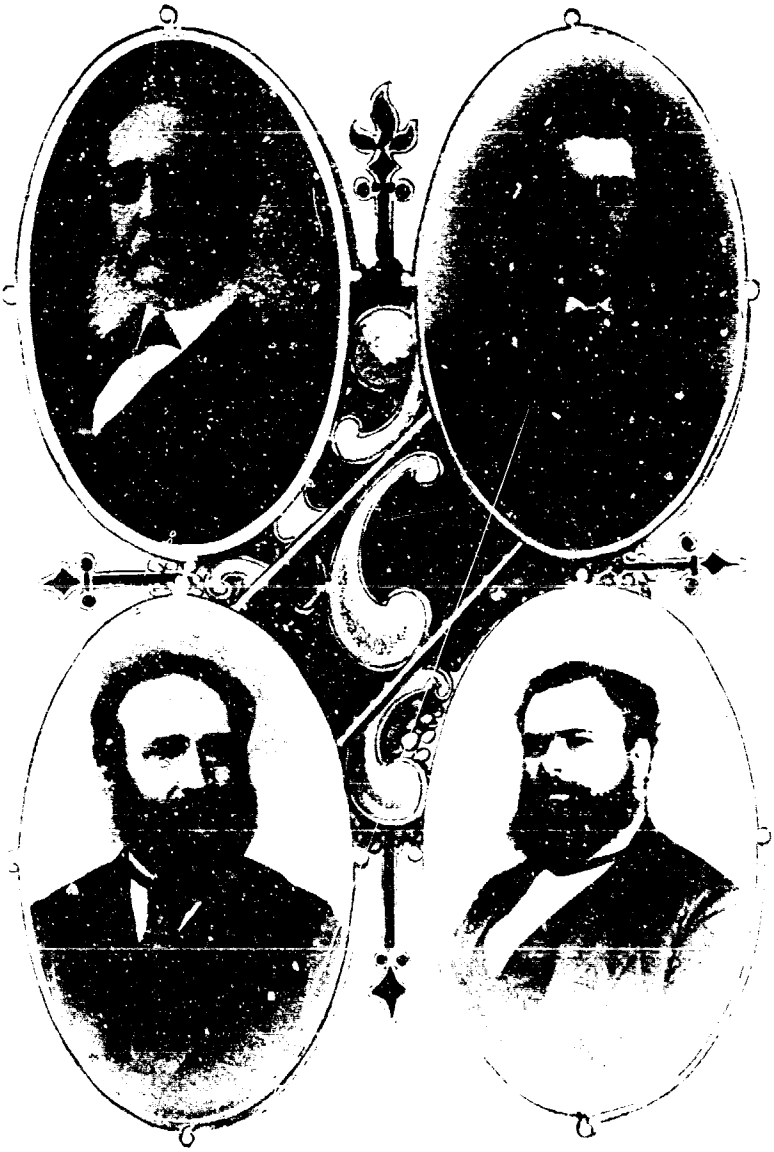
HON. JAMES ROBERT GOWAN, K.C., C.M.G., SENATOR.

FOUNDER OF THE CANADA LAW JOURNAL, 1855.

HON. JAMES PATTON, Q.C.

HEWITT BERNARD, Q.C., C.M.G.



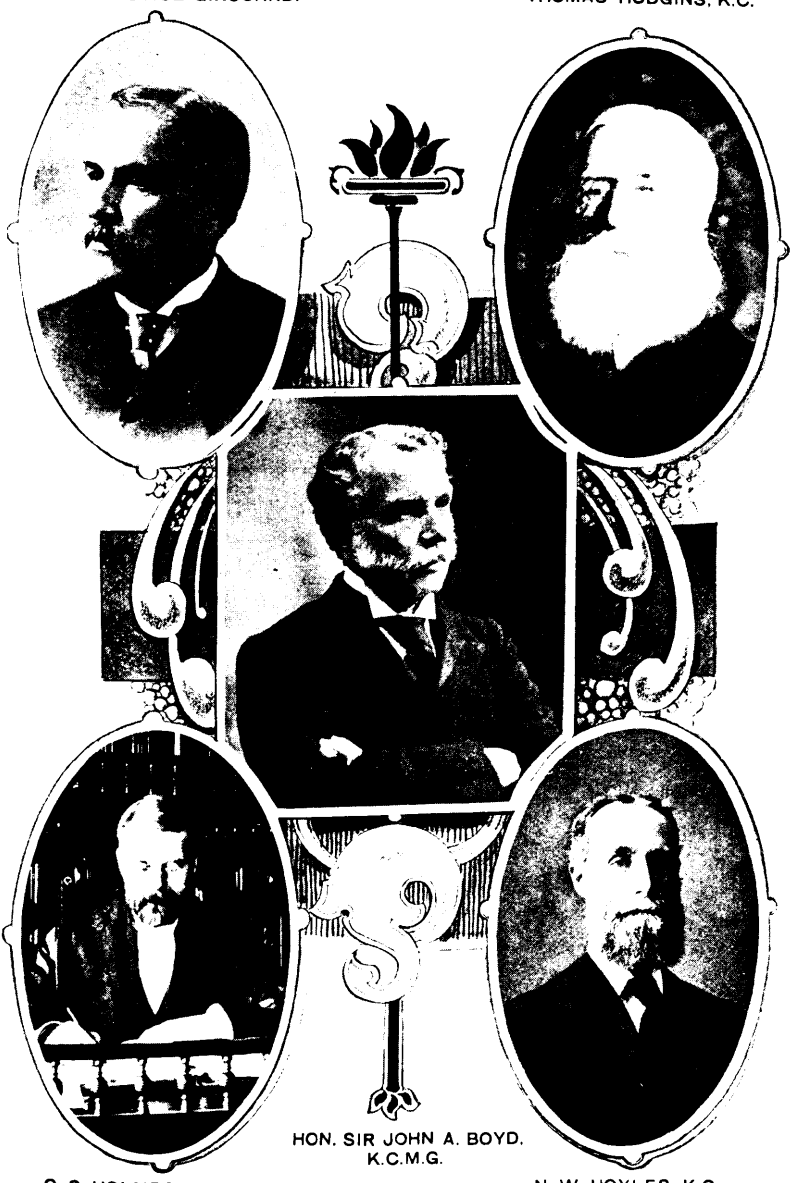
JUDGE W. D. ARDAGH

HON. CHIEF JUSTICE HARRISON

FORMER EDITORS OF THE CANADA LAW JOURNAL.

HON. MR. JUSTICE GIROUARD.

THOMAS HODGINS, K.C.



HON. SIR JOHN A. BOYD, K.C.M.G.

G. S. HOLMESTED, K.C.

N. W. HOYLES, K.C.

SOME OF OUR LEADING CONTRIBUTORS.

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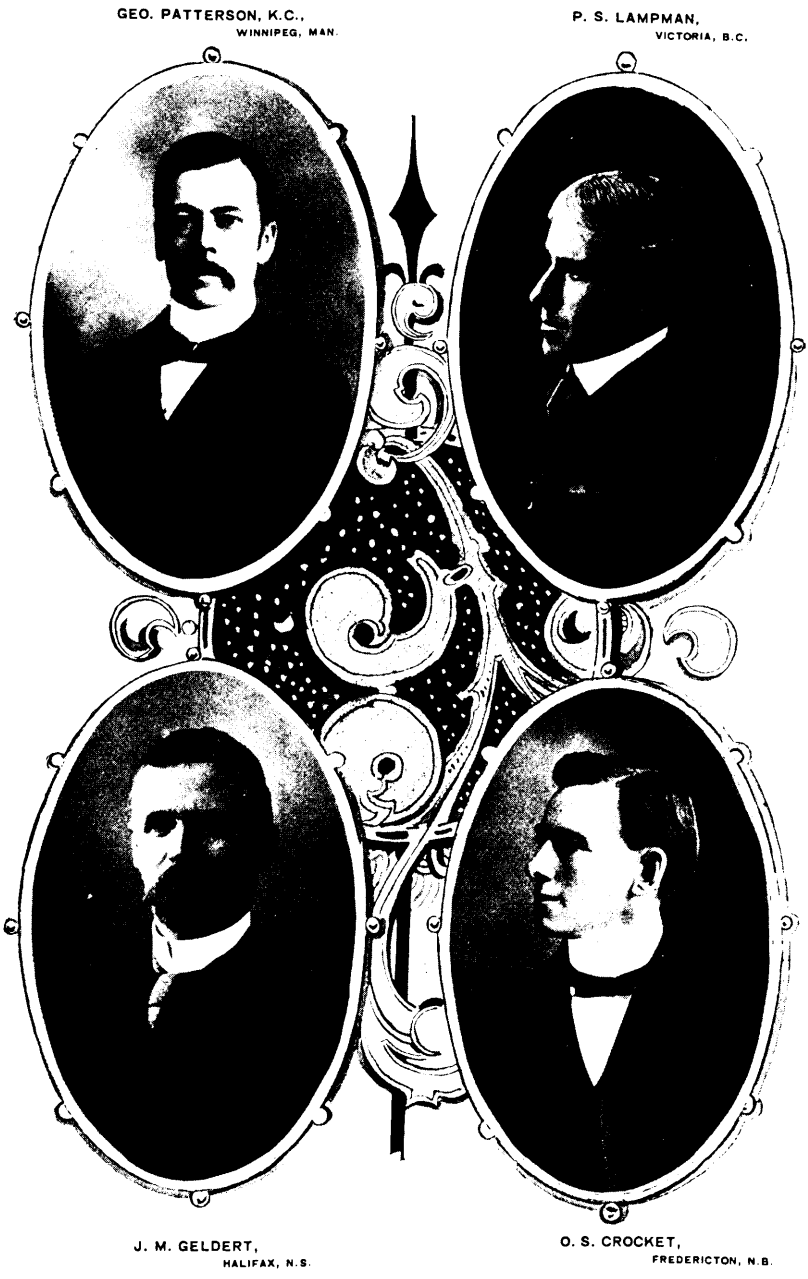

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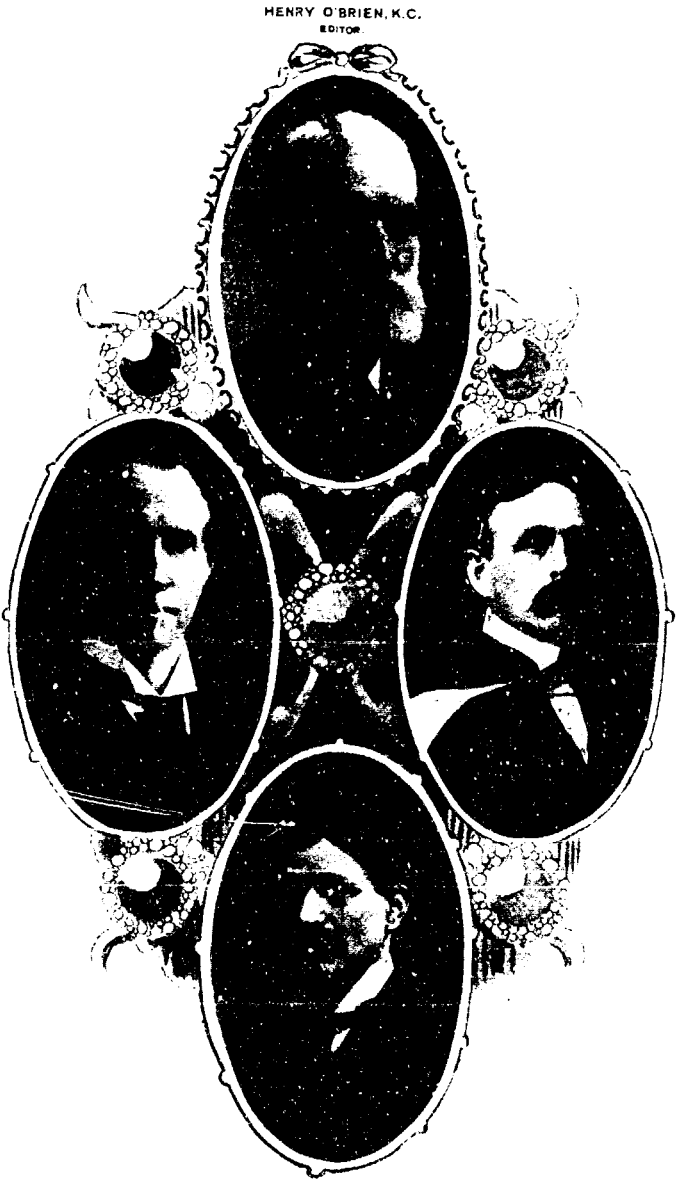

PRESENT CONTROLLERS OF THE CANADA LAW JOURNAL.

Canada Law Journal.

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AN EDITORIAL RETROSPECT.

It is interesting from time to time in the history as well of individuals as of enterprises to indulge in a brief survey of the past. A review of the editorial history of this journal will not, we are sure, be considered out of place.

This retrospect takes us back nearly fifty years—to the beginning of 1855, admittedly no inconsiderable period of time in the annals of journalism. Much has happened in that period. Nation-builders have been busy the world over; perhaps nowhere more successfully than in the British possessions in America, considering the difficulties to be overcome. Law is the cement in which the courses of the social fabric must be laid if they are to stand firm, and in this department of human activity we are especially interested. Here reforms of the most benign and progressive character have been accomplished both in the mother country and her great self-governing colonies. Procedure has been purged of the subtieties that survived the legislation of 1852 and 1854, and the substantive side of the common law has been systematized to such an extent that it may no longer be derided as a "codeless myriad of precedents."

Not only has this journal extended a consistent support to every measure of real legal reform that has been mooted since its inception, but it has suggested several of the more important measures that have become crystalized upon the statute book. We refer to these matters more in detail hereafter.

Many jurists of the first rank have availed themselves of this journal as a medium for the public expression of their views; and thus our files are especially valuable as a repository of contemporary legal thought.

It is a source of pleasure to the present editorial management to be able to claim for this journal an unbroken adherence to the policy defined in the prospectus issued in the latter part of the year 1854; and to remind our readers that this prospectus (framed by his Honour Judge Gowan hereafter referred to—vir bonus ac sapiens), is sufficient to indicate that those who had the enterprise and faith to found a legal journal in this province so many years

ago, were stimulated with the desire to promote the best interests of the bench and bar and to perpetuate their worthiest traditions.

At the time this journal was founded the need of a legal periodical was greatly felt. There was no organ of the profession, nor any medium of communication between its members. It was not a commercial enterprise, nor was it required as an adjunct to any law publisher's business, as has since been the case with many legal periodicals on this continent, and it has always been free to express its opinions on any subject regardless of consequences. It has always sought to promote sound and safe law reform, and to be the repository and exponent of the views of the legal profession of the Dominion, and devoted to their best interests.

In our first number it was stated that the journal would be "opposed to the interest of no class; devoted exclusively to legal subjects;" and that "entering on a widely extended field for useful operations and at a heavy and continuous outlay, we looked for generous support." Party politics moreover, as announced in the prospectus, were to have no part in our programme, and they have been seduously avoided.

The outlay was for very many years both "heavy and continuous," the journal being a source of expense and not of profit. Had the work not been a labour of love it would have ceased long ago. Sparing neither labour nor money, we have kept our course through many discouragements and difficulties along the lines originally laid down. Our reward has been the recognition of our usefulness during nearly half a century; and the support that was claimed has been heartily given and is gladly acknowledged. It will be our pleasure in the future, as in the past, to uphold our reputation as a first-class legal journal; a reputation which we have reason to know, from those most competent to judge, is second to none on the continent.

We shall now proceed to speak with some little detail of the more personal side of our origin and history. The person who first conceived the idea that the time had come for the establishment of a legal journal was the then judge of the County Court of the County of Simcoe, now the Honourable James Robert Gowan, C.M.G., and a Senator of Canada. His many and great services in matters connected with the administration of justice are part of the history of this country.

To him the journal not only owes its existence; but his money, his time and his great talents were freely bestowed upon it. For many years almost all the editorial matter came from his pen, except as hereafter referred to. His work for the journal was not known to the public at that time, nor has it been mentioned until now. Its pages for many years are evidence of the labour and thought devoted by him to the many subjects discussed, and of the extent to which the country is indebted for suggestions made by him in the direction of law reform.

Associated with Judge Gowan was the Hon. James Patton, Q.C. leader of the Bar of the county of Simcoe, and senior partner in the firm of Patton, Bernard & Ardagh, then one of the principal law firms in this province. He was subsequently Solicitor-General under the Macdonald-Cartier Government in 1862. His name appears as the first editor of the journal, then called *The Upper Canada Law Journal and Municipal Local Courts Gazette.* Mr. Patton contributed a series of articles on Coroners, and the subject of Municipal law was discussed with much care and helpfulness by Mr. Patton's partner, Mr. Hewitt Bernard, in later years more widely known as Col. Bernard, Q.C., C.M.G., Deputy Attorney-General and Deputy Minister of Justice from 1859 to 1876, positions which he held to the great advantage of the public, enjoying the entire confidence of the leaders of both political parties.

This journal was commenced in 1855, and was at first published in the town of Barrie, but was removed to Toronto in 1857. In 1856 Mr. W. D. Ardagh, of the firm above-mentioned, became the editor, and so continued for many years. He subsequently removed to Winnipeg, where he held the position of County Court Judge until his death In 1857 Mr. Robert A. Harrison, who had been for some time chief clerk of the Crown Law Department of that day, and subsequently a member of the firm of Paterson, Harrison & Hodgins, became one of the editors, and so remained until his appointment as Chief Justice of the Queen's Bench in 1875. Mr. Harrison was a most industrious man, an able writer and distinguished jurist, well-known in legal circles by his works on the Common Law Procedure Act and his Municipal Manual, and one of the most successful and popular advocates of his day. Under his energetic management the circulation of the journal largely increased.

In 1865, ten years after the journal was first issued, it was decided to publish separately *The Law Journal* and *The Local Courts Gazette*, as was also done with respect to *The English Law Times* and *County Courts Chronicle* both of which periodicals were published in the same office, a portion of the matter appearing in each. This was continued until 1872 when the *Local Courts Gazette*, having done its work, was dropped, and the journal became known as "THE CANADA LAW JOURNAL."

In 1865, commencing with vol. 1 of the new series, Mr. Henry O Brien, K.C., (known to the profession of that time as the compiler of Harrison & O'Brien's Digest, one of the Law Reporters at Osgoode Hall, and the author of the then standard text book on Division Court law, and for half a lifetime in partnership with Mr. Christopher Robinson, K.C.), became one of the editors along with Mr. Harrison and Mr. Ardagh. On their retirement the control of the editorial department devolved upon Mr. O'Brien, who still continues to occupy that position. Before his appointment as Assistant Law Clerk of the House of Commons Mr. A. H. O'Brien, author of Barron & O'Brien on Chattel Mortgages and of the standard text book on Conveyancing Forms, was for some years assistant editor.

In more recent years Mr. C. B. Labatt, now becoming known as one of the best text book writers of the day, and whose learned expositions of various branches of law now form a feature of this journal, became an associate editor. Contemporaneously with the publication of this number another addition to our editorial staff goes into effect in the person of Charles Morse, D.C.L., one of the editors of the Canadian Annual Digest and a legal writer of repute, whose articles have frequently appeared in our columns as well as in those of leading legal journals in the United States. Dr. Morse is also one of the law examiners in Trinity University, Toronto.

Amongst the occasional contributors to our pages, outside of its various editors, have been such men as (while at the bar) Hon. Mr. Justice Girouard, of the Supreme Court; Hon. Sir John Alexander Boyd, K.C.M.G., Chancellor of Ontario; Sir Thomas Taylor, ex Chief Justice of Manitoba, then Master in Chancery at Osgoode Hall; Mr. Thomas Hodgins, K.C., Master in Ordinary of the High Court of Justice, Ontario; the late Messrs. G. W. Wicksteed,

Law Clerk of the House of Commons, B. B. Osler, K.C., and D'Alton McCarthy, K.C; E. Douglas Armour, K.C.; J. G. Scott, K.C., Master of Titles; Judge Hughes, of St. Thomas; Judge McDougall, of Toronto; Judge J. A. Ardagh, of Barrie; A. H. F. Lefroy, who suggested and commenced the resumé of English decisions, now continued by G. S. Holmested, K.C., Senior Registrar of the High Court, (who also contributes in other ways to our editorial pages), Sir Charles Hibbert Tupper, K.C.M.G.; Col. W. E. O'Brien; N. W. Hoyles, K.C., Principal of the Ontario Law School; E F. B. Johnston, K.C.; E. H. Smythe, K.C.; W. R. Riddell, K.C.; F. E. Hodgins, K.C.; W. Seton Gordon, of the New York Bar, and many others.

It has been remarked to the writer that "It would be difficult to find more interesting reading for a lawyer than the earlier volumes of THE CANADA LAW JOURNAL"—taking us back as they do, to the days when such men as Chief Justice Robinson, Chief Justice Macaulay, Chancellor Blake, Justices McLean, Draper, Burns and Richards, and Vice-Chancellors Esten and Spragge were our judges, and when such giants of the bar as John Hillyard Cameron, Henry Eccles, John Hawkins Hagarty and those of that ilk contended for the mastery. Nothing was more instructive than to hear a case conducted by such men, and before such judges. These have all passed away. One of the few survivors of that day, was the then Reporter of the Queen's Bench, Mr. Christopher Robinson, K.C., who was beginning a career which has placed him at the head of his profession in Canada, and made him as well known and as highly respected in the Judicial Committee of the Privy Council as in the courts of the Dominion.

In the early volumes we come across, in the records of the Law Society of Upper Canada, the names of other men, who, notable since then and still to the fore, were admitted as students of the law; in 1853 in the University class, Thomas W. Taylor, subsequently Chief Justice of Manitoba; in the senior class, Thomas Hodgins, now Master in Ordinary, of the High Court; and, in the junior class, Featherston Osler, now senior puisne judge of the Ontario Court of Appeal, as well known for his high character as for his great learning. May we here recall an incident connected with the inception of the journal. That learned judge and the writer, being at that time students together in Mr. Patton's office

were given by their master at the law, our first editor, a long list of names, a bundle of journals, some brown wrapping paper and a pot of paste and directed to prepare for mailing our first number We doubt not the job was well done!

We notice also the name of Robert A. Harrison, already referred to as one of our editors, as being called to the bar with honours, passing his examination before Robert Baldwin, who was at the same period Treasurer of the Society; J. H. Hagarty, Alexander Campbell, Thomas Galt, G. W. Burton, and others being chosen as "Masters of the Bench," now known as Benchers. The lecturers to the students of those days were P. M. S. Vankoughnet, Oliver Mowat, H. C. R. Becher, Henry Eccles, Lewis Wallbridge and Secker Brough.

In the same volume is noted the appointment of Oliver Mowat as Queen's Counsel, followed by the remark: "We are glad to see this. It is always a matter of pleasure when moral worth and professional eminence meet an appropriate acknowledgement." It is much to be regretted that it has been our unpleasant duty on many occasions since then to criticise adversely appointments to this office. The prophecy of a long career of dignified usefulness, when "Dr. Hagarty" was made one of the judges of the Court of Common Pleas to fill the vacancy "consequent on the resignation of that good man and upright judge, Chief Justice Macaulay," was duly fulfilled. He was "doubtless selected, (we are told) as being one 'in whom talents, integrity and experience did most abound and were best united.'"

Our writers of that day were as free in their criticisms as we are glad to know they have been ever since. The reporters came in for their share. Thanks were freely bestowed on Mr. Robinson, Reporter of the Queen's Bench, for "a continuance of his obliging and disinterested attention. We are sorry we are not on this occasion in a position to say so much of Mr. G——; and of the Reporter of the Common Pleas the less said in this respect the better." Another writer in criticising the inaccurracy of some of the reports remarks: "Mr. Christopher Robinson is, I agree with you, a praiseworthy exception, and has done much to redeem the reports of his Court from the charge of carelessness and slovenliness. It would be well for the Chancery Reporter to take a lesson from Mr. Robinson, and, as for Mr. J——, if his case is not hope-

less, he might do so likewise." These lines remind us of a heading in volume 6 of the Common Pleas Reports, in which the word "Sue" (not given as a name as one might have expected, such as "black-eyed Sue," but as a verb) is the heading for a line "— right of foreign corporation to sue in this country." This is almost as good as an English digest which has: "Great Mind—remarkable instance of, in a judge," the reference giving the sentence "I have a great mind to commit you for contempt."

We have alluded to the fact that this journal has frequently suggested important changes in the law which were afterwards adopted. Let us refer to a few of them:

In our first volume the appointment of Crown Attorneys was suggested and strongly urged. The views expressed by us included a wider range than the then leader of the Government, Sir John Macdonald, thought possible to carry into legislation, but a bill was introduced by him based upon our representations which bill subsequently became law.

The simplification of the proceedings against overholding tenants was also advocated, and the suggested improvements subsequently came into force. This by the way brings to the memory of the present writer that his first effort in editorial work was a summary of the law on that subject in 10 U.C.L.J. 1.

For three years we advocated an examination as a requirement for the admission of Attorneys. We venture to think that the fact that this also became a necessity is quite well known to those who have since then gone through the ordeal. We have, however, no apologies to make in that respect, however much we may sympathize with some of them.

The necessity for an insolvent law was pointed out on several occasions. Also the payment of witnesses in criminal cases. Suggestions were made for an improvement in the law of absconding debtors. An equity jurisdiction for County Courts was advocated. The appointment of Deputy Judges was recommended with a view to getting rid of the absurd circumlocution system of those days under which a judge had to resign office when he was granted leave of absence. His locum tenens was then appointed judge; the substitute in his turn resigning when the judge returned, and the latter being reappointed.

The fusion of law and equity was at various times fully dealt with and the present system urged and prophesied.

In 1865 the desirability of an Admiralty Court, in view of our ever increasing mercantile marine, was insisted upon. In later years the need of shorthand reports in judicial proceedings in the Superior Courts was pointed out.

In all the above matters changes were made in the direction indicated, and often in the exact way we had suggested.

In no journal do there appear dissertations more exhaustive or of greater practical interest on various branches of the law than are given in our columns. The editorial review of Current English Cases, which is carefully prepared with special reference to our statute law and the decisions of our own courts, has proved to be of so much value that numbers of our subscribers read this resumé instead of plodding through the English Law Reports. We publish reports and notes of cases from all parts of the Dominion, and endeavour to keep our readers informed of the current literature of the profession.

In 1896 Mr. R. R. Cromarty was entrusted with the business management of this Journal. To his energy, business ability and intelligent helpfulness in a variety of ways the Journal is much indebted for increasing popularity and widely extending circulation.

In conclusion we have no hesitation in asking our subscribers and friends to lend us their valuable aid in making the Journal as useful as possible to all. It has been said that "every lawyer owes a duty to the profession to which he belongs." We think we may claim to have done ours; and trust it may be the ambition of many who read these lines to have it said of them that they have also done theirs.

With such a history in the past and in view of what we are doing in the present we have no hesitation in appealing to the profession of the Dominion for the continuance of the encouragement and support which have been a large factor in placing THE CANADA LAW JOURNAL in the high position which it occupies the world over.

STATUTORY LIABILITY OF EMPLOYERS FOR THE NEGLIGENCE OF EMPLOYÉS EXERCISING SUPERINTENDENCE.

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1. **Introductory.**—The second of the provisions of the Employers' Liability Act which has been selected for discussion in this Journal is that which gives a servant the right to recover damages for an injury caused "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence."

These words constitute sec. 1, sub-s. 2 of the original English Act, and also of those in force in Newfoundland, New South Wales, Victoria, Queensland, South Australia, New Zealand, and Alabama, and sec. 3, sub-s. 2 of the Acts of Ontario, British Columbia, and Manitoba.

A clause of the same tenor is found in the Acts of Massachusetts, New York and Colorado, an action being declared to be maintainable for an injury caused "by reason of the negligence of any person in the service of the employer, entrusted with and

exercising superintendence, whose sole or principal duty is that of superintendence."

By Mass. Stat. 1894, ch. 499, sec. 1, the following words were added to this clause ; "or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." The recently enacted New York Statute also embraces this provision.

The Indiana Act, which in other respects follows the English one very closely, contains no provision expressly relating to superintending employés.

By sec. 8 of the English and Newfoundland Acts it is declared that "the expression, 'person who has superintendence intrusted to him,' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

The corresponding provision in the Acts of Ontario, British Columbia, and Manitoba is sec. 2, sub-s. 1, and runs as follows : "Superintendence shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour."

There is no supplementary definition clause in the Acts of Alabama, Massachusetts, New York, and Colorado, but the effect of the main provision in the two latter Acts is evidently to give the servant a right of recovery for the negligence of agents performing functions not materially different from those contemplated by the framers of the other statutes. See further secs. 3-8, post, as to the persons who are deemed to be "exercising superintendence" within the meaning of each section of the statutes.

2. Conditions precedent to recovery by the servant. Generally.— In order to recover under the provisions declaring employers to be liable for the defaults of servants exercising superintendence the plaintiff must establish these facts :

(1) That the servant was a "superintendent" within the meaning of the Acts. (2) That the act which was the immediate cause of the injury was negligent. (3) That the act was done in the exercise of the controlling functions of the superintendent. These evidential pre-requisites to the maintenance of the action will be discussed seriatim in the following sections.

3. What employés are superintendents within the English, New York, Massachusetts, and Colorado Acts.—(*a*) *General remarks.*—The phraseology employed to define the class of persons for whose negligence the master is responsible is, it will be observed, not quite the same in these statutes. They all define a "superintendent" as an employé whose "sole or principal duty is that of superintendence." But the Massachusetts, New York, and Colorado Acts omit the words which specifically exclude liability for the negligence of an employé who is "ordinarily engaged in manual labour." This complementary clause seems to possess little, if any, real significance, and to be, for practical purposes, nothing but the negative expression of a conception which is adequately defined by that which precedes it. In view of the usual system upon which industrial establishments are conducted, it may be regarded as a necessary implication that an employé whose principal duty is that of superintendence is never "ordinarily engaged in manual labour." And the converse of this proposition also holds.

(*b*) *Employés held to be vice-principals.*—That the negligent employé was "exercising superintendence" within the meaning of these statutes is obviously a warrantable deduction for a jury whenever the evidence indicates that the authority wielded by him was sufficiently extensive to place him in the category of common law vice-principals, as that term was understood in England before the judgment of the House of Lords in *Wilson* v. *Merry* (*a*) restricted, or perhaps wholly abolished, the doctrine that masters are liable for the negligence of managing agents, and as it is still understood in all the American States, which stand outside the list of those in which the doctrine that any superior servant represents the master in so far as he may be performing the function of giving orders (*b*). The applicability of these provisions to all employés who are entrusted with the full control of the whole of an establishment, or one considerable department thereof, has never, it is believed, been disputed, and is taken for granted in several of the cases in which the actual questions discussed were whether the act which caused the injury was negligent, and, if so,

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(*a*) (1869) L.R. 1 Sc. App. 326.

(*b*) A complete review of the cases shewing the position of the courts of England, the Colonies, and the United States with respect to the representative character of controlling employés will be found in the writer's note in 51 L.R.A., pp. 513, et seq.

whether the negligence was in the exercise of superintendence or in the performance of some other function (*c*). See secs. 9, 10, 11, post.

As regards the lower grades of employés, it may be said that, so far as any general principle can be extracted from the decisions, a court will not disturb a finding that the delinquent employé was exercising superintendence, if the evidence tends to shew that he was in full charge of some specific piece of work and invested with a discretionary power to determine the manner in which the general instructions of the employer or of some higher official should be carried out (*d*). In such cases the inference that the descriptive words of the statute are applicable is sometimes corroborated by specific testimony which tends to shew that the superior servant did not work, and was not expected to work, with his hands (*e*). But it does not appear that the absence of such testimony is of itself a sufficient reason for denying the plaintiff's right to recover.

It is also well settled that, if the existence of the other elements of liability is made out, a court will not say, as matter of law, that the plaintiff must fail in his action because the negligent employé did a certain amount of manual labour in connection with the work which he supervised. That fact is not conclusive upon the

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(*c*) Testimony shewing the acts of one alleged to be superintendent of defendant's foundry, in putting persons out of the shop, and what he said while doing so, is admissible, as tending to shew whether or not he was acting as superintendent. *McCabe* v. *Shields*, 56 N.E. 699, 175 Mass. 438.

(*d*) A stevedore's foreman superintending a subdivision of the work of unloading a ship may properly be found to be a vice-principal. *Wright* v. *Wallis* (C.A. 1885) 3 Times L. R. 779. Evidence that the delinquent was a section foreman who had immediate charge and superintendence of a gang of five men, engaged in handling freight, and that it was his duty to take receipts, check the freight into the cars, and see that it was loaded into the right cars, warrants a finding that his principal duty was that of superintendence. *Mahoney* v. *New York &c. R. Co.* (1894) 160 Mass. 573. A foreman of a section gang upon a railroad, not at work himself, but looking on and seeing that the work is done, and, in addition to the performance of other functions, giving warning of the approach of trains to the section men, may be properly found to be a vice-principal. *Davis* v. *New York, N.H. & H.R. Co.* 159 Mass. 532, 34 N E. 1070, distinguishing *Shepard* v. *Boston* (1893) 158 Mass. 174, 33 N.E. 508, where it was laid down in unqualified terms that a section foreman is not a person entrusted with and exercising superintendence, so as to render the railroad company liable for personal injuries to a section hand occasioned by negligence in running a hand car on which the gang is riding.

(*e*) *McPhee* v. *Scully* (1895) 163 Mass. 216, 39 N.E. 1007, where the delinquent was the foreman of a gang of men employed on a pile-driver, with authority to employ and dismiss men, who frequently had charge of the work, and who gave all the directions which were given at the time the injury was received.

question whether his principal duty was that of superintendence (*f*). See also sec. 11, post.

The fact that a foreman is paid higher wages than the ordinary labourers is a circumstance to be considered in connection with other evidence upon the question whether his sole or principal duty is that of superintendence (*g*).

(*c*) *Employés for whose negligence the master is not liable.*—The courts have taken the position that something more than the mere exercise of control is necessary to constitute an employé a super-

(*f*) "If you have a person whose sole or principal duty is to superintend the work of others, the master will be liable for injuries to those who act in obedience to his orders, even though such superintendent should himself casually do manual labour." Smith, J., in *Kellard* v. *Rooke* (1887) 19 Q.B.D. 585 (p. 588). See also *Crowley* v. *Cutting* (1896) 43 N.E. 197, 165 Mass. 436 [Superintendent of quarry sometimes helped to attach the dogs by means of which heavy stones were hoisted.] *Reynolds* v. *Barnard*, 168 Mass. 226, 46 N.E. 703 [Superior servant here was a foreman of slaters]; *McCabe* v. *Shields* (1900) 175 Mass. 438, 56 N.E. 699 [Superior servant who participated in the work, and, in the absence of the employer, gave directions]. It is error to nonsuit a plaintiff, where the evidence is that an employé denominated a "walking superintendent" gave the negligent order from which the injury resulted, although it was also proved that he helped his subordinates to perform the work to which his order related. The jury should be asked whether he was one of those persons whose duty it was not to work himself, but to see that others work. *Ray* v. *Wallis* (C.A. 1887) 51 J.P. 519, aff'g (Q.B.D. 1885) 3 Times L.R. 777. In *Prendible* v. *Connecticut River Mfg. Co.* (1893) 160 Mass. 131, it appeared that a staging which fell was erected in the yard of the defendant's sawmill by the side of a wood pile for the purpose of enabling the workmen to pile the wood higher. There was evidence for the plaintiff that the staging was built by C., who was in the defendant's employ, assisted by a member of the piling gang; that no one gave any orders to this gang except C.; that he was the foreman of the gang; that he sometimes worked with his hands; but worked when he pleased, and did whatever work he pleased; that when he was working he was overseeing the men and giving them directions; that he placed the men at work whenever he saw fit; and that he hired workmen at different times, upon their application to him for work. Two of the defendant's witnesses testified that C. had general authority over the gang of workmen. Held, that the jury would be warranted in finding that C.'s principal duty was that of superintendence. Whether A., employed by the defendant as foreman of its yard but who at times worked with his own hands, is one whose "principal duty is that of superintendence," is a question for the jury where the plaintiff was injured by the falling upon him of a large iron pump, which, loaded upon a truck, he with others was moving from one place to another in the defendant's works, in accordance with A.'s directions. *Gelonecck* v. *Dean &c. Co.* (1896) 165 Mass. 202. The testimony of an employé that it took most of his time telling the other employés what to do and giving them their work, and that during the whole day he kept run of the men, and kept them at work, and told them what to do and what not to do, justifies a finding by the jury that his principal duty was that of superintendence, notwithstanding his later testimony that he worked about three-quarters of the time with his own hands, and that during that time he was bossing the men. *Rion* v. *Rockport Granite Co* (1898) 50 N.E. 525, 171 Mass. 162.

(*g*) *O'Brien* v. *Look* (1898) 171 Mass. 36, where the servant was allowed to recover upon evidence shewing that the delinquent, besides receiving higher wages, employed and discharged men, and that he had seventeen or eighteen men working under him and subject to his orders as to the time of beginning and quitting work and as to the manner of its performance.

intendent within the statute. This provision, in other words, is not construed as being declaratory of the "superior servant" doctrine which prevails, under the common law, in some jurisdictions. See the note in 51 L.R.A., above referred to, at pp. 517, et seq. This conception of the meaning of the statute is doubtless warranted by the fact that cases of the mere exercise of control have been provided for by the succeeding sub-section of the statutes. But it seems to be fairly open to question whether some of the decisions cited below have not construed the facts with undue rigor to the plaintiff's disadvantage. The result of the view thus taken is that the master is not responsible for the negligence of an employé who habitually participates in the work done by his subordinates, and whose authority over them is limited to giving directions in respect to that work (*h*).

(*h*) It has been held that no action can be maintained for the negligence of the following employés: A workman who was being assisted by another in the simple operation of unloading a cart. *Allmarch* v. *Walker* (Q.B.D. 1885) 78 L.T. Journ. 391. A man ordinarily engaged in manual labour, although he in fact superintended his fellow-workmen as a "ganger" or "gang-foreman." *Hall* v. *North Eastern R. Co.* (Q.B.D. 1885) 1 Times L.R. 359 [New trial ordered to determine whether an employé in charge of a body of men engaged in loading cars was a superintendent or ordinarily engaged in manual labour]. A foreman who worked "at getting out lumber and piling it up, and in operating saws." *O'Brien* v. *Rideout* (1894) 161 Mass. 170, 36 N.E. 792 [Plaintiff was a common labourer put to work at a saw]. One employed as a common painter, receiving the same pay and doing the same work as the other men on the job. *Adasken* v. *Gilbert* (Mass.) 43 N.E. 199, 165 Mass. 443. The testimony of the foreman of gang of slaters called by the employer, that he worked with his hands nine-tenths of the time, is not conclusive as to that fact as bearing upon the question whether the witness's principal duty was that of superintendence, but presents a question for the jury, although the fact, if proved, takes the case out of the statute. *Reynolds* v. Barnard (1897) 46 N.E. 703, 168 Mass. 226. Evidence that a person, employed by another as superintendent of the blasting of a ledge of rock by means of dynamite exploded in drill holes by electricity, worked with his own hands in attending to the fire under the steam boiler, in sharpening all the tools used by the workmen, in charging the drill holes and in clearing them out, and in other acts of manual labour, which occupied the most of his time, will not warrant a finding that his "principal duty is that of superintendence." *O'Neil* v. *O'Leary* (1895) 164 Mass. 387. In *Cashman* v. *Chase* (1892) 156 Mass. 342, the delinquent employé was the engineer of the engine by means of which a hoisting apparatus, used for transferring a ship's cargo to a lighter, was operated. His station was on the lighter and the hold of the vessel was out of his sight. There were four men in the hold whose work was to collect the bundles of laths into heaps, around which they put a rope. When the fall was lowered the hook was attached to the rope, and a signal given to the stageman, who signalled to the engineer to raise or lower as the work in the hold required. The engineer employed the men in the first instance, and set them at work. He went into the hold on several occasions, for a few moments at a time, and showed them how to adjust the rope around the bundles of laths. He discharged and employed men. The unloading of the vessel took two or three days, and the men were paid by the defendant in person, who was there several times for a little while on each occasion. The engineer did no manual labour, except the running of the engine. "Upon the facts," said the court, "it might be competent to find that

4.—Within the Alabama Act.—As the master is by this Act made liable for the negligence of employés who have "any superintendence entrusted to them," and these very general words are not qualified by any limiting or explanatory expressions, the inference would seem to be that the legislature intended to create a larger class of vice-principals than that which is constituted by the Acts commented upon in the last section. But how much wider the responsibility of the master really is cannot be determined with any degree of precision from the decisions, as they stand. The only case in which it seems impossible to avoid the conclusion that the result would have been different if the action had been brought under the Acts just mentioned is one in which it was held that a railroad company must answer for injuries to a brakeman resulting from the negligence of an engineer in running the engine (*a*). Under these statutes, of course, an action may be maintained for such an injury, if the declaration is based on the subsection expressly declaring engineers to be vice-principals. But in view of the decisions cited in the last section, by which the master's liability for the negligence of an employé operating a piece of machinery is denied, it is difficult to draw any other inference than that this ruling indicates a real difference between the scope of the Alabama and of the other Acts. It must be admitted, however, that the real scope of this case considered as an application of a general principle, and, not as one determined with reference to the

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the engineer was to some extent a superintendent. The employment and discharge of workmen, setting them at work, and shewing them how to do work, are acts consistent with superintendency. But these acts in connection with the evidence that his station was on the lighter, and his work there the continuous labour of running the engine in accordance with orders transmitted to him from others, shew that neither his sole nor principal duty was that of superintendence." A finding that a direction given as to the disposal of goods was an act of superintendence is not warranted where the injured servant testifies that the delinquent used to give orders to some twelve or thirteen persons in the room where the goods were, but subsequently qualifies this statement by saying, "when anybody gave what I call orders with respect to the load or weight, it was to tell where the load was to go, and that was all there was of it." *Sullivan* v. *Thorndike Co.* (1899) 175 Mass. 41, 55 N.E. 472. [Holding an instruction to be correct by which the jury were told that, if the delinquent had the right to say to the plaintiff, "take these goods upstairs," and it was the duty of the injured servant to obey this direction, that would be a superintendence; but that, if the delinquent merely pointed out where the goods were to go, that would not be a superintendence.] In an English case it was laid down by Smith, J., arguendo, that a "ganger, the foreman of a gang of labourers, who is working with his hands all the day, is not a vice-principal." *Kellard* v. *Rooke* (1887) 19 Q.B.D. 585 (p. 588).

(*a*) *Louisville & N. R. Co.* v. *Mothershed* (1892) 97 Ala. 261, 12 So. 714.

special facts involved, is rendered quite obscure by two later cases. In one of these an operator of a steam-crane was treated as the representative of the master in respect to controlling its movements (*b*). In another recovery was refused for an injury received by a mechanic engaged in repairing a stationary engine, owing to the negligence of the engineer in starting the engine while the work was going on (*c*). As will be seen when we recur to the second of these cases in a later section (11) the essential and ultimate grounds upon which the decision proceeded was that the negligent act, being a manual one, was not done in the exercise of superintendence. This element, however, though it was not specifically referred to, was clearly present in the other cases, and cannot legitimately be adduced as a differentiating factor. To obtain a ground upon which these cases can be reconciled it seems necessary to have recourse to the theory relied upon in a still later decision, that, as to certain operations, a locomotive engineer exercises both control and superintendence, while as to others he exercises merely control, and that a railway company is liable only for negligence in respect to operations of the former description (*d*). But this is a refinement of doctrine for which it seems difficult to find a warrant in the ordinary meanings of the words thus opposed to each other. Superintendence cannot, it is submitted, be exercised without at the same time exercising control (*e*).

In the other decisions in this State, the conclusion arrived at is not affected by the omission of the qualifying words inserted in the

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(*b*) *Anniston Pipe Works* v. *Dickey* 93 Ala. 418, 9 So. 720.

(*c*) *Dantzler* v. *De Bardeleben Coal & I. Co.* (1893) Ala. 22 L.R.A. 361, 14 So. 10. The court said: "Whether there may possibly be a case of superintendency purely of machinery or not, it is most clear to us that Gould's position involved no such case, dissociated from consideration of the fact that he had a helper, whose duties are shown in the evidence. Whether he had any superintendence intrusted to him, in view of this consideration is a question not necessary to be decided in this case. If any such superintendency existed in that connection it was not a general superintendency over the helper and the machines, not a general power of having the machines operated as he directed by the hand of the helper, but only a special superintendence to direct the helper to assist him, Gould, in the manual labour of operating them."

(*d*) *Culver* v. *Alabama M. R. Co.* (1895) 18 So. 827, 108 Ala. 330, holding in an action by a fireman, that it was error to direct a verdict for the defendant, where the injury was caused by the negligence of a railway engineer in not seeing that the coal on the tender was loaded properly by the gang assigned to the work.

(*e*) The definition of the word "superintend" in the Century Dictionary is "to direct the cause and oversee the details of (some work, etc.); regulate with authority; manage."

English, Massachusetts, Colorado, and New York Acts. Employers have been held to be answerable for the defaults of all superior servants, whatever their rank, who are invested with discretionary powers as respects the choice of the means by which the particular work in hand shall be executed (*f*).

5.—Within the Ontario and other Colonial Acts.—The precise significance of the express declaration in the Ontario, British Columbia, and Manitoba Acts that the master is responsible, whether the person exercising superintendence is or is not ordinarily engaged in manual labour, (see sec. 1, ante), has not yet been determined. But the words preceding the clause certainly contemplate something different from that informal superintendence which is often exercised by one member of a gang of men who are sent, without any regularly appointed foreman, to do some particular piece of work (*a*)

The Australian Acts employ virtually the same phraseology, and must therefore receive the same construction, as the English Act.

6. Employés controlling machinery, position of.—The superintendence contemplated by the statutes is that which is exercised over other men, not over inorganic appliances (*a*). So far as

(*f*) Actions have been held maintainable where the negligent persons were the following employés: The superintendent of a mine. *Drennen* v. *Smith* (1897) 115 Ala. 396; *Bessemer, &c., Co.* v. *Campbell* (1899) 121 Ala. 50. The superintendent of an iron company's business. *Woodward I. Co.* v. *Andrews* (1896) 114 Ala. 243, 21 So. 440. A yardmaster, superior to all other railroad employés present, who personally takes the place of the engineer and is running the engine at the time a car is derailed, or is present directing and controlling the engineer. *Louisville & N. R. Co.* v. *Morthershed* (1892) 97 Ala. 261, 12 So. 714. A yardmaster while engaged in making up trains. *Kansas City &c. R. Co.* v. *Burton* (1892) 97 Ala. 240, 12 So. 88; *Louisville &c. R. Co.* v. *Bouldin* (1898) 121 Ala. 197 (First app. 110 Ala. 185); *Highland Ave. &c. R. Co.* v. *Dusenberry* (1892) 98 Ala. 239, 13 So. 308; *Richmond &c. R. Co.* v. *Hammond* (1890) 93 Ala. 181, 9 So. 577; *Alabama M. R. Co.* v. *Jones* (1896) 114 Ala. 519, 21 So. 507. A conductor. *Alabama &c. R. Co.* v. *McDonald* (1896) 112 Ala. 216, 20 So. 472, *Georgia Pac. R. Co.* v. *Propst* (1887) 83 Ala. 518.

(*a*) The fact that one of a small gang of workmen possessed more experience than the rest and took upon himself to give directions as to the manner of executing a general order of their regular foreman with regard to a certain piece of work is not of itself sufficient to shew that he was exercising superintendence. *Garland* v. *Toronto* (1896) 23 Ont. App. 238, rev'g 27 Ont. R. 154. Compare the cases cited under sec. 3 (c), ante.

(*a*) *Kansas City &c. R. Co.* v. *Burton* (1892) 97 Ala. 240. The special point there decided was that this principle did not involve the consequence that a complaint was bad, where the allegation was substantially that some inorganic appliance was left, by the orders of a superior employé, in such a position as to endanger unduly servants engaged in the work assigned to the injured person.

regards most of the jurisdictions, therefore, with which we are now concerned, it is clearly settled that a master cannot be held liable, as for negligence in the exercise of superintendence, where the culpable person was an employé whose duty is essentially the operation of a piece of machinery, though in so doing he necessarily exercised some control over other employés who were affected by its movements (*b*). The Alabama decisions which point, in some measure at least, to a different theory are discussed in sec. 4, ante. Still less is the master liable, where the negligent employé merely controlled the movements of machinery in the sense that it was his duty to inform the employé actually operating it at what precise moment it was to be started or stopped (*c*).

An employé whose usual work is merely to operate a machine is not made a vice-principal by the fact that it is his duty, when the machine gets out of order to notify the employé who does the repairs to put it in order (*d*).

There an action was brought for an injury caused by a railway car which was left too close to the track adjacent to that on which it stood. The court said: "The superintendence averred has relation to more than the track of the defendant, and the car left dangerously close thereto. The averment is that the yard-master, by whom we understand to be intended a person charged with the control of the tracks and cars in the yard of a railroad, was intrusted with superintendence in the placing and position of cars in the yard, and hence necessarily and obviously the performance of his duties involved the movement of cars and, in consequence, the control and direction of men and appliances necessary to such movement as was requisite to place the cars in safe and proper positions. The essence of the averment, therefore, is that the yard-master had intrusted to him superintendence of the men and appliances used in the placing of this particular car, and that whilst in the exercise of that superintendence, he negligently permitted and suffered the car to be placed so near to an adjacent track, with a passing train on which plaintiff was discharging his duties as switchman, as that it collided with the person of the plaintiff, and produced the injuries complained of."

(*b*) *Farnham* v. *New Bank &c. Co.* (1896) 23 Sc. Sess. Cas. (4th Ser.) 722 [Denying recovery where the negligence was that of the engineer of a hoisting cage in a mine. A person in charge of the lever by which a steam-hammer is worked, and whose duty it is to raise or let fall the hammer at the word of command is not a "superintendent." *Hannan* v. *Hudson*, 7 W. N. (New So. Wales) 105.

(*c*) No superintendence is exercised by a workman whose duty it is to guide by means of a guy-rope the beam of a crane used for lowering sacks of wheat into a ship's hold, and to give direction when the chain fall was to be lowered or hoisted. *Shaffers* v. *General Steam Navigation Company* (1883) 10 L.R.Q.B.D. 356, 52 L.J.Q.B.D. 260, 4 L.T N.S. 228, 31 W.R. 656, 47 J P. 327 D. Nor by a brakesman engaged in loading a barge whose duty is to give signals to the drawer of the crane when to raise and lower the bucket. *Claxton* v. *Mowlem* (C.A. 1888) 4 Times L.R. 756.

(*d*) *Roseback* v. *Ætna Mills* (1893) 158 Mass. 379, 33 N.E. 577.

7. Master liable though injured servant was not under the control of the negligent employé.—The mere fact that the "superintendence" was not exercised over the person hurt will not disable him from recovery (*a*).

8. Deputy superintendents, liability for negligence of.—In two of the reported cases the servant's right to recover for the negligence of an employé who was temporarily acting as foreman was denied on the ground that the evidence did not warrant a finding that his sole or principal duty was that of superintendence (*a*). These decisions are unsatisfactory in this respect, that they do not deal with the question which is obviously involved in the facts in evidence, viz., whether the spirit, if not the letter, of the statutes does not require the conclusion that any employé exercising superintendence for a definite period, as the deputy of the person regularly discharging that function, should be regarded as a representative of the master. On general principles, of course the

(*a*) *Ray* v. *Wallis* (C.A. 1887) 51 J.P. 519. It has been held by Denman, J., in a nisi prius case, that the statute is applicable wherever there is a common master, though the injured servant was employed in a department distinct from that controlled by the negligent servant. *Kearney* v. *Nicholls* (1880) 76 L.T. Journ. 63, [Machinist killed owing to negligence of person superintending structural alterations on a mill]; *In Kansas City M. & B. R. Co.* v. *Burton* (1892) 97 Ala. 240, 12 So. 88, the court reasoned thus: "We are unable to agree with counsel that 'the superintendence which comes within the contemplation of the statute shall be a superintendence over the person who complains of the negligence of the person intrusted with it.' The remedy for negligence of superior in the control of inferior employés whereby injury results to the latter is given by sub-section 3. Under sub-section 2, it is manifest, we think, the liability of the defendant is in no sense dependent upon the relations existing in the service between the negligent and the injured person. If the former has superintendence intrusted to him and is negligent in the exercise of it to the injury of any 'servant or employé in the service or business of the master,' whatever be the relation inter se of the servants, the master is made liable therefor by the very terms of the statute. If a yard-master, charged with the duty of keeping the tracks clear, should negligently obstruct a track, and in consequence the president of the company should be injured in the service of the employer, the corporation, it cannot be doubted that the latter would have to respond in damages."

(*a*) *Kellard* v. *Rooke* (1887) 19 Q.B.D. 585; S.C. (1888) 21 Q.B.D. (C.A.) 367; 4 Times L.R. 709. There the theory upon which the court proceeded was that the very fact of the negligent persons being merely a temporary superintendent acting as such during the absence of the defendant himself who usually directed the work shewed conclusively that he was ordinarily engaged in manual labour. In *Dowd* v. *Boston & A. R. Co.* (1894) 162 Mass. 185, 38 N.E. 440, the evidence was that under the general superintendent there was a foreman who hired men and exercised superintendence, more or less, in the superintendent's absence, on that part of the work where the negligent employé was engaged, and that the negligent employé received orders from the superintendent or this foreman in regard to his own work and that of the men working with him, and gave these men directions about the work in the absence of the superintendent. The negligent employé was doing the same kind of work and receiving the same wages as his fellow-labourers.

master could not be held liable, unless the delegation of superintendence was authorized, but, assuming this point to be settled in the servant's favour, it is submitted that, in cases of this type, a court is concerned solely with the relations of the parties during the actual period of deputed superintendence, and that, as to that period, the deputy may justifiably be said to be exercising duties of superintendence, whatever may be his functions at other times.

So far as Massachusetts is concerned this is now the law by virtue of the clauses added in 1894 to the original statute. (See sec. 1 ante) (*b*).

9. Necessity of proving that the injurious act was negligent.—In cases where it is established or conceded that the person whose act or omission was the immediate cause of the injury complained of was a "superintendent" within the meaning of the statutes, and that such an act or omission was one pertaining to the exercise of superintendence, the plaintiff will still fail in his action, unless he can shew that the act or omission constituted a breach of duty. In the subjoined note are collected a number of rulings upon the simple question, whether there was or was not negligence. Other cases involving similar groups of facts, but actually turning upon the question whether the employé alleged to be the defendant's representative was exercising superintendence are cited in the following sections (*a*).

(*b*) Under this amendment a master has been held liable for the negligence of an employé in a small foundry who, when his master was not present, directed the men as to their work, but also participated in that work themselves. *McCabe* v. *Shield's* (1900) 175 Mass. 438, 56 N.E. 699. Where the defendant's general superintendent entrusts to a subordinate the duty of supervising the work of lowering of a heavy shaft, and does not take charge of the work himself and was not present when the injury was received, the jury is warranted in finding that the employé who directed the work was acting as superintendent with the authority and consent of the defendant and in the absence of the defendant's superintendent. *Knight* v. *Overman Wheel Co.* (1899) 54 N.E. 890, 174 Mass. 455.

(*a*) (1) *Master not exempt from liability as matter of law.*—A superintendent may properly be found negligent in absenting himself from the place of work, and delegating his duties to another, when operations of peculiar difficulty and danger are to be carried out. *Cook* v. *Stark* (1886) 14 Sc. Sess. Cas. (4th ser.) 1. Where the evidence leaves it uncertain whether it is the duty of the superintendent of a mine to stop or continue the running of a suction-fan when a fire is discovered in the mine, and also how much time elapsed after the fire began before he learned where it was, and whether or not he acted promptly, and there is also testimony tending to shew that the fan was stopped once and then started again, it is for the jury to say whether the superintendent was reasonably careful in seeing that the fan was not started again, even if it was properly stopped in the first instance, although a large number of people were congregated round the mouth of the mine, and it is not clear who started the fan for the second time. *Drennen* v. *Smith* (1897) 115 Ala. 396. The question as to whether an injury to an employé from the explosion of dynamite in a conduit was due to the negligence

In order to hold an employer for positive acts of negligence on the part of his superintendent, if these facts relate to a matter in

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of the superintendent of the contractor while exercising superintendence, is for the jury upon evidence that the latter knew on the Saturday before the accident that a hole loaded with dynamite had not been fired, and that on the Monday following he directed the plaintiff to drill a new hole which pointed towards the loaded hole, and the explosion resulted from contact with the dynamite in drilling the new hole. *Dean* v. *Smith* (1897) 48 N.E. 619, 169 Mass. 569. The question as to whether a superintendent was guilty of negligence while exercising superintendence in directing dynamite to be put into a hole while the rock was heated by a recent explosion is for the jury upon evidence that, under such circumstances, an explosion was likely or liable to occur, and the explosion which followed and caused the death of the deceased was the result of such direction. *Green* v. *Smith* (1897) 48 N.E. 621, 169 Mass. 485. Cotton waste in a chimney belonging to defendant company caught fire, and its superintendent had sent a man up the chimney to put it out; and in doing so the man threw down two planks which were burning, which act the superintendent approved. Afterwards a second fire broke out, and the superintendent ordered plaintiff's husband and others to assist in putting it out, and the same man was sent up the chimney and threw down a burning plank, as at the former fire; and just as it was thrown, without warning, plaintiff's husband stepped inside the chimney and was instantly killed by the plank. Held, that the fact that the employé who was sent up the chimney failed to give deceased warning of the danger from planks being thrown down did not necessarily shew negligence of a fellow-servant, since the jury might have found that the fellow-servant did all that he should have done, and that it was the duty of the superintendent to give deceased warning. *Cote* v. *Lawrence Mfg. Co.* (1901) 59 N.E. 656, Mass. Where the complaint alleges negligence on the part of defendant's superintendent, or one exercising superintendence, it is proper to admit evidence of statements to defendant's foreman, and in his presence, of the dangerous character of the trench and the need of bracing. *Bartholomeo* v. *McKnight* (1901) 59 N.E. 804, Mass. The fact that it suited the convenience of the consignee of the cargo of a car left standing in dangerous proximity to an adjacent track, to unload it at that place, will not relieve the railway company from liability for the negligence of the yardsmaster in leaving it in that position, the consequence being that a switchman on the adjacent track was injured by collision with the car. *Kansas City, M. & B. R. Co.* v. *Burton* (1892) 97 Ala. 240, 12 So. 88. Allowing an oil box in a railway yard to be so near the track as to catch the foot of a switchman, casually allowed to slightly protrude beyond the end of the footboard of an engine on which he is riding, is negligence in the person whose duty it is to keep the tracks in the yard free from obstructions. *Louisville & N. R. Co.* v. *Bouldin*, (1898) 25 So. 903, 121 Ala. 197, reiterating opinion expressed in first appeal, 110 Ala. 185. The question as to negligence by a superintendent in failing to take any precaution to protect an employé while in an elevator well picking up paper is for the jury, whether the superintendent did or did not promise to look out for him, where the circumstances warrant an inference that he knew that such employé or some other employé would have to go into the well. *Scullane* v. *Kellogg* (1897) 169 Mass. 544, 48 N.E. 622. An employer is answerable for the negligence of a superintendent in stationing a labourer underneath a large overhanging rock which was known to be likely to fall. *Collins* v. *Greenfield* (1898) 172 Mass. 78, 51 N.E. 454.

(2) *No negligence, as matter of law.*—Negligence in regard to the piling of planks, some of which fell on plaintiff, cannot be inferred simply from the fact that the foreman had directed him to lower the stack, especially where he and his witness admit that they did not observe anything unsafe in the appearance of the stack. *Connell* v. *Surrey &c. Co.* (Q.B.D. 1887) 3 Times L.R. 630. A servant injured by the falling of bales of hay in a shed cannot recover on the ground of negligence of the superintendent, in the absence of evidence that he had anything to do with piling the hay, or that he appointed the particular place at which the servant was to work at the time of the injury, or that he knew or ought to have known that the hay was liable to fall. *Fitzgerald* v. *Boston & A. R. Co.*

regard to which the employer has no duty to perform, it should be made clearly to appear that the employer has undertaken to do by his superintendent that which he was not called upon to do. An

(1892) 293 (Mass.) 31 N.E. 7. The mere fact that a ledge stone is left two or three days on a staging used in the construction of a building, projecting to such an extent that it is liable to fall if it is hit or the staging jarred, does not shew that the foreman was negligent in exercising superintendence, where he had no occasion to visit that part of the work while the stone was there, and did not have actual knowledge that it was there, and the amount the stone projected could not be seen from below. *Carroll* v. *Willcutt* (1895) (Mass.) 39 N.E. 1016, 163 Mass. 221. Where the evidence shews that while plaintiff was working in an elevator well, with a lighted lantern between his feet, shovelling a ground product of bone, rock, and slaughter-house refuse, defendant's superintendent started some machinery, which caused a current of air to carry the dust from such product to the flame of plaintiff's lantern, causing an explosion, which injured plaintiff, he cannot recover where it does not also appear that such superintendent knew, or ought to have known, that the dust was inflammable, or that it was a matter of common knowledge that it was inflammable. *O'Reilly* v. *Bowker Fertilizer Co.* (1898) 54 N.E. 534, 174 Mass. 202. Negligence cannot be predicated of the act of a foreman in failing to examine personally a shaky wall which he had requested a contractor, an expert at such matters, to shore up. *Moore* v. *Gimson* (Q.B. 1889) 5 Times L.R. 177, 58 L.J.Q.B. 169. A foreman has no reason to expect that an employé will without any authority remove a stay from a scaffold erected in the course of building operations, and cannot be held liable for failing to discover such removal and to see that other employés suffer no injury from the dangerous conditions thus created. *Kelly* v. *Davidson* (1900) 31 Ont. Rep. 54 An averment that defendant's foreman did not keep closed a trap-door by which goods were raised and lowered between two floors of a laundry does not shew negligence on her part. *Moore* v. *Ross* (1890) 17 Sc. Sess. Cas. (4th Ser.) 796. An employé who, while rolling a cotton bale, was struck by another bale thrown down from a pile by a fellow servant, cannot recover for the injury sustained, although the defendant's superintendent previously told the fellow servant to "throw down cotton." Such a direction is construed, in respect to the master's liability as being merely an order to throw the cotton in a proper way and in a proper place. *Gouin* v. *Wampanoag Mills* (1898) 172 Mass. 222. 51 N.E. 1078. The foreman of a switching gang in a railroad yard whose duty it is to direct on which track a train shall be put while it is being made is not negligent as to an employé engaged in making up a train at one end of the yard, in failing to give special warning or notice as to cars at the other end of the yard on the same track, where the custom of the yard to switch cars in at both ends of the siding on the same track is well known. *Caron* v. *Boston & A. R. Co.* (1895) (Mass.) 42 N.E. 112, 164 Mass. 523. An operator of a steam crane is not chargeable with reckless indifference to consequences, in swinging back the crane in the usual manner, because of the presence of other employés in the way, when he knows that such employés are aware of the operation and are instructed to get out of the way of the crane, and they have always previously done so. *Anniston Pipe Works* v. *Dickey*, 93 Ala. 418. There is no obligation on the part of the general superintendent of a building to oversee every detail of the work. Hence his employer cannot be held liable on the theory that he was negligent in omitting to instruct masons accustomed to build their own scaffolds as to the way in which the work should be done, or to be present when any particular scaffold was being erected. *Burns* v. *Washburn* (1894) 160 Mass. 457, 36 N.E. 109. The master is not responsible for the death of a workman killed, while hoisting planks to an upper story, by the fall through a hole in the floor of a heavy truck which a fellow workman was using, with the roller upwards, to land the planks, but which he had neglected to block, though means for so doing were very simple and always at hand. *O'Keefe* v. *Brownell* (1892) 156 Mass. 131, 30 N.E. 479. The court said: "When placed upon the floor with the roller down, the instrument could be easily moved about with a load resting upon a plank. When placed with the plank down, the instrument was intended to remain

act done voluntarily by the superintendent in that field, without the direction or approval of the employer, would not be an act of superintendence (*b*).

10. Acts constituting negligence in the exercise of superintendence. —An analysis of the decisions shews that negligence in the exercise of superintendence is deemed to have been committed, if the superintendent has been guilty of any of the various breaches of

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stationary, and beams or planks could then be moved by resting them upon the roller and moving them while so supported. The truck was in use by the latter method when the accident occurred. It was a movable tool, designed and adapted for various uses, and in different places about the building. It was complete and in good order, and only dangerous, as any heavy object is dangerous, if carelessly allowed to fall from above upon a person below. When used for certain purposes, for which it was among others designed, it would have a tendency to be displaced by the motion of the articles put upon it, to facilitate the motion of which its roller was designed and adapted to be used while the truck was stationary. If so used at the edge of an open well, it might fall into the well; to prevent this, it could be fastened to the floor on which it rested, or blocked with a cleat. But when used as a vehicle on which to transport articles by its own motion, fastening or blocking would wholly prevent its use. The absence, therefore, of any appliance for blocking or fastening did not make it a defective tool or machine. Like a barrow, an inclined plane, a roller, a screw, or blocking timber, and many other utensils used in building, it was to be often moved about and the means of avoiding danger in its use varied constantly with its situation and the work. It was a common and well known tool, and the duty of using it in a safe manner was the duty of the ordinary workmen who handled and used it, rather than a duty of the employer or a duty of superintendence. The means of blocking or fastening it when necessary were of the simplest, and always at hand, being only nails and bits of wood suitable for cleats. It was not the duty of the employer, but of the ordinary workmen, to see that they were used. The omission to use them was not negligence of a superintendent, or want of superintendence, but mere negligence of fellow workmen in the use of a familiar, simple, and complete tool, well adapted to the work for which it was then in use, and for other work." A superintendent in charge of the running of trains over a single track of a double track road during a snow blockade, who ordered a west-bound train to proceed to a certain station on the east-bound track, is not negligent in failing to direct the switchman at such station to open the switch leading from the east-bound to the west-bound track or so to set the signals as to indicate that it was closed, notwithstanding that a snowplough was on the east-bound track a short distance west of the switch, as he might assume that the switch would be rightly set, or, if not, that the signal would indicate that fact to the trainmen. *Fairman* v. *Boston & A. R. Co.* (1897) 47 N.E. 613, 169 Mass. 170, 47 N.E. 613. It has been laid down that the mere fact that a foreman sees a workman doing a piece of work in an unusual manner and does not interfere, is not a ground for holding the master liable for the consequences of what the workman does. *Milligan* v. *Muir* (1891) 19 Sc. Sess. Cas. (4th Ser.) 18. But this statement cannot be accepted without some qualification, as it may clearly be a duty pertaining to superintendency to see that an improper method of doing work is corrected. See next section.

(*b*) *Shea* v. *Wellington* (1895) 163 Mass. 370, 40 N.E. 173, holding that an employé in a quarry could not recover from the owner for the negligence of the superintendent in failing to tell him of a defective exploder given him by such superintendent for use, the reason assigned being that as no duty could be predicated to inspect the exploders as they had been purchased from a reputable manufacturer.

duty specified below. The authorities are arranged under headings designed to facilitate comparison with that part of the writer's note (already mentioned) in 51 L.R.A. (Sub-d. VI., p. 584), in which the official acts of common law vice-principals are classified. It will be observed that the acts there reviewed cover practically the same range of incidents as those which import liability under this sub-section of the statutes.

(1) The adoption of an improper method of doing the work in hand (*a*).

(*a*) The master's liability is for the jury under the following circumstances: Where a staging fell under the injured servant in consequence of the superintendent having ordered a whole cart load of wood to be put on the staging, the usual custom being to put only half a load of wood on it at one time. *Prendible* v. *Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N.E. 675. Where the superintendent of a pile-driving gang directed one of the gang to stop a car on which the pile driver was placed, by laying a crowbar on the track in front of the car while it was being drawn down a slight incline, a distance of about five feet, by attaching a rope to a heavy pile and setting the pile driver in operation, instead of moving the car to the proper place by means of crowbars, which was the customary mode. *Southern R. Co.* v. *Shields* (1898) 25 So. 811, 121 Ala. 460. Where a foreman failed to have a bank which was being undermined properly shored up. *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N.E. 550. Where a foreman of a quarry undertook to have an unusually large stone hoisted without drilling holes in it so that it might be more securely held by the points of the dogs. *Crowley* v. *Cutting* (1895) 163 Mass. 436. Where a superintendent failed to give proper instructions as to the method of putting into the shears a heavy gate which was to be cut up preparatory to being melted. *Madden* v. *Hamilton I. Forging Co.* (1889) 18 Ont. R. 55. Where a superintendent who was experienced in transporting timbers upon a gear of a given make, and knew that the road over which it was to be carried was rough and uneven, loaded a timber with its narrow sides at the top and bottom and directed the employés to get on and hold it down. *Gagnon* v. *Scaconnet Mills* (1896) 165 Mass. 221, 43 N.E. 82. Where an engineer allowed or directed coal to be loaded in the tender of his engine in such a manner as to be dangerous to his fireman. *Culver* v. *Alabama M. R. Co.* (1895) 18 So. 827, Ala. Where the superintendent of a quarry instructs a labourer to unload an unexploded hole, and stands by him for several minutes while he is undertaking to do the work with an iron scraper. *Grimaldi* v. *Lane* (1900) 177 Mass. 565. If a superintendent knew, or had reason to know, that there was danger of the caving of a trench, and had no materials for bracing it, and no power to procure them, it was negligence to allow the digging to go on before the necessary materials were procured. For such negligence of a superintendent, the principal is answerable, and cannot escape liability by shewing that it was by his own act, and not by the fault of the superintendent, that suitable materials were wanting. *Connolly* v. *Waltham* (1892) 156 Mass. 368. The risk that the plaintiff's employer, a quarryman, or his superintendent will negligently attempt to remove a charge of gunpowder by drilling into a hole that had been charged, before ascertaining that the charge had exploded, is not one of the risks of his employment which the plaintiff assumed. *Malcolm* v. *Fuller* (1890) 152 Mass. 160, distinguishing common law rule, as exemplified by *Kenney* v. *Shaw*, 133 Mass. 501. In an action for injuries occasioned by the falling upon him of a large iron pump, which, loaded upon a truck, he with others was moving from one part of the defendant's works to another, evidence as to other appliances which were at hand and other methods which might have been used to move the pump is admissible upon the question whether the defendant's superintendent was at fault in causing it to be moved as he did. *Geloneck* v. *Dean Steam Pump Co.* (1896) 165 Mass. 202. In *Knight* v. *Overman Wheel Co.* (1899)

(2) The giving of improper directions with respect to particular details of the work (*b*). The right of recovery under this head

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174 Mass. 455, 54 N.E. 890, a heavy shaft which was being lowered slipped in the hitch of the chain-fall by which it was lowered and struck the plaintiff. It was held, that it could not be said as a matter of law, that there was no negligence of an employé for whose acts the master was responsible, inasmuch as there was evidence from which it might be inferred that the superintendent failed to see that the shaft was evenly balanced on each side of the chain-fall by which it was supported, and that, although the hitch which proved defective had been made by one of the workmen, the superintendent had afterwards seen it and made no objection to it, and was thus guilty of a breach of duty in not seeing that everything was right. In *Bessemer &c. Co.* v. *Campbell* (1898) 121 Ala. 50, 25 So. 793, the plaintiff's decedent was suffocated in a mine in which a fire had broken out. It was held that the owners might properly be held liable on the theory, first, that it was the duty of the superintendent of a mine in which a fire starts while employés are in the mine, to telegraph for and have appliances for flooding the mine sent by express, if the lives of the employés could not properly be saved by any other method, and, secondly, that the fact of the superintendent's having consulted the operatives as to the expediency of bratticing up the mine, and that in their opinion it was the best thing to be done, did not relieve the operators of the mine from liability for the death of an employé resulting from such action, where another course, by which his life could have been saved, should have been pursued in the exercise of due care and diligence. (3) That the proprietor of the mine should not be relieved from liability for the death of the employé on the ground that, because of the supersensitiveness of the superintendent's nerves, he failed to use proper means to save the employé's life.

(*b*) A foreman may be guilty of negligence in giving an order to hoist a pile while the fall is caught on the checking-guard. *McPhee* v. *Scully* (1895) 163 Mass. 216, 39 N.E. 1007. An order to clean machinery in motion may be found to be a negligent one. *Marley* v. *Osborn* (Q.B.D. 1894) 10 Times L.R. 388. Evidence that the superintendent of a street railway company gave an order to the motorman of a derailed car which placed him in a dangerous position if a car should come forward on the other track, and that while the motorman was in this position he gave an order to the motorman of a car on the other track standing 6 or 8 feet from the end of the derailed car to come ahead,—is sufficient to warrant a finding that the superintendent was guilty of negligence contributing to the injuries of the motorman, who was caught between the guard rails of the two cars. *O'Brien* v. *West End Street R. Co.* (1899) 173 Mass. 105, N.E. 149. A complaint is not demurrable which alleges that a section-hand was killed through the negligence of his foreman in charge of hand cars, in permitting such cars to be run at a rapid and reckless rate of speed in such close and reckless proximity to each other that they collided. *Highland Ave. & Belt R. Co.* v. *Dusenberry* (1892) 98 Ala. 239 So. 308. A section foreman is not, as matter of law, free from negligence in giving a signal for two hand cars moving close together rapidly over a trestle of a river bridge to check their speed at the same time, where a section hand on the rear car understanding the signal properly applies the brake in the customary way, but the rear car is not stopped before a collision with the front car. *Alabama Mineral R. Co.* v. *Jones* (1896) 114 Ala. 519, 21 So. 507, holding that an instruction based on the theory that the act of the section hand absolved the defendant from responsibility was properly refused. On the second appeal of this case (121 Ala. 113, 25 So. 814), it was held that the giving of the signals simultaneously was not negligence, as a matter of law. For the purposes of legal liability it is clear that the following defaults in respect to the direction of work must be placed on the same footing as specific orders: Allowing a subordinate to do something which ought not to have been done. *Bessemer Land & I. Co.* v. *Campbell*, 121 Ala. 50, 25 So. 703, [where the fan in a mine which was on fire was stopped by one of the servants. See further as to this case note (*a*), supra]. The omission to give an order which should have been given. *Crowley* v. *Cutting* (1895) 165 Mass. 436, [where the foreman of a quarry

is of course conditional upon proof that the order was within the scope of the superintendent's authority (*c*).

(3) The failure to furnish proper appliances (*d*).

(4) Employing servants not competent for the work to be done (*e*).

(5) Allowing abnormally dangerous conditions to exist in the place of work (*f*).

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did not see that holes were drilled for the dogs which were to hold an unusually heavy stone while it was being hoisted.] The failure to countermand an order when due care requires that it should not be executed. *Cavagnaro* v. *Clark* (1898) 171 Mass. 359, 50 N.E. 542, [where the superintendent saw that an employé, not being aware that an order was given, was about to place himself in such a position that the execution of the order would imperil his safety.]

(*c*) See an unreported case mentioned in Ruegg on Empl. Liab. (5th ed.) p. 34, where, in an action alleging negligence, the evidence was that a master stevedore's foreman, not being satisfied with the way a labourer was doing his work in the hole of a ship said to a man near him: "Get hold of a block of wood and chuck it down on his —— head." The order was obeyed, and the labourer's skull was fractured. A Divisional Court held that there could be no recovery.

(*d*) A judgment awarding damages to a boy injured while cleaning out a brick pressing machine with his hands should not be set aside, where the evidence tended to shew that "scrapers" for doing this work were not furnished in sufficient number by the foreman. *Race* v. *Harrison* (C.A. 1893) 10 Times L.R. 92, rev'g. 9 Times L.R. 567. A sufficient cause of action is stated by an averment that a person to whom the defendant had intrusted superintendence "negligently caused or allowed the use of means or appliances in or about attempting to get said car on said rails which would likely cause or allow said car to fall," and by an averment that such a person negligently "caused or allowed the attempt to get said car upon said rails without proper appliances." *Louisville & N.R. Co.* v. *Jones* (Ala. 1901) 30 So. 586.

(*e*) The foreman employed on a pile-driver may be guilty of negligence in allowing a workman apparently drunk to handle a fall liable to become caught on the choking guard which holds the driving hammer in place, while another workman is engaged in swinging the pile to its place. *McPhee* v. *Scully* (1895) (Mass.) 39 N.E. 1007, 163 Mass. 216. Since a general manager exercises superintendence in choosing incompetent workmen, the master is liable for an injury caused by their incompetence, whether the manager was present or not while the work was being done. *Behm* v. *McDougall* (1892) 14 A.L.T. (Victoria) 47.

(*f*) Negligence may properly be found on the principle of res ipsa loquitur (see opinion of Kay, L.J.,) where a manager of a colliery allows an inflammable brattice cloth to stand within two feet of a winding engine having a wooden brake, which, as he must have known, frequently emitted sparks. *Thomas* v. *Great Western &c. Co.* (C.A. 1894) 10 Times L.R. 244, rev'g judgment of Divisional Court. For one having superintendence of railway tracks and cars in a railway yard, either to direct or allow a car to be placed too near another track, or, upon its being there without his fault, to suffer it to remain, is negligence while in the exercise of his superintendence. *Kansas City, M. & B. R. Co.* v. *Burton* (1892) 97 Ala. 240, 12 So. 88. In *McCauley* v. *Norcross* (1892) 155 Mass. 584, the evidence was that three and a half feet from an open hole in a floor a few iron beams were placed; that they had been there for two or three days, and that the defendant's superintendent, being on crutches, and walking about the floor upon which the beams were placed, in order to pass between a pile of planks and these beams, pushed one of the beams with his foot, so that it swung around on the other beams and fell down through the hole on to the plaintiff. The court said:

(6) The failure to give instructions under circumstances which indicate the propriety of doing so (*g*).

(7) The failure to warn a servant as to the existence of an abnormal danger (*h*).

(8) The violation of rules promulgated by the master (*i*).

"Upon these facts, the jury might find that the iron beams were negligently so placed and left that one of them would be liable, from a slight inadvertent push of the foot of a passer-by, to fall through the hole. Being left in this condition for two or three days, the jury might infer a lack of due and proper superintendence. Allowing such things to be negligently left for so long a time in a position where they were likely or liable to be toppled over, and one of them to fall through the hole in the floor, would warrant a finding of negligence on the part of the superintendent in exercising superintendence."

(*g*) Evidence warranting the inference that there was, under the circumstances, an obligation to give the plaintiff instructions regarding the manner in which his work ought to be done, and that his injury was caused by his foreman's failure to give those instructions, is sufficient to sustain a verdict in his favour. *Race* v. *Harrison* (C.A. 1893) 10 Times L.R. 92, rev'g 9 Times L.R. 567. See also *Madden* v. *Hamilton &c. Co.*, cited in note (*a*), supra.

(*h*) The failure to notify the second of two relays of workmen engaged in repairing a marine engine that the crank shaft had been disconnected during the first shift, the result being that the shaft swung round and crushed one of the men in the second relay, is negligence in the exercise of superintendence. *Aitken* v. *Newport &c. Dry Dock* (Q.B.D. 1887) 3 Times L.R. 527. A workman who is struck by a bundle of iron which is being unloaded from a ship, in consequence of his foreman's omitting to warn him to stand out of the way, is entitled to recover on the ground that the negligence was committed in the exercise of superintendence. *Wright* v. *Wallis* (C.A. 1885) 3 Times L. Rep. 779. Lord Esher said: "An argument has been addressed to the court which amounts to this—that, if you order a man to stand in a certain place, and then throw something at him, and injure him, the injury is not caused by his conforming to the order, but solely by the subsequent act. If these refinements are to be introduced into real life, real life cannot go on as it does. The order to stand there and the throwing down of the iron were all part of the same occurrence." A section man engaged upon a railroad track does not take the risk that a foreman stationed to give him warning of the approach of trains will be negligent in the discharge of that duty. *Davis* v. *New York, N. H & H. R. Co.* (1893) 159 Mass. 532, 34 N.E. 1070. A dock company is liable for injuries received owing to the negligence of its foreman in not informing the plaintiff that a piece of the machinery which he was employed to repair had been so loosened that there was a risk of its falling. *Aitken* v. *Newport &c. Co.* (Q.B.D. 1887) 3 Times L.R. 527. A charge that the risk of a heavy shaft's slipping out of the hitch of the chain-fall by which it is being lowered was a transitory risk, of which defendant was not required to notify a servant who was struck by it, is properly refused. The risk is not one incident to, and ordinarily to be expected to occur in, the prosecution of the work in which deceased was engaged. *Knight* v. *Overman Wheel Co.*, 54 N. E. 890, 174 Mass. 455. The facts in evidence may sometimes suggest the existence of this duty as an alternative obligation which ought to be discharged in the event of the servant's environment not being made as safe as it would have been if some other duty had been adequately performed. If an inexperienced workman, while engaged in undermining a bank of earth, is injured by the falling of the bank upon him during the temporary absence of his employer's superintendent, whose duty it is to watch the bank and to warn him of the danger of its falling, it is a question for the jury whether it was not negligence in the superintendent to allow the plaintiff to work under the bank without shoring up the top of it, or stationing someone to give warning. *Lynch* v. *Allyn* (1893) 160 Mass. 248.

(*i*) In so far as specific rules define the course to be pursued in regard to matters pertaining to the duty of superintendence, it is clearly not open to dis-

Where the alleged act or mission was one which prima facie indicates a breach of the duty of a mere servant, the plaintiff cannot, in any event, recover under this provision of the statute unless he shews that the person answerable for the conditions complained of was a foreman or superintendent (*j*). Whether proof of that fact will enable him to maintain the action depends upon the principles discussed in the following section. On the other hand, if the evidence tends to show that the accident was caused by a breach of what the jury may properly find to be a duty pertaining to superintendence, and one of the counts of the declaration is based upon the words of the sub-section, the master is not entitled to a ruling that, as there was no evidence of the negligence of the defendant, the plaintiff cannot recover under this count (*k*).

11. Acts done by superintendents while participating in the work, liability of master for.—The intention of the legislature that the master shall be answerable for the negligence of superintending employés only when it was committed in the exercise of superintendence is somewhat less explicitly stated in the statutes of Massachusetts, New York, and Colorado than are those of England, Alabama, and the British Colonies. But it is well settled that, under

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pute, that the violation may properly be found to be negligence for which the master is responsible. Hence a verdict against a railway company will not be disturbed, where the injury was due to the omission of a foreman of track-repairers in a yard, to set a look-out to warn them of the approach of trains, such duty being imposed on him by the company's rules. *Duthie* v. *Caledonian R. Co.* (1898) 24 Sc. Sess. Cas. (4th Ser.) 934. Nor where the injury resulted from a collision between hand-car caused by the failure of a section foreman to give the signals required by the rules of the road. *Richmond &c. R. Co* v. *Hammond* (1890) 93 Ala. 181, 9 So. 577. Nor where the evidence is that in violation of rule that the engineer should slow up and, if necessary, stop his engine before reaching a switch to ascertain whether it is properly set, the person running the engine pushed the cars over the switch at a rapid rate when the switch was improperly set and caused a derailment and injury complained of. *Louisville & N.R. Co.* v. *Mothershed* (1892) 97 Ala. 261, 12 So. 714. It would seem, however, that, if the injurious act was one which, under the principles developed in the next section, would not be considered as having been done in the exercise of superintendence, the mere fact that the act constituted a breach of some rule ought not to affect the master with responsibility. But no case has been found in which this precise situation was presented.

(*j*) *Trimble* v. *Whitin Mach. Works* (1898) 172 Mass. 150, 51 N.E. 463. [Want of gang-plank caused injury to a workman helping to place a machine in a car]. An unqualified direction to find for the plaintiff if certain dynamite which exploded had been "carelessly left buried by the defendant, or its servants or agents in the discharge of their duty" is erroneous. *Sheffield* v. *Harris* (1893) 101 Ala. 564, 14 So. 357.

(*k*) *Lynch* v. *Allyn* (1893) 160 Mass. 248.

the former statutes, no less than under the latter, the fact that a person is engaged in superintendence does not make his employer liable for every act which he does while so engaged (*a*). On the other hand, all the courts are agreed that the action is not barred simply by proof that the default of the superintendent was committed while he was assisting the plaintiff in manual labour (*b*). A collation of the authorities, however, discloses considerable divergence of opinion as to the theory upon which the boundary line is to be drawn between the acts for which the master is and is not responsible.

Some cases present little or no difficulty. Thus there is clearly no ground upon which the master can be held liable for a merely manual act done by an employé whose characteristic functions are not those of a superintendent at all (*c*). Compare sec. 3 (c), ante. Again it is obvious that, wherever the duties of an employé are susceptible of a definite segregation into two specific classes, so that it is possible to say that the duties in one class are those of a superintendent, while the duties in the other class are those of a mere servant engaged in manual labour, or discharging some function which is characteristic of and customarily entrusted to subordinate workmen, the exercise of superintendence cannot, without doing violence to the express ends of the statute, be predicated as to what is done in performing the latter class of duties (*d*). The position taken is that, when a person is employed

(*a*) *Joseph* v. *Whitney Co* (1900) 177 Mass. 176, per Holmes, J. See also the cases cited in the following notes.

(*b*) *Kansas City &c. R. Co.* v. *Burton* (1892) 97 Ala. 240, 12 So. 88; *Ray* v. *Wallis* (1887) 51 J.P. (C.A. Engl.) 519; and the cases cited in note (*f*), infra.

(*c*) The starting of a table used for the transfer of cars in a street car barn by a car shifter whose duty was to get cars ready for the conductors and motormen is not an act of superintendency as to a conductor who was injured by the table. *Whelton* v. *West End Street R. Co.* (1899) 172 Mass. 355, 52 N.E. 1072.

(*d*) *In Kellard* v. *Rooke* (1887) 10 Q.B.D. 585, where an employé alleged to have been intrusted with superintendency habitually engaged in the manual labour of hauling and throwing bales of wool into a ship's hold, and the injury was caused by one of these bales falling upon the plaintiff. It was held that, assuming this to be the situation, it could not be said to come to anything more than this:—that an employé who was a superintendent for some purposes, and who was also an ordinary working man engaged in the work in which the plaintiff was likewise engaged, was guilty of negligence, whereby his fellow workman was injured, and that the negligence having been committed whilst he was in the exercise of the manual labour in which he was engaged was not in the exercise of superintendence. In *Cashman* v. *Chase* (1892) 156 Mass. 342; 31 N.E. 4, where it was held that the act of an engineer of a hoisting apparatus in improperly raising the fall when ordered to lower it, was not an act of superintendence, for the reason that in operating the engine he was doing the work of a labourer, acting upon

to work with his hands, as well as to exercise superintendence, the line must be drawn somewhere between what are acts of superintendence, and what are acts of manual labour, or all that he does

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the directions of others, and not directing them. The court said: "The negligence for which the statute makes the employer liable is that of a person 'intrusted with and exercising superintendence.' The employer is not answerable for the negligence of a person intrusted with superintendence, who at the time, and in doing the act complained of, is not exercising superintendence, but is engaged in mere manual labour, the duty of a common workman. The law recognizes that the employé may have two duties: that he may be a superintendent for some purpose, and also an ordinary workman, and that if negligent in the latter capacity the employer is not answerable. Unless the act itself is one of the direction or of oversight, tending to control others and to vary their situation or action because of his direction, it cannot fairly be said to be one in the doing of which the person intrusted with superintendence is in the exercise of superintendence. For the negligence of such a person in doing the mere work of an ordinary workman, in which there is no exercise of superintendence, the employer is not made responsible by the statute." In *Flynn* v. *Boston Electric Light Co.* (1898) 171 Mass. 395, a verdict for the plaintiff was sustained where the foreman of a gang of linemen used to labour as an ordinary workman, and caused the injury, while he was helping to pull back an electric wire which caught the branch of a tree which the plaintiff was cutting and broke it off, allowing him to fall. Negligence in the exercise of superintendence entrusted to an employé does not exist in the case of an engineer whose duty it is personally to operate the engine, although he usually has a helper, where, in the absence of the helper, by the negligence of the engineer in starting the engine, or in failing to prevent a third person from starting it, a person engaged in repairing the engine is killed. *Dantzler* v. *De Bardeleben Coal & I. Co.* (1893) (Ala.) 22 L.R.A. 361; 14 So. 10. The court said: "It being his duty personally to perform—not merely direct—this labour, and his right only to have the other man help him to perform it, his relation to the machinery being primarily that of a labourer, it cannot be said that he was in the exercise of any superintendence while he was discharging this primal duty of a manual labourer. His superintendence, if any he had, extended only to his actual direction of the helper, and ceased whenever he did any act in person and in the line of his duty as the engineer in charge of these machines. The evidence in this case is without conflict to the effect that when the engine moved or was set in motion Gould's helper was not even on the premises, and that, if the engine started by Gould, it was the direct negligent act of a manual labourer, not in any sense done in the exercise of superintendence, conceding that at any time superintendence was intrusted to him. This leaves the case outside of sub-sec. 2 of sec. 2590 [of the Code]. The death of McKay, on this hypothesis, was not caused by the negligence of a person to whom superintendence was intrusted 'while in the exercise of such superintendence.' On the other hand, had the jury concluded that Gould did not start the engine, but that it was set in motion by some third person in consequence of his failure to prevent outside interference, the result must have been the same. On this hypothesis Gould was a mere watchman, for whose negligence the company was not responsible to his fellow servant, McKay. Rob. & W. Employ. Liab. 260. In no possible aspect of the evidence was the plaintiff entitled to recover. The affirmative charge for defendant was properly given." The negligence of a conductor of a freight train while engaged in unloading freight, causing an injury to a brakeman assisting him, is that of a fellow servant. *Louisville, N. A. & C. R. Co.* v. *Southwick* (1896) 16 Ind. App. 486, 44 N.E. 263. A foreman is a fellow servant with the employés under him, where both are engaged in throwing rails upon a car. *Louisville, N. A. & C. R. Co.* v. *Isom* (1894) 10 Ind. App. 691, 38 N. E. 423.

must be regarded as superintendence or as manual labour, which manifestly would be unjust" (*e*).

But the solution of that class of cases in which the injury was due to the negligence of a superintendent in regard to a manual act casually done for the purpose of expediting the work, is less easy.

The conception underlying some of the decisions is that these incidental digressions into the functions of a mere servant do not carry him outside the scope of his duties of superintendency. This doctrine has the merit of avoiding the logical incongruity involved in the hypothesis that the judicial effect of the same physical event may be different according as it resulted from the personal negligence of the superintendent himself, or the negligence of a subordinate in carrying out his orders (*f*).

(*e*) *Riou* v. *Rockport Granite Co.* (1898) 171 Mass. 162. There it was held that the act of an employé in a quarry whose principal duty was that of superintendent in placing a can of powder preparatory to blasting where it was hit by a swinging tag rope attached to a derrick, is not an act of superintendence. The court said: "If the work of blasting was in some sense in the nature of superintendence, the mere act of fetching and putting down a can of powder preparatory to blasting could hardly be described as an act of superintendence, or as anything more than an act of manual labour on the part of Labelle. There was nothing in it involving any control over or direction to or oversight of any other workman, or requiring any skill, or distinguishing it from any other act of manual labour."

(*f*) In *Osborne* v. *Jackson* (1883) 11 L.R. Q.B.D. 619, 48 L.T.N.S. 642, recovery was allowed where the injury was caused by the negligence of a foreman in handling a plank, the other end of which was held by the plaintiff. The foreman took the plank, and, in effect, directed the plaintiff to take it when he could not do so safely, and thus thrust upon him a duty which he could not safely perform, said: "If the foreman had directed another to do what he did himself, he would surely have been negligent in the exercise of superintendence." Denman, J., distinguished *Shaffers* v. *General Steam Nav. Co.*, 10 Q.B.D. 356, on the ground that the negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident, while, in the case before him, the foreman was generally superintending the work on which the plaintiff was employed. It has also been laid down by the English Court of Appeal that the mere fact that a superintendent undertakes to do some manual work himself does not preclude the inference that, while doing such work, he was exercising superintendence. *Ray* v. *Wallis* (C.A. 1887) 51 J.P. 519. [The walking foreman of a stevedore pushed some planks which he had given orders to lower and knocked plaintiff off a platform.] The act of a foreman of stevedores who by way of pushing on the work, takes hold of a case which is being lowered into the hold of a ship and impatiently "cants" it over to one side, the result being that it falls and injures a servant, is done by him as superintendent, and not as a mere servant temporarily engaging in manual labour. *Donnelly* v. *Spencer* (1899) 1 Sc. Sess. Cas. (5th Ser.) 1109. In this case it was suggested that a foreman is not to be regarded as having exchanged his functions of superintendent for those of a mere servant engaged in manual labour, unless he engages in such labour on some "appreciable length of time." A conductor undertaking to make a coupling between two cars which, if not made properly, will affect the safety of a brakesman who has been ordered to make a coupling between two other cars was apparently assumed to be acting as a superintendent in *Alabama &c. R. Co.* v. *McDonald* (1896) 112 Ala. 216, 20 So. 472. But no negligence was stablished.

Another conception is that a superintendent who, during however brief a period, engages in manual labour, is primâ facie deemed to have abdicated his functions of superintendence and to be acting ad hanc vicem in the capacity of a mere workman (*g*). An extreme application of this doctrine is found in a case which seems to embody the principle that an act which is deemed to have been done as a mere servant, for the reason that it is manual, communicates its quality, as an act of that character, to acts incidentally connected with it, which would otherwise have been regarded as pertaining to superintendence (*h*). The conclusion thus arrived at, though in a sense logical, seems to ignore the essential rationale of the theory of differentiation which the court professes to be applying. It is submitted that, if the mere doing of a manual act implies ad hanc vicem a temporary divestiture of the functions of superintendence, the discharge of one of those functions, even when it is intimately associated with the manual

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(*g*) It is not an act of superintendence to push a heavy beam with the foot, so that it falls through a hole in the floor. *McCauley* v. *Norcross* (1891) 155 Mass. 584. The act of a person whose principal duty was that of superintendent, in permitting himself or another labourer to be in the neighbourhood of a third labourer with a crowbar in his hands, cannot be found to be negligent superintendence merely because the event shewed that it was possible to harm the latter employé by negligently handling or dropping the bar. *Fleming* v. *Elston* (1898) 50 N.E. 531, 171 Mass. 187. A street railway company is not liable for injuries to servant due to negligence of the superintendent of its paint-shop, where at the time of the injury the superintendent was acting as motorman. *Brittain* v. *West End Street R. Co.* (1887) 168 Mass. 10, 46 N.E. 111.

(*h*) In *Whittaker* v. *Bent* (1896) 167 Mass. 588, 46 N.E. 121, it was held that a superintendent of an iron foundry does not exercise superintendence in setting up molds and inspecting them with reference to their condition as to dampness, or in assuring an employé that they were all right, where such acts are mere matters of detail and of recurring necessity. According to the plaintiff's testimony he asked the superintendent if the molds were all right, and received the answer, "Yes, go ahead, Bob." It was argued that, assuming the superintendent not to have acted as such in setting up the mold, he did exercise superintendence in what he said to the plaintiff, according to a distinction pointed out in *Kalleck* v. *Deering*, 161 Mass. 469, 470. But the court said: "We think that the answer, 'Yes, go ahead,' was not the direction of a superior, but merely the assurance, in a customary colloquial form, of the fellow-workman who had inspected the mold, that all was safe. A doubt might be raised as to the effect of a previous statement by the plaintiff that the foreman gave him a ladle of iron to pour, which looks at first like a direction to do what the foreman ought to have known to be dangerous. But it appears from the context that it means only that the foreman that morning was doing the manual work of filling the ladles, and handed one to the plaintiff. It was part of the plaintiff's regular business to pour." In a later case it was laid down that "the employer is not made answerable by the statute for acts of superintendence negligently performed in his service by an ordinary workman, or by one who is both workman and superintendent, in making declarations which may be interpreted either as orders of a superintendent or as assurances of a fellow-workman, if in fact they are merely such assurances." *Cavagnaro* v. *Clark* (1898) 171 Mass. 367.

act in question, should be regarded as involving pro tanto the resumption of these functions. Under any other theory, it is clear, the master will enjoy all the advantages, and be subject to none of the drawbacks, of the doctrine that the applicability of the statute is to be tested solely by the character of the functions in regard to which negligence is alleged.

The severe doctrine adopted in the cases just cited is qualified to the extent of allowing the servant to recover, when the manual act in question was so connected with a plan or order coming from him in the exercise of his authority as to show that the plan was ill-conceived or the order negligent (*i*). But this qualification is not construed as involving the conclusion that every act done by a superintendent, even to help in carrying out an order which he himself has given, should be regarded as part of his superintendence (*j*) A fortiori is the master not liable where the act of the superintendent has no proper connection with his duties. "The question whether the connection is close enough is," as has

(*i*) *Joseph* v. *Whitney Co.* (1900) 177 Mass. 176, per Holmes, C.J. The authority for this proposition cited by the learned judge was *O'Brien* v. *Look* (1898) 171 Mass. 36, 50 N.E. 458, where it was held that the manual labour of a superintendent who directed the method of lowering the fore and after into its socket, in unwinding a rope from the drumhead, cannot be separated from his duty as superintendent, so as to relieve the master from liability for injury to a servant, resulting from the superintendent's negligence in unwinding the rope when it was in a wet condition. In *McCabe* v. *Shields* (1900) 175 Mass. 438, 56 N.E. 699, the acting superintendent in a foundry directed the plaintiff to use a mold for a casting in which he had made a perforation with a rusty piece of iron. The evidence tended to shew that, when the molten iron came in contact with the rust in the mold left there by the iron used by H. in perforating it, it caused an explosion resulting in plaintiff's injury. It was held that the superintendent in placing the dangerous mold in plaintiff's hands and directing him to use it, acted as a superintendent, but whether the act of perforation itself was one of superintendence was not decided. In *Malcolm* v. *Fuller* (1890) 152 Mass. 160, 25 N.E. 83, it was held that, as a foreman of a quarry was exercising superintendence in determining, after the firing of a blast, that the tamping should be cleared out of a drill-hole by drilling, a servant injured by an explosion while the work was being done might recover, regardless of the fact that the superintendent himself struck the drill. In *Crowley* v. *Cutting* (1895) 165 Mass. 436, where a stone which was being hoisted slipped out of the dogs which held it for the reason that no holes had been drilled to receive them, a verdict for a servant injured by the fall of the stone was upheld, although the superintendent adjusted one of the dogs himself. In *Ray* v. *Wallis* (C.A. 1887) 51 J.P. 519, the court mentioned, as an additional reason for holding the defendant liable, the fact that the manual work was connected with an order previously given, but the decision was independent of this factor.

(*j*) *Joseph* v. *Whitney Co.*, ubi supra.

been observed by Chief Justice Holmes, "one of degree, and naturally different people will draw the line at different points" (*k*).

(*k*) *Joseph* v. *Whitney Co.*, ubi supra. There the plaintiff was at work on an embossing machine, which was not running, and had his hands between its jaws, when another workman called the superintendent, who leaned over between plaintiff's machine and another to give directions to the second workman, and accidentally touched the shipper, thereby starting plaintiff's machine, and causing the injury. Held that plaintiff could not recover. "The precise place," it was said on the opinion of the court, "in which Meyer, the superintendent, should be while giving his directions, the way in which he should stand or sit, and his care in managing his body in the place he selected, were too much the accident of his independent personality and too remote from the act of giving the orders for us to charge the defendant with the consequences of his neglect in that regard. The matter may be stated in a different form. If the motion of Meyer which caused the injury be regarded as part of an act of superintendence, the fact that he was superintending was in no way a necessary element in producing the injury. But we are of opinion that by a true construction of the statute the superintendence must contribute as such, and that when, as here, it had nothing to do with the injury qua superintendence, the case is not within the act." Even if a superintendent, travelling on a street car, as a passenger, is a superintendent to the extent of having his eye on the way in which the car was managed, his superintendence, as such, does not contribute to an injury received by the conductor through striking against a tree close to the track in consequence of his having to step round the superintendent while he was standing on the running board. *Hall* v. *Wakefield &c. R. Co.* (Mass. 1901) 59 N.E. 668. On the other hand it has been held that a jury is justified in finding that a superintendent in general control of the entire work of digging a new trench was engaged in an act of superintendence in walking along the bank, and in stopping to look down at the work, in the course of which he precipitated a fall of the bank. *McCoy* v. *Westboro* (1899) 172 Mass. 504, 52 N.E. 1064. See also *McCauley* v. *Norcross* (1892) 155 Mass. 584, the facts of which are stated under sec. 10, note (*f*) supra.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

INTERPRETATION—"PERSON"—BODY CORPORATE—SALE OF FOOD AND DRUGS ACT, 1875 (38 & 39 VICT., C. 63—INTERPRETATION ACT 1889 (52 & 53 VICT., C. 63) S. 2, SUB-S. 1—R.S.O. C. 1 S. 18 (13)—R.S.C. C. 1, S. 7 (22).

Pearks v. *Southern Counties Dairies Co.* (1902) 2 K.B. 1, was a prosecution of a limited Company for selling goods contrary to the Sale of Food and Drugs Act (38 & 39 Vict., c. 63), and one of the questions raised was whether a corporation was a "person" within the meaning of the Act. Under the English Interpretation Act, (52 & 53 Vict., c. 63), s. 2, sub-s. 1, the word person in an Act of Parliament is defined to include a body corporate "unless the contrary intention appears." The Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.) held that there was nothing to the contrary in the Sale of Food and Drugs Act and that the company was liable to indictment for breaches of the Act committed by their servants. Section 6 of the Act prohibits sales "to the prejudice of the purchaser of any article of food or drug which is not of the nature, substance and quality of the article demanded by such purchaser" under a penalty; and it was held that a sale might be within the Act though the purchaser from his special knowledge knew that the goods in question were not up to the standard demanded. The question being what would be the position, not of a skilled purchaser like an inspector, but of an ordinary person purchasing the article without any special knowledge.

ADULTERATION—SALE OF FOOD AND DRUGS ACT 1875 (38 & 39 VICT., C. 63 S. 6—SALE OF ARTICLE NOT OF NATURE, SUBSTANCE AND QUALITY OF ARTICLE DEMANDED—MILK, AS TAKEN FROM COW, DEFICIENT IN FAT.

Smithies v. *Bridge* (1901) 2 K.B 13, was also a prosecution for sale of milk in breach of the Sale of Food and Drugs Act 1875, s. 6. The facts were that the milk in question was sold as taken from the cow, but owing to the length of time which had elapsed since the cow had been last milked the milk was deficient in fat to an extent of 30 per cent., the deficiency having been absorbed by the cow into her own system. It was held by the Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.) that although no actual adulteration had taken place, the sale was never-

theless a breach of the Act. It is doubtful however whether such a case could be held a breach of the Dominion Act (R.S.C. c. 107) which is not in the same terms as the English Act.

COMPANY—DIRECTOR—REMUNERATION—ACTION BY DIRECTOR FOR REMUNERATION—CONDITION PRECEDENT.

Caridad Copper Co. v. *Swallow* (1902) 2 K.B. 44, was an action against a shareholder of a limited company to recover calls on shares in which the defendant, who was a director of the company, by way of counter claim claimed to recover £400 for two years' services as director. The articles of association provided that there should be allowed to each of the directors out of the funds of the company as a remuneration for his services £200 per annum to be paid at such times as the directors might determine. At a meeting of the directors held on 28 Dec., 1899, a resolution was passed the minute of which was as follows, "with reference to the question of unpaid directors' fees it was agreed, in view of the fact of the company being without funds, that the payment of the same should remain in abeyance for the time being," and no further resolution on the subject had been passed. Under these circumstances the Court of Appeal (Williams, Romer and Mathew, L.JJ.) agreed with Wright, J., that the counter claim could not be maintained, as the fixing of a time for payment of the remuneration was a condition precedent to the right of the directors to recover the same.

CROWN NOT NAMED IN ACT—LIABILITY—CROWN PREROGATIVE—EXCEPTION.

The Hornsey U.D. Council v. *Hennell* (1902) 2 K.B. 73, is an illustration of the rule of law that an Act of Parliament imposing pecuniary burdens on property does not bind Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound. Under the Public Health Act property abutting on streets was made liable for the expenses of paving such streets. The land sought to be made liable was acquired and occupied by a volunteer corps for military purposes and held under and subject to the provisions of certain Acts, and vested in the commanding officer for the time being of the corps, and it was held by the Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.) that it was land owned and occupied for the purposes of the Crown, and that therefore the commanding officer was not liable to taxation for paving, etc., of streets on which the property abutted.

MASTER AND SERVANT—COMPENSATION FOR INJURY—WORKMEN'S COMPENSATION ACT 1897 (60 & 61 VICT., c. 37)—RIGHT OF WORKMAN RECEIVING COMPENSATION FOR INJURIES TO WAGES.

Elliott v. *Liggens* (1902) 2 K.B. 84, although a decision under the English Workmen's Compensation Act of 1897, of which there is no counterpart in Ontario, may nevertheless be applicable under our Ontario Act, R.S.O. c. 160. The plaintiff had under the Act received compensation for an injury sustained by him, which incapacitated him from working, and which compensation was 50 per cent. of his average weekly earnings. The plaintiff having been injured in July, was paid compensation at the above rate up to Nov. 9, when he was notified to quit. The action was brought to recover the other fifty per cent. of his wages, but the Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.) decided that he could not succeed, that the compensation payable under the Act must be taken to be in lieu of the wages he loses by reason of being rendered incapable of earning them. Channell, J., considered that the workman by claiming compensation under the Act is estopped from claiming wages.

INDUCING BREACH OF CONTRACT—TRADE UNION BRINGING PRESSURE TO BEAR ON MASTER TO VIOLATE CONTRACT WITH WORKMAN—BONA FIDE BUT MISTAKEN BELIEF IN EXISTENCE OF RIGHT.

In *Read* v. *Friendly Society of Stonemasons* (1902) 2 K.B. 88, the plaintiff claimed to recover damages against the defendants, a trade union society, for their having interfered and by threats induced a firm of Wigg & Wright to violate a contract they had entered into with the plaintiff to teach him the business of a stonemason. By certain rules of the defendant society, of which Wigg & Wright were members, it was provided that boys entering the trade should be bound apprentices and in no case be more than sixteen years, "except masons' sons and step-sons." The plaintiff was the son of a mason and was twenty-five years of age. Wigg & Wright thinking he was an exception to the rules had accepted him as an apprentice and bound themselves to teach him the trade whereupon the defendants notified them that they had committed a breach of the rules as the plaintiff was over sixteen and notified them that if they continued to employ the plaintiff they would direct the members of the defendant society who worked for Wigg & Wright to quit their employ. Wigg & Wright therefore refused to teach the plaintiff as agreed. The County Court Judge thought

that the defendants had acted in the bona fide belief that they had the right to do as they did for the enforcement of their rules and dismissed the action; the Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.) disagreed with that view of the law, and held that the bona fides of the defendants would not relieve them from liability unless they had in fact a sufficient justification; but although the facts found by the County Court Judge did not amount to such sufficient justification, yet as the defendants might be able to prove one, a new trial was granted, although Lord Alverstone, C.J., thought that judgment should be entered for the plaintiff.

EXPROPRIATION OF LAND—COMPENSATION—RISE IN VALUE OF EXPROPRIATED LAND AFTER NOTICE TO TREAT—COAL MINE.

In re Ballfa & M. D. S. Collieries v. *Pontypridd Water Works* (1902) 2 K.B. 135. The decision of the Divisional Court (1901) 2 K.B. 798, noted ante p. 16, has failed to command the approval of the Court of Appeal (Williams and Romer, L.JJ.), they being of opinion that, after notice to treat has been served, a subsequent rise in the price of coal cannot properly be taken into account in fixing the compensation to be paid for the coal mine proposed to be expropriated.

NEGOTIABLE INSTRUMENT—THEFT OF NEGOTIABLE INSTRUMENT—BONA FIDE SALE BY BROKER OF NEGOTIABLE INSTRUMENT—DEBENTURE PAYABLE TO BEARER—USAGE—CONVERSION—HOLDER FOR VALUE.

In *Edelstein* v. *Schuler* (1902) 2 K.B. 144, the plaintiff was the owner of certain debentures, payable to bearer, which by the usage of the stock exchange and the mercantile world generally, were treated and regarded as negotiable instruments and passed by delivery from hand to hand. These bonds were stolen and taken by the thief to a broker at Bradford for sale, the broker sent them to the defendants, who were members of the stock exchange, with instructions to sell, and the defendants offered them for sale and sold them to jobbers, and the price was duly received by them and remitted to the broker at Bradford. Bigham, J., under these circumstances held that the bonds were negotiable instruments and that when the defendants received them they become holders thereof for value, and that it was now no longer necessary for a plaintiff to tender evidence that such bonds are negotiable instruments, that being a fact of which the Court will take judicial notice.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Master in Chambers]. PLATT *v.* BUCK. [June 10.

Production—Letters between solicitor and client.

Letters passing between a solicitor and his client, who was the common grantor of the plaintiff and defendant, in respect to the property in dispute, which had passed into the possession of the defendant from the executor of the writer after his decease are not privileged from production.

H. L. Drayton, for plaintiff. *Masten*, for defendant.

Meredith, C.J.] McGILLIVRAY *v.* WILLIAMS. [July 15.

Lis pendens—Vacation of—Ex parte application.

The plaintiff having registered a lis pendens, the local judge, on his ex parte application, vacated it, and the plaintiff registered the order within fourteen days of its being made.

Held, that ss. 98, 99 of the Judicature Act, giving a judge the power to vacate a certificate of les pendens where the plaintiff or other party at whose instance the certificate was issued, does not in good faith prosecute the litigation, and allowing registration of the vacating order only on or after the fourteenth day from the date of the order, are applicable only when the party seeking to vacate the certificate is not the person by whom and for whose benefit it has been registered. Where a party to an action registers a lis pendens for his own benefit he may get an order vacating it at any time, and register the same.

F. A. Anglin, for appellant. *Middleton*, for respondent.

Divisional Court.] REX *v.* JAMES. [July 16.

Fruit Inspection Act Having in possession for sale—Fraudulent packing —"Faced or shewn surface."

The mere having in possession for sale packages of fruit fraudulently packed within the meaning of s. 7 of the Fruit Inspection Act, 1901, is an offence thereunder, though no one is imposed on thereby or any fraud intended.

Semble.—The "faced or shewn surface" within the meaning of the section is not limited to the branded end of the package.

J. D. Montgomery, for defendant. *Beaumont*, contra.

Divisional Court.] SCOTT AND MIDDLETON. [July 31.

Mortgage—Amount due—Waiver or dispensation with tender of rate of interest after maturity of mortgage—Costs.

Prior to the maturity of a mortgage, the mortgagor's solicitor wrote to the mortgagee's solicitor, that if he would call at the former's office he could have the principal and interest due amounting to $396.48, and on the mortgagee's solicitor failing to call, he wrote to the mortgagee, that he was prepared to pay the said sum; this was answered by the mortgagee's solicitor sending a statement claiming in addition certain disputed costs.

Held, that what took place did not amount to a waiver or dispensation of a tender of the amount due under the mortgage.

The payment of the principal money was to be made at the expiration of a named period, with interest at a specified rate, as well before as after maturity until the said principal was fully paid and satisfied.

Held, that the interest at the rate specified was payable after as well as before the expiration of such period.

Peoples' Loan and Deposit Co. v. *Grant* (1890) 8 S.C.R. 262, distinguished.

In an action for redemption brought by the mortgagor, in which the said tender was set up, the judgment was for a reference before the master to ascertain the amount due, to make all necessary enquiries for redemption or foreclosure and to report. The provisions for costs being that if the mortgagor had made default in payment of the amount if any found to be due, he should pay the costs; and, if no greater sum than $396.48 were found to be due, the defendant should pay the costs. Further directions were not reserved; nor were there any further directions as to costs.

Held, that the defendant was entitled to the costs of the action.

M. Wilson, K.C., and *J. B. O'Flynn*, for appellants. *Middleton*, for defendants.

Divisional Court.] RE BRAMPTON GAS COMPANY. [Aug. 13.

Winding-up Act—Claims provable thereunder—Secured creditors.

Creditors holding fully secured claims and content to rely thereon, without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in the winding-up proceedings under the Dominion Winding-Up Act, R.S.O. ch. 129, and have them adjudicated upon therein, and where such creditors without any intention to submit to such adjudication had filed with the liquidator affidavits proving their claims, leave was given them to withdraw same, leave also being given to one of such creditors, who had an unsecured debt, to file a claim limited thereto.

Shepley, K.C., and *Skeans*, for creditors. *Cassels*, for liquidator.

Lount, J.] BAXTER *v.* JONES. [Aug. 15.

Principal and agent—Insurance agent—Agreement to give necessary notices —Omission to do so—Liability.

An insurance agent who, in consideration of his being given the right of effecting a firm's insurance in companies represented by him, undertakes to attend to the insurances, to see that the policies were duly made out, and to give the necessary notices required to be given from time to time, but upon a further insurance being subsequently effected, omits to give any notice thereof whereby the insured were indemnified, he is liable therefor.

Riddell, K.C., for plaintiff. *Shepley*, K.C., and *Washington*, K.C., for defendant.

Divisional Court.] MASON *v.* LINDSAY. [Aug. 22.

Sale of goods—Conditional sale—Name of vendor.

Upon a piano made by a company whose corporate name was "The Mason & Risch Piano Company, Limited," and place of business Toronto, claimed by them in replevin as against a mortgagee thereof, there were painted the words "Mason & Risch, Toronto."

Held, that if the transaction came within the Conditional Sales Act R.S.O. 1897, c. 149, this was not a compliance with the provisions of s. 1 of that Act.

But *held*, also, that the transaction did not come within the Act, the mortgagor not being bound by the agreement under which the piano was in his possession, to purchase the piano, but having merely the option to purchase it.

Helby v. *Matthews*, [1895] A.C. 471, distinguished and applied.

Judgment of LOUNT, J., affirmed on other grounds.

Joseph Montgomery, for the defendant. *Strachan Johnston*, for the plaintiffs.

Ferguson, J.] LAISHLEY *v.* GOOLD BICYCLE COMPANY. [Aug. 26.

Master and servant—Dismissal of servant—Damages—Percentage on sales.

The plaintiff, who had been employed by the defendants as manager, receiving a salary and a percentage on moneys received from sales, and had been dismissed upon the sale by the defendants of their business before the expiration of his engagement, was held entitled, primâ facie, as damages to the amount of his salary for the unexpired term of his engagement and of the fixed percentage on moneys received after his dismissal in respect of sales previously made, but not to the fixed percentage upon the amount of sales which, it was contended, would have been made during the unexpired term had the business been carried on, the ascertainment of that amount being too speculative and uncertain.

But the plaintiff having, shortly after his dismissal, obtained other employment, and having received in respect thereof remuneration to a larger amount than the damages calculated as aforesaid, it was held that his action failed, and it was dismissed with costs.

Watson, K.C., and *S. C. Smoke*, for plaintiff. *Wallace Nesbitt*, K.C., and *H. S. Osler*, for defendants.

Falconbridge, C.J.K.B., Street, J.] [Sept 8.

PEOPLES' BUILDING AND LOAN ASSOCIATION *v.* STANLEY.

Execution—Motion for leave to appeal—Costs of—High Court—Authority to issue execution.

This was an appeal by the defendant from the judgment of MEREDITH, J., reported ante p. 550 : 4 O.L.R., 247. The appeal was heard before a Divisional Court, composed of Falconbridge, C.J.K.B., and Street, J., on Sept. 8, 1902.

Bartram, for appeal. *Dyce Saunders*, contra.

At the conclusion of the argument on behalf of the defendant, the Court held that the learned judge had power to make the order and dismissed the appeal with costs.

Boyd, C.] IN RE MURRAY. [Sept. 12.

Specific performance—Lease—Undertaking to build—Non-performance in lifetime of lessor—Devise to lessee—Damages.

By an instrument dated 29th January, 1901, a father leased a farm to his son for five years from the 1st March, 1901, at a yearly rental of $200, payable in October of each year, and undertook to build on the farm during the first year of the term, a house of certain expressed dimensions. There was a provision in the instrument for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on the 19th June, 1902, after the expiry of the first year of the term, but had not built nor done anything towards building the house. By his will, dated the 7th February, 1901, he devised the farm to his son, but made no reference to the lease.

Held, that (the father having died after breach of the undertaking) the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build.

Cooper v. *Jarman*, L.R. 3 Eq. 98, and *In re Day* (1898) 2 Ch. 510, distinguished.

Peter McDonald, for the executor. *J. W. Mahon*, *J. P. Mabee*, K.C., and *A. S. Ball*, K.C., for the other parties.

ELECTION CASES.

Maclennan, J.A.] IN RE LENNOX ELECTION—PROVINCIAL. [July 2.

Elections—Provincial—Marking of ballot papers—Identification of voter—R.S.O. 1897, c. 9, ss. 112 (4) 124, 126.

A County Court Judge is not confined, on a recount, to the consideration of cases in which an objection was made before the Deputy Returning Officer when counting the votes at the close of the poll.

When a ballot was marked with a cross outside, but near the upper line of the top division,

Held, that it should be allowed. It is not essential to have a line on a ballot paper at all. Similiarly all votes below the lower division must be counted for the candidate whose name is in it.

Where a ballot was marked with a circle, not a cross, nor any apparent attempt to make a cross,

Held, bad.

Where a ballot was well marked for one candidate, but in the other candidate's division there was an irregular, shapeless pencil mark, which was not, however, a cross or any attempt to make a cross, not a mark by which the voter could be identified,

Held, a good vote for the candidate for whom the paper was well marked.

Where a ballot, though well marked, had in the same division the initials S.A. in small but legible capitals,

Held, bad. Any written word or name upon a ballot, presumably written by the voter, ought to vitiate the vote as being a means by which he may be identified.

Where ballot papers had a cross or crosses in the division of both candidates,

Held, bad.

S. H. Blake, K.C., *W. D. McPherson*, K.C., and *E. G. Porter*, for Carscallen. *Watson*, K.C., and *J. Grayson Smith*, for Madole.

Osler, J.A.] IN RE HALTON ELECTION—PROVINCIAL. [July 14.

Parliamentary elections—Recount of ballots.

Upon the recount of ballots cast at the election of a member for the Ontario Legislature, there being two candidates, ballots were allowed which were marked (1) with a cross below and to the right of the lower compartment; (2) with a cross in one compartment and a line in the other; (3) with a cross in one compartment and a faint and probably unintentional mark in the other; (4) with a mark in the form somewhat of an inverted V, as being probably intended for a cross; (5) with three crosses in one compartment; and (6) with a mark which might fairly be

taken to be a clumsy and ill-made cross; and ballots were disallowed which were marked (1) with a single stroke, the error in the head-note in *In re West Huron* (1898) 2 O.E.C. 58, in which it is stated that ballots so marked were in that case allowed being pointed out; (2) with a plain cross in one compartment and a fainter, partly smudged or rubbed out cross in the other; (3) with the name of the candidate written in the compartment; and (4) with a circle in both compartments.

Ballots marked in due form but with an indelible coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence, and evidence not being admissible, to shew whether a pencil of this kind had or had not been supplied by the deputy returning officer.

J. W. Elliott, and *E. N. Armour*, for the candidate Nixon. *E. F. B. Johnston*, K.C., and *W. I. Dick*, for the candidate Barber.

Osler, J.A.] RE LINCOLN ELECTION—PROVINCIAL. [Aug. 21.

Provincial election—Misdescription of electoral district—Surplusage—Amendment.

The petition and other papers in an election case were headed in the proper court and purported to be under "The Ontario Controverted Election Act." "As to the election of a member of the Legislative Assembly for the Province of Ontario for the electoral district of Lincoln and Niagara, holden on the 22nd and 29th days of May, 1902." No such provincial electoral district as Lincoln and Niagara existed, but there was an electoral district for Lincoln, being the district intended.

Held, that the misdescription was not fatal; that the additional words might be treated as surplusage and struck out, leave being given to the petitioner to make such amendment.

W. D. McPherson, K.C., for the motion. *R. A. Grant*, contra.

Province of New Brunswick.

SUPREME COURT.

Pugsley, A. S., Arbitrator.] RE DEFOREST. [Oct. 1.

Vendor and Vendee—Taxes—St. John Assessment Act, 52 Vict. c. 27, s. 131.

By agreement dated March 18, 1902, for the sale of land in the city of St. John the vendee was to be given a "good title free of all claims on the first of May," the date when possession was to be given. Section 131 of

the St. John Assessment Act, 52 Vict., c. 27, enacts that "any assessment upon or in respect to real estate shall be a special lien on such real estate from the first day of April in the year of the assessment, being the date to which the assessment relates in any year, and such lien shall continue for two years from the time of the completion of the assessment list and the filing thereof in the office of the common clerk." On May 1st, 1902, the rate of taxation for the year from April 1st had not been fixed by the assessors, and the rate was not determined, nor was the assessment list filed by the assessors with the common clerk until a number of weeks after May 1st. The vendee contended that the taxes for the year beginning April 1st should be paid by the vendor, and the matter was referred to the Attorney-General, whose decision it was agreed should be final.

Held, that the vendee should pay the taxes, save one month's proportion thereof, to be borne by the vendor.

A. P. Barnhill, for vendee. *A. Geo. Blair, jr.*, for vendor.

Province of Manitoba.

KING'S BENCH.

Richards, J.] DIXON v. MACKAY. [Aug. 13.

Buildings, whether chattels or part of the realty—Proof of judgment of County Court—Irregularity in entry of judgment—Sale after expiry of writ—Sale at inadequate price—Purchase by plaintiff's wife at sale under execution—Specific delivery of chattels.

The plaintiff's husband having recovered a judgment against the defendant in a County Court and issued an execution thereunder, the bailiff seized as chattels some buildings which had been erected by defendant on land belonging to the Crown, and after due advertisement sold them by auction to the plaintiff. Defendant had erected the buildings about 1883 and lived in them until 1896, when he left. He resumed possession after the sale to plaintiff and before she commenced this action, which was for the specific delivery of the buildings as chattels. The buildings were not so affixed to the freehold as to require that anything should be broken or separated by force in order to remove them, and for many years after their erection defendant made no attempt to get title from the Crown for the land so occupied. He had, on the contrary, endeavored to induce the Government to purchase the buildings from him.

Held, 1. Notwithstanding the defendant's sworn statement that the buildings, when erected, were intended to be part of the freehold, the circumstances shewed that the buildings were always chattels.

2. To prove the judgment it was sufficient, under section 46 of "The County Courts Act," R.S.M. c. 33, to produce the entry in the procedure books of the County Court or a certified copy thereof, as County Courts in Manitoba are Courts of Record.

3. The omission by the Clerk of the Court, when signing judgment in the original action, to observe the directions of s. 105 of the Act relating to striking out the name of a defendant who had not been served with the writ of summons by making a note of the amendment in the procedure book amounted only to an irregularity and did not invalidate the judgment.

At the trial defendant's counsel also argued that there had been no proper seizure of the buildings under the execution, or, if there was, that the seizure had been abandoned, that due notice of the sale and of the several postponements had not been given, also that the buildings had been sold to the wife of the execution creditor for an inadequate price, that before so selling, the bailiff should, under section 185 of the Act, have applied to the judge of the court for power to sell, and that the writ of execution had expired before the sale. The bailiff found the buildings locked and vacant. He did not enter them or put a man in possession, but put up three written notices on them, stating that he had seized them and mentioning the place and date of the intended sale. No notices of the several adjournments of the sale were made public in the neighbourhood of the buildings, but defendant knew the date finally fixed for the sale and his solicitor, at the time of the sale, gave the bailiff a written notice forbidding it. The buildings were situated in a small and distant settlement on the shore of Lake Winnipeg, and, although they were sold for a very small percentage of what they had cost, it would not have paid to remove them from the settlement, and it was not shewn that there were any other persons likely to buy them at any price.

Held, 1. The seizure was sufficient and could not be said to have been abandoned.

2. As against the execution debtor, the notices of the sale and of the adjournments were sufficient.

3. The sale could not be impeached for inadequacy of price, or because the purchaser was the wife of the execution creditor, and that the provisions of s. 185 are only for the protection of the bailiff against an action for selling it at too low a price.

4. As the seizure was made while the writ of execution was in force, and the sale then advertised was adjourned from time to time till the buildings were actually sold, it made no difference that the writ had expired before the actual sale.

Judgment for the plaintiff with costs, execution to be stayed for two months to enable defendant to appeal.

F. Heap, for plaintiff, *Ewart*, K.C., and *Sutherland*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] OPPENHEIMER *v.* SPERLING. [June 12.

Practice—Writ of summons—Action against foreign firm.

Appeal from judgment of IRVING, J., dismissing summonses by defendant Horne-Payne to set aside writs.

Sperling, Garbutt, and Horne-Payne, were residents of England and members of the firm of Sperling & Co., which firm carried on business in England only. Plaintiffs issued two writs (neither of which was for service out of the jurisdiction) in respect of the same cause of action, one being addressed against the firm and also against Sperling, Garbutt, and Horne-Payne individually and the other against the three individuals only. The writs were served on Horne-Payne while on a visit to British Columbia, and he entered conditional appearances and applied to have both writs set aside and (in the alternative) as to the second action that it be dismissed as vexatious.

Held, 1. The name of the firm was wrongly inserted and should be struck out of the first writ;

2. The plaintiffs should elect as to which action they would proceed with.

Before the hearing of the appeal the respondents gave notice that they were content that the name of Sperling & Co., should be struck out of the writ.

Held, that the appellants were entitled to the costs of appeal up to the time of the service of the notice and the respondents of the costs subsequent.

McPhillips, K.C., for appeal. *Davis*, K.C., contra.

Full Court.] MACAULAY *v.* VICTORIA YUKON TRADING CO. [June 25.

Practice—Special indorsement—Action on judgment—Interest till judgment Liquidated demand.

A claim for interest "until payment or judgment" is not a claim for a liquidated demand within the meaning of Order III., r. 6, except where the cause of action is in respect to negotiable instruments in which case the interest is by s. 57 of the Bills of Exchange Act deemed to be liquidated damages.

Interest claimed under a statute cannot be the subject of special indorsement unless it is stated in the indorsement under what Act the interest is claimed.

A specially indorsed writ should state specifically the amount due and when a claim is made for the taxed costs of a foreign judgment the date of the taxation should be stated.

Decision of WALKEM, J., reported ante p. 223, reversed, MARTIN, J., dissenting.

Duff, K.C., for appellant. *Cassidy*, K.C., for respondents.

Martin, J.] FRY *v.* BOTSFORD. [July 29.

Costs—Abandoned appeal—Briefs—Counsel fee—Rules 583 and 790.

On 20th May, the plaintiffs gave notice of appeal, to come on at the November sittings of the Full Court, from an order requiring them to give security for the costs of the action. On 3rd June appeal was abandoned.

Held, on a review of taxation, that respondents were entitled to tax briefs and a counsel fee. Counsel fee under the circumstances fixed at $10. A taxation may be reviewed under r. 583 as well as under r. 790.

Martin, K.C., for appeal. *Sir C. H. Tupper*, K.C., and *Duncan*, contra.

UNITED STATES DECISIONS.

The act of a servant of a railroad company instructed to watch a station and catch burglars, in mistaking a co-employee for a burglar and shooting him through want of proper care, is held, in *Lipscomb* v. *Houston & T. C. R. Co.* (Tex.) 55 L.R.A. 869, to render the company liable.

MASTER AND SERVANT.—The noon intermission is held, in *Mitchell-Tranter Co.* v. *Ehmet* (Ky.) 55 L.R.A. 710, not to sever the relation of a servant to his master, so as to prevent his recovery for an injury resulting from an unsafe working place, received while attempting during that time, by the direction of a superior, to remove broken timbers which render unsafe the work of the employees.

RAILWAY LAW.—A stipulation in a pass releasing the carrier from liability for negligent injuries to one riding thereon is held, in *Payne* v. *Terre Haute & I. R. Co.*, (Ind.), 56 L.R.A. 472, to be valid. Injury to a passenger who in attempting to have her baggage checked, is knocked down in a passageway leading from the ticket office or waiting room to the baggage room, by cabmen who, in sport, are scuffling on the passageway, is held, in *Exton* v. *Central Railroad Company of New Jersey*, (N. J. Err. & App.) 56 L. R. A. 508, to render the railroad company liable, where the occurence of similar conduct on the part of the cabman to the annoyance and injury of passengers was known, or should have been known, to the company.