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STATUTORY LIABILITY OF EMPLOYERS FOR DEFECTS IN THE CONDITION OF THEIR PLANT.

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1. Introductory remarks.—In this and in ensuing numbers of the CANADA LAW JOURNAL it is proposed to review the decisions respecting two of the principal provisions in the English Employers' Liability Act, and the various statutes, Colonial and American, in which its phraseology has been more or less closely copied (*a*). The collection of authorities in each of the articles to be published will be more complete than any which has hitherto been offered to the profession.

The provisions selected for discussion in the present issue are sec. 1, sub-sec. 1, and sec. 2, sub-secs. 1, 3, of the English Act, which correspond respectively to sec. 3, cl. 1, and sec. 6, cls. 1, 3, of the Ontario Act. They run as follows, the additions made in the Canadian statute to that of the mother country being indicated by the words enclosed in brackets, except as otherwise stated :—

Where [after the commencement of this Act] personal injury is caused to a workman, (1) By reason of any defect in the condition [or arrangement] of the ways, works, machinery [buildings or premises] or plant connected with, intended for or used in the business of the employer, ... the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.

Sec. 2. A workman [or his legal representatives, or any person entitled in case of his death], shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say: (1.) Under sub-section 1 of section 1 [that is clause 1, of section 3 of the Ontario Act], unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person *in the service of the employer, and* [The Ontario Act omits the words italicized] entrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery [building or premises] or plant were in proper condition. (3.) In any case

(*a*) Statutes similar to the English Act have been adopted in Ontario, British Columbia, Manitoba, Newfoundland, New South Wales, Victoria, Queensland, South Australia, Massachusetts, Alabama, Colorado and Indiana.

where the workman knew of the defect or negligence which caused his injury, and failed [without reasonable excuse] within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of his employer, unless he was aware that the employer or such superior already knew of the said defect or negligence. [Provided, however, that such workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect, negligence, act, or omission, which caused his injury, be deemed to have voluntarily incurred the risk of the injury.]

2. **Effect of these provisions, generally.**—The effect of these provisions, as a whole, is to give, under the circumstances specified, a statutory sanction to a doctrine which, so far as the common law is concerned, has been greatly restricted in England and the English Colonies by the well-known case of *Wilson* v. *Merry* (*a*), but which has been fully developed and is applied in all the American States—the doctrine namely, that the master is absolutely responsible for the proper discharge of certain duties, whether he undertakes to perform them in person, or employs an agent to perform them in his stead. In other words, the injured servant is given a right to recover damages in the cases enumerated, although the abnormal conditions which caused his injury may have been created or suffered to continue through the negligence of a fellow-servant (*b*). Hence, in order to establish the allegations of a complaint framed on the theory that the master is liable under this section, it is not necessary to shew that he was himself negligent (*c*).

So far as regards the character of the actual physical conditions which warrant the inference of culpability on the part of the

(*a*) (1868) L.R. 1 Sc. App. 326. As to the precise effect of this decision see a note in 51 L.R.A. pp. 57, 572, where the present writer has collected the cases which seem to justify the inference that the doctrine of vice-principalship was left untouched by the House of Lords, so far as regards the duty of the master to see that the instrumentalities of his business are reasonably safe and suitable at the time when they are first brought into use. It is clear, moreover, that a master cannot, by the employment of a delegate, escape liability for the non-performance of any duty which is imposed by statute. See *Groves* v. *Winborne* [1898] 2 Q.B. 402.

(*b*) See the remarks of the court in *Ackley* v. *Hart* (1888) 147 Mass. 573, 18 N.E. 416.

(*c*) *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N.E. 550. There the action was for personal injuries occasioned to the plaintiff, by the falling upon him of a bank of earth, which he was engaged in undermining by direction of the defendant's superintendent. Held, that the defendant was not entitled to a ruling that "the plaintiff could not recover under the second count of his declaration, as there was no evidence that there was any negligence on the part of the defendant."

immediate actor, whether he be the master himself or an employé, the evidential pre-requisites to establishing a right to indemnity are essentially the same under the statutes as at common law. See secs. 8, 9, post.

3. Master not liable, unless the defect alleged was the proximate cause of the injury.—Upon the general principles of the law of negligence, as well as by the express terms of the statutes, the injured servant cannot maintain an action unless he shews that the defect alleged was the proximate cause of his injury (*a*). Thus he cannot recover if his injuries are due to an occurrence which was a mere accident (*b*), nor if the negligence of a fellow-servant in the use of the defective appliance was the actual efficient cause of the injury (*c*), nor if the defect in question would not have caused any injury, if he had not himself been guilty of negligence in dealing with the defective appliance (*d*).

But proof that a defect for the existence of which the master was responsible was the sole proximate cause of the injury is not a condition precedent to recovery. It is only requisite to shew that it was one of the efficient causes (*e*).

(*a*) *Southern R.W. Co.* v. *Guyton* (1898) 122 Ala. 231.

(*b*) *McManus* v. *Hay* (1882) 9 Sc. Sess. Cas. (4th ser.) 425. A freight brakeman cannot recover for personal injuries alleged to have been caused by defects in a brake which he was trying to let loose, causing the brake to stick or be retarded in its revolutions, and throwing him from the top of a box car, in the absence of proof that the brake was defective, or that his falling was not due to his slipping or to some other cause wholly unconnected with any defect of the brake. *Louisville & N. R. Co.* v. *Binion* (1892) 98 Ala. 570, 14 Sc. 619. In *Hamilton* v. *Groesbeck* (1890) 18 Ont. App. 437, aff'g. 19 Ont. R. 76, the Court of Appeal held the action not maintainable for the reason that the proximate cause of the injury was not the unguarded condition of the saw by which the pliantiff was hurt, but the fact that he tripped over a pile of staves.

(*c*) The fact that a defect existed, and that the plaintiff had to be assigned to the work of remedying it is not the proximate cause of an injury received by him in consequence of a fellow servant negligently setting machinery in motion while he is engaged in the work. *Mackay* v. *Watson* (1897) 24 Sc. Sess. Cas. (4th ser.) 383.

(*d*) A defect in the machinery is not the cause of an injury received by a workman in consequence of his using it in an unsafe manner when he knew how to use it with safety to himself. *Martin* v. *Connah's Quay, etc., Co.* (1885) 33 W.R. 216, where the plaintiff knew that a car brake was bent and did not see that it was in its proper position before signalling to the engineer to move the car. See also *Milligan* v. *M'Alpine*, as stated in sec. 9, note (*a*), post

(*e*) A plaintiff is entitled to retain a verdict in his favour where the jury find that the injury was caused by a defect in the plant and also by the negligence of a fellow servant. *Bean* v. *Harper* (1892) 18 Vict. L.R. 388. For common law cases to the same effect, see the writer's note in 54 L.R A., pp. 167, et seq.

4. What instrumentalities are covered by the terms "ways," etc.—The words used to designate the instrumentalities for the defects of which the master is made responsible are not precisely the same in the statutes now under discussion. In all of them the terms "ways, works, and machinery" are found. But the expression "plant," which occurs in the English Act, as well as in those of the various British Colonies and of Alabama, is omitted in the statutes of Massachusetts and Colorado. The list of instrumentalities enumerated in the English Act is enlarged in the Ontario Act by the addition of the words "buildings and premises" and in the Indiana Act by the addition of the word "tools." That these variations of phraseology imply corresponding differences in the total extent of the master's liability cannot be affirmed in view of the decisions as they stand, though possibly some case may hereafter arise in which they may be found material.

(*a*) *Two or more descriptive terms used in combination.*—In the cases where the court in affirming or denying the defendant's liability has coupled together two or more of the instrumentalities specified in the statute under review, it is impossible to say with certainty to which designation it was intended to refer the instrumentality which caused the injury (*a*).

(*a*) A defect in the "ways, works, machinery or plant," enumerated in the Alabama statute, have been held to exist where the supply-pipe of a water-tank extended over a railroad track so as to knock a brakeman off the top of a freight car. *East Tennessee V. & G.R. Co.* v. *Thompson* (1891) 94 Ala. 636, 10 So. 280. In an Alabama case it has been held that a rope used for lowering timber in the construction of a trestle along a railroad track, by means of which heavy timbers are put into their places, is, in no sense, a part of the ways, works, machinery, or plant of a railroad company. *Southern Ry. Co.* v. *Moore* (1901) 29 So. 659. The court seems to have assumed that the authority of the two cases cited in sub-s. (*d*), infra, declaring such an appliance not to be "machinery," was conclusive against the right of the servant to maintain the action. But there is no apparent reason why the rope in question should not be regarded as a part of the "plant." The shorter formula "ways, works and machinery," which occurs in the Massachusetts statute, has been construed in several cases. It includes a truck used by a railroad company as a part of the appliances of the repair shop, consisting of axles, wheels and a frame, all fastened together and fitted to the tracks. *Gunn* v. *New York N. H. & H. R. Co* (1898) 171 Mass. 417; 50 N.E. 1031. A temporary staging erected by the side of a woodpile, to enable the workmen to place wood thereon and pile it higher, and which is taken down and put up from time to time in different places and intended to be used from four days to a week at a time in each place, is a part of the owner's ways, works and machinery while in use at a particular place. *Prendible* v. *Connecticut River Mfg. Co* (1893) 160 Mass. 131; 35 N.E. 675. [Held to be competent for the jury to find this]. A temporary derrick at a stone yard, erected to move stones from cars to where stonecutters, who had nothing to do with setting it up, could use them, is a part of the "ways, works and machinery" connected with the yard. *McMahon* v. *McHale* (1899) 54 N.E. 854, 174 Mass. 320. [Considered to be a part of the fitting of the stone yard rather than an appliance to be put together and set up and moved from place to place by the workmen who were

(*b*) "*Ways.*"—In its ordinary sense this term may be regarded as embracing any part of the master's premises over which the servants pass on foot or otherwise, from one point to another (*b*). To constitute a "way" within the purview of the Act, it is not necessary that it should be marked out by metes and bounds or by habitual user (*c*).

In a more special sense the term signifies the line or course along which a thing which is being worked on or with is caused to move (*d*).

The "ways" with which the cases deal are usually horizontal or sloping. But presumably the term also covers such instrumentalities as the vertical shaft of a mine or of an elevator (*e*).

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using it. See sec. 10, post.] Loaded freight cars received from other lines form a part of the "works and machinery of the receiving company. *Bowers* v. *Connecticut R. Co.* (1884) 162 Mass. 312, 38 N.E. 508. See also next section.

(*b*) "The course which a workman would in ordinary circumstances take in order to go from one part of a shop where part of the business is done to another part where business is done, when his duties require him to go, is a 'way.'" *Willetts* v. *Watt* (C.A.) [1892] 2 Q.B. 92, per Lord Esher. Compare the statement that the word applies to such places as a workman or servant is called upon to pass over in the performance of his duty. *Caldwell* v. *Mills* (1893) 24 Ont. R. 462, holding that a plank put down to serve as a fulcrum for a lever, if it is placed in such a position that servants have to pass over it in the course of their duties, was a "way." For specific instances of "defects" in what were *conceded* to be "ways," see sec. 7 (a) post.

(*c*) *Willetts* v. *Watt* (C.A.) [1892] 2 Q.B.D. 92, Fry, L.J., said (p. 99):—"In determining what is a 'way' we should, I think, look to the fact that workmen have to go through places where sometimes there is an open space, while at other times what was an open space is covered with stores or other things used in the business. We should consider, further, the case of an open yard where the whole or only a small part might be used at any time according as there were a great many or only a few workmen going through it. I think that these and other considerations show that we should answer in the negative the question whether metes and bounds are necessary to a 'way' under the statute. There are many ways which persons have a right to use that are not defined by any physical boundary, and to hold that such a boundary is necessary would be to withdraw from the protection given by the statute a large number of places used by workmen in which the mischief at which the statute was aimed might arise. For the purpose of this case, I should say that wherever there is a large space connected with or used in the business of the employer, over which the workmen pass in the course of their employment, when that space is for the time being vacant, and is so used, it is a 'way' within the meaning of the statute."

(*d*) The most familiar instance of such a way is a railway track. See *Kansas City, &c. R. Co.* v. *Burton* (1892) 97 Ala. 240. 12 So. 88; *Louisville &c. R. Co.* v. *Bouldin* (1895) 110 Ala. 185; *McQuade* v. *Dixon* (1887) 14 Sc. Sess. Cas. (4th Ser.) 1039. A roadway of iron plates along which loads are conveyed in a car was held to be a way in *McGiffin* v. *Palmers &c. Co.* (1882) 10 L.R.Q.B.D. 1. Doubtless the term would also be held to include the ways in a ship-building yard or the skids used for the transfer of heavy articles, such as logs, barrels, etc., or the posts between which the hammer of a pile-driver moves up and down.

(*e*) In *Peagram* v. *Dixon* (1886) 55 L.Q.B.B. 447, it was apparently assumed that a lift-well in a building under construction becomes a "way" when workmen placed ladders in it for the purpose of obtaining access to the upper floors.

(*c*) "*Works.*"—See also sec. 5 (b) and (c), post. In one well-known case this word seems to be regarded as connotative of the same idea as "system" (*ee*).

(*d*) "*Machinery.*"—The term "machine" has been defined as "every mechanical device or combination of mechanical powers and devices to perform some function, and produce a certain effect or result" (*f*). Nor does this word include a steel bar used to align the track on a railway bridge (*g*). Apparently the action might have been maintained in both these cases if the pleader had alleged defects in the "plant."

For specific examples of appliances viewed as "machinery," the point actually involved being whether there was a "defect," see sec. 7 (b), post.

(*e*) "*Plant.*"—(See also under sec. 5, post.) This term includes "whatever apparatus is used by a business man for carrying on his business—not his stock in trade which he buys or makes for sale—but all goods and chattels fixed or movable, live or dead, which he keeps for permanent employment in his business" (*h*). For examples of defective instrumentalities assumed to come within this definition, see sec. 7 (a), post.

(*ee*) *Smith* v. *Baker* [1891] A.C. 325. There Lord Watson, in commenting on the finding of the jury that the manner in which the apparatus in question was used betokened negligence, first referred to the method adopted as being a "defective system," (p. 353), and in a later passage of his opinion (p. 354), remarked that the evidence brought the case within the operation of the rule, that a dangerous arrangement of machinery and tackle constitutes a "defect" in the condition of the works.

(*f*) *Coming* v. *Burden* (1853) 15 How. U.S. 267. [Patent case]. Such a definition obviously excludes such an appliance as a hammer, disconnected from other mechanical appliances and operated only by muscular strength. *Georgia Pac R. Co.* v. *Brooks* (1887) 84 Ala. 138, 4 So. 289. [Scale flying from an iron rail when struck by a hammer wielded by a fellow-servant injured]. It would seem that, if the rail was in such a condition as to render such an accident probable, the defendant should have been held liable as for a defect in the "plant" or in the "works."

(*g*) *Clements* v. *Alabama &c. R. Co.* (Ala. 1900) 8 So. 643. The reason assigned was that the bar was "disconnected from any other mechanical appliances, and operated by muscular strength directly applied."

(*h*) *Yarmouth* v. *France* (1887) 19 Q.B.D. 647, per Lindley, L.J., who thus disposed of the contention that a horse was not a part of the "plant":—"It is suggested that nothing that is animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses horses and carts, wagons, or drays, seem to me to form the most material part of the plant; they are the materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees; and for this purpose he must use horses and carts or wagons. They are all necessary for the carrying on of the business. It cannot for a moment be contended that

5. Significance of the qualifying phrase, "connected with or used in the business of the employer."—(*a*) *Instrumentalities temporarily used by the defendant's servants in the transaction of his business.*—The mere fact that the defendant did not own the defective instrumentality which caused the injury will not protect him if, as a matter of fact, it was being used in his business at the time of the accident (*a*). Whether there was such use within the meaning of the statutes is determined with reference to various considerations.

In some cases the essential question is whether or not he himself or his agent had, at the time when the injury was received, adopted the instrumentality as a part of the plant by means of which the plaintiff was expected to perform his duties. If such adoption is shewn, he is considered to have assumed, as regards this temporary addition to his plant, a liability which, it would seem, is of precisely the same character and extent as that to which he is subject as regards his own property (*b*). Manifestly no adoption within the meaning of this doctrine can be inferred, where the plaintiff or his fellow-workmen took and made use of the defective instrumentality without any authority, either express or implied, from the employer himself or his agent. Under such circumstances no liability can be predicated from the fact that there was a defect and that a proper inspection would have disclosed it (*c*)

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the carts and wagons are not 'plant.' Can it be said that the horses, without which the carts and wagons would be useless, are not? To same effect, see *Haston* v. *Edinburgh &c. Co.* (1887) 14 Sc. Sess. Cas. (4th Ser.) 621; *Fraser* v. *Hood* (1897) 15 Ct. of Sess. Cas. (4th Ser.) 178.

(*a*) *Coffee* v. *New York &c. R. Co.* (1891) 155 Mass. 21; *Engel* v. *New York &c. R. Co.* (1893) 160 Mass. 260. *Louisville &c. R. Co.* v. *Davis* (Ala. 1890) 80 So. 552.

(*b*) Lack of ventilation of the hold of a vessel belonging to a navigation company in which coal is shipped by contractors to supply coal to a railway at another port where such contractors have to unload the coal, in consequence of which one of their employés is injured by an explosion of gas accumulating in the hold, is a defect in the plant of such contractors. *Carter* v. *Clarke* (Q.B. 1898) 78 L.T.N.S. 76. It has been laid down, without qualification, that a defect in a cart hired temporarily to carry a load is not a defect in the plant. *Allmarch* v. *Walker* (Q.B.D. 1885) 78 L.T. Journ. 391. But this ruling seems to be inconsistent with the one last cited, and to be unjustifiable in general principles. The report is so meagre that it is impossible to say precisely what the standpoint of the court may have been.

(*c*) A verdict for the plaintiff has been set aside where the injury caused by the giving way of a ladder which the workmen themselves had taken and used simply because they found it lying on the premises where they were sent to work, and which had not been borrowed, so as to become a part of the plant, by any

The essential basis of other decisions is that the words of the provision now under discussion imply that "the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right" (*d*). A corollary of this doctrine is that,

person having authority to make it a part of such plant. *Jones* v. *Burford* (Q.B.D. 1884) 1 Times L.R. 137. A complaint of which the gravamen is that the plant was defective is not sustained by evidence shewing that the plaintiff, a painter in the employ of a firm of contractors doing work on a Government building, asked his foreman for a ladder; that, being referred by the foreman to the Government official in charge of the work, he was told he might have a ladder belonging to the Government; and that the ladder which he thus obtained leave to use was so defective that it broke under him. *Perry* v. *Brass* (Q.B.D. 1889) 5 Times L.R. 253. The court relied mainly on the fact that the ladder did not belong to the defendants, but Denman, J., also laid stress on the fact that their foreman knew nothing about it. The correctness of this decision under the particular facts in evidence seems somewhat dubious, as it may fairly be argued that the permission of a foreman to use whatever appliance a designated person may supply should have the effect of making the appliance actually selected a part of the plant.

(*d*) *Engel* v. *New York &c. R. Co.* (1893) 22 L.R.A. 283, 35 N.E. 547, 160 Mass. 260, holding that a railroad track owned, maintained and repaired by a manufacturing company, and used by a railroad company only under a licence or invitation to deliver freight under a contract, is not a part of the railroad company's "ways." *Engel* v. *New York, P. & B. R. Co.* (1893) 22 L.R.A. 283, 35 N.E. 547, 160 Mass. 260. In delivering the opinion of the majority of the court, Holmes, J., said:—"We think that neither the language of the statute nor good sense would permit us to hold an employer liable under the act for defects which he cannot help, in a place out of his control, to which his employés once in a while may be called for a few minutes." A railroad company that only goes upon the track of another under a licence to take cars therefrom, and has no control over it, is not liable for an injury to an employé caused by its defective character. *Trask* v. *Old Colony R. Co.* (1892) 156 Mass. 298, 34 N.E. 6. An employé of a gas company hired to remove gas pipe from a trench dug by authority of the city has no right to expect his employer to shore the sides of the trench or make it safer than it was, for he must be taken to know that his employer had no control over it. *Hughes* v. *Malden & M. Gaslight Co.*, 168 Mass. 395, 47 N.E. 125. The location of the tracks of a street car company being determined by the municipal authorities, it cannot be charged with failure to provide a safe place for its conductor, for the reason that there is a tree close to the side of the car, unless it is shewn that the company had a right to remove the tree. *Hall* v. *Wakefield & S. St. Ry. Co.*, 59 N.E. 668. The want of a fence at the top of a declivity at one side of a public street used by the employer as an approach to his place of business, is not a defect for which he can be held liable. *Strude* v. *Diamond Glass Co.* (1895) 26 Ont. Rep. 270, (following *Engel* v. *New York &c. R. Co.*, supra). Discussing the question whether the defective condition of a public street which was used by the employer in connection with his business was a defect in a "way used in the business," within the meaning of the Ontario Employers' Liability Act, sec. 3, sub-s. 1, Boyd, C., said:—"Light is thrown upon the scope of these words by sec. 6, sub-s. 1, which provides that the workman shall not be able to recover unless the defect arose from or had not been remedied owing to the negligence of the employer. That means some defect on his premises, or on a place over which he had control that could be made right by the employer. Such is not the case in regard to a public street upon which the employer had no right to construct a fence or barrier as is here suggested. One part of the street is higher than the other, but it is the business of the corporation of the city to deal with the alleged defect in the interests of the public, or be exposed to action by injured persons." A coalmaster is not liable to a ser-

unless there is something to put him on inquiry, a master is not under any active duty of inspection with regard to an instrumentality not under his control (*e*).

The cases involving the liability of a railway company for defects in a car received from another road have been made to turn upon the question whether they were loaded or empty. Loaded cars, it is said, form a part of the works and machinery of the receiving company, inasmuch as it is not bound to use them in its train if on inspection they are found to be unsafe (*f*). But an isolated empty car on its way to be returned to its owner is a part of the ways, works, or machinery connected with or used in the business of a railroad company which received it loaded (*g*). It

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vant for injuries caused by defects in waggons sent by a railway company to be loaded with coal for carriage, and left at the pit in charge of his servants. Such waggons are not a part of the coalmaster's plant and, even if they are, he is not, under such circumstances, under the duty of inspecting them before allowing the servants to use them. *Robinson* v. *Watson* (1892) 20 Sc. Sess. Cas. (4th ser.) 144. An auctioneer selling goods on the premises of a stranger is not responsible to his servants for the sufficiency of the appliances for bringing forward and removing the goods which are to be sold. *Nelson* v. *Scott* (1892) 19 Sc. Sess. Cas. 425.

(*e*) The failure of a gas company to ask how long a trench dug by the city has been dug, and to tell its employé the length of time, before sending such employé into same to remove gas pipe therefrom, does not render it liable for an injury to the employé caused by the caving in of the trench. *Hughes* v. *Malden & M. Gaslight Co.* (1897) 168 Mass. 395, 47 N.E. 125. The plaintiff, said the court, "had a right to expect that, if the defendant knew of any danger which the plaintiff did not know and ought not to be assumed to know, it would inform him. But no such knowledge on the part of the defendant was shewn. It does not appear to have known anything except what was visible to the eye, or to have been able or bound to infer from what was visible anything which the plaintiff with his experience was not equally able to infer. What more could it have done? There is no reason to suppose that inspection would have disclosed anything beyond the visible facts, and therefore it is not necessary to consider whether the duty of inspection existing with regard to cars received from connecting lines to be forwarded on a railroad would be held to exist in such a case as this." In the absence of any allegation of particular circumstances which would impose the duty of inspecting the fittings of a ship in which a stevedore or other person who has contracted to do work, his servant cannot maintain an action against him for an injury caused by defects in these fittings. *Simpson* v. *Paton* (1896) 23 Sc. Sess. Cas. (4th ser.) 590. In *McLachlan* v. *S. S. Peverel Co.* (1896) 23 Sc. Sess. Cas. (4th ser.) 753, a complaint based on existence of duty to inspect, was held to be demurrable. Lord Young dissented on the ground that the stevedore was not wholly exempt from the duty of supervision and declined to assent to the proposition that there would be no liability if things are wrong, and by proper supervision, without requiring anything out of the way on his part he would have discovered that they were in that condition. See also *Robinson* v. *Watson* (1892) 20 Sc. Sess. Cas. (4th ser.) 144, as stated supra.

(*f*) *Bowers* v. *Connecticut R. Co.* (1894) 162 Mass. 312, 38 N.E. 508, settling this point which was left undecided in the next case cited.

(*g*) *Coffee* v. *New York, N.H. & H.R. Co.* (1891) 155 Mass. 21, 28 N.E. 1128. The court said:—"By the terms 'ways, works or machinery connected with or used in the business of the employer,' we understand something in the place, or means, appliances, or instrumentalities provided by the employer, for doing or

is, however, not apparent why the right of rejection which undoubtedly exists in this instance as well as in the former should not create a similar obligation. The distinction taken and its rationale are, it is submitted, unsatisfactory. In Massachussets it is no longer of importance since the passage of the Act mentioned in sec. 10, note (*d*), post.

In one case the principle is applied that a "defect" within the meaning of these statutes exists, where the physical conditions resulting from a use to which the servant's employer permits a stranger to put his premises are of such a nature that negligence would have been a warrantable inference if they had been created by the act of the employer himself or his agent (*gg*).

As the decisions holding a master not to be liable for an injury due to a defect in an instrumentality belonging to another person may be regarded as being essentially merely declarations that the wrong party was being sued, there would, at first sight, seem to be no serious practical objection to such an application of the general principle that responsibility is a juridical incident of the power of control and does not exist apart from such power. But the extremely nebulous condition of the law defining the nature and extent of a stranger's liability to the servants of one with whom he has business relations, involving the use of, or contact with, his property (*h*), renders it wholly unwarrantable to assume that, in all the cases in which the defendant will be absolved for the reason that he had no control over the defective instrumentality, the plaintiff will be able to maintain an action against the actual owner of that instrumentality. It is manifest, therefore, that the employment of this test to determine the applicability of these statutes will sometimes result in leaving the injured servant entirely remediless. Under these circumstances, the doctrine that the possession or non-possession of the power of control is the

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carrying on the work which is to be done. The use of other words may not make the meaning clearer, but it would seem that there must be a defect in something which can in some sense be said to be provided by the employer."

(*gg*) *New York &c. R.Co.* v. *O'Leary* (1899) 93 Fed. 737, 35 C.C.A. 562, where a railway company which permitted a guy to be stretched by a third person across its tracks, at a point where the volume of business required great diligence and care as to the condition of the track was held liable for an injury to an employé, caused by failure to see that the guy is placed at a particular height to avoid such injury, [construing the Massachusetts statute].

(*h*) See the articles by the present writer in THE CANADA LAW JOURNAL, vol. 36, pp. 178, et seq., and in 46 L.R.A. pp. 33, et seq.

main differentiating factor in cases in which the existence or absence of authority to use the defective instrumentality is not involved, as one of the determinant elements, deserves to be somewhat closely scrutinized.

It is submitted that the clause in question may, upon a perfectly reasonable construction, be made to comprehend instrumentalities over which the employer has no control. The opposite contention would doubtless be irresistible if the failure to "remedy" defects were mentioned as the sole ground of liability. But the declaration of an alternative liability for the negligent failure to "discover" defects seems to be hardly susceptible of any other interpretation than that it was intended to extend the employer's responsibility beyond the cases in which the right to apply a remedy may be predicated. Such a declaration may fairly be regarded as a recognition of the principle that the application of a remedy is neither the only duty which the law implies, nor the only method by which the master can free himself from the imputation of negligence. On the one hand, where it is in his power to apply a remedy to the defect thus actually or constructively known to him, it may conceivably be and in fact frequently is, his duty to warn his servants as to the existence of the defect or to discontinue the use of the defective instrumentality until it has been restored to a safe condition. On the other hand, where it is not in his power to apply a remedy, the duties of warning or discontinuance become imperative, and by performing them he fully discharges his obligations to his servants. It is clear, therefore, that there are certain obligations to which he may be subject in respect to instrumentalities which are out of his control, and that the negligence which consists in the failure to discover a defect cannot be dissociated from the negligence which consists in the breach of those obligations, for the reason that they arise as soon as the defect is known, and that it is presumed to be known wherever it would have been known if due care had been exercised. It is submitted, therefore, that the balance of probability is in favour of the inference that the legislature intended to create a responsibility for injuries due to instrumentalities not controlled by the master, provided they are "connected with his business," and that, upon

the true construction of the statute, the absence of the power of control merely affects the extent of that responsibility (*h*).

The Ontario case in which the master was held not to be liable under the statute for the want of a fence on a public street which was used as an approach to the master's place of business (*i*) seems to have been improperly referred to the analogy of the other cases cited in this section. The true ground upon which a servant is precluded from maintaining an action against his master

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(*h*) Some of the unsatisfactory consequences of the doctrine that the statute does not apply to cases where there is no power of control are pointed out in the dissenting opinion of Knowlton, J., in *Engle* v. *New York &c. R. Co.* (1893) 160 Mass. 260.—"The employé finds a track of this kind used like other side tracks belonging to the corporation, adapted to the convenient transaction of its freighting business. Ordinarily he has no means of knowing whether the track is owned and maintained by the railroad corporation or by the manufacturer whose freight is brought over it. All he can see or know is that it is connected with and used in the business of the corporation in delivering freight. Whether an additional price is paid for the transportation of its cars or of the cars of other railroads over that track, he does not know, nor is it important for him to know. It is a place specially fitted for the work of his employer, on which his employer sets him at work, and in which the employer presumably has rights for the time being. It ought to make no difference under the statute how the employer procures the ways, works, or machinery connected with and used in his business, or by what kind of title he holds them. So long as they are connected with his business and used in it, it is his duty to have them safe, so that his employés may not be unnecessarily exposed to danger. If another owns and furnishes them, and agrees to keep them safe, it is his duty, as between him and his employé, to see that the owner properly does what he agrees to do. It is a general rule of the common law that a railroad corporation is liable for an injury to a passenger, or for loss of freight arising from a defect in a track of another corporation over which it runs its cars, as if it owned the track. As between the two corporations, the only duty to maintain the track in repair under their contract may be upon the owner of the road, but as between the first mentioned corporation and a passenger or owner of freight, it is the duty of the carrier to have the track safe, whether it owns it or hires it. The duty of a railroad corporation to furnish for its employés safe tracks, cars, locomotive engines, and other machinery, tools, and appliances with which its business is to be carried on, is similar in kind to its duty to passengers in these respects, although the degree of care required is less. In either case, its duty is the same when the tracks, cars, and engines are hired, or used under a license from others, as when they are owned by the employer. The doctrine contended for by the defendant, as I understand it, comes to this. If a manufacturer, instead of owning the ways, works, and machinery necessary to be used in his business, arranges with another person who owns a manufacturing establishment to furnish it for his use and to keep it constantly in good condition, and if one of his employés is instantly killed by a defect negligently suffered to be in the ways, works or machinery which he is using under his arrangement, he will not be liable under the statute, because the ways, works and machinery are not his. The owner will not be liable under the statute for he is a stranger to the manufacturing business carried on there, and the person killed is not his employé. Neither the employer nor the owner of the establishment will be liable at the common law, for the common law permits no recovery for a death resulting from negligence. The widow and children of the deceased employé will therefore be left remediless. It seems to me that such a construction of the statute tends to defeat the purpose of the Legislature."

(*i*) See note (d) supra.

under the circumstances there in evidence is that alluded to in the opinion, viz., so far as regards his right of recovery for injuries which are due simply to the manner in which streets are laid out, graded, and protected, he is in the same position as any other member of the public. His remedy, if any, must be sought from the municipal body which is responsible for the creation and continuance of those conditions.

(*b*) *Structures &c., in course of erection or demolition.*—According to the most recent of the English authorities, these statutes should be so construed as to enable a servant of a contractor to recover for injuries due to abnormally dangerous conditions in the substance of a building which is in course of erection or demolition by that contractor himself. The broad principle relied upon was that premises which are in the possession of a person for the purposes of his business are to be regarded as the "works" of such person so long as he is carrying on his business there (*j*). The contention that the case of *Howe* v. *Finch* (see following sub-section), was a controlling precedent against the plaintiff was easily disposed of on the ground that the employer who was sued there was the owner, not the builder of the premises. But, singularly enough, no reference was made to the cases cited in the subjoined note, which are not distinguishable on this ground, and are directly opposed to the conclusion arrived at. The conflict of authority thus disclosed can now be adjusted in England only by a decision of the Court of Appeal (*k*).

(*j*) *Brannigan* v. *Robinson* (1892) 1 Q.B. 344, [house was being pulled down]. The doctrine of this case is in harmony with two other decisions, though this particular point was not directly raised. In *Moore* v. *Gimson* (1889) 58 L.J.Q.B. 160, an insecure wall left standing on premises where there had been a fire seems to be regarded as a part of the works of a party who took a contract for the reinstatement of the building destroyed and decided against the plaintiff on the ground that there was no knowledge, actual or constructive, of the conditions. Compare *Booker* v. *Higgs* (1887) 3 Times L.R. 618, where a wall fell on the servant of a person who, as incident to certain work on the premises, was making a hole through it. Similarly it has been held in Ontario that a railway used by contractors engaged in constructing an extension of the line is a part of their plant while the work is going on. *Romburgh* v. *Balch* (1900) 27 Ont. App. 32.

(*k*) In one case it was held that no action lay for an injury caused by the negligence of a co-servant in throwing rubbish down a lift-well of a building under construction through which, by means of ladders, the workmen were obliged to get access to the upper floors, this result not being affected by the fact that the master had not taken precautions to prevent such accident by warning the workmen to cease throwing things down, when it became necessary to use the well as a passage for the workmen. *Peagram* v. *Dixon* (1886) 55 L.J.Q.B. 447, 2 Times L.R. 603. In another a contractor was held not to be liable for maintaining an

In Massachusetts the servant's right to maintain an action under such circumstances has been uniformly denied (*l*).

(*c*) *Instrumentalities not yet brought into use or disused.*—The words of the statute are declared to be applicable only to ways, etc., which are "existing and completed," and not to those which are partly finished and not yet used for the purposes of the employer's business (*m*). Nor does any action lie for defects in a machine which has been discarded, as unfit for use, and is, at the time it causes the injury, being removed from the premises (*n*).

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unusually large well hole in the staircase of a building under construction, through which a brick fell on the plaintiff from an upper story. *Conway* v. *Clemence* (Q.B.D. 1885) 2 Times L.R. 80. In another a contractor for the brickwork on an unfinished house was held not liable for injuries caused by the collapse of a staircase erected shortly before by another contractor as the permanent staircase of the house, as he was entitled to rely on the sufficiency of the structure without examination. *McInully* v. *Primrose* (1897) 24 Sc. Sess. Cas. (4th Ser.) 442.

(*l*) It is held that contractors by setting a servant to work on the premises of a third person where there are movable steps leading into a cellar, going down which the servant was injured, cannot be said to adopt the steps as a way used in their business. *Regina* v. *Donovan* (1893) 159 Mass. 1, 33 N.E. 702. Effect of case, as stated in *Lynch* v. *Allyn*, infra.—Injury was caused by the steps falling. So a servant of a contractor engaged in grading the land of a third person cannot recover on the theory that the liability of a bank of earth to fall, when undermined, unless it is properly shored up, is a "defect" within the statute, the descriptive words being applicable to "ways, &c., of a permanent character, such as are connected with or used in an employer's business." *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N.E. 550. So it is held that a building in process of construction is not "ways, works or machinery connected with or used in the business" of a subcontractor helping to build it, so as to render a hole cut in the floor by another subcontractor a defect in "ways, works and machinery." *Beique* v. *Hosmer* (1897) 169 Mass. 541, 48 N.E. 338. So a plumber is not liable to an employé injured by the fall of ladders and stagings leading from one floor to another of a building in process of construction, where he neither constructed, managed, nor controlled such ladders and stagings. *Riley* v. *Tucker* (Mass. 1901) 60 N.E. 484. In *Lynch* v. *Allyn*, supra, the court remarked that there is a conflict between *Brannigan* v. *Robinson*, supra, and *Howe* v. *Finch*, supra. But this is not necessarily so. It is quite possible, without any inconsistency, to take the view that a wall is a part of the works of the person who has it under his control for the purpose of erecting it, and at the same time not a portion of the works of the person who intends to use it in his business when it is completed. It would be going too far to say that an instrumentality can never be a part of the works of two separate employers at the same time, but the mere statement of the situation presented by cases of this type shews that the user by the owner of the structure and the user by the contractor for its erection are successive, and mutually exclusive. It is, therefore, possible, to say the least, that the legal quality of the structure may be different according as regard be had to the servants of the owner or to the servants of the contractor.

(*m*) *Howe* v. *Finch* (1886) 17 Q.B.D. 187. [Where a wall in course of erection fell on a plumber in the defendants' employ].

(*n*) *Thompson* v. *City Glass &c. Co.* (K.B. 1901) 17 Times L.R. 594. [A portion of the machine fell on the plaintiff]. The case was deemed to be the converse of *Howe* v. *Finch*, supra.

The present writer ventures to express the opinion that all the cases cited in the last two sub-sections, except *Brannigan* v. *Robinson*, are based upon a narrow and technical construction of the statutes, and that the circumstances under which the right of recovery was denied were fairly within the spirit, if not the letter, of the language used by the legislatures.

6. What constitutes a "defect."—Wherever an instrumentality is "not in a proper condition for the purpose for which it was applied," there is a "defect" in its condition within the meaning of the Act (*a*). If the whole arrangement of a machine is defective for the purpose for which it is applied there is a defect so as to bring it within the Act, although each part may be sufficient (*b*). It follows, therefore, that, whenever there is such unsuitableness for the work intended to be done and actually done, the liability contemplated by the statute arises, although the appliance is perfect of its kind and in good repair and suitable for other kinds of work. In such a case the employer is in fault because he has furnished appliances for a use for which they are unsuitable, and in effect is so ordering and carrying on his work that, without fault of the ordinary workman, the natural consequences will be

(*a*) Lord Coleridge, in *Heske* v. *Samuelson* (1883) 12 Q.B.D. 30. [Approved in *Cripps* v. *Judge* (C.A. 1884) 13 Q.B.D. 583]. Lindley, L.J., in *Yarmouth* v. *France* (1887) 19 Q.B.D. 647. "I take defect to include anything which renders the plant etc. unfit for the use for which it is intended, when used in a reasonable way and with reasonable care." The word "defect" implies an inherent defect, a deficiency in something essential to the proper use of the apparatus for the purpose for which it is to be used. *Hamilton* v. *Gresbeck* (1890) 19 Ont. R. 76. Compare also the passage from the majority opinion in *Walsh* v. *Whitely*, as quoted infra "A defect in the condition of the way, or works, or machinery, or plant means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases, I should say that the way itself is not defective, but the condition of the way, by reason of the water which is incorporated with it, or from its being in a freezing state, is affected." Per Stephen, J., in *McGiffen* v. *Palmers &c. Co.* (1882) 10 Q.B.D. 5.

(*b*) *Cripps* v. *Judge* (C.A. 1884) 13 Q.B.D. 583, per Brett, M.R. The words "defect in the arrangement," used only in the Acts of Ontario and British Columbia, means the element of danger arising from the position, and collocation of machinery in itself perfectly sound and well fitted for the purpose for which it is to be used. *McCloghertv* v. *Gale Mfg. Co.* (1892) 19 Ont. App. 117, per Osler, J.A. (p. 121).

that the appliance will be used for purposes for which it is unsuitable (*c*).

A defect importing negligence on the master's part may properly be found to exist, where the appliance in question was so constructed or arranged that it was likely to cause undue hazard to a person exercising that degree of care which might be expected, whether regard be had to the special circumstances under which the appliance was to be put into operation (*d*), or to the age, skill, and experience of the particular employé who was to operate it (*e*).

The fact that the instrumentality which caused the injury was less safe than one which was used by a large proportion, or by the majority of other employers in the same business is probably regarded by all courts as an element which entitles the servant to go to the jury on the question, whether it was defective (*ee*). (As

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(*c*) *Geloneck* v. *Dean &c. Co.* (1896) 165 Mass. 202, 43 N.E. 85. Whether an appliance was properly constructed in reference to the use for which it was intended is usually a question for the jury. *Prendible* v. *Connecticut &c. Co.* (1893) 160 Mass. 131.

(*d*) A sliding door intended to be closed in case of fire is defective unless it can be manipulated with reasonable safety by persons who would naturally be acting as hurriedly as would be the case under such circumstances. *Johnson* v. *Mitchell* (Sc. Sess. Cas. 1885) 22 Sc. L. Rep. 698.

(*e*) This seems to be the actual scope which should be ascribed to the decision in *Morgan* v. *Hutchins* (C.A. 1890) 59 L.J.Q.B. 197, in order to prevent its clashing with *Walsh* v. *Whitely*, sec. 8, post, to which, according to the statement of the court, there was no intention of running counter. A child was there held entitled to maintain an action for an injury caused by uncovered machinery. The broad ground was taken that the statute applies where a machine is "defective with regard to the safety of the workmen," even though it is effective for the purpose for which it is used. The Master of the Rolls, who, since the decision in *Walsh* v. *Whitely*, supra, had been created Lord Esher, said: "The argument in the present case is that there is no defect in machinery if the machine in question is in itself a proper one for the work it is to perform. It must be carried to this length, that if the machine contains a secret defect which causes danger to the workmen, but which does not affect the purposes for which it is to be used, then this is not a defect within the meaning of the Act. Now this leather pressing machine cannot be worked without workmen; without labour it is useless as a machine. Surely this fact of itself is something that has to do with the condition of the machine. If its condition be such that the workman cannot do his part with safety, is that or is it not, a defect in the condition of a machine the working of which is a necessary performance? It seems to me that unless we hold the defect complained of here to be one within the sub-section in question, the Act might as well have never been passed."

(*ee*) As where a common round stick without any holes in it was furnished to be used as a lever for tipping a large ladel of molten metal, the evidence being that it was not safe, and that another kind of device was customary in large foundries like that of the defendant. *Flaherty* v. *Norwood &c. R. Co.* (1898) 172 Mass. 134, 51 N.E. 463. Whether a piece of iron piping is a proper material to use as a buffer to protect the head of a bolt which is being driven is a question for the jury, where the evidence is that for several years copper hammers have

to the effect of evidence that the employer had satisfied the standard fixed by common usage, see sec. 8, post.)

In Ontario it is held that the effect of the provisions in the Factories Acts by which the failure to take certain specified precautions is made a penal offence, is that although an injury due to non-compliance with one of these provisions does not constitute a cause of action under the statute itself, such non-compliance is evidence which it is competent to consider as tending to shew negligence on the defendant's part, in an action brought under the Workmen's Compensation Act (*f*). Considering the extreme improbability that any jury will absolve an employer who has been guilty of a breach of the statute, and the perfect propriety of their refusing to do so, it is manifest that, for practical purposes, the consequence of such a doctrine is to place servants in a position not materially different from that which they would hold if the theory had been adopted that damages may be recovered by anyone injured by the violation of a penal act.

The statute is equally applicable, whether the defect was in the original construction of the machine, or arose from its not being kept up to the obligatory standard of safety (*g*). The fact that

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been made for such work, and that piping is the least desirable of the metals used, because it is so brittle that chips are apt to fly off from it and injure the person holding it. *Littlefield* v. *Ally Co.* (1900) 177 Mass. 151, 58 N.E. 692.

(*f*) *O'Connor* v. *Hamilton Bridge Co.* (1894) 29 Ont. R. 12, affirmed 21 Ont. App. 596, 24 Can. Sup. 598; *Thompson* v. *Wright* (1892) 22 Ont. R. 127; *Rodgers* v. *Hamilton Cotton Co.* (1893) 23 Ont. R. 425; *Rodgers* v. *Gale Mfg. Co.* (1893) 23 Ont. R. 425; *McCloherty* v. *Gale Mfg. Co.* (1892) 19 Ont. App. 117; *Godwin* v. *Newcombe* (1901) 1 Ont. L.R. (C.A.) 525. In all these cases the propriety of declining to interfere with the verdicts of juries based on the theory that the maintenance of unguarded machinery is negligence was recognized. In *Hamilton* v. *Grosebeck* (1890) 19 Ont. R. 76, the lower court seems to have been of opinion that an unguarded saw was not a defect. If it was intended to lay this down as a matter of law, the doctrine is clearly contrary to that of the decisions just cited. The Court of Appeal (18 Ont. App. 437), declined to consider whether the want of a guard was or was not a defect.

(*g*) See the passage quoted in the sec. 8, post from the majority opinion in *Walsh* v. *Whitely*, sec. 8, infra. In *Heske* v. *Samuelson* (1883) 12 L.R.Q.B.D. 30, 53 L.J.Q.B.D. 45, 49 L.T.N.S. 474, Stephen, J., in commenting on the theory of the county judge that a defect arising from the original construction of a machine was not a defect in the condition of the machinery, said:—"The argument for the defendants comes to this, that, if the employer has a machine, one part of which is weaker than it ought to be, there is a defect in its condition; but if the whole machine is too weak for the purpose for which it is applied, there is no such defect. Could it be said that if a windlass, fit only for raising a bucket, is used to draw up a number of men, that there is no defect in the condition of the machinery? The condition of the machine must be a condition with relation to the purpose for which it is applied."

an appliance comes up to the legal standard of safety when it is in its normal condition, will not excuse the master if that condition has been so changed as to render it unsafe, and the change is due to the act of an agent who is entrusted with the duty of seeing that it is in proper condition (*h*).

In a leading English case Lord Watson remarked that he saw "no reason to doubt that an arrangement of machinery and tackle which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business, constitutes a defect in the condition of the works within the meaning of the sub-section" (*i*).

A servant who is a mere licensee or a trespasser in respect to the locality where he received the injury complained of cannot, it is manifest, recover damages, even though the conditions which caused the injury may have constituted a defect as to other employés (*j*). A double reason for his inability to sue will, of course, exist where the servant's presence at the spot where he was injured was not merely unauthorized, but negligent as well (*k*).

(*h*) *Tate* v. *Latham* [1897] Q.B. (C.A.) 502, per Brett M.R.

(*i*) *Smith* v. *Baker* [1891] A.C. 325, 354.

(*j*) As where a servant who left a dockyard by a path which was not the regular exit, and which the servants were merely permitted to use, fell into a pit. *Pritchard* v. *Lang* (Q.B.D. 1889) 5 Times L.R. 639, following *Bolch* v. *Smith* 7 H. & N. 736, as to the general principle.

(*k*) An unguarded elevator opening is not a "defect in the condition of the way" as regards a workman required to pass through a passage 12 feet wide, well lighted, and with which he is well acquainted, where it is upon the opposite side of the passage from that upon which such workman should pass, and he turns out of his way to look at repairs in progress upon the elevator. *Headford* v. *McClary Mfg. Co.* (1894) 21 Ont. App. 164, aff'd 24 S.C.R. 291.

C. B. LABATT.

(To be continued.)

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

BY-LAW—VALIDITY—OFFENSIVE LANGUAGE IN TRAM CARS.

Gentel v. *Rapps* (1902) 1 K.B. 160. Under a Tramways Act the promoters of any tramway are empowered to make by-laws for prevention of nuisances in any carriage belonging to them. The promoters of a tramway made a by-law providing: "No person shall swear or use offensive or obscene language while in or upon any carriage." On a case stated by justices, the Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.,) held that the by-law was valid although it did not contain any words indicating that the prohibition was confined to cases where the use of such language would be a nuisance or annoyance to others.

BANKER—CHEQUE—CONVERSION—CROSSED CHEQUE PAID INTO CUSTOMER'S ACCOUNT—FORGED INDORSEMENT—CREDIT GIVEN TO CUSTOMER BEFORE CHEQUE CLEARED—RECEIPT OF PAYMENT OF CHEQUE BY BANKER—CROSSING CHEQUES—LIABILITY OF BANKER—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61) S. 3, SUB-S. 1; SS. 60, 73; S 77, SUB-S. 6; S. 79, SUB-S. 2; SS. 80, 82 (BILLS OF EXCHANGE ACT, 53 VICT., C. 33, D., S. 3, SUB-S. 1; S. 24, SUB-S. 2; S. 72; S. 76, SUB-S. 6; S. 78, SUB-S. 2; SS. 79, 81).

Gordon v. *London City and Midland Bank* (1902) 1 K.B. 261, is a case involving the construction of several sections of the Bills of Exchange Act, 1882 (see 53 Vict. c. 33, D.). The plaintiff traded under the firm name of Gordon & Munro; he had in his employ a clerk named Jones, who opened accounts in his own name with the defendant banks respectively. After he had opened this account with the defendants, the London City and Midland Bank, he commenced a series of dealings with cheques which belonged to the plaintiff, and most of which were drawn on banks other than the defendants' bank, payable to the order of Gordon & Munro. Having obtained possession of these cheques he forged the signature of the plaintiff's firm on the back of these, and then handed them to the defendant bank, who at once credited him with the amount of the cheques and he was allowed to draw the money as and when he required. His account would have been overdrawn during a large portion of the time covered by the transactions but

for the cheques paid in as above mentioned. The plaintiff, as the true owner of the cheques, claimed to recover from the defendant banks the proceeds of the cheques as persons who had dealt with the cheques in a manner amounting to a conversion of them. The question was whether the defendants, who were prima facie liable, were protected by the Bills of Exchange Act, 1882. This question turned principally on s. 82 (s. 81 of Canadian Act). The Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) held that the section did not protect the defendant banks because they had not simply acted as Jones' agent for collection, but had required Jones to indorse the cheques and assumed to become transferees thereof and as such received payment, and had credited him therewith the amounts of such cheques as soon as they were received from him. Further, in order to obtain the benefit of s. 82 the Court of Appeal holds that the cheque must be crossed at the time it comes to the hands of the bank for collection, and that a crossing of the cheque by such bank itself will not bring it within s. 82. Where any of the cheques were payable to bearer the plaintiff, it was conceded, could not recover. But as to cheques issued by one branch of a bank or another branch of the same bank it was held that they were not within the Bills of Exchange Act at all, and therefore not within s. 82, and cheques drawn by customers on the defendant banks to the order of the plaintiff were held to be within protection of that part of s. 60 (of which there is no counterpart in the Canadian Act). As regards cheques marked "not negotiable," the defendants were held to be liable. The case is important and deserves attentive perusal. It seems now to be clear that s. 82 (s. 81 Canadian Act) will afford no protection to a bank unless it is acting in the receipt of payment strictly as an agent for collection.

SHIP—BILL OF LADING—EXCEPTIONS—PERIL OF THE SEAS OCCASIONED BY NEGLIGENCE—INTENTIONAL LETTING IN SEA WATER—NEGLIGENT MISTAKE.

In *Blackburn* v. *Liverpool B. & N. Navigation Co.* (1902) 1 K.B. 290, the plaintiff sued a steamship company for damage to plaintiff's cargo carried by defendants on their ship. The bill of lading excepted loss or damage resulting from any of the perils of the seas, whether arising from the negligence of any of the officers or crew. The damage in question was occasioned by one of the officers of the ship by mistake opening a valve whereby the sea

water gained access into the tank where the goods in question were stored, instead of into the ballast tank, as the officer intended. It was held by Walton, J., that this was within the above mentioned exception, and therefore that the plaintiff's action failed.

LICENSING ACTS—PUBLIC HOUSE NOT AN INN—RIGHT OF LICENSE HOLDER OF PUBLIC HOUSE TO REQUEST PERSON TO LEAVE LICENSED PREMISES.

Sealey v. *Tandy* (1902) 1 K.B. 296, was a case stated by a police magistrate. The plaintiff charged the defendant with assault under the following circumstances, and the question was whether the defendant was liable. The defendant was licensee of a public house, not being an inn, and the plaintiff, who was not a traveller and had misconducted himself on previous occasions, entered defendant's premises. The defendant requested him to leave, and on his refusing to do so, ejected him, using no unnecessary violence. The Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.,) held that the defendant acted within his rights and the charge should be dismissed.

ADMIRALTY—ACTION IN REM—AVOIDING COLLISION—LOSS OCCASIONED BY.

In *The Port Victoria* (1902) P. 25, Jeune, P.P.D., held that where a vessel slipped her anchor and put to sea to avoid a collision with another vessel which had been negligently allowed to drag down upon her and foul her chain, the owners of the former vessel had an action in rem to recover the loss incurred thereby.

FRIENDLY SOCIETY—LIFE POLICY OF FRIENDLY SOCIETY—ASSIGNMENT ON POLICY—NOMINATION OF BENEFICIARY.

In *Re Griffin, Griffin* v. *Griffin* (1902) 1 Ch. 135, the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.,) have overruled the decisions of Kekewich, J., *In re Redman* (1901), 2 Ch. 471, and of Phillimore, J., in *Caddick* v. *Highton* (1901), 2 Ch. 476 *n* (noted ante vol. 37, p. 841), and held that a life policy issued by a friendly society is assignable in the ordinary way, as well as by nomination under the Friendly Societies Act. The Court of Appeal, however, do not in any way commit themselves as to what would be the legal effect of an assignment for value, followed by a nomination, at variance with such assignment.

CONTRACT—PRIVITY OF CONTRACT—CONTRACT WITH PROMOTER FOR BENEFIT OF INTENDED COMPANY—RATIFICATION—ADOPTION—AGREEMENT TO GRANT LICENSE TO PROMOTER OF INTENDED COMPANY FOR BENEFIT OF COMPANY—RIGHT OF GRANTOR TO ENFORCE AGREEMENT AGAINST COMPANY WHEN FORMED.

In *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (1902) 1 Ch. 146, an attempt was made to enforce against the defendant company a contract which had been made by the plaintiffs with a promoter of the defendant company for the benefit of such company when formed, on the ground that the defendant company had adopted and ratified the contract. The contract in question was made with one Phelps whereby the plaintiffs agreed to grant to Phelps a license to use a certain patent, he agreeing that he or a company when formed would pay a certain sum per annum for the use thereof. Phelps entered into an agreement with one Piercy on behalf of the intended company to assign the license to the company, and it was agreed by Piercy that the company should purchase the full benefit of the license. The company was afterwards registered, and the company, by agreement with Phelps and Piercy, adopted the agreement between Phelps and Piercy. The company made some use of the license, but it was never actually assigned to the company. The Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.) affirmed the judgment of Kekewich, J., on the ground that the action would not lie, there being no privity of contract between the plaintiffs and the defendant company.

TRUSTEE—BREACH OF TRUST—TRUSTEE ACT 1888 (51 & 52 VICT., C. 59) S. 8—(R.S.O. C. 129, S. 32)—"ACTION TO WHICH NO EXISTING STATUTE OF LIMITATION APPLIES"—"PROPERTY RECEIVED BY TRUSTEE AND CONVERTED TO HIS OWN USE"—EXECUTOR WHEN BECOMING TRUSTEE—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT. C. 57) S. 8—(R.S.O. C. 133, S. 23).

In re Trimmis, Nixon v. *Smith* (1902) 1 Ch. 176, was an action against trustees for an account, and payment of what might be found due, in which the defendants claimed the benefit of the Trustee Act, 1888, s. 8 (see R.S.O. c. 132, s. 29). By the will of a testator his personal estate was bequeathed to the defendants as executors and trustees upon trust for conversion and investment to provide an annuity for the testator's widow during her life, and to divide the residue and the annuity fund on the widow's death into four shares, one of which was settled on a niece of the testator

for life with remainder to her children, and the other three shares were devisible between the defendants equally. On the death of the widow the defendants retained their own shares and paid the share settled on the niece and her children to the niece. More than six years and less than twelve years after the death of the niece, the plaintiff, one of her children, commenced the present action. Kekewich, J., held that it must be assumed that the defendants duly administered the estate and became trustees of the annuity fund upon the trusts declared in the will, and that the action was not an action for the recovery of a legacy within the Real Property Limitation Act, 1874, s. 8 (R.S.O. c. 133, s. 23), but was brought against the defendants in the character of trustees and not of executors, and was consequently one to which "no existing statute of limitations" applied within the Trustee Act, 1888, s. 8, sub-s. 1 (R.S.O. c. 129, s. 32 *b*), and that as each of the defendants received only the share which was payable to him under the terms of the will, the settled share could not be held to have been received by them and converted to their own use within the meaning of the exception contained in the earlier part of the sub-section, and the claim was consequently barred under s. 8 of the Act of 1888 by the lapse of six years from the time when the action first accrued.

VENDOR AND PURCHASER—WILL—SPECIAL EXECUTORS—GENERAL EXECUTORS—SALE BY GENERAL EXECUTORS—LAND TRANSFER ACT, 1897 (60 & 61 VICT., C. 65) SS. 1, 2, SUB-S. 2; 24, SUB-S. 2, (R.S.O. C. 127, S. 4)

In re Cohen's Executors and London County Council (1902) 1 Ch. 187, was an application under the Vendors and Purchasers Act. The vendors were the general executors named in the will of a deceased person; by the will special executors were also appointed to deal with property in Australia. The question was whether a conveyance by the general executors was, under the Land Transfer Act 1897 (see R.S.O. c. 127, s. 4), sufficient to convey the property without the concurrence of the special executors. Byrne, J., held that it was sufficient, and that the concurrence of the special executors was unnecessary.

VENDOR AND PURCHASER—CONDITIONS OF SALE—INTEREST ON PURCHASE MONEY—DEFAULT OF VENDOR—DAMAGES—DELAY.

Jones v. *Gardiner* (1902) 1 Ch. 191, was an action by a purchaser to compel specific performance of a contract for the sale of

land. Two questions were at issue (1) whether the plaintiffs were entitled to damages for delay occasioned by the vendor in completing the contract, and (2) whether the plaintiffs were liable to pay interest on their purchase money. The conditions provided that "the purchaser in default" should pay interest, but as the delay in completion was due to the vendor, Byrne, J., held that the condition did not apply as the purchaser was not in default. He also held that the plaintiff was entitled to damages occasioned by the vendor's delay, where such delay was not in consequence of any defect in title, or in consequence of any conveyancer's difficulties, and as he considered there had been considerable delay on the part of the vendor not due to any such causes, he assessed the plaintiff's damages at £25. See infra *Bennett* v. *Stone*.

PAYMENT INTO COURT WITH DENIAL OF LIABILITY—"ACTION PROCEEDED WITH"—ACCEPTANCE OF PAYMENT—COSTS.

Smith v. *Northbach R.D. Council* (1902) 1 Ch. 197, deals with a simple point of costs. The plaintiff sued for damages on several claims. Defendants paid money into Court in respect of one claim and denied liability. The plaintiff proceeded with the action, but ultimately accepted the money paid in, in satisfaction of all the issues. The question then arose how the costs of the action were apportionable. Farwell, J., held that the defendants should pay the plaintiff's costs of the claim in respect of which the money was paid in, up to the date of that payment, and that the plaintiff should pay the defendants' costs of the discontinued claims and all their subsequent costs.

WILL CONSTRUCTION—COLLECTIVE DEVISE OF REAL ESTATE—AGGREGATE CHARGES—EXONERATION OF PERSONAL ESTATE—LOCKE KING'S ACTS, 1854, 1867, 1877 (17 & 18 VICT., C. 113; 30 & 31 VICT., C. 69; 40 & 41 VICT., C. 34)—R.S.O. C. 128, S. 37).

In *Re Kensington, Longford* v. *Kensington* (1902) 1 Ch. 203, Farwell, J., held that under Locke King's Acts above referred to (see R.S.O. c. 128, s. 37) a collective devise of lands of any tenure to the same set of persons prima facie throws the aggregate charges on such lands upon the aggregate lands in exoneration of the testator's personal estate.

WILL—CHARITABLE LEGACY—GENERAL OR LIMITED CHARITABLE PURPOSES—EVIDENCE.

In *Re Huxtable, Huxtable* v. *Crawfurd* (1902) 1 Ch. 214, a testatrix by her will had bequeathed £4,000 to the defendant Crawford "for the charitable purposes agreed upon between us." Two questions arose, viz., whether this was a gift for a general or limited purpose, and secondly whether parol evidence was admissible to shew what was the charitable purpose intended by the testatrix. Farwell, J., was of opinion that the gift was for a limited charitable purpose, namely that agreed upon with the legatee, and also that parol evidence was admissible to establish what the charitable purpose was. By the evidence of the legatee it appeared that the income of the fund was to be applied by him during his life for the relief of necessitous members of the Church of England, and for the support of charities connected with the Church of England, and that he was to dispose of it after his death as his own property, and that at no time had the testatrix indicated that the principal sum should be applied for charitable purposes. At the bar the legatee disclaimed any beneficial interest in the corpus, and Farwell, J., held that there was a good charitable bequest of the income during the life of Crawford, and that on his death the corpus would fall into the residue.

ADMINISTRATION—INTESTACY—DEATH OF SOLE LEGATEE AND SOLE EXECUTRIX BEFORE TESTATOR—ADVANCEMENTS TO CHILDREN—HOTCHPOT—STATUTE OF DISTRIBUTIONS, 1671 (22 & 23 CAR. 2, C. 10) S. 5.

In re Ford, Ford v. *Ford* (1902) 1 Ch. 218. The only question discussed was whether the Statute of Distributions, s. 5, which provides for advancements to children of a deceased being brought into hotchpot, applies to an intestacy occasioned by a wholly inoperative will, or must be confined to cases of actual intestacy. In the present case the will was inoperative by reason of the sole legatee and executrix having predeceased the testator. Buckley, J., held that the statute applied to an intestacy thus arising.

VENDOR AND PURCHASER—CONDITIONS OF SALE—INTEREST ON PURCHASE MONEY—WILFUL DEFAULT OF VENDOR—DISPUTE AS TO TERMS OF CONVEYANCE—SPECIFIC PERFORMANCE—OCCUPATION RENT—FARMING LOSSES.

Bennett v. *Stone* (1902) 1 Ch. 226, was an action by a purchaser for specific performance of a contract for the sale of land. The conditions of sale provided that if from any cause other than wilful

default of the vendors the purchase was not completed by January 2, 1899, the purchase money should bear interest at 5 per cent. The completion was delayed by a dispute as to the terms of the conveyance. The judge who tried the action found that the vendors were wrong in this dispute, but that his objection was bona fide, this he was of opinion, however, did not constitute wilful delay on his part, and therefore the purchaser was bound to pay interest. After the action commenced one of the farms sold fell vacant, and the vendors occupied it themselves, paid the valuation of the outgoing tenant and farmed the land—and the vendors were held chargeable with rents and profits and the proceeds of the sale of a crop actually received, but not with an occupation rent, and that the vendors were entitled to be allowed what they had paid for the valuation and the expenses of realizing the crop, but not for the losses incurred in farming.

VENDOR AND PURCHASER—TRUSTEE FOR SALE—SALE OF TRUST PROPERTY TO FORMER TRUSTEE.

In re Boles & British Land Co. (1902) 1 Ch. 244. The trustees for sale of certain land had sold it to a person who had formerly been one of the trustees for sale of the same land, but had retired from the trust twelve years before the sale to him. He having sold the land, his purchasers raised the objection that, by reason of his former connection with the trust, he was incompetent to become a purchaser. Buckley, J., overruled the objection.

COPYRIGHT—BOOK—AUTHOR AND PUBLISHER—ARTICLES CONTRIBUTED TO ENCYCLOPÆDIA—COPYRIGHT IN ARTICLES—COPYRIGHT ACT 1842 (5 & 6 VICT. C. 45), S. 18.

Aflalo v. *Lawrence* (1902) 1 Ch. 264, was an action to restrain an infringement of a copyright which was claimed under the following circumstances. The plaintiff Aflalo was employed by the defendants, a firm of publishers, to edit an encyclopædia of sport and to contribute thereto a certain quantity of original matter for a stipulated price. The plaintiff Cook was specially employed at a stipulated price to contribute certain articles to the encyclopædia. The plaintiffs were respectively registered as the proprietors of four specified articles. There was no express bargain with the defendants as to the ownership of the copyright. The defendants, without the consent of the plaintiffs, published a book

called "The Young Sportsman," containing copies of the articles in question. Joyce, J., came to the conclusion that there was nothing in the bargain between the plaintiffs and defendants to warrant the inference that the defendants were to be the owners of the copyright in the articles contributed by the plaintiffs, and he granted the plaintiffs an injunction and an inquiry as to damages.

POLICY OF LIFE INSURANCE—POLICY PAYABLE TO ANOTHER—PURCHASE IN NAME OF STRANGER—RESULTING TRUST—PREDECEASE OF PAYEE OF POLICY.

In re Policy No. 6402 (1902) 1 Ch. 282, was a summary application by the executors of a deceased person to determine the title to a certain policy of insurance which he had effected on his life, but which he had had made out "for behoof of Miss Harriott Styles." Miss Styles had predeceased the insured, and the insured had always retained the policy in his own possession and paid all the premiums thereon up to the time of his own death. Under these circumstances Joyce, J., held that there was a resulting trust of the policy in favour of the insured, and that on his death it passed to his executors; personalty being governed by the same rules as realty in this respect.

WILL—CONSTRUCTION—EVIDENCE DEHORS THE WILL.

Higgins v. *Dawson* (1902) A.C. 1, is a case which was known in the Courts below as *In re Grainger, Dawson* v. *Higgins* (1900) 2 Ch. 756 (noted ante vol. 37, p. 153). The case turns upon the construction of a will. The testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies and then gave "all the residue and remainder" of two specified mortgage debts then due to him after payment of his debts and funeral and testamentary expenses (but not adding "and legacies") to three persons named. At the date of the will the testator's personal estate consisted of the two mortgage debts which were only sufficient for the payment of the legacies (if payable thereout) and the testator's debts and funeral and testamentary expenses. Subsequently the testator became possessed of further personal estate, but as the will contained no general residuary gift this remained undisposed of. The total personal estate, exclusive of the two mortgage debts above mentioned, was insufficient for the payment of the legacies, debts, funeral and testamentary expenses. Stirling, J., thought

that the pecuniary legacies were not payable out of the mortgage debts. Rigby, L.J., agreed with him, but Lord Alverstone, M.R., and Collins, L.J., disagreed with them and held that the pecuniary legacies were payable out of the mortgage debts The House of Lords (Lord Halsbury, L.C., and Lords Shand, Davey, Brampton and Robertson,) came to the same conclusion as Stirling, J., and Rigby, L.J., and have consequently reversed the judgment of the Court of Appeal. Their Lordships were of opinion that the will, speaking from the date of the death of the testator, under the Wills Act, s. 24 (R S.O. c. 128, s. 26), must be construed according to its terms and not by reference to extrinsic evidence as to the condition or amount of the estate. That the testator, having specified expressly what deductions were to be made from the mortgage debts, it would be in fact making a new will for the testator to add the legacies to those specified deductions.

PRACTICE —JUDICIAL COMMITTEE OF PRIVY COUNCIL—SPECIAL LEAVE TO APPEAL —CONVICTION BY SPECIAL COURT —OBJECTION TO CONSTITUTION OF COURT— COLONIAL LAWS VALIDITY ACT (28 & 29 VICT. C. 63).

In re The Queen v. *Marais* (1902) A.C. 51, a defendant convicted of treason before a special Court constituted under the authority of a Provincial Act in the Colony of Natal, applied for leave to appeal to the Judicial Committee of the Privy Council, on the ground (1) that the Provincial Act was ultra vires under the Colonial Laws Validity Act (28 & 29 Vict., c. 63,) as being repugnant to the laws of England in that it deprived the accused of a right to trial by jury, and (2) that the Court was improperly constituted, the Act providing that one of the judges at least should be a judge of the Supreme Court. The Judicial Committee (the Lord Chancellor and Lords Hobhouse, Macnaghten, Davey, Robertson and Lindley) refused the application, and in doing so took occasion to say that the object of the Colonial Laws Validity Act was to conserve the right of the Imperial Parliament to legislate for the colonies by enactment expressly made applicable to them, and where such legislation had taken place to invalidate any colonial legislation repugnant thereto. But it was not intended to invalidate colonial laws because they happened to be repugnant to English law, where no such express legislation by the Imperial Parliament had taken place. The Act in question was therefore

held to be intra vires of the local legislature. On the second point the Committee came to the conclusion that the Court had been properly constituted.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, J.A.] [Feb. 7.

RE HOLLAND.

Succession duty—Chargeable against legacies—Payment of legacy within a year—Set off.

The direction in a will to executors to pay debts, funeral and testamentary expenses, does not operate so as to make the payment of the succession duty, payable under R S.O. 1897, c. 24, a charge on the residue and to exonerate the legacies from payment thereof. *Manning* v. *Robertson*, (1898) 29 O.R. 483, followed.

The rule that executors are not bound to pay pecuniary legacies before the expiration of a year from the testator's death does not prevent them, where no time is fixed for payment, and there is sufficient to pay debts, legacies and charges, from paying a legacy forthwith, and so to allow the amount thereof to be set off against a mortgage due by a legatee to the estate.

Clute, K.C., for executors. *R. U. McPherson*, for residuary legatee.

Moss, J.A.] [Feb. 7.

RE EVANS.

Will—Sickness—Provision, in case of—Executors' discretionary power of—Personal representatives.

A testatrix by her will bequeathed a sum of money to a son, with a direction that her executors should invest the same and pay to the son half the interest, and in case of his sickness to advance to him such portion of the principal money as they should think necessary; and in case of his death, after paying the funeral and other necessary expenses to divide the amount equally amongst her other surviving children; and by a residuary clause she gave the residue of her estate to her children in equal shares.

Held, that in case of sickness a trust was created which must be exercised by the executors, when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied, and that such sum was payable to the son's personal representatives.

James Bicknell, for executors. *R. U. McPherson*, for brothers and sisters. *Tucker*, for Alex. Wright.

HIGH COURT OF JUSTICE.

Master in Chambers.] COOKE *v.* WILSON. [Jan. 21.

Examination for discovery—Appointment—Attendance on—Voluntarily taking oath—Refusal to answer questions—Liability.

Where a plaintiff, who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn, she is precluded from setting up, as a ground for her refusal to answer questions submitted to her, that she had not been served with a subpœna.

J. A. Ferguson, for the motion. *J. W. McCullough*, contra.

Trial—Robertson, J.] [Jan. 22.

SUTTON *v.* VILLAGE OF PORT CARLING.

Survey—Village lots—Authorization—Statutory requirements—Order in council—Resolutions of municipal council—By-law—Cost of survey—Assessment for—Proprietors interested.

The council of an incorporated village, upon its own motion, passed a resolution "That the council do write to the Lieutenant-Governor and Council to send a surveyor to finally settle disputes in regard to Port Carling streets." The clerk of the council thereupon wrote a letter, addressed to the Lieutenant-Governor-in-Council, stating that there had been great dissatisfaction with regard to the surveyor's lines of the village lots known as "The Bailey estate," composed of about 114 lots; that the lines had been run more than once since the original survey, and each time had been altered; that the village council had been applied to repeatedly to have the work done by an experienced surveyor, appointed by "Your honourable council" under s. 39 of R.S.O. 1887, c. 152, and to have the boundaries of the lots ascertained and marked; and asking the council to "Decide in favour of this. In answer to this the Assistant Commissioner of Crown Lands wrote as follows: "Referring to yours . . asking that certain streets on which are about 114 lots known as "The Bailey estate" be re-surveyed, owing to the original survey having become obliterated, . you understand the survey will have to be at the cost of the municipality,

and the survey will consist, under R.S.O. 1887, c. 152, s. 39, of planting posts at the angles of the lots on Bailey Street, Joseph Street, . . and a street . . which, it appears, has no name. These are the streets on which the Bailey lots front, and I presume that a post planted at the front angles of these lots would be all that the municipality would require. . . Let us know at once, and . . give us the name of the surveyor to whom you wish instructions to issue." Thereafter a resolution was passed by the village council "That the clerk be instructed to order a surveyor to locate the streets of the village at once." The clerk then wrote to the Commissioner of Crown Lands that the council had decided to employ C., land surveyor, "To run the lines on certain streets and lots on the Bailey estate." An order-in-Council was passed, by which C. was instructed to survey the village lots of the Bailey estate and to plant durable monuments at the front angles of each of these lots, on Joseph Street, Bailey Street, and a street south of Bailey Street, unnamed in the original survey, and he did as he was instructed. The village council then passed a by-law directing that the sum of $290.77 should be levied on the proprietors of the lands surveyed, being the village lots of the Bailey estate.

Held, 1. The survey directed was not authorized and was illegal, the requirements of the statute (R.S.O. 1887, c. 152, s. 391) not having been complied with so as to give the Lieutenant-Governor-in-Council jurisdiction to authorize the survey.

2. The survey being illegal, the municipal council had no power to pass a by-law to levy the cost of it.

3. If there was jurisdiction to authorize the survey, it could only be at the cost of the proprietors of the lands in each range or block interested, and not of all the proprietors, whether interested or not.

In re Scott and County of Peterborough, 26 U.C.R. 36, followed. *Regina* v. *McGregor*, 19 C.P. 69, distinguished.

R. D. Gunn and *T. E. Godson*, for plaintiffs. *C. E. Hewson*, for defendants.

LOVELL *v.* COLE.

Master in Chambers—Street, J.] [Jan. 18, 27.

Contract—Breach of—Traveller—Action within jurisdiction.

The defendant was employed by the plaintiffs, who resided and carried on business in Ontario, to act as their traveller, at an agreed on remuneration, in selling and taking orders for their goods over a prescribed route to British Columbia and return, his duties on such return requiring him to call at a number of places in Ontario; to make his report to the plaintiffs, and return his samples. After entering on the performance of the contract, and while in British Columbia, he wrote resigning his position, which the plaintiffs refused to accept, and, after allowing a sufficient time to elapse for the performance of the contract, they brought an action in Ontario for the breach of the said contract.

Held, by the Master in Chambers, that there was a breach of the said contract within Ontario, for which the plaintiffs were entitled to sue.

On appeal to STREET, J., this judgment was varied by limiting the action to breaches in Ontario, but reserving to the plaintiffs the right to bring actions for breaches which occurred out of Ontario.

L. E. Stephens, for the motion. *R. S. Cassels*, contra.

Trial—Britton, J.] PATTERSON *v.* TURNER. [Feb. 1.

Company—Subscription for shares—Abandonment of undertakings—Old subscriptions—Liability.

On Jan. 28, 1899, defendant and others subscribed for a certain number of shares in the stock book of a projected company, the purpose of which was to build an hotel, and prospectus stated that it was intended to apply for a charter forthwith, and to commence building as soon as $40,000 of the stock had been subscribed, and that the buildings were estimated to cost about $45,000, and to be ready for opening at the beginning of the summer season of 1899. The company, however, was not formed nor anything done towards getting the hotel ready for occupation by the time mentioned. Prior to Oct. 24, 1899, only $28,700 had been subscribed, but additional subscriptions obtained on that date and shortly afterwards, brought the total up to $40,150. On Nov. 24, 1899, letters patent of incorporation were issued. About July 1, 1900 the hotel was completed and cost about $15,000 more than originally contemplated.

Held, that as the undertaking had not been proceeded with within a reasonable time from its inception, and as the defendant had not at any time after Oct. 1, 1899, agreed to be bound by his subscription, or approved of then proceeding with the erection of the hotel, or that it should cost the sum it was afterwards erected for, he could not now be held bound to take the shares he had subscribed for.

Aylesworth, K.C., and *Levy*, for plaintiff. *Lynch-Staunton*, K.C., for defendant Turner. *Washington*, K.C., for hotel company.

Master in Chambers.] MORANG *v.* ROSE. [Feb. 3.

Joinder of parties—Application to strike out—Matter of substance.

An objection that one joined as plaintiff in an action has no title to maintain the action, is matter of substance which should be raised on the pleadings as provided by Rule 259, and is not a proper subject for an application to strike out parties under Rule 185.

Lindsey, K.C., for defendants. *J. H. Moss*, for plaintiff.

GAUL *v.* TOWNSHIP OF ELICE.

Boyd, C., Ferguson, J., Robertson, J.] [Feb. 13.

Conviction—Information by constable—Invalid warrant—Indemnity resolution by municipal corporation—Arrest—Payment of fine—Protection to constable—Knowledge of corporation—Ultra vires resolution—Liability of members of corporation.

The plaintiffs on the information of the defendant M. a constable, and one H. were summoned before a magistrate charged with interfering with and spoiling a spring of water at the side of a highway but did not attend, and in their absence were convicted and fined, the conviction imposing one fine on all three. A question was raised as to the regularity of the proceedings because there was no seal on the summons, and the magistrate hesitated about issuing a warrant until the Township Council passed a resolution indemnifying him against costs. The warrant directed "To all or any constables," etc., was issued, following the form of the conviction and handed to one Maurer, another constable, who got M. to assist him and arrested the plaintiffs, conveyed them to gaol and kept them there (over night) until the fine and costs were paid. In an action against the Township Council and defendant M. for maliciously enforcing an invalid conviction.

Held, that the defendant M. was a constable and acted as such in the execution of the warrant and was entitled to all the protection extended by the law to public officers of the peace; that the warrant being bad on its face he was, by virtue of section 21 of the Code, exempt from all criminal responsibility; that he was protected from a civil action by virtue of R.S.O. 1897, ch. 88 sections 1, (2), 13 and 14 and the action should have been brought within six months and notice of action given under sections 975, 976 and 980 of the Code. *Ex p. McCleave* (1900) 35 N.B.R. 100 distinguished.

Held, also that there was no proof of knowledge on the part of the council that either the conviction or warrant was illegal or that they were acting other than bona fide for the protection of the spring on the highway and no evidence of malice; that even if there was knowledge, the resolution was ultra vires and they were not bound to make good any costs or any damages in any action by the magistrate, in consequence of the resolution; that the legal consequences of any illegal conduct arising from the act of the council are not to be visited on the municipality but upon the members who passed the resolution.

McSorley v. *Mayor etc. of St. John* (1881) 6 S.C.R. 531, distinguished.

Judgment of the County Court of Perth affirmed.

Mabee, K.C., for the appeal. *G. G. McPherson*, K.C., contra.

Street, J.] REX *v.* WATTS. [Feb. 15.

Habeas corpus—Contempt of foreign divorce judgment—Parent stealing his own child—Foreign law—Extradition—Crim. Code s. 284.

Application for discharge on a writ of habeas corpus. The prisoner and his wife got a collusive decree for divorce in the State of Illinois where they were domiciled in 1900, and the marriage was absolutely dissolved. One of the terms of the decree gave the custody of their child, five years old, to the wife, with permission to the prisoner to take it out with him in the day time but to return it the same day. The prisoner having obtained the child, instead of returning it, brought it to Canada.

Held, following *Re Murphy*, 24 O.R. 163, 23 A.R. 380, that "child stealing" being mentioned in the existing Extradition Treaty between the United States and Great Britain, one of the extradition crimes, the court should in the absence of any evidence to the contrary, assume the crimes to be identical in the two countries, and the onus did not rest upon the Crown of proving what the foreign law was. The evidence taken before the extradition commissioner shewed a case of child stealing under sec. 284 of the Criminal Code, 55 56 Vict., c. 29, and in the absence of evidence of foreign law that was sufficient. Sec. 284 of the Criminal Code does not exclude the case of father and child. Though what was done was a contempt of court, yet if a man has committed a crime it does not become the less a crime because it also happens to be a contempt.

As to the prisoner's contention that he had acted in good faith because he had been advised that the decree of divorce having been obtained collusively was a nullity, this was a matter which might properly be set up as a defence by the prisoner upon his trial, but could not be properly dealt with by the magistrate who had before him the decree of the foreign court, and the oath of the wife that she did not collude.

Aylesworth, K.C. and *F. A. Anglin*, for prisoner. *Shepley*, K.C., for Crown.

Street, J.] IN RE PUBLISHERS' SYNDICATE. MALLORY'S CASE. [Feb. 21.

Company—Subscription for shares—Condition precedent—Liability—Notice.

Mallory signed an application for five shares in the company subject to the condition, not however appearing on its face, that he was not to be required to accept any allotment until he should have collected $700 then due to him, which would enable him to pay for the shares. The president was fully advised of this condition, either when the application was handed in to him, or shortly afterwards. The directors allotted the shares to Mallory, but no formal notice of such allotment was ever given to him. He never paid anything on the shares or acted in any way as a shareholder. He failed to collect the $700 referred to, and on two occasions told this to persons sent on behalf of the company to enquire; he finally went to the

company's office and told the president that he had failed to collect the $700, and would not take the shares, and was told it was all right.

Held, on winding up proceedings that he was not a contributory in respect to the shares.

Raney, for alleged contributor. *J. T. Scott*, for liquidator.

Lount, J.] IN RE DUNCOMBE. [Feb. 24.

Will—Construction—"Including"—"Estate"—Policies of insurance—R.S.O. 1897, c. 202, s. 2, sub-s. 36, s. 159.

By a clause in his will a testator bequeathed to his wife one-half his estate "including policies of insurance made payable to her upon my death." The testator left three policies, one for $1,000 payable to his wife, the second providing for payment to his wife of an annuity of $250 per annum for twenty years, and the third payable at his death to the "legal heirs." There were no children, grandchildren or mother living at the time of the testator's death, but his widow survived him.

Held, that the third policy being payable to the heirs and not to the widow as a preferred beneficiary, formed part of the testator's estate, although as a fact the widow was the legal heir; but the first two policies did not form part of the estate. By them a trust was created in favour of the wife as a preferred beneficiary, and so remained until the death of the testator.

Held, also that "including" imported addition, that is indicating some thing not to be included.

W. A. Wilson, *Clarke*, K.C., *Cartwright*, K.C., *A. M. Stewart*, and *M. F. Muir*, for various parties.

MCCORMICK HARVESTING COMPANY *v.* WARNICA.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [March 4.

Division Court—Breach of undertaking—Amount ascertained by signature—Jurisdiction.

Defendant gave two notes for $75 and $62 respectively on a form which contained an undertaking to give further security, and in the event of default in giving the security that the notes might be treated as due. Plaintiffs demanded further security and not receiving same brought an action on the notes before the time, mentioned in them for their maturity, had expired.

Held, that notwithstanding the plaintiff had to prove a breach of the undertaking to give security before he could recover on the notes the Division Court had jurisdiction to entertain the action. *Petrie* v. *Machan* (1897) 28 O.R. 642, followed in preference to *Kreutziger* v. *Brox* (1900) 32 O.R. 418.

Judgment of the Tenth Division Court, County of York reversed.

F. C. Cooke, for the appeal. *C. F. Hewson*, contra.

CROWN CORUNDUM AND MICA CO. *v.* LOGAN.

Falconbridge, C.J.K.B., Street, J.] [March 5.

Action—Order to do an act, or dismissal of action—Default—Effect of—No further order to dismiss.

Per MEREDITH, C.J.C.P. Where an order is made for the doing of an act or in the alternative that the action should be dismissed, when default is made in the doing of the act, the order operates to put an end to the action and no further order is necessary and the action being dead the court has no power to relieve from the consequences of such default.

On an appeal, a Divisional Court, being of opinion that under the circumstances the action should be dismissed, declined to consider the question of the necessity of a further application or the power to relieve from the default.

Middleton, for the appeal. *G. F. Macdonell*, contra.

Street, J., Britton, J.] [March 5.

BIRKBECK LOAN COMPANY *v.* JOHNSTON.

Trustees of shares in building society—Mortgage of—Notice—Purchaser of land for value subject to mortgage collateral to loan on shares without notice that shares pledged for prior loan—Consolidation—Purchaser of trust shares.

The defendant A. J., being the holder of six shares of class A permanent stock in her own name, and six shares of class C instalment stock "in trust," and other shares of class B stock in a building society, obtained a loan of $700 from the company and transferred to the company's treasurer, as security, "All my stock in the said company," consisting of shares of class A, B and C stock held by me in the said company," and "All other stock or shares held by me in the said company." Subsequently she obtained a further loan of $600 and transferred it to the treasurer, as security, six shares of class C instalment stock, the intention being to transfer the six shares held in "in trust" and already assigned as the company contended to secure the prior loan of $700, giving also a mortgage on land, reciting that she was the owner of six shares of the capital stock of the company, and that the company had agreed to advance $600 upon the said shares with this mortgage as further security. The defendant A. K. J. became the purchaser of the land subject to the $600 mortgage (which she assumed), and purchased from A. J. her equity in the six shares of instalment stock so held "in trust" and took subject to the $600 mortgage. In an action by the company claiming consolidation of the loans and payment of both mortgages or foreclosure.

Held, that the use of the words "in trust" put the company upon inquiry, and they were affected by the notice that A. J. was not the owner of the shares and had no power to mortgage.

Held, also, that s. 53 of c. 205, R.S.O. 1897, did not empower the company to disregard the trusts, although it relieved them from seeing to the execution of any trust to which the shares were subject.

The defendant A. K. J. brought into court the arrears due on the collateral mortgage and the plaintiff company accepted the amount in satisfaction of such arrears.

Held, that the company could not consolidate the two mortgages as against A. K. J., as she was a purchaser for value without it being shewn that she was aware at the time she purchased the equity of redemption in the lands that any prior mortgage existed against the six shares in the hands of the company

Judgment of MACMAHON, J., reversed.

Bartlett, for the appeal. *Luscombe*, contra.

PHILLIPS *v.* MALONE.

Falconbridge, C.J.K.B., Street, J.] [March 11.

Writ of summons—Service out of jurisdiction—Option exercised through post office—Contract—Terms—Acceptance—Onus.

An appeal from the judgment reported ante 3 O.L.R. 47, to a Divisional Court was dismissed with costs.

Per FALCONBRIDGE, C.J. If the agreement of May 1st, 1899, was complete the contract was made in Quebec; but if it was to be completed by the enlargement acts of the parties there was no authority to the plaintiff to use the post office as a means of communication.

Per STREET, J. The plaintiff might have notified the defendants that they desired them to become the purchasers of the goods, but they had no right to prescribe the dates at which the defendants should pay for them.

Their letter was only a proposal to take the goods upon the terms proposed therein requiring an acceptance by the defendant to make it a complete contract the onus of shewing which, was on the plaintiffs and was not satisfied.

Judgment of MEREDITH, C.J.C.P., affirmed.

Worrell, K.C., for appeal. *George Kerr*, Jr., contra.

Meredith, C.J.C.P., MacMahon, J., Lount, J.] [March 13.

REGINA *v.* MCKINNON.

Summary conviction.

The Ontario Summary Convictions Act, R.S.O. c. 90, s. 2, has the effect of incorporating s. 841 of the Criminal Code, and therefore in the case of any offence punishable on summary conviction if no time is specially limited for making any complaint or laying any information under the Act or law relating to the particular case, the complaint shall be made

or the information shall be laid within six months from the time the matter of complaint or information arose.

N. W. Rowell, for the defendant. *W. R. Riddell*, K.C., for the prosecutors.

CLERGUE *v.* MCKAY.

Boyd, C., Ferguson, J., Meredith, J.] [April 7.

Discovery—Production of documents—Affidavit—Privilege—Confidential communications—Solicitor and client.

The decision of STREET, J., ante p. 209, affirmed on appeal.

Douglas, K.C., for appellant. *Aylesworth*, K.C., and *R. U. McPherson*, for respondent.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] GALLAGHER *v.* CITY OF MONCTON. [March 18.

Practice—Reference—Accounts—Warrant to proceed—Dismissal of bill.

It is not a ground for dismissal of the bill in a suit that the plaintiff fails to take out a warrant to proceed in a reference in the suit to take accounts between the parties. On the failure of the plaintiff to take out the warrant the defendant is entitled to do so.

Chandler, K.C., for the motion. *Teed*, K.C., contra.

Province of British Columbia.

SUPREME COURT.

Drake, J.] BOYLE *v.* VICTORIA YUKON TRADING CO. [Dec. 1, 1901.

Practice—Special indorsement—Foreign judgment.

Summons for summary judgment under Order XIV. The statement of claim indorsed on the writ was, "The plaintiff's claim is against the defendants for the sum of $830.50, being the amount of debt and costs recovered by the plaintiff under a certain judgment, dated the 11th day of July, 1901, in the Territorial Court of the Yukon Territory."

Held, the writ was not specially indorsed, as it did not shew against whom the judgment was recovered. Summons dismissed.

Griffin, for summons. *J. H. Lawson*, contra.

Court of Criminal Appeal.] REX v. BROOKS. [Jan. 11.

Criminal law—"Zionites"—Child's death due to want of medical aid—Aiding and abetting—Cr. Code, ss. 209 and 210.

Case reserved for the consideration of the Court of Criminal Appeal. The prisoner, an elder of the sect "Catholic Christians in Zion," or "Zionites," was indicted for aiding and abetting and counselling in his actions one John Rogers, who neglected to provide two of his young children under six years of age with medical attendance and remedies when sick with diphtheria. Both children died. At the trial (Speedy Trial) DRAKE, J., found that prisoner knew that the children had diphtheria, and knew that it was a dangerous and contagious disease, that the ordinary remedies would have prolonged their lives and in all probability would have resulted in their complete recovery, and he convicted him and sentenced him to three months' imprisonment. At prisoner's request a case was reserved, and the question was argued before WALKEM, IRVING and MARTIN, JJ., who affirmed the conviction and held as follows:—

Medical attendance and remedies are necessaries within the meaning of ss. 209 and 210 of the Criminal Code, and anyone legally liable to provide such is criminally responsible for neglect to do so. So also at common law. Conscientious belief that it is against the teachings of the Bible, and therefore wrong to have recourse to medical attendance and remedies, is no excuse.

Maclean, D.A.-G., for the Crown. The prisoner was not represented by counsel in either Court.

NEW RULE OF COURT, ONTARIO.

STYLE OF CAUSE IN MECHANICS' LIEN CASES.

On the 31st March, 1902, the following rule was passed by the judges of the Court of Appeal and High Court of Justice.—

"All proceedings under the Mechanics' Lien Act, R.S.O. ch. 153, shall be legibly endorsed as follows:

In the matter of the Mechanics' Lien Act.

Between A. B., plaintiff, and C. D., defendant."