v. *Connah's Qu .y &c. Co.*, referred to in the preceding section.

(2) *Negligence in regard to subsequent acts or omissions* See *Wild* v. *Waygood*, as stated in the preceding section, and also the cases referred to in sec. 9, post.

(*b*) *Louisville N.A. & C. R. Co.* v. *Wagner*, 153 Ind. 420, N S. 706, 53 N.E. 927. The court said: "Both subdivisions are equally parts of the same section, and relate to the same subject-matter. Each subdivision specifies different employés, but in common they distinguish employés of a superior rank—employés clothed with responsibility and authority of the employer—and both must be governed by the same rules of interpretation. The section must be construed as a whole." The fact that the injury was caused by the foreman's negligently approaching with a naked light a place where gas was escaping will not prevent a servant from recovering under sec. 1 sub-sec 2, although such an act is not in the performance of a duty of the corporation under sub-sec. 4." *Indianapolis Gas Co.* v. *Shumack* (1899) Ind. App. 54 N.E. 414.

9. Superior servants participating in manual work, masters liability for negligence of.—As this sub-section declares in the most general terms that the master is to be liable for the "negligence" of any employé of the class designated, there would seem to be no room for the controversy which has arisen with respect to the construction of the sub-section dealing with superintendence, viz., whether the manual acts of a superior servant are among those for which the master is responsible. See sec. 11 of the present writer's article in the October number of the Journal. The few authorities which bear upon the subject are of a negative complexion; but the implication in favour of the workman's right to recover for an injury caused by such an action is as strong as it can be without a direct ruling on the point. In *Wild* v. *Waygood* (see sec. 7, ante), the point that the action could not be maintained because of the character of the negligent act was one so obviously suggested by evidence, that, if it had been considered an open one, it would almost certainly have been averted to by one or other of the distinguished judges and counsel who took part in the discussion of the facts. In one Indiana case the action was held not to be maintainable, where the evidence shewed the infliction of an injury through the negligence of the plaintiff's superior in handling a heavy piece of machinery (*a*). The true rationale of this decision, however, is not the character of the act constituting the negligence, but the theory that there was no causal connection between the order and the injury. See sec. 7, ante. In a still later case in the Court of Appeal, the negligence was again in respect to a manual act, but it was not suggested that this was a sufficient reason for refusing to allow the action to be maintained (*b*).

II. LIABILITY OF AN EMPLOYER FOR INJURIES CAUSED BY ACTS OR OMISSIONS DONE OR MADE IN OBEDIENCE TO RULES.

10. Introductory.—In sec. 1, sub-sec. 4, of the English Act it is provided that a servant shall have a right of action against his employer, whenever he is injured "by reason of the act or omission

(*a*) *Hodges* v. *Standard Wheel Co.* (1899) 152 Ind. 680, 52 N.E. 391. One of the grounds of the decision, viz., that the directing employé was a duly appointed delegate has been already noticed. See sec. 4, ante.

(*b*) *Indianapolis &c. Co.* v. *Shumack* (1899) 23 Ind. App. 87.

of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf." Sec. 3, sub-sec. 4, of the Ontario Act (Rev. Stat. Ont. 1897), is identical in its terms, as are also the other Colonial Statutes. This provision has been inserted in the statutes of Alabama and Indiana; but it is not found in those of Massachusetts, New York, or Colorado.

11. General scope of provision.—The effect of this provision, as a whole, is indicated by the following passage from the opinion of Fry, L.J., in an English case:

"There are four questions which must be asked, every one of which must be answered in the affirmative before the plaintiff can substantiate his case. The first question is, was there personal injury caused to the plaintiff? The second, is, was there injury caused by reason of an act or omission of any employe of the defendant? The third question is, was the act or omission done or made in obedience either to a rule or a by-law of the employer, or to particular instructions given by a delegate of the employer? Why Parliament so framed the section it may be a little difficult to understand: why the particular instructions of the employer should not be referred to, but only the rules or by-laws of the employer and the instructions of a delegate of the employer, is not on the surface very easy to see. No doubt the legislature had some good reason for so enacting. The fourth question is, whether the injury resulted from some impropriety or defect in the rules, by-laws or instructions. It must not only be the result of impropriety or defect in the rules, by-laws, or instructions, but it must be an act or omission done or made in obedience to them or one of them."

12. Necessity of proving negligence in respect to the rules, etc., or particular instructions.—By sec. 2, sub-sec. 2, of the English Act, and the corresponding provisions of the Colonial Acts, it is expressly declared that the workman shall not be entitled to compensation "unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions" (*a*). This proviso is not inserted in the American Statutes; but it is clear, both on principle and authority, that this non-insertion cannot be construed as having the effect of overruling the general rule that proof of negligence in respect to the subject-matter is a condition precedent to recovery

(*a*) A jury is justified in finding an impropriety, etc., where a man is placed in charge of an engine, and at the same time employed in other operations which may involve risk to life or limb. *Whatley* v. *Holloway* (Q.B.D. 1890) 62 L.T. N.S. 639, per Fry, L.J.

on actions against the employer. The intention of the legislatures is assumed to be that no liability can be predicated, unless the defendant is shewn to have been culpable either in promulgating the rule in question, or in failing to promulgate a rule to meet the requirements of the case (*b*).

13. "In obedience to the rules," etc.—The effect of this clause is to relieve the master from liability wherever the rules, etc., were not in themselves improper or defective, and the actual cause of

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(*b*) In *Dixon* v. *Western U. Teleg. Co.* (1895) 68 Fed. Rep. 630, it was insisted by plaintiff's counsel that this clause in the Indiana Statute gives a right of action to an employé who has without his fault, sustained an injury, arising from the performance of any service rendered in obedience to the rules, etc., without regard to the question of negligence or want of care of the corporation or its foreman. His argument was that the sub-section was to be construed as if the employer had been declared liable where the injury "resulted from the act or omission of the person injured or any other person, done or made, etc." Discussing the contention, the court said: "The phrase 'where such injury resulted from the act or omission of any person,' is broad enough to embrace the injured person. The expression 'any person,' in its usual and ordinary sense, is inclusive and embraces every employé. This clause of the statute is not free from ambiguity. While the language employed is capable of a construction as broad as is contended for, it will not be given such construction, if to do so would lead to absurd or unjust consequences. The construction contended for would make every corporation, except municipal, an insurer of the safety of its employés from injury in all cases where they were injured without their fault, while acting in obedience to the rules and instructions of their employer. It would subject the industries of the state to hazards and burdens of new and dangerous proportions. Its mischiefs would prove far-reaching, and its injustice would be great. No corporation could safely conduct its business, if it were required to become an absolute insurer of the safety of its employés. No principles of justice or sound policy can be invoked in support of a construction which would condemn the employer to compensate an employé for an injury for which the employer was in no wise in fault. The statute is susceptible of a construction which does no violence to the language employed, and which will protect the just rights of the employé, and at the same time hold the employer to respond in damages for injuries resulting from its fault or negligence, or from the fault or negligence of any person delegated with authority to represent it. The true construction of the clause requires the words 'any person' to be limited so as not to include the person injured. Thus construed, the clause would read: 'Where such injury resulted from the act or omission of any person (except the person injured) done or made: (1) in obedience to any rule, regulation, or by-law of such corporation: or (2) in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.' This construction makes the statute harmonious, and gives effect to every word and member of it. Under this construction, the effect of this clause is to prevent the corporation from setting up the defence that the injury to the plaintiff was caused by the act or omission of a co-employé, when such co-employé was acting in obedience to the rules, regulations, or by-laws of the corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. In my opinion this clause of the statute ought to receive no broader construction."

the injury was the imprudent manner in which a co-servant of the plaintiff carried them out (*a*).

That an injury was "caused by reason of an act or omission" of a co-employé, "done or made in obedience to particular instructions, etc.," cannot be held were it appears that the plaintiff, while engaged in carrying out his directions, not improper in themselves, was injured by a subsequent breach of duty on the part of the directing employé (*b*).

14. "Delegated with the authority of the employer."—The employés to whom these words are considered to be applicable are persons occupying the position of managers whom the employer deputes in his stead to do or to abstain from doing what his employer would do or abstain from doing in the premises (*a*).

(*a*) Where it is the duty of an employé to draw away the wood which has been cut by a saw and also to attend to the engine which operates the saw, a jury is not justified in finding that the employer's instructions not to neglect the engine required him to abandon his other duty without giving notice to a workman who fed the wood to the saw. *Whatley* v. *Holloway* (Q.B.D. 1890) 62 L.T. N.S. 639, 6 Times L.R. 160, affirmed (C.A.) 6 Times L.R. 353. Mathew, J., pointed out that what was done by the delinquent employé was not done in obedience to the instructions, but in consequence of disobedience to them. An averment that the plaintiff was injured by a fellow-servant's disobedience to a rule of the master will not enable him to recover under this clause, since its effect is to make the master liable in precisely the opposite case, viz., where the act or omission of the fellow-servant is done in obedience to the master's rules. *Laughran* v. *Brewer* (1897) 113 Ala. 509, 21 So. 415. In *Baltimore & O.S.W.R. Co.* v. *Little* (1897) 149 Ind. 167, 48 N.E. 862 also, the contention that the true construction of this provision is that if any duty is enjoined by rule, etc., upon a servant, and the duty is omitted, the corporation is liable for resulting injury, was rejected. The court said: "If this was the proper construction of the specification, there would be little requirement for other provisions of the Act than those of the third sub-division, since it would strike down the fellow-servant rule in its entirety wherever the act or omission is in the line of duty. It would make the corporation liable for the act or omission of a servant, whether negligent or not, and whether the duty negligently performed or negligently omitted may have been enjoined by the general rules, etc., of the corporation, or is in obedience to particular instructions from one 'delegated with authority in that behalf.' Such was not the intention of the legislature."

(*b*) *Postal Teleg. Cable Co.* v. *Hulsey*, 27 So. 854 (1896) 115 Ala. 193. [Complaint held demurrable which shewed that the plaintiff would not have been hurt if his foreman had notified him when it was no longer safe to remain in the neighbourhood of a tree which he had been ordered to chop down]. This case under another of its aspects is noticed in sec. 7, ante.

(*a*) *Claxton* v. *Mowlem* (C.A. 1888), 4 Times L.R. 756.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE—PARTIES—ADDING PLAINTIFF—ORIGINAL SOLE PLAINTIFF HAVING NO CAUSE OF ACTION—RULES 124, 133 (ONT. RULES 206, 313).

Hughes v. *The Pump House Hotel Co.* (1902) 2 K.B. 485, is an important decision on the construction of Rules 124, 133 (Ont. Rules, 313 and 206). The action had been, through a bonâ fide mistake, instituted in the name of a sole plaintiff who had in fact no cause of action. The mistake arose on a question of law raised in the action as to whether there had been an absolute assignment by the plaintiff of the debt sued for, within the meaning of the Jud. Act, s. 25, sub-s. 6 (Ont. Jud. Act, s. 58, sub-s. 5) it having been decided that the assignment was absolute; (see S.C. ante p. 673) the plaintiff applied to substitute the assignees for himself as plaintiffs. The order was made, and affirmed by Channell, J., and the defendants appealed, contending that as the original plaintiff had no cause of action there was no jurisdiction to substitute another plaintiff. The Court of Appeal (Collins, M.R. and Cozens-Hardy, L.J.) however refused to give such a narrow construction to Rules 124, 133, and affirmed the order appealed from holding the existence of a bonâ fide mistake as to the person entitled to sue was sufficient within the Rules to give the Court jurisdiction either to add, or substitute, a plaintiff.

MANDAMUS PRACTICE—APPLICATION BY COUNSEL—SUITOR IN PERSON.

Ex parte Wallace (1902) 2 K.B. 488, was an application by a suitor in person for a rule nisi to justices to shew cause why they should not hear and determine the matters of certain charges preferred by the applicant. The application was made under 11 & 12 Vict. c. 44, s. 5. The Divisional Court refused to entertain the application upon the ground that it was one which must be made by counsel, and the Court of Appeal (Collins, M.R. and Matthew and Cozens-Hardy, L.JJ.) affirmed this ruling. The Master of Rolls says "the rule of practice has been clear for many years that a writ of mandamus can only be moved for by counsel,

and we have been referred by the Master to a long series of decisions (though they have not found their way into the reports) to the effect that the same practice applies in the case of a motion under 11 & 12 Vict. c. 44, s. 5, for a rule in the nature of a mandamus to justices." *Re Lewis* (1884) 14 Q.B.D. 474, where such a rule was moved for in person, was held to be of no authority in view of the settled practice of the Court.

INSURANCE – PROPERTY OF ALIEN ENEMY—LOSS BEFORE COMMENCEMENT OF WAR—SEIZURE BY ENEMY'S GOVERNMENT – WARRANTY AGAINST CAPTURE, SEIZURE AND DETENTION.

In *Robinson Gold Mining Co.* v. *Alliance Ins. Co.* (1902) 2 K.B. 489, the Court of Appeal (Collins, M.R. and Matthew and Cozens-Hardy, L.JJ.) have affirmed the decision of Phillimore, J. (1901) 2 K.B. 919, noted ante vol. 38, p. 149.

STATUTE OF LIMITATIONS – MORTGAGE – ACKNOWLEDGMENT – PAYMENT OF INTEREST – PERSON "BOUND TO PAY" – REAL PROPERTY LIMITATIONS ACT, 1874 (37 & 38 VICT. C. 57) S. 8 – R.S.O. C. 133, S. 23).

Bradshaw v. *Widdrington* (1902) 2 Ch. 430. The plaintiff in this action was grantee of a mortgagor and claimed a declaration that the title of the mortgagees was barred and extinguished under the Real Property Limitations Act, 1874, s. 8, (R.S.O. c. 123, s. 23). The mortgage was made by J. E. Bradshaw in 1879 in favour of one Moss, the surviving trustee of the estate of Sir Edward Cust. The money on the mortgage was raised for the benefit of the mortgagor's son, W. Bradshaw, who gave the mortgagor a bond for the payment of the amount of the mortgage Moss died in 1887, and the defendants were his representatives. The mortgaged property had been conveyed to the plaintiff partly by the mortgagor in 1884, and partly by his executors and trustees after his death in 1887, for value free from incumbrances and without notice of the mortgage, and the plaintiff himself had never paid anything in respect of the mortgage or given the mortgagees any acknowledgment. A solicitor named Harrison had acted for the mortgagor and mortgagee, and their respective representatives after their deaths, and also for W. Bradshaw, and this solicitor had duly paid to the mortgagee and his representatives the interest as it accrued on the mortgage down to 1899, when he committee suicide, and it was then discovered that he had been guilty of a number of frauds. Harrison had also acted as solicitor

for the plaintiff and had throughout the possession of the title deeds of the property. It would appear from the judgment that what in fact happened, though it is not distinctly alleged in the statement of facts, was that Harrison received the plaintiff's purchase money, and instead of applying it in discharge of the defendant's mortgage, he misappropriated it, and the case resolved itself into a question which of the two innocent persons was to suffer for the fraud thus committed. Buckley, J., came to the conclusion that as the mortgagor and his representatives, by their conveyances to the plaintiff had purported to convey the estate free from incumbrances, the mortgagor and his representatives were as between themselves and the plaintiff bound to pay off the mortgage; and that consequently the mortgagor and his representatives and W. Bradshaw were persons "bound to pay" the mortgage debt, and consequently payment of interest by them or any of them would have the effect of preventing the running of the Statute of Limitation in favour of the plaintiff. This decision the Court of Appeal (Collins, M.R. and Stirling, and Cozens-Hardy, L.JJ.) affirmed. See *The Trust & Loan Co.* v. *Stevenson* 20 Ont. App. 66, where a similar conclusion was reached.

COMPANY—PROSPECTUS—OMISSION OF MATERIAL CONTRACT—WAIVER CLAUSE IN PROSPECTUS—COMPANIES' ACT, 1867 (30 & 31 VICT. C. 131) S. 38—(2 ED. 7, C. 15, S. 34, D.).

Cackett v. *Keswick* (1902) 2 Ch. 456, was an action brought by the shareholders against the directors and promoters of a joint stock company to recover damages for an alleged fraudulent omission from the prospectus of a joint company on the faith of which the plaintiff subscribed for a share, of a material contract entered into between the promoters and the future chairman of the company whereby a firm of which the chairman was a partner was to receive 12,000 fully paid shares as to 2,000 for commission for underwriting, and as to 10,000 for the use of the names of the chairman and his firm on the prospectus and for adopting the company. The company was a mining company and the prospectus contained a statement disclosing inter alia an agreement as to the purchase of the produce of the mine, and stated that the directors had guaranteed the subscription of a part of the capital and would receive a commission for so doing. And it then stated that there might be various trade contracts and business

arrangements in addition which might constitute contracts within s. 38 of the Companies Act 1867, (2 Ed. 7, c. 15, s. 34, D.) and that applicants for shares should be deemed to waive the insertion of the particulars of such contracts or agreements in the prospectus. But notwithstanding this provision Farwell, J. held, and the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) affirmed his decision, that the contract with the chairman and his firm ought to have been disclosed, and that it was not covered by the waiver clause which in the opinion of the Court gave no fair or sufficient notice to any intending investor of the real nature of the contract omitted from the prospectus.

MORTGAGE—CLOG ON REDEMPTION—OPTION TO MORTGAGEE TO PURCHASE MORTGAGED PROPERTY.

Jarrah Timber Corp. v. *Samuel* (1902) 2 Ch. 479, is another of the somewhat numerous decisions of late in which the Equity doctrine which invalidates what is called a clog on the right of redemption is discussed. In this case the mortgage was of shares in a joint stock company. The mortgage provided that the mortgagee should have the option of purchasing the whole or any part of the stock at 40 per cent. at any time within 12 months and that the advance should become due and payable with interest at thirty day's notice on either side. Kekewich, J., applying *Noakes* v. *Rice* (1902) A.C. 24 (noted ante vol. 38 p. 335) held that this option to purchase was a clog on the right of redemption and invalid and could not be enforced.

COMPANY—DIRECTOR, QUALIFICATION OF—DIRECTOR HOLDING SHARES IN HIS OWN RIGHT—CHARGING ORDER—1 & 2 VICT. C. 110, S. 14—(R.S.O. C. 324, S. 21).

In *Sutton* v. *English & Colonial Produce Co.* (1902) 2 Ch. 502, the plaintiff had been a director in the defendant company, in which it was necessary in order to be qualified to act as a director, to hold 100 shares in his own right. When appointed director he held 1,000 shares in his own right, but he became bankrupt and his trustee in bankruptcy notified the company that he claimed the shares standing in the plaintiff's name, but stated that he would not ask for an actual transfer for a few days. The plaintiff was therefore excluded from the board of directors on the ground that

he had become disqualified. Three days afterwards the transfer of another 100 shares to the plaintiff was lodged with the company, but the directors refused to register it or restore the plaintiff as a director. The plaintiff applied for an interlocutory injunction to restrain the company and directors from excluding him from the board. Buckley, J., dismissed the motion, holding first that on the receipt by the company of the notice from the trustee in bankruptcy the plaintiff ceased to be qualified and his office as director became vacant and that the subsequent acquisition by him of the 100 shares could not re-establish him in his office. The learned judge also expressed the view that the words "holding in his own right" for the purpose of qualification, and the same words in 1 & 2 Vict. c. 110, s. 14, (R.S.O. c. 324, s. 21) for the purpose of a charging order have a different meaning, and in the latter Act mean that the debtor must have a beneficial interest, but that is not necessarily so for the purpose of qualification, but for that purpose he must at least hold them so that the company may safely deal with him as the owner.

VENDOR AND PURCHASER — LEASEHOLD—LEGAL ESTATE OUTSTANDING — REQUISITIONS ON TITLE—CONDITIONS OF SALE—TIME—WAIVER OF OBJECTION.

Pryce-Jones v. *Williams* (1902) 2 Ch. 517, was an application under the Vendors' and Purchasers' Act. The property sold consisted of two leases. These leases had been granted in 1884 to a company which went into liquidation and its assets, including the leases in question, were sold to a new company of the same name but no formal assignment of them was made. The old company was shortly afterwards dissolved. The leases were sold subject to conditions of sale which limited the time for delivering objections and requisitions. After the prescribed time the purchaser delivered an objection to the effect that the vendor had shewn no legal title. Rent had been paid by the new company and accepted by the lessor from 1884 until the present time. Under these circumstances Joyce, J., held that the objection did not go to the root of the title, and that as the vendors were able to convey a good equitable title, the condition as to time was binding, and the objection was too late and the purchaser could not insist on it.

Correspondence.

ELECTION TRIALS AND THE BENCH.

TORONTO, Dec. 11, 1902.

To the Editor CANADA LAW JOURNAL:

DEAR SIR,—I take the liberty of directing your attention to a matter suggested by the many election trials that have recently taken place in this province, my excuse for troubling you being that the subject can be thus brought to the attention of the profession without the general notoriety and possible ill consequences that might result from its discussion in the newspapers. It may be that a little knowledge is in this case, as it usually is, a dangerous thing, and that upon full information the difficulties to be suggested will disappear. If it be so, and you or your readers can give this information, so much the better; if not, the mention of the matter in a spirit of enquiry will not be misinterpreted.

For many of these election trials the judges have been chosen so that each Court of two has been composed of one Judge, who, while at the bar, had been a Conservative and one who had been a Liberal.

Is this a wise course to pursue? Not for a moment is it suggested that its adoption has any object other than the public good; but the question remains, does it promote the public good?

True, it may be a satisfaction to the petitioner or a respondent, and their respective supporters in the locality, to know that one who had been of their way of thinking politically is to be a judge at the trial; and it may also shield the judges from that covert criticism or insinuation of party bias which irresponsible or unthinking persons might make upon the unfavourable decision of a court whose members were both formerly of opposite politics to the unsuccessful litigant.

If these are the reasons by which the practice is justified, are they sufficient reasons? Is it not to be feared that its continuation will lead the community into the grave error of considering each of the two judges the champion of his old party?

Should it not rather be the policy of the Bench to educate the public to the belief that in election matters as well as in all other

judicial proceedings its members are beyond the reach of party feeling, and that however partisan a man may have been while at the bar, upon his elevation to the bench the line is drawn and this ends it; and that in the high office of a judge there is no room for party desire, inclination, or sympathy? Do not cases where, under the present system, trial judges disagree from the best of motives and the divergence of opinion happens to be on party lines, subject the judges to more unfair criticism than they would be exposed to under another system? If the judges were allotted to the election trials without regard to their past politics, and it was found in the country at large, as it would be found by all but irresponsible or unthinking people while the bench continues to maintain its present high standing, that justice was done irrespective of politics, would not the dignity of the bench be emphasized, and the impersonal quality of justice be accentuated? Would not the increased feeling of security in the public that would flow from this be more than compensation for the loss that litigants or their followers or parties might feel by reason of the absence from the trial of a judge who formerly was of their political stripe?

Again, is it not clearly in the interest of the public that appointments to the bench should be made from the available men at the bar who are best qualified in the matters of knowledge, ability and integrity without regard to their politics? Should not this point be kept constantly before the public? Does not the practice of considering in election matters the former politics of judges tend rather the other way, and give strength to the idea that judges and politics are inseparable? What, then, can be more natural than that the public should in time become schooled in the thought that in the selection of judges politics are paramount?

It may be that if the present method of selection has been followed for many years a change would at first cause dissatisfaction, but there are many in the profession who, having its best interests at heart, feel that former political views should be disregarded in allotting judges to election trials, and that in the long run the country would be benefited thereby.

Yours truly,

SOLICITOR.

REVISION OF THE DOMINION STATUTES.

To the Editor CANADA LAW JOURNAL:

SIR,—Now that the commissioners for the revision of the Dominion Statutes have been appointed, would it not be a very favourable opportunity to take some practical steps towards having notes of decided cases in the various provinces incorporated with the statutes as revised when printed. It is not my idea that at the present time any extensive annotation of the statutes should be undertaken, but a memorandum of cases under the appropriate sections might be prepared under the direction of the Law Societies in each province, and include Supreme Court and Privy Council decisions consequent on appeals from the various provinces, and furnished to the Commissioners for insertion in their proper places; the annotation to consist merely of a reference to the name of the case and the citation of it. This would be a very great convenience to the profession at large. For instance, there are a considerable number of decisions in each province on Insurance laws, the Railway Acts, the Banking Act, Bills of Exchange Act, Criminal Code, Election Acts, and numerous other subjects of purely Dominion jurisdiction where the decisions of all the provinces would be very useful for reference. This is also in line with the efforts of those gentlemen who on two or three occasions have assembled themselves as an association for the purpose of forming a Dominion Bar Association. It can also be advocated in a general way as far as the provinces, except Quebec, are concerned, as being a step in the direction of the ultimate uniformity of laws in Ontario, Nova Scotia and New Brunswick under section 94 of the B.N.A. Act.

Yours sincerely,

SUBSCRIBER.

[We will refer to this matter on a future occasion.—Ed. C.L.J.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT OF CANADA.

B.C.] PAULSON *v.* BEAMAN. [Oct. 28, 1902.

Appeal to Supreme Court—What is a "final judgment."

This was an action brought under s. 37 of the Mineral Act of British Columbia, c. 1351, R.S.B.C. 1897, as amended, to adverse the defendants application for certificate of improvements for "Pearl" mineral claim situate near Kaslo, B.C.

The trial Judge (MARTIN, J.) proceeded with a partial hearing of the case, but before plaintiff closed his case allowed an adjournment to permit plaintiff to put in proof of the measurement shewing the extent of the encroachment of the "Pearl" on the "Iron Chief" mineral claim owned by the plaintiff. During the course of the trial it appeared that the plan filed under s. 37 was not the result of a survey actually made by a Provincial land surveyor but from measurements taken by plaintiff's brother, the defendants then urged a dismissal of the action, claiming that the map or plan was of no effect, but the trial Judge ordered it to be filed in evidence on the ground that the same was admissible and declined to deal with its effect at that stage of the action. The defendants took advantage of the delay caused by the postponement of the trial as above named and appealed to the Full Court of the Supreme Court of British Columbia and there claimed that the action should have been dismissed, and that a postponement should not have been granted because plaintiff had not filed with the Mining Recorder a map made as a result of actual survey; with this view the majority of the Court agreed and directed a judgment to be entered dismissing the action and allowing the appeal; from this judgment the plaintiff appealed to the Supreme Court of Canada and thereupon the defendants moved to quash the appeal on the ground that the same was not from a final judgment as provided by s. 24 of the Supreme and Exchequer Courts Act, but one within the discretion of the Court and affecting only a matter of procedure.

Held, that under the interpretation of the words "final judgment," as shewn by the Supreme and Exchequer Courts Act, the judgment appealed from dismissing the action was a final judgment, and the motion to quash was dismissed with costs.

Davis, K.C., for the motion to quash, referred to *Solaman* v. *Warner* 1 Q.B. (1891) 734; *Re Riddell*, 20 Q.B.D. 318, 512; *Standard Discount Co.* v. *La Grange*, 3 C.P.D. 67; *Maritime* v. *Stewart*, 20 S.C.R. 105; *Morris* v. *London*, 19 S.C.R. 434.

Taylor, K.C., contra, was not called upon.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] DOMINION IRON AND STEEL CO. *v.* THE KING. [Dec. 5, 1902.

Bounties on manufacture of "pig iron" and steel—60 & 61 Vict., c. 6—62 & 63 Vict., c. 8—Interpretation of statutes—Use of commercial terms.

It is a general practice in the art of manufacturing steel to use the iron product of the blast furnaces while still in a liquid or molten form for the manufacture of steel, the hot metal being taken direct from the blast furnaces to the steel mill. Among iron masters and those who are familiar with the art of manufacturing iron and steel the term "pig iron" has come to mean that substance or material in a liquid as well as in a solid form. A question having arisen as to whether the iron when so used in a liquid or molten form was "pig iron" within the meaning of the term as employed in the above Acts.

Held, 1. The term "pig iron" in the Acts mentioned applied to the iron used in the manner described, and that a manufacturer of steel ingots therefrom was entitled to the bounty provided by the said Acts in respect of the manufacture of such iron.

2. As to the construction of terms occurring in statutes, reference was made in the judgment to *Maillard* v. *Lawrence*, 16 How. 261, where it is stated that the popular or received import of words furnishes the general rule for the interpretation of general laws as well as private and social transactions; but in the case of tariff laws the legislature in imposing duties must be understood as describing the articles upon which the duty is imposed according to the commercial understanding in the markets of the country of the terms used in the statute. In the designation of commercial terms the use of such terms by merchants and importers is in such cases the first thing to be ascertained. See *Arthur* v. *Morrison*, 96 U.S.R. 108; *Robertson* v. *Salomon*, 130 U.S.R. 413; *Nix* v. *Hedden*, 149 U.S.R. 304. But where a term has not acquired any special meaning in trade or commerce, it is said to be taken and received in the ordinary meaning in the common language of the people.

Chrysler, K.C., and *W. B. Ross*, K.C., for the company. *Aylesworth*, K.C., and *C. H. Moss*, for the Crown.

Province of Ontario.

COURT OF APPEAL.

From Lount, J.] [Nov. 24, 1902.

UNION BANK OF CANADA *v.* RIDEAU LUMBER CO.

Trespass—Cutting and removing timber—Measure of damages Wrongful and wilful acts.

In trespass, the inquiry is, what damages will compensate or restore the plaintiff financially to his original position as nearly as possible at the time when the trespass was committed ?

Where the defendants had wrongfully and wilfully entered upon and cut and carried away timber from the plaintiffs' limits, and the plaintiffs sued for trespass only:—

Held, that the damages should be measured by (1) the value of the timber after it was severed and manufactured, so far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it; (2) such sum as represented the extent to which the limits were injured, if at all, by reason of their having been partly denuded by the acts of the defendants; (3) such further and other damages as resulted to the limits by the acts of the defendants, such, for instance, as wasteful methods in cutting, using the surface to pass and repass, etc.

Martin v. *Porter*, 5 M. & W. 351, and *Bulli Coal Co.* v. *Osborne*, [1899] A.C. 351, applied and followed.

Judgment of LOUNT, J., affirmed.

Douglas, K.C., and *Smellie*, for plaintiffs. *G. F. Henderson*, for defendants.

From Divisional Court.] [Nov. 24, 1902.

MORRISON *v.* GRAND TRUNK RAILWAY CO.

Evidence — Discovery — Examination before trial—Officer of company—Engine driver—Consolidated Rule 439.

Held, reversing the decision in this case, 38 C.L.J. 379; 4 O.L.R. 43, that inasmuch as the engine driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control, conduct and management of the train in such a way as to make him responsible to the defendants except for the management of his engine, he was not an officer of the company examinable for discovery under Consolidated Rule 439.

Speaking generally the officer of the corporation who, if there was no action, would be looked upon as the proper officer to act and speak on

behalf of and to bind the corporation in the kind of transaction or occurrence out of which the action arises, would, prima facie, be the proper officer to be examined in the first instance under Rule 439.

J. L. McCarthy, for the defendants, appellants. *O'Donoghue*, for the plaintiff, respondent.

Divisional Court.] [Nov. 24, 1902.

TORONTO GENERAL TRUSTS CORPORATION *v.* WHITE.

Landlord and tenant—Valuation of buildings—Extension of time for making award—Interest.

By a lease made on the 1st of November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuators or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st of November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid, with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1901, and until such further day as the valuators or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the land and buildings was given up by the lessees to the lessors on the 31st October, 1900.

Held, OSLER, J.A., dubitante, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties, and without the fault of either, the lessees were entitled to the interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent., and for the remainder of the time at the legal rate of five per cent.

Judgment of the Divisional Court, 38 C.L.J. 347; 3 O.L.R. 519, varied.

J. Bicknell, K.C., for appellants. *F. E. Hodgins*, K.C., for respondents.

HIGH COURT OF JUSTICE.

Trial of Actions. Boyd, C.] [Nov. 17, 1902.

FARLEY *v.* SANSON.

Arbitration—Appointment of third arbitrator.

The lessee under a renewal of lease contended that he was not obliged to take a renewal, and wanted to have this point settled before

arbitrating to fix a renewal rent. The lessors, however, urged on the preliminaries for having arbitrators appointed, and to this the lessee responded by naming an arbitrator under protest so as to save his rights in regard to his contention. The lessors, however, refused to accept this nomination and proceeded to appoint a sole arbitrator, as though the lessee had made no appointment.

Held, that the lessors had no power thus to appoint a sole arbitrator, and injunction granted restraining them from proceeding before such sole arbitrator.

The arbitration might have proceeded in the ordinary form of three arbitrators notwithstanding the protest of the plaintiff, who might in the end have had the benefit of his legal objection.

Delamere, K.C., for plaintiffs. *O'Meara*, for defendants.

Meredith, C.J.] SHANTZ *v.* TOWN OF BERLIN. [Nov. 17, 1902.

Striking out jury notice — Powers of Judge in Chambers — Action to restrain nuisance.

Motion to strike out a jury notice in an action for an injunction to restrain a nuisance in the shape of a sewage farm, and for damages.

Held, this not being an action, which prior to the Administration of Justice Act, 1873, was cognizable by the Court of Chancery, the jury notice could not be set aside as irregular by the Common Law Procedure Acts. Long prior to the Administration of Justice Act, 1873, the common law courts had power to grant an injunction in a case such as this.

While no doubt a Judge sitting in Chambers has power in the exercise of his discretion to strike out a jury notice in an action such as this, although the party requiring a jury may prima facie be entitled to it, the practice is not to exercise that power, but to leave it to be dealt with by the trial Judge.

C. P. Smith, for the defendants. *Du Vernet*, for plaintiffs.

MacMahon, J.] IN RE MCKENZIE. [Nov. 18, 1902.

Will — Construction — Annuities — Creation of fund for — Right to resort to corpus.

The testator by his will made certain specific bequests and devises, and then gave to his executors all the residue of his property, real and personal, in trust to provide means to pay the expenses of administration, to pay debts, and to pay the bequests thereinafter made, with power to the executors to sell lands, etc., "to deposit with interest, lend on security of mortgages, or invest in the Dominion funds, any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters . . namely, to pay to each one of my sisters . . $250 a year,

or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill health or misfortune a greater sum than the others, and a greater sum than $250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to four named persons, or in like proportions to each of them, "if there be not enough to pay them in full," and "to pay to the children of my brother . . whatever may remain of the estate."

Held, that the sisters of the testator had the right to resort to the corpus of the fund provided for the payment of their annuities, if the income was insufficient. *Mason* v. *Robinson*, 8 Ch. D. 411, and *Illsley* v. *Randall*, 50 L.T.N.S. 717, followed.

Marsh, K.C., *Armour*, K.C., and *J. R. Meredith*, for the various parties.

Trial of Action. Street, J.] [Nov. 21, 1902.

BLACK v. IMPERIAL BOOK COMPANY.

Copyright—Foreign reprints—Notice to Commissioners of Customs—Statement of wrong date of expiration of copyright.

The result of the legislation contained in ss. 42, 152 of the Imperial Customs Law Consolidation Act, 1876, and s. 17 of the Imperial Copyright Act, 1842, is that in order to entitle the proprietor of copyright in a book to enforce his rights in regard to foreign reprints of it, he is required to give the notice prescribed by s. 152 of the former Act, to the Commissioners of Customs, besides registering the work at Stationers' Hall; and until he has complied with both of these formalities he has no rights which he can enforce with regard to imported reprints.

Held, also, that in this case the notice required by s. 152 of the former Act had not been given, inasmuch as in a notice which had been given in pretended compliance with the section the date when the copyright would expire in the case of the book in question, being the 9th edition of the Encyclopedia Britannica, had not been correctly stated.

In the case of such a work as the Encyclopedia Britannica the duration of the copyright of the actual authors of the various articles is seven years from death in each case, or 42 years from the first publication, which ever shall be the longer period, and the only actual date which can be fixed as the date of the expiration of the copyright would be 42 years from the registered date of the publication of the first number of the Encyclopedia.

Barwick, K.C., and *J. H. Moss*, for the plaintiffs. *S. H. Blake*, K.C., and *Raney*, for the defendants, the Imperial Book Co., Limited. *A. Mills*, for the defendant Hales.

Street, J.] IN RE PINK. [Nov. 26, 1902.

Will—Construction—Inconsistent bequests—Reconciling—Formal bequest of residue.

A testator bequeathed all his clothing, wearing apparel, and personal effects to his brother; all his household furniture and other personal property to his sister; he then devised to his sister for life all his real estate, with remainder in fee to his nephew, subject to certain legacies and annuities which he charged upon it; and wound up his will by devising and bequeathing the rest and residue of his real and personal property to his nephew. And at the time of his death the testator's personal property consisted of: household goods and furniture, $150; farming implements and live stock, about $500; book debts and promissory notes, $35; cash, $273; wearing apparel, watch, chain, etc., $25; total $983.

Held, that all the brother took was the wearing apparel and the watch and chain; that the sister took all the remainder of the personalty; the nephew taking none of it.

The proper view of the residuary clause was that the testator, having disposed specifically of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form.

W. F. Kerr, *B. M. Jones*, and *F. W. Harcourt*, for the various parties.

Divisional Court.] FLETT *v.* COULTER. [Nov. 27, 1902.

Infant—Evidence—Examination for discovery.

An infant suing by a next friend may, in the absence of special incapacity, be examined for discovery. *Arnold* v. *Playter* (1892) 14 P.R. 399, approved. Judgment of MEREDITH, C.J.C.P., affirmed.

An order for the examination of an infant for discovery should not give to the examiner a discretion to determine the capacity of the infant; the proper manner of raising any question as to the capacity of the infant is by motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be considered by the Court itself.

O'Donoghue, for appellant. *Parker*, for respondent.

Falconbridge, C.J.K.B.] [Dec. 9, 1902.

IN RE BERGMAN *v.* ARMSTRONG.

Division Court jurisdiction—Assignments and preferences—Declaration of right to rank.

An action for a declaration of the right to rank against an insolvent estate vested in an assignee under the Assignments Act, R.S.O. 1897, c. 147, is not within the jurisdiction of the Divisional Court.

Blake, K.C., for defendant. *W. Davidson*, for plaintiff.

Meredith, C.J., MacMahon, J.] [Dec. 12, 1902.

MONRO *v.* TORONTO R.W.CO.

Practice—Stay of reference pending appeal—Rules 826, 827, 829—Ruling of Master in Ordinary—Appeal from—Forum.

A judgment directed the Master in Ordinary to make partition of lands; ordered that the parties should execute and deliver all necessary conveyances, to be settled by the Master, and should give possession to each other in accordance therewith; and direct the Master to ascertain the plaintiff's damages for ouster, mesne profits, and waste. The defendants appealed from the judgment to the Court of Appeal, and gave the security provided for by Rule 826.

Held, that the reference was stayed pending the appeal.

Construction and application of Rules 827, 829.

The ruling of the Master that the reference was not stayed was a ruling upon a question of practice, and therefore came within the exception in s. 75 (2) of the Judicature Act, R.S.O. 1897, c. 51: and an appeal from his ruling lay to a Judge in Court.

J. Bicknell, K.C., for defendants. *W. N. Ferguson*, for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Chambers, Ritchie, J., and Townshend, J.] [July 3 and 9, 1902.

REX *v.* CARTER.

Criminal Code, ss. 207 (j) 208, 784—Inmate of a disorderly house—Penalty in excess of jurisdiction—Material omission.

The defendant was convicted before the stipendiary magistrate of the city of Halifax "for that she the said C. was during the month of May, 1902, unlawfully an inmate of a disorderly house, that is to say a house of ill fame," in the city of Halifax, and was adjudged for her said offence "to forfeit and pay the sum of $60," and if the said sum were not paid forthwith "to be imprisoned in the city prison of the city of Halifax for the term of five months" unless said sum were sooner paid. An application for the discharge of the prisoner was made in the first instance under R.S.N.S. c. 181, to RITCHIE, J., at Chambers, and being refused was renewed before TOWNSHEND, J.

RITCHIE, J., *held*, that the offence of being an inmate of a house of ill fame was one which the stipendiary magistrate had jurisdiction to try in a summary way (Code I.V., s. 784) and in which he had absolute jurisdiction,

not depending upon the consent of the person accused. That if the prisoner was tried and convicted under that part of the Code the penalty imposed was within the terms of the Act. That the omission from the conviction returned of the words "being charged before me," used in the form applicable to Part LV. of the Code, could not affect the jurisdiction of the magistrate to try the offence summarily, or make the conviction bad in view of ss. 800, 807.

TOWNSHEND, J., *held*, it being clear from the conviction, which was in the form W W, and the papers returned, that the magistrate proceeded and convicted the defendant under ss. 207 (j) and 208 of the Code, that the penalty inflicted was in excess of the jurisdiction, and that the omission of the words "charged before me" was material.

Also, that defendant having a right of appeal in the one case and not in the other a strict construction was necessary.

The discharge of the prisoner was ordered on condition that no action should be brought against any official.

Power, for prisoner. *Cluney*, for Attorney-General.

Meagher, J., and Townshend, J.] [July 18 and Nov. 12, 1902.

CALDER *v.* M. & V. B. RAILWAY CO.

Expropriation Railway—County charge—Injunction—Costs.

Action for an injunction to restrain defendants from building a railroad across plaintiff's land and to recover damages for trespass. Plaintiff owned land within the town of Bridgetown, and the defendants entered and began to build their road therein before any steps had been taken to expropriate. It appeared that the town council of Bridgetown in Dec., 1901, called a meeting of ratepayers and voted the defendants a free right of way through the town, and thereupon passed an Act authorizing the town to expropriate the necessary lands and providing for entering thereon upon payment or tender of the compensation awarded by arbitrators. The Provincial Railway Act is similar to the Dominion Railway Act, but the Provincial Act provides that where a charter makes the cost of the right of way a charge upon any municipality it shall not be necessary for the company to expropriate, and the defendants' charter made the costs of the right of way a county charge. The municipality is to expropriate, and there is no provision permitting the company to enter before expropriation. The proposed line was wholly within the county of Annapolis. On October 23, 1900, the county council passed the following resolution: "Ordered that a free right of way and lands necessary for railway purposes from Victoria Beach to Middleton in the County of Annapolis be granted to the Granville and Victoria Beach Railway and Development Company, Limited, said right of way to be paid for on the completion of said line of railway."

On the application for the interim order restraining the defendants, it was held that no proceedings to expropriate had been taken under the Railway Act at any time, and no effective proceedings had been taken to vest the plaintiff's land, or the right to enter into possession of it, in the town or in the defendants' company, under the Towns and Corporation Act; and further that the town could not be regarded in this connection as forming any part of the County of Annapolis, and therefore no proceedings by the latter could be called to the defendants' aid. Interim restraining order granted.

The defendants justified the entry under the statute and the plaintiffs joined issue. Subsequently the town of Bridgetown expropriated the plaintiff's land for the use of the defendants. The restraining order was thereupon discharged by consent and the defendants obtained leave to plead and pleaded that since the commencement of the action the town of Bridgetown had expropriated the plaintiff's land, etc., and had paid him the damages awarded, and that such award included all damages done to the plaintiff's land by the defendants' company as well as all the trespasses, acts and grievances complained of in the statement of claim.

The plaintiff confessed this defence and entered judgment for his costs to be taxed. Defendants then moved to set aside the judgment.

TOWNSHEND, J., *held*, that in this case the action was for trespass for the act of the defendants' company illegally entering upon plaintiff's land. The object of the action was damages, and the subsequent defence rested upon the payment of these damages by the town of Bridgetown after action brought which plaintiff confessed. From the nature of this defence it necessarily operated as a waiver of the previous grounds. Under these circumstances he would not set aside the judgment, or order the case to go to trial unless the defendants' company agreed to withdraw their subsequent defence. It would be futile to do so, as the only purpose of the action was to recover damages, which, as the defendants subsequently pleaded, had already been paid and accepted in full. There was no question remaining to be tried. He therefore refused the motion with costs.

Milner, for plaintiffs. *Daniels*, for defendant.

Chambers, Townshend, J., and Wetherbe, J.] [Nov. 11 and 23, 1902.

THE KING *v.* SHEPHERD.

Criminal Code, ss. 198, 785—Keeping a disorderly house—Statement of charge—Duty of magistrate before proceeding to try summarily—Renewing application before another judge.

Defendant was convicted before the stipendiary magistrate of the city of Halifax under Crim. Code, ss. 198, 785, "for that she, the said S.S., did in the city of Halifax, in or about the month of Sept., 1902, keep a disorderly house, that is to say, a common bawdy house, on Albermarle Street, in the city of Halifax."

On the return of the writ of habeas corpus the Court was moved under c. 181 R.S.N.S. (1900) for the discharge of defendant on the grounds:

(1). That no offence was charged in the conviction. (2). That the magistrate had not reduced the charge to writing after obtaining the consent of the accused to be tried, but merely read over to her the charge as set out in the information leading to the warrant. (3). That the exact place was not stated in the conviction, the location being necessary.

Held, per TOWNSHEND, J., refusing the motion:

1. The offence was sufficiently stated.

2. The magistrate did what was within the meaning of the law with respect to reducing the charge to writing.

3. That the locality was sufficiently set forth.

Subsequently the motion was renewed before WEATHERBE, J., when the additional ground was urged that the magistrate, when he obtained the prisoner's consent to be tried before him, did not inform her of her right to a trial by jury alternatively with her right to be tried summarily before the magistrate.

Held, 1. In order to constitute the crime charged it must appear that the place referred to was a place used for the purposes of prostitution, and that the statement in conviction was incomplete.

2. The option of a jury trial should have been given to prisoner by the magistrate before obtaining her consent to be tried summarily before him and this not having been done the prisoner must be discharged. *The Queen v. Cockshott* (1898) 1 Q.B. 582, followed.

The following cases were relied on as establishing the practice with regard to renewing an application before another judge when the application has been refused in the first instance. *Cox v. Hakes*, 15 App. Cas. 514; *Re A. L. McKenzie*, 2 R. & G. 481; *Re Bowack*, 2 B.C.R. 222.

Power, for prisoner. *Chaney*, for Attorney-General.

Chambers. Weatherbe, J.] [Nov. 25, 1902.

THE KING *v.* POWER.

Recognizance to keep the peace—Procedure to impose and collect costs—Crim. Code, ss. 959 (3), 870—Order imposing imprisonment without distress held bad

Defendant was ordered to enter into a recognizance with sureties to keep the peace towards G. and pay G., the prosecutor, the sum of $1.42 for his costs, and on refusal or neglect to enter into such recognizance and to find such securities forthwith, and if the said sum for costs were not paid forthwith to be imprisoned for one month unless said recognizance was sooner entered into and said sureties sooner found and said sum for costs sooner paid. Defendant, having refused to comply with the order, was committed to jail under a warrant of commitment in the terms of and

reciting the order. On return to a writ of habeas corpus and motion for the discharge of the prisoner,

Held, that ss. 959 (3) and 870 of the Criminal Code gave the authority and procedure respectively for imposing and collecting costs in a case like the present and that under the last mentioned section defendant could be imprisoned for non-payment of costs only in default of distress and that the order awarding imprisonment without distress as a means of recovering the costs was therefore bad as an excess of jurisdiction.

Power, for prisoner. *Kenney*, for prosecutor.

Province of Manitoba.

KING'S BENCH.

Richards, J.] HENRY *v.* BEATTIE. [Nov. 20, 1902.

Negligence Insurance agent employed to effect insurance against fire—Damages.

Defendant was the agent at Portage la Prairie of the Royal Insurance Company, also of the Hamilton Provident Loan and Savings Company. Plaintiff's uncle formerly owned a quarter section of land which he had mortgaged to the Loan Company, and upon which he afterwards erected a dwelling house and farm buildings. He then conveyed the property to the plaintiff, who was his infant niece living under his care and protection. The conveyance was subject to the mortgage. Being unable to pay the interest due on the mortgage in 1900, the uncle asked the defendant for time and was told that the Loan Company would not give time unless he insured the buildings in their favour as mortgagees. The uncle afterwards went to defendant's office to apply for insurance on the buildings, which defendant had never seen, when defendant took a form of application for insurance in the Royal Insurance Co. and filled it up, getting the necessary information from the uncle who signed it. It called for $500 of insurance on the dwelling and $500 on the other buildings. The premium was $20, of which $15 was paid at the time and the rest afterwards, and it was intended that the loss, if any, should be made payable to the Loan Company as collateral security to the mortgage. The uncle stated that he applied for the insurance for the benefit of the plaintiff and that he told defendant so and had previously informed him of the plaintiff's interest in the property, whilst defendant denied that he had ever heard of the plaintiff's having any interest in the property. The application was to have been sent to the Loan Company to enable them

to look after the insurance, but they never received it, and defendant never forwarded the premium, saying he had credited the amount to the Company on a contra account he had against them. Defendant had no recollection of having sent the application to the Loan Company, but thought he must have done so, and told the uncle at the time the remaining $5 of the premium was paid, that the insurance had been effected and that the Loan Company held the policy. In July, 1902, some of the buildings referred to were destroyed by fire when it was ascertained that no insurance had been effected on any of them. The defendant had no recollection as to the application after it was signed by the uncle. He never received any acknowledgement of its receipt by the Loan Company, and owing to his memory having failed very greatly as to the facts of the case, the trial Judge accepted the statement of the uncle as to what had taken place between them.

Held, that having received the application the onus was on defendant to shew what he had done with it, that having failed to shew that, the proper conclusion was that he had done nothing with it and that he had been guilty of gross negligence for which he was liable in damages to the plaintiff.

The proper findings of fact on the evidence were that defendant at the time of the application knew of plaintiff's ownership, that the plaintiff was the person named in it as applying for insurance and that the uncle was to defendant's knowledge her agent in so applying.

Defendant also set up that the uncle had fraudulently overvalued the buildings when applying for the insurance, and that the evidence shewed that the actual value was less than the amount of insurance asked for. As to this the learned Judge was satisfied that the uncle, at the time of the application, believed them to be worth the amount stated.

Held, that there was no fraudulent overvaluation, and that it was doubtful whether, even if there was, it would be a good defence to this action.

Verdict for plaintiff for the value of the burned buildings, fixed at $350, with costs of action on King's Bench scale.

D. A. Macdonald, for plaintiff. *F. G. Taylor*, for defendant.

ELECTION CASES.

Killam, C.J., Dubuc, J.] [Oct. 30, 1902.

IN RE LISGAR ELECTION—DOMINION.

Election petition—Corrupt practices — Bribery — Treating — Furnishing transportation — Proof of agency of person guilty of corrupt practice —Dominion Elections Act, 1900, ss. 108-111.

At the trial of the petition in this case, evidence was given upon a great number of charges of bribery, corrupt treating and furnishing of

transportation to voters against persons who had been working to secure the election of the respondent; but, in the few cases in which it was held that such charges were proved, it was also held that there was no sufficient proof that the persons found guilty were agents of the respondent for the purposes of the election so as to make him responsible for their acts.

The following are some of the principles laid down or re-affirmed with the authorities relied on:—

1. A charge of bribery, whether by a candidate or his agent, is one which should be established by clear and satisfactory evidence, as the consequences resulting from such a charge being established are very serious: *Londonderry case*, 1 O'M. & H. 274; *Werrington case*, 1 O'M. & H. 42; *North Victoria case*, Hodg. Elec. Cas. 702.

2. To prove agency, the evidence should also be clear and conclusive and such as to lead to no doubtful inference: *Sligo case*, 1 O'M. & H. 300; *Perth case*, 2 Ont. Elec. Cas. 30.

3. To constitute agency in election cases, as in other cases, there must be authority in some mode or other from the supposed principal. It may be by express appointment or direction or employment or request, or it may be by recognition and adoption of the services of one assuming to act without prior authority or request. It may be directly shewn, or it may be inferred from circumstances. It may proceed directly from the alleged principal or it may be created indirectly through one or more authorized agents: *Taunton case*, 2 O'M. & H. 74; *Stroud case*, 3 O'M. & H. 11; *North Ontario case*, Hodg. 304; *East Elgin case*, 2 Ont. Elec. Cas. 100.

4. The fact that a person is a delegate to, or member of the convention or body which selects a candidate does not of itself make such person an agent of the candidate chosen: *Harwich case*, 3 O'M. & H. 69; *Westbury case*, Id. 78; *West Simcoe case*, 1 Ont. Elec. Cas. 159.

5. Canvassing, speaking at meetings or other work in the promotion of an election does not per se establish agency, although, according to degree and circumstances, it may afford cogent evidence of agency: *Londonderry case*, 1 O'M. & H. 278; *Staleybridge case*, Id. 67; *Bolton case*, 2 O'M. & H 141; *East Peterboro case*, Hodg. 245; *Cornwall case*, Id. 547; *South Norfolk case*, Id. 660.

6. Accompanying a candidate in his canvass is not sufficient in itself to constitute agency: *Shrewsbury*, 2 O'M. & H. 36; *Harwich*, 3 O'M. & H. 69; *Salisbury*, 4 O'M. & H. 21.

7. Section 109 of The Dominion Elections Act, 1900, is new and goes far in advance of the former law as to treating voters at an election in omitting the element of corrupt intent, and should be strictly construed. Under it the providing or furnishing of refreshments or drink would not be an offence unless done at the expense of the candidate.

8. The treating of electors prior to and on polling day by an agent of the respondent, even when done on a liberal scale, will not be assumed to have been done with the corrupt intent necessary to make it an offence,

when the Court is satisfied that the agent was accustomed to keep at all times considerable quantities of liquors on hand and to supply them freely to others in the way of hospitality or as a matter of business, and there is no evidence to shew that the treating was done in order to influence a voter or voters: *Glengarry case*, Hodg. 1: *Brecon case*, 2 O'M. & H. 44: *East Elgin*, Hodg. 769: *Welland*, Id. 50.

The same rule applies to treating when done in compliance with a custom prevalent in the country without express evidence of some corrupt intent in so treating; also to the supplying of meals at a private house to electors who have come from a distance, in the absence of evidence that this was done for the purpose of influencing the election: *Rochester case*, 4 O'M. & H. 157; *Dundas case*, Hodg. 205; *London case*, Id. 214.

9. The taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, or the giving to a voter of a free pass or ticket by railway, boat or other conveyance, if unaccompanied by any condition or stipulation affecting the voter's action in reference to his vote is not a corrupt practice, and the onus is on the petitioner to prove that any railway tickets supplied and used had been paid for: *Berthier case*, 9 S.C.R. 102: *North Perth*, 20 S.C.R. 33: *Lisgar case*, 13 M.R. 478.

10. Where a charge is made of an offer, not accepted, of money to influence a voter, the evidence is required to be particularly clear and conclusive: *South Grey*, Hodg. 52: *Prescott*, 1 Ont. E.C. 88: *Northallerton*, 1 O'M. & H. 167.

The witness in this case, whom the judges considered to be honest and reliable, said first that the agent, Fisit, told him that the other side was poor "but if you come with us we have lots of money," and afterwards testified: "He said our side was poor and that I wanted money and if I wanted to go on their side they would give me some money."

Held, too indefinite and vague on which to base a finding of a corrupt offer.

The respondent was nominated at a meeting of delegates from different portions of the constituency and, at a public meeting, after the close of the convention, he stated that he expected all the delegates to help at the election, and that he looked for assistance not only from them, but from all supporters of the government.

Held, that these and other general remarks made by the respondent were not sufficient to constitute all his supporters his agents, but that the persons promoting his election from a central agency or committee room in Winnipeg recognized and visited by him and persons sent out from that agency should be deemed to be his agents for the purposes of the election.

In the following cases agency was held to have been sufficiently proved:—

Alex. Smith, who went to a polling place on election day to look after it, armed with authority to vote there as the respondent's agent.

Edward Jobin, who had been recognized by the central agency in Winnipeg.

Talbot, Bureau, and Ami, who came from outside the constituency and made Somerset their headquarters for the promotion of the respondent's election and acted openly there for about three weeks, and went about addressing public meetings for the respondent. Bureau had also been sent out by the Winnipeg agency to speak at a meeting, and the respondent had an important meeting with Bureau and Talbot from which it was reasonable to infer that he recognized them as working for him in their district.

Amede Fiset. This man canvassed in the constituency for ten days, was at a meeting at which Bureau spoke and Talbot and Ami were present, and he publicly thanked the people present for attending at his request.

The respondent having allowed the organization of the contest to go into the hands of persons as to whom he could not, or would not, give any information, and having failed to shew that he had made any serious effort to prevent illegal practices, he was refused any costs of his attendance or examination as a witness, but in other respects the petition was dismissed with costs.

Wilson and *Haney*, for petitioners. *Howell*, K.C., and *Cameron*, for respondent.

Book Reviews.

An essay on the principles of Circumstantial Evidence, illustrated by numerous cases, by the late William Wills, Esq., Justice of the Peace, edited by his son Sir Alfred Wills, Knt., one of His Majesty's Judges of the High Court of Justice. Fifth edition. London: Butterworth & Co., 12 Bell Yard, W.C., Law Publishers, 1902. Toronto: Canada Law Book Co.

These are the days of novels good, bad and indifferent, especially the two latter, but yet "truth is stranger than fiction, and the true tales which illustrate the legal propositions of the author are more interesting than most novelettes. Whilst it is not our mission to call the attention of the young lady reader of the present day, who devours novels with the voracity of a boa constrictor, to this most interesting book, there is some satisfaction in telling our readers about it. The first edition was published in 1838 by Mr. William Wills, J.P.; the present one is edited by his more widely known son Sir Alfred Wills. Whilst the latter gives to the former the principal share of any value which it may deserve, he has, as will be seen, largely added to that value, as well from the storehouse of his own experience as from a variety of other sources. He calls attention to the wholesale

appropriation of his father's work by a namesake at the Chicago Bar, and sascastically concludes with this reference to his piracy by saying: "I hope he will remember that this preface is as much at his disposal as any other part of the book." We strongly advise every one who desires interesting reading as well as sound law, to procure a copy of the book now before us.

The Law Quarterly Review, edited by Sir Frederick Pollock, Bart., D.C.L., LL.D.

The October number of this well-known review is up to its usual standard of excellence. The editor's notes on recent cases are as usual timely and suggestive criticisms upon the more important decisions of the quarter. The papers contained in this number are as follows: Executive and judicial functions in India; Some recent developments of the doctrine of *Collen* v. *Wright*, 8 E. & B. 647, which, as our readers will remember, deals with the question of contract by agency, the writer contending that the decision there arrived at is wholly unwarranted by any legal principle: English Borough Courts; the English law of defamation: Lawyers and the public, being the substance of a lecture delivered in New Zealand; The sources of international law, a learned article from the pen of the editor himself. The number concludes with the usual reviews and notices of new books.

The Yearly Supreme Court Practice, 1903, being the Judicature Acts, and Rules, 1873 to 1902, and other statutes and Orders relating to the practice of the Supreme Court, with the Appellate practice of the House of Lords. With practical notes by M. Muir Mackenzie, B.A., S. G. Lushington, M.A., B.C.L., and J. C. Fox, Master of the Supreme Court, assisted by A. C. McBarnet, B.A., and Archibald Read, B.A. In one volume. London: Butterworth & Co., 12 Bell Yard, Temple Bar, W.C., law publishers. 1903.

This work needs no notice at our hands. It is of course a necessity in every solicitor's office in the British Isles, and finds an appropriate and helpful place wherever British law prevails. Although our practice and procedure is not the same as that in England, there is such a general similarity, that "Yearly Practice" is of great value even here; and as the notes refer to all the English authorities, the practitioner is saved both time and labour.

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