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## *WHAT PERSONS ARE WITHIN THE PURVIEW OF STATUTES AFFECTING THE ENFORCEMENT OF CLAIMS FOR SERVICES.*

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1. Introductory.—In the last number of this Journal we had occasion to notice a decision by the Manitoba Court of Appeal with regard to the right of certain employés to a lien for their wages under the Builders' and Workmen's Act. In the present article it is proposed to deal comprehensively with the general question which was presented under one of its aspects in the case referred to, viz., what classes of persons are within the purview of enactments by which the common law rights of employés with respect to the recovery of remuneration for their services have been modified. For the purpose of supplementing the English and Colonial authorities on the subject, the writer has drawn freely upon the copious stores of American case-law. The use of that source of information is abundantly justified by the fact that most of the existing Canadian enactments in this field of legislation are modeled upon those which have been enacted in the United States.

The decisions regarding the construction of the clauses by which the scope of statutes of this description in respect of persons is defined are extremely conflicting. This remark is applicable even to the groups of cases concerned with statutes which are directed to the same general objects; and the antagonism is of course still more pronounced if those of a dissimilar, as well as those of a similar type, are included in the comparison. Under these circumstances it is apprehended that the preferable, if not the only feasible method of dealing with the subject is to take up each of the enactments *seriatim*, and show what construction has been placed upon them. But it will be advisable in the first place to specify the various rules of statutory construction and other elements which are treated as determinative considerations in cases of the kind with which we have to deal.

(*a*) The rule of statutory construction that the words used by the legislature are to be taken in their ordinary sense.

(*b*) The rule "that general words are to be restricted to the same genus as the specific words which precede them"[1].

[1] Willes J.—*Fenwick* v. *Schmalz* (1868) L.R. 3 C.P. 308 (316). "The general word which follows particular and specific words of the

(*c*) The kindred rule which is summed up in the phrase, *Noscitur a sociis*[1].

(*d*) The rule under which "each word used in an enumeration of several classes or things, is presumed to have been used to express a distinct and different idea'"[2]. It is obvious that the operation of this rule is, generally speaking, directly antagonistic to that of the two just referred to. In fact, as will be shown hereafter its application to the concrete facts involved in the New York case cited has produced an embarrassing conflict of authorities in that State. See § 7 (*f*), *post*.

(*e*) The footing upon which the statute in question should be construed,—whether strictly or liberally. The diverse views entertained on this point by the American courts have been a fruitful source of inconsistency. In this connection reference may be made especially to §§ 4, 11, 20.

(*f*) The general objects which it may be supposed that an enactment of the kind under consideration was intended to subserve.

(*g*) The previous course of legislation in the same country or state. The fact that the language of a provision is broader and more comprehensive than an earlier enactment in *pari materia* may sometimes be a sufficient reason for holding the former to be applicable to classes of employés, which were not

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same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words." Maxwell, Stat. 4th ed. p. 499. (§ 405 in Endlich's adaptation of this work).

"When there are general words following particular and specific words, the former must be confined to things of the same kind." Sutherland, Stat. Constr § 268.

[1] "When two or more words, susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take, as it were, their colour from each other; that is, the more general is restricted to a sense analogous to the more general." Maxwell, Stat. 4th ed. 491. (§ 400 in Endlich's adaptation of this treatise.) This statement was adopted in *Re Stryker* (1899) 158 N.Y. 526; *Wakefield* v. *Fargo* (1882) 90 N.Y. 213.

[2] *Palmer* v. *Van Santvoord* (1897) 153 N.Y. 612, 38 L.R.A. 402.

For a case in which the court proceeded upon the principle, that an intention on the part of the legislature to enlarge the scope of the statute in question was to be inferred from the addition of another descriptive term to those used in the context, see *Conlee L. Co.* v. *Ripon L. & N. Co.* (1886) 66 Wis. 481 (see § 7, note 13, *post*).

within the purview of the former[4]. It is obvious that a court which deals with a case from this standpoint may conceivably be led to conclusions different from those which might have been recited, if the later statute stood alone.

(*h*) The terms by which the remuneration which is the subject-matter of the statute is described. As will be shown in §§ 4(*c*), 13, 15, 17, *post*, the use of the word "wages" alone is regarded as an element which is indicative of an intention on the part of the legislature to exclude from the purview of the statute those classes of employés who are ordinarily spoken of as being in the receipt of "salaries."

(*i*) The nature of the claimant's position, viewed with reference to the question whether it enabled him to protect himself adequately in his dealings with the employer. Although this element has sometimes been adverted to as a ground for confining the application of statutes to employés of the lower grades, it is probably not to be regarded as one which, for purposes of differentiation, possesses an independent force.

**2. Employés entitled to a preference under the English and Colonial Bankruptcy and Insolvency Acts.**—(*a*) *Scope of these Acts as determined by the reasons for allowing the preference.* It has been stated that the principle upon which a preference has been accorded to the "servants and clerks" of bankrupts is that they suffer more severely than any other creditors from the loss of their employment[1].

(*b*) *Footing on which these Acts are to be construed.* With regard to one of the earlier Acts it was laid down by one of the Commissioners in Bankruptcy that the provision as to the preference of wages was to be strictly construed[2]. The doctrine

[4] See, for example, *Weike* v. *Rutland* (1894) 71 Miss. 933.
See also the extract from the opinion of the court in *Wetherby* v. *Saxony Woollen Co.* (N.J. Eq. 1894), 29 Atl. 326, § 7(*b*), *post*. The argument in that case illustrates the conclusion which may be indicated by the course of legislation, both as a factor which justifies an enlarged construction, and as a factor which operates restrictively.

[1] *Ex parte Gee* (1839) Mont. & C. 99.

[2] *Ex parte Hampson* (1842) 2 Mont. D. & De Gex. 462.

thus propounded was, however, not stated with relation to the scope of the provision, *quoad personas*. It was not alluded to in any of the cases cited in the following subdivision, and there is no indication of its having appreciably influenced any of the conclusions at which the courts arrived. So far as any controlling principle is traceable in those cases, it seems rather to have been that the descriptive expressions are to be understood in their ordinary sense.

(*c*) *Meaning attached to the specific expressions used to designate the preferred classes of employés.* In the earlier English Bankruptcy Acts the only words used to designate the classes of employés entitled to a preference were "any clerk or servant." By the terms of the Preferential Payments in Bankruptcy Act, 1888, § 1, (which, so far as regards the subject now under discussion, is a re-enactment of the corresponding provision in the Bankruptcy Act, 1883), a priority is allowed to the "wages or salary of any clerk or servant," and to the "wages of any laborer . . . . . whether payable for time or piece work."

The more comprehensive terms of the latest enactments are apparently to be regarded as indicating an intention to include all servants of the classes specified, irrespective of the duration of their engagements. If this supposition be correct the cases in which it was laid down that the Act of 1825, although its operation was not confined to servants hired by the year[3], was not to be considered as being applicable, unless the hiring was of longer duration than a week[4], can no longer be considered as

[3] (*Ex parte Collyer* (1834) 4 Deac. & Ch. 520, 2 Mont. & Ayr. 2; *Ex parte Humphreys* (1835) 3 Deac. & Ch. 14.)

[4] *Ex parte Crawfoot* (1831) Mont. 270; *Ex parte Skinner* (1833) Mont. & Bli. 417 (see *Ex parte Collyer* (1834) 2 Mont. & A. 29; 4 D. & C. 520 where the report of the earlier case was corrected by the court); *Ex parte Neal* (1829) 1 Mont. & McA. 194. The considerations upon which the court relied in *Ex parte Crawfoot*, *supra*, were that the insertion of the word "clerks" would have been surplusage, if the word "servants" had been used in a general sense; that the phraseology by which the terms of remuneration,—"six months' wages and salary,"—were described could not with propriety be understood as having reference to workmen, who were paid daily or weekly; and that there was no express mention of "workmen" in the Act.

good law. On the other hand, the alterations have evidently not in anywise impaired the authority of any of the earlier decisions which proceeded, as may be supposed, upon the principle that the word "servant" was to be understood in its ordinary legal sense, of a person under the control of the bankrupt with respect to the details of his work[s].

In this point of view there has been no abrogation of the doctrines, that a preference cannot be claimed by a partner of the bankrupt[t], nor by persons following a distinct business or profes-

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[s] That a commercial traveler, engaged upon an annual salary was within the description, "clerk or servant," was laid down in *Ex parte Neal* (1829) Mont. & Mac. 194.

A similar ruling with regard to the manager of a cotton mill paid so much a year in weekly instalments was made in *Ex parte Collyer* (1834) 2 Mont. & A. 29, 4 D. & C. 520.

That a city editor of a newspaper employed at a weekly salary under a contract terminable at a week's notice was a servant within the Act of, 1849, ch. 106, § 168, was held in *Ex parte Chipchase* (1862) 11 W.R. 11, 7 L.T.N.S. 290.

That a claimant who had worked during the evening for the bankrupt, and during the day for another person, was entitled to a preference was held in *Ex parte Oldham* (1858) 32 L.T.N.S. 181.

In *Ex parte Homborg* (1842) 2 Mont. D. & DeG. 642, 6 Jur. 898, it was declared that a "seaman" is a servant within the Act.

In *Ex parte Harris* (1845) De Gex, 165, 9 Jur. 497, 14 L.J. Bank. 26, a trader borrowed £550, under an agreement by which the lender was to become his clerk at a salary of £220 a year. The trader agreed to produce his accounts and balance sheets to the lender who was to get in the debts, and alone to draw checks on the banking account. If the balance was in the trader's favour at any time he might draw the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. *Held*, that the lender was a "clerk." The contention on the other side was that he was merely a person advancing capital, and that the agreement was only a mode of paying a large rate of interest.

That the preference could be claimed by the servant of a person who at the time of the commission was a "trader," although he was not such at the time when the claimant was hired was held in *Ex parte Gough* (1833) 3 D. & C. 189, Mont. & Bl. 417 (bankrupt had been an architect until about two months before the commission, and had then become a builder).

[t] *Hickin, Ex parte* (1850) 3 De G. & S. 662, 14 Jur. 405, 19 L.J. Bank. 8. There however, it was held that the claimant, a bookkeeper and cashier, was not a partner, although he had been performing services for several years before any definite agreement as to a salary of a specific amount was made, and the evidence showed that the reason why such agreement had not previously been made was that the employer was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which the claimant was to be paid for his services. But it was also proved that he had done his work in consideration of an anticipated salary, and was not looking for his remuneration solely to the profits of the business.

sion[7], nor by a servant of an independent contractor employed by the bankrupt[8].

It has been denied that a manager is within the purview of the Victoria Companies Act (1885) (No. 851), § 3, in which the phrase "clerk or servant" is defined as including "any clerk, artificer, handicraftsman, journeyman, servant in husbandry, labourer, workman, domestic or menial servant"[9]. In the same case, however, such an employé was held to be within the description, "clerk or servant" in the Insolvency Act, 1871, § 113[10].

In Newfoundland the term "servants" has been held to include all persons who, (not being contractors or mechanics engaged on an occasional or special service), render personal service in the ordinary course of business on the trading establishment of an insolvent[11].

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[7] In *Ex parte Walter* (1873) L.R. 15 Eq. 412; 42 L.J.B. 49, 21 W.R. 53, it was held that a music master and a drill sergeant, engaged by the term to attend a school twice a week at a fixed rate per hour or per lesson, were not "clerks or servants." Their attendance was deemed rather to be of the same nature as that of a surgeon or apothecary.

That an accountant employed at a fixed salary to keep the books of a trader was not a "servant or clerk" within the meaning of the Act of 1849 was held in *Ex parte Butler* (1857) 28 Law Times O.S. 375.

[8] In *Ex parte Ball* (1853) 3 De G., Mac. & G. 155; 17 Jur. 198; 22 L.J., Bank. 27, it was held that the phrase "labourer or workman of such bankrupt" in § 160 of the Act of 1849, did not include "drawers" employed in mining to assist colliers, to whom the work was let out at a certain price per score baskets. The evidence showed that each collier had a "drawer" attached to him, whom he brought when he was himself hired, and whom he paid out of his own earnings, according to an agreement made without the privity of the bankrupt, and that the colliers discharged the drawers as they saw fit, without interference by the bankrupt.

[9] *In re Intercolonial S. & P. Co.* (1887) 13 Vict. L.R. 896; 9 Austr. L.T. 76. The *ratio decidendi* was that the descriptive words were used in a descending order, according to rank, and therefore could not be construed as, comprehending a class of employés higher than "clerks."

[10] The decision proceeded on the ground that the descriptive words were intended to include all the employés in the sole service of the debtor, and paid by salary or wages, as distinguished from those hired to work by the piece, and that these words were indicative of a division of employés into two main classes—one consisting of those whose duties were mainly mental and clerical, the other composed of those who duties were mainly manual and physical. On the facts this ruling agrees with the English decision, *Ex parte Collyer*, cited in note 5, *supra*.

[11] *In re Insolvency of Ridley* (1876) Newfoundl. Rep. (1864-1874), 351. ("skinners" and "cullers" allowed in preference under § 22 of the Act.)

(*a*) *Scope of statutes considered with reference to the character of the remuneration.* By the explicit provision regarding piece-work which is inserted in the two latest of the English Bankruptcy Acts a decision in which the Act of 1825 was declared not to be applicable to persons employed on that footing, has been definitively overridden [12].

The doctrine of that decision, however, had already been discarded in a case controlled by the Act of 1869, which does not expressly include employés working by the piece [13].

Having regard to the broader phraseology of the existing enactment it is perhaps open to question, whether the English Courts would now follow the doctrine, adopted with reference to the Act of 1849, that a clerk paid by commission on goods sold by him was not entitled to a preference [14].

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[12] *Ex parte Grellier* (1831) Mont. 264, Rev'g. Mont. & Mac. 45. This case was followed in two of the Australian Provinces, with relation to statutes which did not expressly include persons working by the piece. *In re Murray* (Victoria: 1874) 5 Austr. J.R. 3 (Insolvency Act, 1871, § 113): *Re Whittell* (§ 848) Legge Rep. (New So. Wales) 441 (Insolvency Act, 18[illegible]).

The more recent of these cases, it will be observed, antedated the decision in *In re Allsopp* (1875) 32 L.T.N.S. 443, by which workmen by the piece were admitted to the benefits of the English Acts. See next note.

*In re Holyoke* (1857) 35 W.R. 396, (decided under § 40 of the Act of 1883), a man who had formerly acted for the bankrupt as general foreman of a brick yard, entered into an agreement with him by which he undertook to manufacture bricks by piece work, receiving so much per thousand for the bricks produced, out of which the wages of the men who worked under him were to be paid. It was shown further that the bankrupt had paid the workmen who did certain parts of the work and that the claimant continued to act as general manager of the brick works, and that he was liable to be discharged at a week's notice by the bankrupt, who had also the right to discharge and engage all men working under the contract, and to make alterations in the rate paid per thousand for the bricks. *Held*, that he was within the description "labourer or workman" in § 40 of the Act of 1883.

[13] *In re Allsopp* (1875) 32 L.T.N.S. 43. There a miner employed to get ironstone out of a mine for which he was paid by the yard or ton, had under him to assist in the work other men for whose wages he alone was responsible, but he was bound to conform to the regulations in force at the time, by which he was obliged to work a stated number of hours per day, and was subject to be dismissed at a moment's notice for misconduct, and could not leave or absent himself without the consent of the manager.

[14] *Ex parte Simmons* (1858) 30 L.T. 311.

In Victoria it has been held that the words "clerk or servant" in the Insolvency Act, 1871, §113, (a provision worded similarly to the earlier English Acts), do not include a commercial traveller paid by a percentage on his sales. *Ex parte Tomlin* (1885) 11 Viet. L.R. 304.

It may also be observed, that in some American cases it has been held

**3. —— under the United States Bankruptcy Act.**—(a) *Scope as determined by the reasons for allowing the preference.* In a case decided with reference to the Act of 1867, the court remarked that it was to be regarded as embracing those classes of employés who, under normal circumstances, are dependent for their subsistence upon their wages or salaries exclusively, and whose probable necessities entitle them to special protection[1].

(b) *Footing upon which this Act is to be construed.* The present writer has not found any explicit expression of opinion with regard to the question, whether the provision in this Act regarding the priority of wages should be strictly or liberally construed. But as the Supreme Court of the United States has definitely adopted the doctrine that statutes creating specific liens for labour are to receive a liberal construction[2], it may reasonably be assumed that the Bankruptcy Act, so far as it relates to the preference of the claim of servants, would also be construed on this footing.

(c) *Meaning attached to the specific expressions used to designate the preferred classes of employés.* The expressions "workmen, clerks, or servants," as used in the existing Act have not been defined by the legislature[3], and so few cases involving their construction have as yet been decided that the scope which will ultimately be ascribed to them is a matter of

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that the expression "wages" does not include remuneration paid in the form of commissions. *People* v. *Remington* (1887) 45 Hun, 329, Aff'd. 109 N.Y. 631 (memo.) (see § 7(*f*), *post*); *Re Mayer* 101 Fed. 227.

[1] *Re Rose*, 1 Am. Bkry. R. 68. The conclusion which the court deduced from the principle thus laid down was that an independent contractor is not within the purview of the statute. But this deduction may more properly be referred to the more general considerations referred to in § 21, *post*.

[2] *Flagstaff Mining Co.* v. *Cullins* (1881) 104 U.S. 176.

[3] In two cases it has been held that the meaning of these words is not controlled by the definition of the expression "wage-earner" which is given in § 1(27), viz., "an individual who works for wages, salary, or hire at a rate of compensation not exceeding $1,500 per year. That definition, it is considered, refers only to the section by which "wage-earners" are excluded from the list of the parties against whom an involuntary petition may be filed. *Re Scanlon* (1899) 97 Fed. 26; *Re Carolina Cooperage Co.* (1899) 96 Fed. 950.

great uncertainty. The application of the familiar rule with respect to the construction of statutory words derived from a foreign enactment would naturally lead American judges to treat the English cases as authorities of a strongly persuasive force, so far as regards the meaning of the words "clerks" and "servants." On the other hand, it is only to be expected that the Federal Courts should be greatly influenced by the general trend of opinion in those State Courts which have shown a disposition to affix to the words "servants" and "employés," as used in the statutes discussed in §§ 5-8, a more restricted meaning than they bear in England. The influence thus indicated is possibly accountable, in some degree at least, for two decisions to the effect that a travelling salesman is not entitled to a preference[4].

The same remark is perhaps applicable to two cases in which priority was refused to the claims of directors of companies who had acted as general manager. The position of such persons was considered to be that of representatives or vice-principals, exercising a supreme authority over the corporate affairs[5].

(*d*) *Scope of Act, considered with reference to the character of the remuneration.* It has been held that a claim for commissions by an employé engaged outside his employer's store in procuring customers, under an agreement for the payment of

[4] *In re Scanlon* (1899) 97, Fed. 26, the broader meaning of the word "servant" was deliberately repudiated, and it was held that the petitioner was neither as a "workman," "clerk," or "servant." This decision is directly opposed to that in the English case of *Ex parte Neal*, cited in § 2, note 5, *ante*.

For the other decision excluding employés of this class from the benefits of the Act, see *Re Greenewald* (1900) 99 Fed. 705.

It has been held that the term "clerk" is not confined to its strict lexicographical meaning of a person employed to keep records or accounts, and that it includes also a salesman employed in a shop or store. *Re Flick* (1900) 105 Fed. 503. But in *Re Scanlon, supra*, this popular American sense of the term was considered to be inadmissible in construing the Act.

[5] *Re Grubbs, W. D. Co.* (1899) 96 Fed. 183, (director and general manager of a mercantile corporation); followed in *Re Carolina Cooperage Co.* (1879) 96 Fed. 950 (president of business corporation). The conclusion thus arrived at is antagonistic to that which was adopted in the English decision, *Ex parte Collyer* (1834) 2 Mont. & A. 29, 4 D. & C. 520.

weekly wages and an additional sum for commissions, is not entitled to priority as "wages"[5]

**4. ——— under other American statutes giving a priority to claims for wages. Generally.**— (*a*) *Scope as determined by the reasons for their enactment.* The considerations by which the legislatures are said by the courts to have been influenced in enacting these statutes have reference both to the welfare of the employés and to that of the employer.

On the one hand they are viewed as being intended to afford an additional security to those classes of employés who are the least able to protect themselves against loss[1], and whose remuneration is in a special sense necessary for the support of themselves and their families[2]. They are not "designed to give a preference to the salaries and compensation due to officers and the employés occupying superior positions of trust or profit"[3].

On the other hand it has been stated that one of their objects is "to prevent those persons whose labour is indispensable to the continuance of the business of the employer from abandoning it," and thus obviate that "sudden and general desertion" which "would in many instances result in complete ruin to all concerned[4].

(*b*) *Rule of construction applied in determining the scope of these statutes.* The doctrine laid down in most of the cases in which the point has been specifically referred to is that statutes

[5] *Re Mayer*, 101 Fed. 227.

[1] For cases in which the notion that the employé in question did or did not belong to a class which required protection was mentioned as a factor which operated in favour of or against his claim, see *Seventh Nat. Bank* v. *Shenandoah I. Co.* (1887) 35 Fed. 436; *Pennsylvania & D.R. Co.* v. *Leuffner* (1877) 84 Pa. 168.

[2] For allusions to the significance of this factor, see *Boston & A.R. Co.* v. *Mercantile T. & D. Co.* (1896) 82 Md. 535, 38 L.R.A. 97; *Palmer* v. *Van Santvoord* (1897) 153 N.Y. 612; *Pennsylvania & D.R. Co.* v. *Seuffner* (1877) 84 Pa. 168; and the case cited in the next note.

[3] *Re Stryker* (1899) 158 N.Y. 526.

[4] *Navigation Co.* v. *Central R.R. of N.J.* 2 Stew. 252, quoted with approval in *Watson* v. *Watson Mfg. Co.* (1879) 30 N.J. Eq. 588.

of this type are to be liberally construed[5]. This doctrine, however, is to be taken as being subject to the limitation implied in the statement that "as legislation of this character confers upon a class of persons having a specific contractual relation with corporations new and unusual privileges and securities at the expense of other creditors whose distributive share of the assets is diminished, it is in derogation of the common law, and should not be extended to cases not within the reason as well as within the words of the statute"[6].

(c) *Scope of statutes, considered with reference to the character of the remuneration.* In New York the Court of Appeal has taken the position that the expression "wages," as used in a statute granting a preference to the "wages of employés, operatives, and labourers," is to be regarded as connoting only such

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[5] For case affirming this doctrine, see *Flagstaff Mining Co.* v. *Cullins* (1881) 104 U.S. 176; *Seventh Nat. Bk.* v. *Shenandoah I. Co.* (1887) 35 Fed. 436; *Heckman* v. *Tanner* (1900) 184 Ill. 144, 56 N.C. 361; *Bass* v. *Doerman* (1887) 112 Ind. 390; *McLaren* v. *Byrne*, 80 Mich. 275.

In *Palmer* v. *Van Santvoord* (1897) 153 N.Y. 612, 47 L.R.A. 402, the court remarked that the New York statute granting preferences to employés of insolvent corporations "proceeds upon a broader policy as to the persons to be protected than has been attributed to the acts imposing liability upon stockholders."

In *In re Black* (1890) 83 Mich. 513, the court, adverting to certain decisions cited by counsel, which involved the construction of enactments relating to the personal liability of stockholders for the debts of corporations, observed: "In all such cases a strict construction must be placed upon the statutes, because, although remedial, they are in derogation of the common law, and impose liabilities where none existed before. But the statute under consideration creates no new liabilities. It is merely a statute regulating the distribution of insolvent estates. It does not depend upon any constitutional provisions to authorize it. It regards the remuneration of labour performed for an employer as more worthy of payment than mere merchandise debts or other unsecured claims against an insolvent debtor. It merits are of the same nature as those which prefer debts due to the United States or to the State, and debts due for the last sickness and funeral expenses, in insolvent estates of deceased persons, and I think it should have a just and liberal construction."

In two States it has been categorically laid down that statutes creating liens are to be strictly construed. *Hinton* v. *Goode* (1884) 73 Ga. 233; *Flemming* v. *Shelton* (1884) 43 Ark. 168.

A similar view seems to prevail in Maryland. See *Boston & A.R. Co.* v. *Mercantile T. & D. Co.* (1876) 82 Md. 535, 38 L.R.A. 97, § 8(c), *post*. But the expression of opinion in that case is not direct and explicit.

The rule of strict construction has also been adopted under the Civil Law. See § 9, *post*.

[6] *Re Stryker* (1899) 158 N.Y. 526, referring to *People* v. *Remington* (1887) 45 Hun, 329, Aff'd. 109 N.Y. 631 (memo.).

remuneration as is paid for manual labour[7]. On this ground it has been held that a preference could not be claimed for the fees paid to an attorney-at-law for services rendered under occasional retainers, nor to the commissions of a selling agent, nor to the remuneration of an employé performing work of such a character that the amount stipulated to be paid for it would, in ordinary parlance, be designated as "salary"[8]. In the case cited the use of the word "wages" was treated as an element corroborating an inference which was also deduced from the collocation of the terms by which the preferred classes of claimants are described. See § 7(*f*), *post*.

In a New Jersey case also, the fact that the statute in question referred to "wages" as the subject-matter of the preference granted, and made no specific mention of "salaries," was mentioned as an element corroborating the inference drawn on independent grounds, that the statute did not cover the *officers* of a corporation[9].

(*d*) ——— *by the nature of the business or work with relation to which the services were rendered.* In some instances in which the word or words under review were clearly an apt description of employés of the class to which the claimant belonged, the specific ground upon which his right to the preference was contested was that his services were not rendered in connection with the kind of business or occupation to which the statute had reference[10].

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[7] *Re Stryker* (1899) 158 N.Y. 526, Aff'g. 73 Hun. 327.

[8] *People* v. *Remington* (1887) 45 Hun. 329, Aff'd. 109 N.Y. 631 (memo.).

[9] *Weatherby* v. *Saxony Woollen Co.* (N.J. Eq. 1894) 29 Atl. 326 (see § 7 subd. (*b*), note 000).

[10] In *Schilling* v. *Carter* (1886) 35 Minn. 287, N.W. , it was held that farm labourers were not within a statute for the protection of "mechanics, labourers and others," the decision being based upon the ground that the context clearly indicated that only employés connected with "works, manufactory or business" were within the purview of the enactment.

By § 2 of New York Laws, 1897, ch. 415, (Labour Law), it is declared that, the term employé "shall be taken to mean a "mechanic, workingman, or labourer" who works for another for hire. It was held that firemen were not within the purview of the Act, as it was not applicable to persons holding the municipal positions which are included in the classified

(e) —— – *to the fact that the employer is or is not a corporation.* It is clear that no preference should be allowed,

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lists of the Civil Service Law, who receive salaries, not wages, and who enjoy rights and privileges which differentiate them from labourers. *People* v. *Sturgis* (1903) 79 N.Y. Supp. 969, 78 App. Div. 460.

It has been held that a statute declaring a lien in favour of persons performing labour in connection with "logging" covers, cooks and blacksmiths in logging camps. *Winslow* v. *Urquhart* (1875) 39 Wis. 200; *Breault* v. *Archambault* (1876) 64 Minn. 420.

On the other hand it was held in *McCormack* v. *Los Angeles Water Co.* (1870) 40 Cal. 185, that a man hired to cook for the labourers engaged in constructing a reservoir, although he was a "labourer" was not within a statute giving a lien to persons who performed labour or such a work. The court was of opinion that the scope of the statute was limited to labourers whose services had relation to the actual work of construction.

The Michigan statute which gives a lien to any person who does work in connection with the lumbering industry expressly declares that the word "person" is to be understood as including "cooks, blacksmiths, artisans, and all others usually employed in performing such labour or services." Comp. L. § 10756.

The following decisions were rendered with relation to the Pennsylvania Act of April 9, 1872, and its supplements. In the original Act a lien was declared in favour of money due for "labour or services rendered by any miner, mechanic, labourer, or clerk," from any person or company employing them, either as owners, lessees, *contractors*, or underowners of any works mines, manufactory or other business." In the supplements the Act was expanded as to include an exhaustive list of twenty-five specific classes of employés.

In *Pfaender* v. *Hoffman*, 4 W.N.C. 171, a skilled florist was held not to be within the descriptive clause, "any miner, mechanic, labourer, or clerk." The *ratio decidendi* was that the statute was confined by its express terms to the employés of the owners or lessees of "works, mines, manufactories" or other industries *ejusdem generis*.

This is also the explanation of the decision that the term "labourer," as used in this statute, does not include a hotel cook. *Sullivan's Appeal* (1872) 77 Pa. 107; *Allen's App.* (1873) 81 Pa. St. 30; 77 Pa. St. 107; nor professional baseball player. *Kercher* v. *Sullivan* (1884) 2 Chest. Co. Rep. 461.

The phrase "clerks employed in stores and elsewhere," is held not to embrace a travelling salesman paid by commission. *Mulholland* v. *Wood* (1895) 36 W.N.C. 140, 31 Atl. 248, 166 Pa. 486.

That a man engaged in soliciting orders for, and selling the product of, a mine on commission, was not a "miner," was held in *Willauer's Estate* (1882) 1 Chest. Co. Rep. 533.

A girl employed in a "concert saloon" was held not to be within the description, "any servant girl at hotels . . . restaurants . . . . or any other servant and helper in and about said houses of entertainment. *Cleveland* v. *O'Neill*, 4 C.P. Rep. 148.

But in *Weaver* v. *Wheaton*, 2 Pa. Co. Ct. 425, a bartender in a hotel was allowed a priority under this clause.

The general doctrine has also been adopted, that this Act contemplates a business that is complete and independent, and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to a particular branch of business. The decisions from this standpoint are as follows. *Pardee's Appeal* (1882) 100 Pa. 408 (cutting saw logs and driving them on a stream to the place of manufacture, not a "business" within

where the claim is founded on the performance of work in relation to a specific kind of business, and the only employés connected with that business who are designated by the statute in question are those in the service of corporations[11].

*(f) ——— to the exhaustive character of the enumeration of the preferred classes of employés.* An application of the rule of statutory construction, ***Expressio unius est exclusio alterius,*** requires the conclusion that, if the statute in question enumerates a considerable number of classes of employés, the legislature did not intend that any other classes should be benefited[12].

*(g) Preference of employés of corporations who are also stockholders.* It has been laid down that an employé of a corporation, if he is otherwise within the purview of a statute of

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the Act); *Llewellyn's Appeal* (1883) 103 Pa. 458 (mechanics and labourers, whose services were rendered in the repair and equipment of a plant preparatory to the production of pig iron,—held not to be entitled to a preference out of the property of the manufacturer); *Wolf* v. *Krick*, 17 Pa. Co. Ct. 118 (person who performed labour in the equipment of a manufactory under the employment of the persons who proposed to carry on the manufacturing business, held not to be entitled to a preference out of the assets of such persons); *Pacific Guano Co.* v. *Kuhns*, 7 Pa. Dist. R. (preference not available to the employés of a log jobber, or of a railroad or building contractor).

In *Gibbs & S. Mfg. Co.'s Appeal* (1880) 100 Pa. 528, it was held that the employés of a man who undertook the drilling of oil-wells were not working for a "contractor" as that word is used in the original Act. The position of the court was that this word applicable only to persons employed by the owner or lessee of the mine or works to produce the mineral or the article manufactured, as the case may be, and "does not embrace those who undertake to perform some special service in the construction of works, or the opening of mines preparatory to their being operated."

But it is perhaps open to doubt whether a similar construction would be placed upon a provision in which phraseology of a less special character was employed.

[11] That a bookkeeper employed by an individual engaged in the saw mill business is not within a statute which allows a lien to bookkeepers and other employees of "merchants, transportation companies and corporations," was held in *Warburton* v. *Coumbe* (1894) 34 Fla. 212.

[12] In *Thomas* v. *Washbrough* (1900) 24 Pa. Co. Ct. 419, the court refused to allow a preference to a man performing services as the janitor and trainer of an athletic association, the *ratio decidendi* being that in the Pennsylvania Act of May 12, 1891, there was no mention of persons performing such services, and that the claimant could not be placed [illegible] any of the classes of employés which were specified.

this description, cannot be excluded from its benefits on the ground that he is also a stoc lder [13], or a director [14].

**5. Same subject further discussed. Meaning of the word "labourer."—** A class of employés which is always specified in statutes of this type is that composed of "labourers" or "persons performing labour." In its widest sense, the term "labour" may be said to embrace every form of human exertion, whether mental or physical. But, as commonly used in everyday language, it conveys the idea of work which is entirely or principally performed with the hands. This is also the signification commonly ascribed to it by American judges in construing these statutes [1]. Accordingly the benefit of a provision which grants a preference or lien in favour of a "labourer" can be claimed by such employés as the following: A person hired as a clerk, bar-tender, and boy of all work in a grocery and liquor store [2]; a mailing clerk in a newspaper office, whose work consists in addressing and despatching the papers to the subscribers and in attending to their delivery [3]; a driver of a milk wagon [4]; a cook in logging-camp [5];

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[13] *Conlee L. Co.* v. *Ripon L. Co.* (1886) 66 Wis. 481.

[14] *Re Armleder* (1900) 11 Ohio C.D. 320.
This general rule is of course not applicable in a case where the employing corporation has not been legally organized. *Fay* v. *Eagan* (Wis.), 71 N.W. 893.

[1] In *Hinton* v. *Goode* (1884) 73 Ga. 233, the court, in discussing the meaning of the word as used in § 1974 of the Georgia Code, the court observed: "Labourers, as used in the statute, mean what were generally and universally known as labourers at the time of the passage of the Act. A labourer is one who works at a toilsome occupation—a man who does work requiring little skill, as distinguished from an artisan—sometimes called a labouring man. (Webster.) Clerks, agents, cashiers of banks, and all that class of employés, whose employment is associated with mental labour and skill, were not considered labourers, and were not intended by the statute to be embraced therein as labourers, so as to have a lien for their wages."

[2] *Oliver* v. *Boehm* (1879) 63 Ga. 172 (short judgment: no argument).

[3] *Michigan T. Co.* v. *Grand Rapids Democrat* (1897) 113 Mich. 615.

[4] *Wilbur* v. *Henkins*, 17 Pa. Co. Ct. 222. (Pa. Act of May 12, 1891, granting a preference to "hand labourers, including farm labourers or any other kind of labour.")

[5] *Winslow* v. *Urquhart* (18.. 3 Wis. 260; *Breault* v. *Archambault* (1876) 64 Minn. 420 (cook and assistant cook entitled to lien).
It should be observed that in these cases it was not disputed that the

a blacksmith engaged in shoeing horses and repairing appliances used by the labourers in such a camp[6]; a man employed to attend a bar, wash bottles, unpack goods, sweep out the bar-room, and do everything that is required of him[7]. There is also explicit authority for the doctrine that a servant engaged to do work which is essentially manual is a "labourer," although the work may be such as cannot be performed without the exercise of special skill. In this point of view it is considered that a preference should be accorded to such employés as type-setters, cylinder-feeders, and pressmen in a printing-office[8]. The position has also been taken that, while a person who merely discharges the functions of an architect, to the extent of drawing the plans of a building, is not within the purview of a statute granting a lien for "work" or "labour" in respect to that building, such a statute embraces a person who not only furnishes the plans for the building but also superintends its construction[9].

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claimants fell under the generic description "labourers." The actual point upon which they turned was that they were engaged in a common enterprise with the men who handled the logs. They are in conflict with *McCormack* v. *Los Angeles Water Co.* (1870) 40 Cal. 185, where it was held that a man hired to cook for men engaged in constructing a reservoir was not entitled to a lien on it.

[6] *Breault* v. *Archambault* (1876) 24 Minn. 420.

[7] *Lowenstein* v. *Myer* (1901) 114 Ga. 709. The mere fact that a part of his duties was the keeping of the books was deemed not to be sufficient to exclude him from the benefit of the statute.

[8] *Heckman* v. *Tammen* (1900) 184 Ill. 144. The court said: "To so construe the statute as to limit its benefits to mere menial servants performing the lowest forms of labour requiring no skill, would, we think, do violence to the meaning of the Act and leave the evil intended to be cured to remain in existence only slightly mitigated. While we are disposed to hold that the statute must be confined to those who perform manual services, still it cannot be confined to such services only that require no skill in the performance of them."

[9] *Bank of Pennsylvania* v. *Gries* (1860) 35 Pa. 423. Alluding to the functions of the claimant the court said: "This is work often done by the master-mechanic, and is as essential to the due construction of a building as is the purely mechanical part. . . . . A mere naked architect, and who may be such without being an operative mechanic, who draws plans in anticipation of buildings usually, to enable the builder to determine the kind he will erect, could hardly be supposed to be within the Act which provides a lien for work 'done for or about the erection or construction of the building.' But very distinguishable from this, is the case of a party employed to devote his entire time to a building, and

On the other hand a provision of this tenor is not applicable to a civil engineer[10]; nor to a professional chemist in the employ of an iron company[11]; nor to the secretary and treasurer of a company[12]; nor to a clerk of a hotel[13]; nor to a clerk in a mercantile establishment[14]; nor to the editors and reporters of news-

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who draws the plans for every part of the work, and directs its execution according to such plans and specifications. This is labour—mechanical labour of a high order—contributing its proportionate value to the beauty, strength, and convenience of the edifice. Why is this not entitled to be considered as meritorious as mere manual labour with the tools of a trade? Both are necessary, or were deemed so to be in this case, to the progress of the building, and were performed in and about its construction."

The reasoning and conclusions of the court in the above case have been adopted in *Knight* v. *Norris* (1868) 13 Minn. 473; and *Stryker* v. *Cassidy* (1879) 76 N.Y. 50, Rev'g. 10 Hun, 18. In the last-mentioned case the court, discussing the effect of a statute granting a lien to "any person who should perform any labour," said: "This language is general and comprehensive, and its natural and plain import includes all persons, who perform labour, in the construction or reparation of a building, irrespective of the grade of their employment, or the particular kind of service. The architect who superintends the construction of a building performs labour as truly as the carpenter who frames it, or the mason who lays the walls, and labour of a most important character. It is not any the less labour within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance. The language quoted makes no distinction between skilled and unskilled labour, or between mere manual labour and the labour of one who supervises, directs, and applies the labour of others. . . . . Looking at the whole Act it is plain that it was not passed simply for the protection of labourers, using that word in a restricted sense as designating those who work with their hands, and are dependent upon their daily toil for their subsistence. Mechanics' Lien Acts were originally enacted for the especial protection of this class of persons, but their scope has been greatly extended. Under the Act in question a lien may be created not only in favour of workmen employed by a contractor, but in favour of the contractor also."

See also *Mulligan* v. *Mulligan* (1866) 18 La. Ann. 20, which is to the same effect as the cases above cited. See § 9, note 9, *post*.

That a person who superintends construction is within the purview of a statute which grants a preference to anyone who shall do any "work" in respect to a building, and declares that this expression shall be deemed to include labour of any kind, whether skilled or unskilled, was held in *Fischer* v. *Hanna* (1896) 8 Colo. App. 4,

[10] *Pennsylvania R. Co.* v. *Leuffer* (1877) 84 Pa. 168.

[11] *Cullom* v. *Lickdale I. Co.*, 5 Pa. Dist. R. 622.

[12] *Fidelity Ins. T. & S. Co.* v. *Roanoke I. Co.*, 81 Fed. 439 (Va. Acts of March 21, 1877, and April 2, 1879).

[13] *Ricks* v. *Redwine* (1884) 73 Ga. 273.

[14] *Hinton* v. *Goode* (1884) 73 Ga. 233; *Oliver* v. *Macon & Co.* (Ga. 1896) 25 S.E. 403.

papers [15]; nor to a man engaged in soliciting orders for, and selling the products of a mine upon commission [16]; nor to a man employed to disburse money and pay off workmen engaged in the building of a house [17]. Having regard to these decisions, as well as the general trend of the authorities, it seems impossible to accept as correct the ruling that a travelling salesman is a "person performing labour" [18].

Several cases may be said to proceed upon the general principle that the higher descriptions of supervising employés are not "labourers" in the statutory sense of the term. Thus the courts have refused to recognize the claims of the president of a company who was acting as general manager [19], of the manager of a company [20]; of a mining engineer employed on account of his professional knowledge and executive capacity to manage a mine [21]; of a man employed by a company to superintend its affairs at a place where it was erecting a building [22]; of the architect and superintendent of a building [24]. But it seems to

[15] *Michigan T. Co.* v. *Grand Rapids Democrat* (1897) 113 Mich. 615. The court remarked that the labour of this class of employés was intellectual rather than manual—"the work of professional men, rather than the work of labourers, giving that word its ordinary acceptation."

[16] *Willauers' Estate* (1882) 1 Chest. Co. Rep. 533.

[17] *Edgar* v. *Salisbury* (1852) 17 Mo. 271, (construing the Missouri Mechanics' Lien Law, R.C. 1845, p. 733.

[18] In *Re Lawler* (1901) 110 Fed. 135 (Statute of Washington State).

[19] *Seventh Nat. Bank* v. *Shenandoah I. Co.* (1887) 35 Fed. 436. (Va. Acts of March 21, 1877, and April 2, 1879). The court said: "If the statute had intended to embrace presidents, vice-presidents, general superintendents, general managers, and other like officials, it would doubtless have said so. The prominence of such officials in every company named in the statutes precludes the idea that their distinct existence and claims were overlooked and that they were intended to be embraced in some of the designated classes of employés. They seem to have been purposely omitted; doubtless for the reason that this class of officials are, generally, in a position to protect their interests, and secure their salaries; while the classes included in the statute are not so situated, and are not able to protect themselves against loss."

[20] *Fidelity Ins. T. & S. Co.* v. *Roanoke I. Co.*, 81 Fed. 439 (same statute).

[21] *Boyle* v. *Mountain Key Min. Co.* (N.M.) 50 Pac. 347.

[22] *Smallhouse* v. *Kentucky, etc., Co.* (1878) 2 Mont. T. 443.

[24] *Foushee* v. *Grigsby* (1876) 12 Bush (Ky.) 75. See, however, the decisions to the contrary effect in note 9, *supra*.

be wholly impossible to reconcile, on any reasonable basis, all the cases concerning the lower grades of this class of employés. Some of the decisions may be said to reflect the broad conception that, for the purposes of these statutes, there is an essential distinction between employés whose functions are entirely or mainly confined to superintendence, and those who actually perform the work in question[25]. Thus it has been held that the benefit of the lien or preference cannot be claimed by an overseer of a farm, in respect of his supervisory functions[26]; nor to the foreman of works at a tunnel[27]. On the other hand the position has been taken that the expression "labourers" embraces a man employed as a general foreman of the mine to "boss the men, keep their time, and give them orders for their pay at the end of each month"[28].

Employés who in respect to the other incidents of their positions do not belong to the classes to which the term is applicable cannot claim the benefit of the preference on the mere ground that they sometimes performed some manual work as an inci-

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[25] In *Pullis Bros. I. Co.* v. *Boemler* (1901) 91 Mo. App. 85, it was observed: "The phrase 'wages for labour,' if we construe the words according to their ordinary meaning, defines compensation for either manual labour, or, at most, for any service rendered in performing a necessary detail of a company's business by the employé's personal exertion, rather than for work performed by others under his supervision."

[26] *Fleming* v. *Shelton* (1884) 43 Ark. 168 (decided on the ground that a statute, Gautt's Dig. §§ 4079-97, giving a lien to "labourers" must be strictly construed); *Rusk* v. *Billingdale* (1871) 44 Ga. 308 (Act of 1879), (the court remarking that the rule was subject to an exception in cases where the overseer worked as a common day labourer also); *Hester* v. *Allen* (1876) 52 Miss. 162; *Whitaker* v. *Smith* (1876) 81 N.C. 340; *Isbell* v. *Dunlap* (1887) 17 S.C. 581.

In the case last cited the court said: "An overseer is one who is employed, not to labour himself, but to overlook and direct the labour of those who are employed to do the manual work of planting, cultivating and gathering a crop, and it could be a confusion of terms to call such a person a labourer."

[27] *Pratt's Appeal* (1886) 1 Sadler (Pa.) 12, 1 Cent. 218.

[28] *Capron* v. *Strout* (1876) 11 Nev. 304. The court refused to express an opinion regarding the right of a general superintendent to claim the lien; but remarked that the cases were, at all events, distinguishable. The latter of these views is sustained by the analogy of the decisions which relate to statutes in which the expression "work and labour" is used. See § 6a, *post*.

dent of the discharge of their duties[m]. Manual work so performed does not constitute their normal employment, and, as a general rule, it is only when they have been hired to do that

[m] In *Oliver* v. *Macon Hardware Co.* (Ga. 1896) 25 S.E. 403, the same court remarked: "Every human being who follows any legitimate employment, or discharges the duties of any office, is, in a very broad sense, a labourer. The president of the United States, the governor of this state, and the justices of this court are all labouring men, in the sense that they do a great deal of hard work, much of which is, indeed, attended with physical and muscular exertion; but at the same time they cannot properly be termed 'manual labourers,' either in the popular sense in which these words are used and understood, or in the sense in which the term 'labourer' was employed in the statutes under consideration." In that case the general principle here indicated was, in the headnote written by the court, expressed in the following language with reference to the particular facts under discussion: "Primarily, a clerk in a mercantile establishment is not a 'labourer,' in the sense in which that word is used in § 1974 of the Code, even though the proper discharge of his duties may include the performance of some amount of manual labour. If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon mere physical power to perform ordinary manual labour, he would not be a labourer. If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labour as that last above indicated, he would be a labourer. In any given case, the question whether or not a clerk is entitled, as a labourer, to enforce a summary lien against the property of his employer, must be determined with reference to its own particular facts and circumstances."

This decision and the arguments by which it was sustained seem to indicate some departure from the position taken in *Richardson* v. *Langston*, 68 Ga. 658. There it was ruled that an affidavit to foreclose a labourer's lien, in which it was alleged that the defendants, merchants selling dry goods and groceries, were indebted to the deponent "for services rendered as clerk, labourer, and general service in said store," was not demurrable as not sufficiently setting out the fact that the plaintiff was a labourer. From the opinion of the court, which was written by a *dissenting* judge, the court in *Oliver* v. *Macon Hardware Co.* quoted the following passage: "I do not understand that clerks, or persons doing general service, although they may labour, are therefore labourers, in legal contemplation. If they are to be included in the general term 'labourers,' then I see no limit to the exercise of this extraordinary right of having execution on oath, by all agents and employés, such as cashiers, tellers, and bookkeepers of banks, secretaries, treasurers, bookkeepers, salesmen, and superintendents of manufacturing companies, as well as all the officials of railroads below the president, whether in the offices or on the roads. To enlarge upon class legislation by implication should not be the policy of courts, and especially so where *ex parte* summary remedies are allowed."

An inspector of lumber, although his work requires him to perform a small amount of manual labour, is not a "labourer." *Re Sayles* (1892) 92 Mich. 354, 52 N.W. 637. (How. Mich. Ann. Stat. § 8749m.) The court remarked that what is compensated in such a case "is not the labour, but the judgment and integrity of the inspector. The inspector is nothing less than an arbitrator between the parties, and to hold this class of services within the meaning of the statute would, we think, require that all pro-

kind of work that they are deemed to be "labourers" within the meaning of these statutes[30]. But a person engaged for the specific purpose of performing manual labour as well as work of a higher quality is entitled to a preference, possibly in respect to the whole of his wages, irrespective of the nature of the services by which they were earned[31]—certainly in respect of

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fessional services, as well as the services of the officers of the corporation, should be likewise protected."

See also *Prendergast* v. *Yandes* (1890) 124 Ind. 159, 8 L.R.A. 849, § 7(*c*), *post*.

A man hired to work as general clerk and bookkeeper, and to make himself generally useful, during the reconstruction of a hotel, and afterwards as clerk and steward, was held not to be entitled to a labourer's lien under the North Carolina statute, although he occasionally did some manual work upon the building, was held in *Nash* v. *Southwick* (1897) 120 N.C. 459.

A "woodsman" who superintended a large number of hands on a turpentine farm, and also worked as a clerk in the employer's commissariat department, was held not to be entitled to a lien as a "labourer," although he did a considerable amount of manual labour in the discharge of his duties. *Cole* v. *McNeill* (1896) 99 Ga. 250.

That an agent whose principal duty was to collect money due to his employer was not within a statute which prefers debts for "labour" debts, although occasionally, in performance of his duties, he did some manual work in fixing machines, was held in *Clark's Appeal* (1894) 100 Mich. 448.

That the Washington statute creating liens for labour does not cover manual labour performed as an incident to a person's connection with a corporation as stockholder and general manager, his actual incentive being his interest in the expected profits, was held in *Addison* v. *Pacific Post Milling Co.* (1897) 79 Fed. 459. The allusion to the motive of the claimant in this case, however, seems to introduce a supererogatory factor.

[31] Thus it has been held that one who not only acts as overseer and assistant superintendent, but performs manual labour in the construction of a building, is within an Act which gives a lien to "all persons" performing labour for the construction of a building. *Williamette F. Co.* v. *Renick* (1855) 1 Or. 169.

So also a superintendent or foreman of labourers who remains with them, directing their work, and sometimes working himself, is a "labourer." *Texas & St. L.R. Co.* v. *Allen*, 1 White & W. Civ. Cas. Ct. of App. § 508.

In *Ricks* v. *Redwine* (1884) 73 Ga. 273, it was conceded that a hotel clerk would have been entitled to a lien, if he had performed manual labour *as a part of his duties*. But this concession must be interpreted with reference to the general principle embodied in the cases cited in note 29, *supra*.

A practical miller, who was employed by a corporation engaged in building flour mills and in manufacturing and selling milling machinery, and whose duty it was to go from place to place and start new mills or new machinery, erected by the corporation, for the purpose of showing the vendors the practical results obtainable and procuring their acceptance of the mills and machinery, was held to be within a statute, preferring debts for "labour" owing by insolvents. *In re Black* (1890) 83 Mich. 513. (How.

such wages as are due on account of the manual labour alone[32]. It is also clear, both on principle and authority, that an employé who, if he were engaged to perform work of the description indicated by his occupation or trade, would be treated as being outside the privileged classes, is entitled to claim the preference accorded to "labourers" if, as a matter of fact, he performs manual labour[33].

As to the New Jersey statutes, see § 7, subd. (*b*) *post*.

**6. Meaning of other single words primarily importing manual work.**—(*a*) "*Workmen.*" In one case the Supreme Court of Pennsylvania, adopting the Webster's definition of this word, viz., "one who is employed in any labour, especially manual labour" refused to hold that it was applicable to a civil engineer[1].

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Stat. 8749m.) The conclusion of the court was based upon the ground that statutes of this description are to be liberally construed, and that the claimant's functions involved "manual labour and practical demonstration in the operation of machinery to produce the required result—the performance of such services as are usually performed in a flouring mill." But the opinion was also expressed that, if a strict construction should be placed upon the statute, the claim of petitioner would still come within the letter and spirit of the statute.

[32] In *Lawton* v. *Richardson* (1898) 118 Mich. 669, it was held that the phrase "labour debts," (How. Mich. Stat. § 8749m), did not embrace a claim for work done by an employé in assisting the proprietor of a store to purchase goods for a store of which he expected to be manager after it was started, but that it covered his services rendered in unpacking the goods, marking them and putting them on the shelves, and in performing the ordinary work of a salesman in attending to customers, sweeping out the store, etc., during the time which elapsed before the store was closed by creditors. The *ratio decidendi* was that nearly all the labour performed after the purchase of the goods was not intellectual or professional in its character, but in the main manual.

That the same statute was applicable to the *personal* labour performed by the overseer and custodian of a mine, while in charge of the property of the corporation, was held in *McLaren* v. *Byrne* (1890) 80 Mich. 275.

[33] In *Adams* v. *Goodrich* (1816) 55 Ga. 233, this doctrine was applied with respect to a mechanic. In this case the court seems to have assumed that the term "labourers" was only applicable to persons performing *unskilled* labour—a narrow construction of the term which is not borne out by the other authorities. But the general principle applied is plainly not open to any exception.

"In determining whether a particular clerk, or other employé, is really a labourer, the character of the work he does must be taken into consideration. In other words, he must be classified, not according to the arbitrary designation given to his calling, but with reference to the character of the services required of him by his employer." *Oliver* v. *Macon Hardware Co.* (1896; Ga.), 25 S.E. 403.

[1] *Leuffer* v. *Pennsylvania & Delaware R.R. Co.* (1877) 84 Pa. 168, Rev'g. 11 Phila. (Pa.) 548. In the statute there under review, the words

(*b*) *"Mechanics."* In its wider sense this term denotes an artisan, mechanic or artificer, or a person who follows a handicraft for his living; in its more restricted sense it is applied to employés of the above descriptions whose work is confined to the making and repairing of machinery[2]. Invariably, therefore, it imports the performance of some kind of manual work. Accordingly it is not applicable to a person who is employed by the owner of a factory to assist him in purchasing machinery, to superintend its erection, and to put the factory in working order, but who does no manual labour himself[3]; nor to a man engaged in soliciting orders for, and selling the products of a mine upon commission[4].

(*c*) *Operatives.* By lexicographers this term is defined as a "labouring man, artisan, or worker in manufactories"[5]. Like the two words discussed in the preceding subsections, therefore, it connotes manual work. See subd. (*f*), *post.* It has been held applicable to an artisan who makes boots at his own home out of materials furnished by his employer[6].

(*d*) *Persons performing labour as operatives.* The notion of a preference extended only to those classes of employés whose work is primarily and essentially of a manual character manifestly inheres in this form of words as in the simple term "labour." Accordingly it does not embrace a traveling salesman[7]; nor the secretary of a manufacturing company, even though as an incident of his duties as secretary, he manages the business and assists in packing and shipping

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"workmen" and "labourers" are grouped together. The court, therefore, might have fortified its conclusion by invoking the rule, *Noscitur a sociis.* But the scope of the word was not considered from this standpoint.

[2] Imperial Dictionary; Century Dictionary.

[3] *Crook* v. *Ross* (1895) 117 N.C. 193.

[4] *Willauer's Estate* (1882) 1 Chest. Co. Rep. 533.

[5] Imperial Dictionary; Century Dictionary.

[6] *Thayer* v. *Mann* (1848) 56 Mass. 371 (Insolvency Act of 1838, ch. 163).

[7] *Re Sloan's Estate* (1899) 60 Ohio St. 472; *Davis* v. *Greenley*, 13 Ohio C.C. 229.

goods[8]; nor the superintendent of a brewing corporation[9]. On the other hand it is applicable to farm labourers[10]; and to salesmen employed in a store[11].

6a. —— **of groups of words importing manual work.**—(a) All *persons doing any "work or labour."* This phrase has been held to embrace such superior employés as a civil engineer who surveys routes for and superintends the construction of a railroad[1]; a foreman who directs the work of labourers in improving a railroad[2]; and an overseer in a mine who was under the orders of the general agent of the foreign company which owned the mine, and who personally superintended the manual labour of the miners and directed the development of the property[3].

[8] *Green* v. *Weller*, 3 Ohio C.D. 488.

[9] *Hanner* v. *Maumee Brew. Co.*, 6 Ohio N.P. 385. This decision, however, is inconsistent with another, also rendered by a court of inferior jurisdiction, to the effect that a man employed to oversee and manage in all its details the work of a contractor engaged in the business of making streets, grading, etc., and who, when it was necessary, lent a helping hand, was held to be entitled to a preference. *Re Angle*, 1 Ohio N.P. 110.

[10] *Re Lowry*, 7 Ohio Dec. 282.

[11] *Re Assignment of Duhme*, 6 Ohio Dec. 448.

[1] *Van Frank* v. *St. Louis C. G. & S.R. Co.* (1902) 93 Mo. App. 412. The theory of the court was that the phrase occurred in the general lien law of Missouri (Rev. Stat. 1899, § 4239), and that this was of a broader scope than another enactment, (Rev. Stat. 1899, § 1006), which was intended to protect "labourers."

[2] *Sweem* v. *Atkinson T. & S.F.R. Co.* (1900) 85 Mo. App. 87.

[3] *Cullins* v. *Flagstaff Min. Co.* (1878) 2 Utah, 219, (Aff'd. (1881) 104 U.S. 176, L. ed.). In its opinion the Supreme Court of the United States remarked: "His duties were similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from these which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. They cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and labour. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labor."

The decision in *Idaho M n. & Mill Co.* v. *Davis* (1903) 123 Fed. 396 is to the same effect (with reference to Sess. Laws Idaho, 1895, p. 43, § 1).

(*b*) *"Mechanics and labourers."* As both the words which are thus coupled together imply persons who perform manual work, it follows that the combination includes only employés whose work is exclusively or mainly of that character. It does not embrace a draughtsman[4]; nor the general manager of a shop[5].

(*c*) *Mechanics, workmen and labourers.* The remark made in the preceding sub-section is also applicable to this combination of terms. Accordingly it does not cover the manager and superintendent of a mining company[6]; nor a bookkeeper[7].

(*d*) *"Mechanics, labourers and operatives."* These expressions all import the performance of manual work and do not embrace a civil engineer in the employ of a railway company[8].

**7. ——— of groups of words composed partly of those importing manual work and partly of those having a wider significance.**—(*a*) *"Labourers or servants."* Two decisions with reference to this group of expressions proceed upon the theory that they cover only persons who perform manual labour, and consequently do not confer a right to a preference upon a bookkeeper[1]; or a traveling salesman[2]. These rulings appear to be a very strong application of the rule, *Noscitur a sociis*. The writer ventures to express a doubt as to their correctness. However this may be, there is no reasonable ground upon which the phrase can be restricted to persons who perform unskilled labour. Thus it has

[4] *Lineau* v. *Albright*, 10 Pa. Co. Ct. 181.

[5] *Raynes* v. *Kokomo L. & F. Co.* (1899) 153 Ind. 315.

[6] *Smallhouse* v. *Kentucky M.S.G. & S.M. Co.* (1876) 2 Mont. 443.

[7] *Cochrar* v. *Baker* (Sup. Ct. 1899) 30 Misc. 48, 61 N.Y. Supp. 724. The provision in question (N.Y. Laws, 1897, ch. 415, § 8), uses merely the word "employés." But in the definition clause (§ 2), this expression is declared to mean "mechanic, workingman or labourer."

[8] *Gulf & B.V. Ry. Co.* v. *Berry* (Tex. Civ. App. 1903) 72 S.W. 1049.

[1] *Signor* v. *Webb* (1892) 44 Ill. 338, denying the applicability both of the Act of June 15, 1887, 3 Stan. & C. Statutes, p. 828, and 61 (settlement of insolvent estates), and of the provision as to preferences in case of voluntary assignments in 1 Starr & C. Stat. p. 1305.

[2] *Eppstein* v. *Webb* (1892) 44 Ill. App. 341.

been held that such employés as typesetters, cylinder feeders, pressmen and a printer's bookkeeper are entitled to a preference[3].

(*b*) *All persons doing labour or service of whatever kind.* By the New Jersey Corporation Act, § 63, as originally framed, only "labourers" were allowed a preference. It was not disputed that this expression was applicable only to those persons who performed manual labour[4]. But the Act, as amended contains a definition clause declaring that the word "labourers" is to be construed as including "all persons doing labour or service of whatever character for, or as workmen or employés in the regular employ of such corporations." It has been held, with reference both to the earlier and the later versions of this statute that neither the president, nor a director, nor any officer, is entitled to a preference[5]. On the other hand it has been

[3] *Heckman* v. *Taumen* (1900) 184 Ill. 144, 56 N.E. 361. (Ill. Laws of 1895, p. 242.)

[4] See the language used by the court in *Weatherby* v. *Saxony Woollen Co.* (N.J. Eq. 1894), 29 Atl. 326 (note 5, *infra*).

[5] In *England* v. *Daniel F. Beatty Organ & Piano Co.* (1886) 41 N.J. Eq. 4, the court argued thus: "The president of a corporation, under the Act, is and must be a director. He is part and parcel of the organization. There must be employer as well as employed; and the question arises: Does the Act authorize the organization, which is the employer, to employ itself? . . . I am well satisfied that to make favourites of this class would be against the true spirit of the Act as well as against a wise public policy. The spirit of the Act is manifestly to pay 'labourers doing labour or service' . . . and not to give a preference to the individual members of the corporation; and not that they may employ themselves and maintain both attitudes, employer or employé, as their individual gain and the loss of creditors may dictate. And as to the public policy of so extending the construction as is urged, let it be considered how strong the inducement as well as how convenient for every director to be employed 'doing labour or service as a workman or employé' for his company; and let it also be considered what a prolific source of injustice and fraud such construction would prove to be. There are numerous considerations in this direction which will arise to the mind of the thoughtful."

In *Weatherby* v. *Saxony Woollen Co.* (1894) N.J. Eq. 29 Atl. 326, the court after expressing the opinion that the true doctrine had been stated in *Lehigh Coal & Nav. Co.* v. *Central R. Co.*, 2 Stew. 252, viz., that "the preference given by the sixty-third section of the Corporation Act is in derogation of the right of creditors to be paid equally, and must not be extended by construction," proceeded thus "officers can only be included in the phrase 'labourers and employés' by construction, and that, too, of a very strained character. It cannot be that the legislature, in any of its enactments respecting preferences, meant to include officers, in the words 'labourers' or 'employés,' for there has been no period in the history of

strongly intimated in one case that the secretary and treasurer of a company, if they are not directors, are within the scope of the amended clause[6]. If this conception of the scope of the preference should ultimately prevail the effect of the comprehensive definition clause will have been to extend the benefits of the Act to classes of employés who, even under the most liberal construction of the simple term "labourers," have never been regarded as favoured claimants. That clause has also been relied upon as a ground for granting a priority to the wages of a bookkeeper, although he was also a director[7]; and of a drayman who used his own vehicles and horses for the purpose of performing the stipulated services[8]. But it seems clear that

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legislation upon this subject when these different classes have not been broadly distinguished. The first legislation upon this subject only provided a preference for labourers. By universal consent, this had reference only to those who performed manual labour, of whatever nature, and there was but little difficulty in determining those who were included. But it became manifest to the common understanding that there was another class who did equal service in the interests of corporations and of their creditors, whose vocation was of a different character from that of mere manual labour. There seemed to be no just reason for omitting the latter class from the preference, and the legislature extended the favour which it had given to labourers to this class, and designated them as 'employés.' Surely, it cannot be, since the legislature proceeded in this very cautious manner, by advancing from the use of the word 'labourers' to that of 'employés,' that it meant also to include officers. Note again that the Act provides for the payment of wages due to labourers and employés, for all service, of whatever nature, but makes not the slightest reference to salaries due to officers. The unmistakable difference in the true meaning and proper application of the words 'wages' and 'salaries,' and the exclusion of the latter from the original enactment, and especially from the amendment, render further discussion unnecessary."

[6] *England* v. *Daniel F. Beatty Organ & Piano Co.* (1886) 41 N.J. Eq. 470.

[7] *Consolidated Coal Co.* v. *Keystone Chemical Co.* (1896) 54 N.J. 309.

[8] *Watson* v. *Watson Mfg. Co.* (1879) 30 N.J. Eq. 588. The court said: "A carpenter, blacksmith or other mechanic, whose work can only be done with tools, may be regularly employed by a corporation to work for it with his own tools. In such a case I think there can be no doubt that his wages, though largely earned by the use of tools, would be preferred. Corporations engaged in the manufacture of bulky articles, must necessarily, in the conduct of their business, have a large amount of carriage by vehicles done in the transfer of raw material from depots and wharves to their works, and in the removal of manufactured articles from their works to points where they may be delivered to common carriers to be carried to market. . . . The services of carriers of the description of the petitioner were quite as necessary and essential to the continued operations of the defendants as those of any class of workmen rendering labour or service to them. Certainly much more vitally essential than those of a

even the simple expression "labourers" would, in most jurisdictions at least, be regarded as covering such employés. Even the manager of a company, although he is also its president, has been held to be entitled to a lien [9].

(c) *"Labourers and employés."* Two cases which involve the construction of this combination of terms imply an acceptance of the theory that the use of the expression "employé" imports an extension of the scope of the statute beyond that which would be ascribed to it if only "labourers" were mentioned. In one of these cases an employé of a natural gas company, who was designated superintendent, but who was neither an officer of the company, nor its general manager, was held to be entitled to a preference [10]. In the other a preference was

porter, clerk or bookkeeper, and yet they are generally regarded as being clearly within the provision of the statute. It has been held that one of the main purposes of this Act is to prevent those persons whose labour is indispensable to the continuance of the business of a corporation, from abandoning it, and thus suspending its operations, whenever they become alarmed by fear of losing their wages. *Lehigh Coal and Navigation Co.* v. *Central R.R. of N.J.*, 2 Stew. 252. A sudden and general desertion would, in many instances, result in complete ruin to all concerned. The principal design of this statute is to erect a guard against such disasters. I think it is quite obvious that the petitioner belongs to the class of persons which the legislature intended to protect by the enactment of this statute."

[9] See *Duryea* v. *United States Credit System Co.* (N.J. Eq. 1895) 32 Atl. 690. The court relied upon the earlier case of *Weatherby* v. *Saxony Woollen Co.* (N.J. Eq. 1894) 29 Atl. 326, in which a similar claim had been allowed. It is to be observed, however, that the fact of this allowance is not mentioned in the report itself.

[10] *Pendergast* v. *Yandes* (1890) 124 Ind. 159, 8 L.R.A. 849. The duties of the claimant were thus stated by the court: "He was himself responsible directly to the company, and had no immediate superior officer except the president and vice-president. His duty was almost wholly confined to superintending the employés under his control, in the discharge of which duty he was required to do a great deal of walking along the pipe-lines; and, when testing gas wells, it was necessary for him to handle wrenches and other tools for a few minutes. But, beyond this, the discharge of his duties did not make it necessary for him to do any physical or manual labour other than such as is ordinarily incident to the superintendency of the employés engaged in such work, although he did occasionally, of his own volition, when work was pressing, and there was scarcity of hands, do some physical labour in the handling of gas pipes, and other work incident to the laying and fitting of them. His salary or compensation was $100 per month. His duties kept him constantly with the men who were engaged in the manual labour of laying the pipes, and doing the other work herein specified, to see that such work was done properly, and with proper mechanical skill; and, as these men were often separated into different gangs, it was necessary for him to travel back

allowed by one of the inferior courts of Ohio to a traveling salesman employed by a manufacturing corporation at a monthly salary and a commission [11]. But a statute which uses these terms is not applicable to an attorney employed at a yearly salary [12].

(*d*) "*Labourers, servants and employés.*" With reference to a statute in which the preferred classes of employés are thus designated, it has been held that a priority had properly been accorded to the wages of a drayman and the salary of the manager of a lumber and manufacturing company [13].

(*e*) "*Employés and other operatives.*" It has been held that the indefinite term "employés," as used in this combination has been held to take its color from the more precise expression, "operatives," and consequently that it does not embrace a general superintendent of a company [14].

(*f*) "*Employés, operatives and labourers.*" This particular grouping of terms occurs only in the New York enactments which relate to the disposition of the assets of insolvent corporations. It is agreed by the courts of that State that, in spite of its generality, the expression "employés" is to some extent narrowed in meaning by its association with the words with which it is coupled, and that it does not include every person in the employment of a corporation, irrespective of the nature of their service [15]. In this point of view it is considered that a

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and forth from one gang to another. There is nothing in the articles of association or by-laws of said company specifying such an office as that of superintendent."

[11] *Lewis* v. *Dawson*, 6 Ohio C.C. 243.

[12] *Latta* v. *Lonsdale* (1901) 52 L.R.A. 479, 107 Fed. 585 (Sand. & H. Ark. Dig. §§ 1425, 1426).

[13] *Conlee Co.* v. *Ripon L. & M. Co.* (1886) 66 Wis. 481. The court said that the right to the preference in the case of the former of these employés was clear, and that the claim of the superior employé, should be allowed on this ground that the words "servants" and "employés" means something more and different than the word "labourers" and that they were used for the purpose of extending and broadening the exception made in the statute.

[14] *Pullis Bros. I. Co.* v. *Boemler* (1901) 91 Mo. App. 85.

[15] *Palmer* v. *Van Santvoord* (1897) 153 N.Y. 612. The court said: "If the legislature intended, by the Act of 1885, to prefer all debts owing

superintendent or manager of a corporation is not entitled to a preference[16]. Such a functionary is regarded as being substantially an officer[17]; or, as it is expressed in another case, he is the representative of the corporation in respect to the conduct of its business[18]. Nor do these words include an agent for the sale of goods in a foreign country, on a salary and commissions[19]. There is, however, a conflict of opinion concerning the scope of the expression with relation to the lower grades of corporate servants.

One view is that it "includes persons employed by a corporation in comparatively subordinate positions who cannot correctly be described either as operatives or labourers; such for example as bookkeepers, clerks, salesmen and agents engaged at a regular compensation in soliciting orders for goods"[20]. This statement summarizes the effect of some of the earlier decisions[21]. The essence of that doctrine is that the term

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by a corporation (other than an insurance or moneyed corporation), of which a receiver should be appointed, to 'employés,' using the word in its largest sense, the words 'operatives and labourers' with which it is associated are superfluous. The use of these associated words indicates that the word 'employés,' by which they are preceded, was used in a restricted and limited sense."

[16] *People* v. *Remington* (1887) 45 Hun. 329, Aff'd. 109 N.Y. 631 (memo.); *Re Stryker* (1899) 158 N.Y. 526, Aff'g. 73 Hun. 737.

[17] Andrews, C.J., in *Palmer* v. *Santvoord* (1897) 153 N.Y. 612, referring to the first of the cases cited in the preceding note.

[18] *Re American Lace & Fancy Paper Works* (1898) 30 App. Div. 321.

[19] *People* v. *Remington* (1857) 45 Hun. 329. Aff'd. 109 N.Y. 631 (memo.).

[20] *Re American Lace & Fancy Paper Works* (1898) 30 App. Div. 321.

[21] In *Brown* v. *A.B.C. Fence Co.* (1889) 52 Hun. 151, it was held that a man employed to assist the general manager in keeping the books of the company, and to clean the office and show room, and assist in putting together, taking apart, and shipping the manufactured products was entitled to the preference. The language used in the opinion shows that, even if the duties of the claimant had been confined to those of a bookkeeper, he would still have been treated as being within the protection of the statute.

In a later decision by the same court, the right of a bookkeeper to a preference was explicitly affirmed. *People* v. *Bevendge Brewing Co.* (1895) 91 Hun. 313. The court disapproved *Re Stryker*, 73 Hun. 327, which was *afterwards* affirmed by the Ct. of Appeals in 158 N.Y. 526. See *infra*.

The position taken in these cases was indorsed by the Court of Appeals

"employés" although it takes its colour from the other expressions with which it is grouped, should be regarded as bearing a distinct and independent significance which serves to extend the scope of the statute beyond the limits imported by those expressions.

In its latest decision on the subject, however, the Court of Appeal has definitely committed itself to the view that the statute is not intended "to secure a preference for claims due to the clerical force engaged in transacting the business of a company, nor to its superintendent, firemen, or any officers of the corporation who are compensated by a fixed yearly salary"[m].

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in *Palmer* v. *Van Santvoord* (1897) 153 N.Y. 612. The effect of the decision was that a preference should be allowed to an employé hired to sell the machines of his employers, and to go from place to place and set them up for the purchasers. As stated in *Re Stryker*, (see next note), the work which this claimant performed was so largely manual that he might without impropriety have been classed among "labourers" and mechanics." But the actual standpoint of the court is indicated not merely by its remark, made *arguendo*, to the effect that "a bookkeeper or person employed to make sales of merchandise or property is entitled to a preference," but also the general course of its reasoning, which distinctly shows that it regarded the expression "employés" as being intended to cover a class of servants engaged in the performance of work different from, and higher than that implied by the terms "operatives" and "labourers." The following passage may be quoted: "The word 'employés' in the statute of 1885 is a word of larger import than the words 'operatives and labourers' which follow it, (*Gurney* v. *Atlantic G.R. Co.*, 58 N.Y. 358); and, while it may embrace the latter classes it is not confined to those who perform manual labour only; and to construe in the narrowest sense as embracing those classes only, would violate one of the accepted canons of construction to which we have referred,—that each word used in an enumeration in a statute of several classes or things, is presumed to have been used to express a distinct and different idea. . . . "It is doubtless true that, from the lack of technical accuracy and precision in the framing of statutes, a word of large import is often followed by words of narrower meaning, expressing what is included in the larger term, but this does not justify a restriction of the scope and meaning of the larger term to what is expressed in the words which follow, unless the context points to such a construction."

The two cases last cited were relied on in *Re Smith* (Sup. Ct. 1899) 59 N.Y. Supp. 799, as authorities for granting a preference to a commercial traveller who sold goods in a particular territory, selected by the employer, and whose remuneration consisted exclusively of commissions.

In *Re Fitzgerald*, 21 Misc. 226, a travelling salesman was held to be entitled to a preference. This decision, like those above mentioned, is in fact overruled by *Re Stryker*.

The same remark is applicable to a decision by which a preference was allowed to a salesman in a store. *Re Luxton & D. Co.* (1898) 35 App. Div. 243.

[m] *Re Stryker* (1899) 158 N.Y. 526. The employés whose claims were rejected in this case were a clerk and bookkeeper, the superintendent, the

The present writer has no hesitation in saying that, in his opinion, the broader view at first taken by the court is the correct one. Under the doctrine finally adopted the group of expressions used by the legislature becomes tautological to an almost inconceivable degree.

(*g*) "*Employé, labourer, or other person who may aid by his labour, etc.*" These words as used in the section, (1360), of the Mississippi Code regarding liens on crops, have been held to embrace the overseer of a farm. The *ratio decidendi* was that

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shop foreman, and the draughtsmen of a manufacturing company. The court reasoned thus: "The most important word in the statute is the word 'wages.' It was wages that the legislature intended to prefer in the distribution of the assets of the insolvent corporation, not salaries, nor earnings, nor compensation. It was not intended to prefer the claims of all employés, but it was manifestly intended to limit the preference to the particular class whose claims would be properly expressed by the use of the word wages. This word is applied in common parlance specifically to the payment made for manual labour, or other labour of menial or mechanical kind, as distinguished from salary and from fee, which denotes compensation paid to professional men. (Century Dictionary.) In its application to labourers and employés it conveys the idea of subordinate occupation which is not very remunerative, of not much independent responsibility, but rather subject to immediate supervision. This was the construction which this court placed upon the statute in the case of *People* v. *Remington* (see *supra*). . . . "Although the word employés is used, yet the purpose of the statute was to protect mechanics, operatives or labourers from loss of their wages in the event of the insolvency of the corporation. It is significant to note that insurance and moneyed corporations are excepted from the operation of the statute. There was no reason for excepting these corporations but for the fact, well known, that they do not employ labour, in the ordinary sense of that word. The conduct of the business of these corporations requires a large clerical force, graded and organized according to the extent and necessities of the business. If it was intended to protect the claims of this class of employés, there was no reason why all corporations should not be included within the scope of the statute. But it evidently was not. It was supposed that that class of employés could protect themselves, whereas the common labourer, operative or mechanic would be left by the failure of the business in a much more helpless condition. The wages of labourers, mechanics and domestic servants has in modern times become the subject of protective legislation in this and many other countries, and whenever the law has been extended beyond these classes, so as to include the claims of parties performing clerical duties or work of a like character, it was by judicial construction based upon language much broader than is to be found in the enactment in question." The court stated that the views thus expressed were not in conflict with the case of *Palmer* v. *Van Santvoord*, *supra*. This assertion was justifiable if only the facts of that case are adverted to. (See last note.) But it seems to be scarcely possible to escape the conclusion that the two cases reflect essentially different conceptions regarding the scope of the term, "employés." In *Cochran* v. *Baker* (Supp. Ct. 1899) 30 Misc. 48, 61 N.Y. Supp. 24, the opinion was expressed that the later decision had overruled the earlier.

the insertion of the word "employé" in the previous enactments, in *pari materia*, and the broadening of the language in other respects justified the inference that the alterations were made for the purpose of enlarging, *quoad personas*, the scope of the lien [m].

**8. ——— of words, single or grouped, not importing manual work.**—(*a*) *Employés.* In its most extended signification this term is applicable to any person employed by another. In statutes of the type under discussion it is invariably associated with other expressions which serve to show more or less precisely the meaning which the legislature intended to attach to it. But there is some authority for the doctrine that, even if it were used alone, it should not be construed as including a person occupying so high a position as that of manager or superintendent of an entire concern [1]. Such a doctrine, however, can scarcely be regarded as beyond discussion in all the American States. It is directly opposed to the views of the English courts with respect to the scope of the term "servant," as used in the Bankruptcy Acts [2].

The meaning of the term employé is sometimes restricted by the words of the title of the statute in which it occurs. Thus it has been held that, when used in the body of an Act of which the purpose is to provide "labourers'" liens for wages, it should be regarded as being equivalent to "labourers," and therefore not applicable to the superintendent of a mining company [3].

(*b*) *"Clerks."* This expression has been held not to be ap-

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[m] *Wiese* v. *Rutland* (1894) 71 Miss. 933.

[1] In *Pullis Bros. Iron Co.* v. *Boemler* (1901) 91 Mo. App. 85, the court expressed the opinion, *arguendo*, that by popular use of the term is confined to "clerks or labourers who work for a salary or wages."

Reference may also be made to a case in which it was held that the secretary of a railroad company is not a "servant" or "employé" within a foreclosure decree directing the payment of sums due to "any servant or employé." *Wells* v. *Southern Min. R. Co.* (1880) 1 Fed. 270. The *ratio decidendi* was that the secretary is an "officer."

[2] See § 2, note 5, *ante*.

[3] *Malcomson* v. *Wapoo* (1898) 86 Fed. 192.

plicable to a general manag[4]; nor to a man engaged in soliciting orders for and selling the products of a mine upon commission[5].

(c) *"Clerks, servants and employés."* An insurance adjuster who received an annual salary and his expenses, but did not devote his whole time and services to his employers, was held not to be entitled to a preference under a statute containing the combination of words[6].

(d) *"Bookkeepers, clerks, agents, reporters, and other employés."* In the only State where this combination of words

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[4] *The Short Cut* (1887) 6 Fed. 630 (construing the special Pennsylvania Act of April 20, 1858, as to boats navigating certain rivers).

[5] *Willauer's Estate* (1882) 1 Chest. Co. Rep. 533.

[6] *Boston & A.R. Co.* v. *Mercantile T. & D. Co.* (1896) 82 Md. 535, 38 L.R.A. 97. Referring to the functions of the claimant the court observed: "It was his duty and the duty of other adjusters when an accident occurred to ascertain all the facts and circumstances in connection with such accident—how it happened, whether it was through the fault of the insured corporation, the nature and extent of the injury, and to make report thereof to the company. All this involved the exercise of judgment and discretion and required some familiarity with the principles of law relating to the legal liability of the insured. Now, it is clear, we think, that the word "employé" as used in the statute was intended to have a limited meaning, and that it cannot be applied in its broadest sense, or as including every one in the service or employment of a corporation or individual. The object of the statute was to provide for the payment of the wages and salaries due a certain class of persons to whom such wages or salaries were deemed always necessary for their support and maintenance. The statute first provides for the payment of the wages and salaries of clerks, persons rendering mere clerical services, then, of servants or employés. The statute did not mean by employés persons rendering services of a higher degree than clerks. The duties of an adjuster being, as far as we are able to discover, of the character we have described, these officers, whilst in a general sense employés, cannot by any fair rule of construction be considered employés in the limited and restricted meaning of that term as used in the statute. To hold otherwise would result in the inclusion of a large class of persons in the service of a company or individual as preferred creditors though they are obviously not within the scope, purpose and object of the Code, under which provision is made for a preference." The court undertook to distinguish this decision from that rendered in *Moore* v. *Heaney* (1859) 14 Md. 558, by pointing out that, in the earlier case a wide and liberal meaning was given the word "employés," so as to bring as large a class of persons as possible within the range of an exemption granted of labourers and other employés from the stringent terms of the attachment law, and from the equally harsh effects of attachment levied by way of execution on wages. The explanation seems to show that the *rationale* of the decision as to the adjuster was that, in the view of the court, statutes granting preferences to the wages of employés are to be construed strictly a doctrine which is certainly opposed to the weight of authority.

has been used by the legislature, it has been held that they include an employé who used his own team to haul logs for a sawmill, at a stated sum per diem[1]. No general principle, however, was invoked by the court.

**9. Persons entitled to privileges under statutory provisions in Civil Law Jurisdictions. Louisiana.**—(*a*) *Scope of provisions as determined by the reasons for allowing the preference.* In one case it was observed that "most of the claims mentioned in Art. 3158 [3191] of the Code, are a class which the lawyer has thought proper to favour from considerations of humanity and public order. 'Servants' and 'clerks' are a class of persons who are usually dependent for their support upon their 'wages or salaries'"[2].

(*b*) *Rule of construction applied in determining the scope of these provisions.* It has been laid down that privileges are *stricti juris,* and only to be allowed in cases expressly provided for by law[3].

(*c*) *Meaning attached to specific terms.* The description "clerks, secretaries, and persons of that kind," in Art. 3191, [3158] of the Code, has been held not to embrace editors, reporters, carriers, printers, and compositors of a newspaper[4]; nor a foreman in a job printing office[5]; nor an agent, employed on a monthly salary and commissions to solicit sales of the goods of his employer's manufactory[6]; nor a person engaged in selling goods under a contract that he shall receive half the profits and bear half the losses of the business[7]; nor a teacher in a school kept by the insolvent[8].

By the express terms of Art. 3205 [3172] of the Code, the

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[1] *First Nat. Bank* v. *Kirby* (Fla. 1901), 32 So. 881.

[2] *Guion* v. *Brown* (1851) 6 La. Ann. 112.

[3] *Guion* v. *Brown* (1851) 6 La. Ann. 112.

[4] *Stephens* v. *Sawyer* (1848) 3 La. Ann. 428.

[5] *Lewis* v. *Patterson* (1868) 20 La. Ann. 294.

[6] *Weems* v. *Delta N. Co.* (1881) 33 La. Ann. 973.

[7] *Brierre* v. *Their Creditors* (1891) La. Ann. , 9 So. 640.

[8] *Labato's Case* (1852) 2 Mart. N.S. 652.

"servants" who are accorded a privilege by Art. 3191 [3158], are defined as "those who receive wages, and stay in the house of the person paying and employing them for his service or that of his family; such are valets, footmen, cooks, butlers, and others who reside in the house." Accordingly a tailor's foreman has no privilege under this provision[8].

It has been held that a person who superintends the construction of a building is within a statute which gives a lien to "every mechanic, workman or other person doing or performing any work towards the erection of a building"[9].

10. —— Quebec.—(*a*) *Footing on which the provisions in this province are construed.* It is held as in Louisiana that privileges are *stricti juris*[1].

(*b*) *Meaning attached to specific terms.* In one case the court applying the rule of strict construction held that a commercial traveller was not a "clerk" within the meaning of Art. 2006 of the Code. It was considered that the phraseology of this provision showed that it was intended only for the benefit of employés whose services were required in the "store, shop, or workshop" which contained the "merchandise" subjected to the privilege[2]. In a later case the court of first instance proceeded upon the ground that the general term "*commis,*" which in the English version of the Code is translated by the word "clerk," might fairly be regarded as including "*commis-voyageur.*" The consideration adduced for the purpose of justifying this construction was that the older French Law regarded

[8] *Lauran* v. *Hotz* (1823) 1 Mart. (La.) N.S. 140. The court took the position that the word "servant" is used in the same restricted sense as the phrase "*gens de service*" in the French law, and includes only "domestic servants." Pandectes Françaises, vol. 15, 102; Pothier, Traité des hypothèques, ed. 1809, app. p. 448. Reference was also made to the similar doctrine of the Spanish law.

[9] *Mulligan* v. *Mulligan* (1866) 18 La. Ann. 20. This decision is in line with those cited in § 5, note 9. But there seems to be some difficulty in reconciling it with the principle that "privileges" are *stricti juris.*

[1] *Ross* v. *Fortin* (1881) 8 Quebec L.R. 15, 11 Rev. Leg. 337.

[2] *Ross* v. *Fortin* (1881) 8 Quebec L.R. 15, 11 Rev. Leg. 337.

the privilege with favour[3]. The appellate court expressed a doubt as to the correctness of the view, but did not definitely determine the question[4]. The modern French doctrine is that such an employé has no privilege[5]. But that doctrine has relation to the scope, not of the term "*commis*," but of the phrase "*gens de service*," as used in Art. 2101 of the Code Napoleon.

The French authorities are divided upon the question whether that phrase embraces such employés as the professors attached to an educational institution, secretaries, librarians, etc.[6]

A man employed from day to day has no privilege under Art. 2006 of the Code[7].

**11. Employés within the purview of statutes imposing a personal liability upon stockholders.**—(*a*) *Scope of these statutes as determined by the reasons for enacting them.* The motive by which the legislatures have been influenced in imposing the special liability created by these statutes is, broadly speaking, the same as that which has led to the enactment of the laws discussed in the preceding sections, viz., "to throw a special protection around that class of persons who actually perform the manual labour of the company"[1] The consideration which has influenced the legislatures in affording them this protection is that they are "not well qualified to protect themselves,—men who usually labour for small compensation, and who are regarded, to a certain extent, as in the power of their employers—men who usually take no security for their services, who would generally

[3] *Harris* v. *Haneyman* (1885) Montr. L.R. 1 S.C. 191, 8 Leg. News 102.

[4] *Haneyman* v. *Harris* (1886) Montr. L.R. 2 Q.B. 466.

[5] See Beauchamp's Quebec Civ. Code Ann., notes to Art. 2006.

[6] See Beauchamp's Quebec Civ. Code Ann., notes to Art. 2006.

[7] *Van Alstyne* v. *Gray* (Super. Ct. 1879) 2 Leg. News, 302. The French commentators on Art. 2101 of the Code Napoleon are divided upon the question whether such a servant has a privilege, the preponderance of authority being against according him priority. See Beauchamp's Quebec Civ. Code Ann., notes to Art. 2006. The same writers are upon the whole in favour of the view that an engagement for a year is not a necessary condition of the privilege. *Ibid.*

[1] *Coffin* v. *Reynolds* (1868) 37 N.Y. 640.

be dismissed for requiring it, and therefore never make the attempt''[2].

(*b*) *Rule of construction applied in determining the scope of these statutes.* In one State it has been held that these statutes should be liberally construed in favour of employés[3]. But the view sustained by the preponderance of authority is that they should receive a strict construction, for the reason that, although remedial in character, they are in derogation of the common law, and impose new liabilities[4]; or as it is expressed in one case, because they are penal in their nature[5].

**12. Same subject. Construction of specific words and phrases.**— (*a*) *"Labourers."* As employed in statutes of the description now under consideration, this word, whether it be used alone, or in combination with other descriptive terms, may be said, broadly speaking, to carry the same significance as when it occurs in enactments which create liens and preferences. That is to say it is applicable to "a class of servants who obtain their living by coarse manual labour''[1]. It does not include employés who

[1] *Ericsson* v. *Brown* (1862) 38 Barb. 390. Compare the remarks in *Coffin* v. *Reynolds*, *supra*, that the purpose of the Act was "to furnish additional relief to a class who usually labour for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers."

"The obvious intent and policy of this and other similar Acts is to make provision for those who are the workmen on (*i.e.* of a railway company) the road, who are usually persons of small pecuniary means, not able to lose their daily earnings. *Bontwell* v. *Townsend* (1860) 37 Barb. 205.

[2] *Day* v. *Vinson* (1890) 78 Wis. 198, 47 N.W. 269, 10 L.R.A. 205. *Clokus* v. *Hollister Min. Co.* (1896) 92 Wis. 325, 66 N.W. 398.

[3] *Appeal of Black* (1890) 83 Mich. 513, 47 N.W. 342. The court also laid stress upon the consideration that, as regards their liability for corporate debts, the stockholder stood in the relation of sureties to the company, and that sureties are only liable according to the strict terms of their undertaking.

For other case affirming the doctrine of strict construction, see *Palmer* v. *Vantvoord* (1897) 153 N.Y. 612 (*arguendo*, p. 618); *Moyer* v. *Pennsylvania Slate Co.* (1872) 71 Pa. 293; *Cocking* v. *Ward* (Tenn. Court Chancery Appeals) (1898) 48 S.W. 287; *Cole* v. *Hand* (1890) 7 L.R.A. 96, 88 Tenn. 400, 12 S.W. 922.

[4] *Bristor* v. *Smith* (1899) 158 N.Y. 157, 53 N.E. 42.

[5] *Ericsson* v. *Brown* (1862) 38 Barb. 390.

hold positions of such a nature that the manual labour which they are required to perform in the course of their duties is an incident rather than the principal part of the service[2]. In other words the occasional performance of manual labour by an employé who, apart from that circumstance, would not be considered as a "labourer" does entitle him to the benefit of the statute[3]. In this point of view it is not applicable to an assistant chief engineer of a railroad company[4]; nor to a travelling salesman[5]; nor to the secretary and bookkeeper of a manufacturing corporation[6].

(*b*) *Labourers and operatives.* In a case cited in the preceding subdivision the court expressed the opinion that the word "operative" though of nearly the same signification as the word "labourer," has a somewhat more comprehensive scope. But this conception regarding the connotation of the two words seems to be wanting in accuracy. The more correct doctrine, it is submitted, is to consider the word "labourer" as being the appropriate description of an unskilled workman, and the word "operative" as being designative of a skilled workman or artisan[7]. But in any event it is obvious that neither word can

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[2] See case cited in last note.

[3] *Dean* v. *De Wolf* (1878) 16 Hun. 186.

[4] *Brockway* v. *Innes* (1878) 39 Mich. 47, 33 Am. Rep. 348 (decided on the ground that the work was "mostly direction and scientific work, involving much more superintendence than personal exertion in manual labour."

In this connection reference may be made to a case in which it was held that a member of an engineering corps is not within an Act appropriating money to pay "labourers" of a railroad company. *State* v. *Rusk* (1882) 55 Wis. 465.

[5] *Jones* v. *Avery* (1883) 50 Mich. 326. In that case the court observed that the claimant "had no part in carrying the establishment, nor in manufacture. He was a mere outside agent or representative of the company, to bring business to it; upon a salary. As regards the present question, his position was nearer the position of an officer of the corporation than that of a labourer."

[6] *Viele* v. *Wells* (1881) 9 Abb. (N.Y.) N. Cas. 277, a case in which the claimant had performed services in New York for a Michigan corporation. It was held that the term "labour" should be construed in accordance with the law of Michigan, that the judgment contemplated by the Act was a judgment of a Michigan court, and that under the law of neither state were plaintiff's services embraced within its meaning.

[7] See the Dictionaries, *sub voc.*

be construed as including the services of a professional man, such as a consulting engineer of a steamship company[8].

(*c*) "*Labourers and servants.*" These words, which are used in the New York Railroad Act, have been declared to be applicable to "all persons employed in the service of the company who have not a different, proper, and distinctive appellation, such as *officers* and *agents* of the company. The engineer, the master mechanic, the conductor, is as fully entitled to its benefit as is the man who shovels gravel. The latter is, in law, no more and no less a '*servant*' of the company than either one of the former"[9]. In the case cited a civil engineer was held to be within the statute,—a ruling which, if it is to be regarded as being still good law, indicates that this enactment is not so restricted in its operation as the one considered in the following subsection. But having regard to the general trend of the more recent decisions in New York—not merely those which relate to the personal liability of stock-holders, but those which involve the extent of preferences and other special remedial rights affecting the recovery of wage,—(see § 5, ante), it is permissible to feel some doubt whether so wide a scope as is indicated by the passage quoted above would at the present time be attributed to the words in question.

(*d*) "*Labourers, servants, and apprentices.*" These descriptive words were used in § 18 of N. Y. Laws, 1848, ch. 40. That Act is now superseded by § 54 of the Stock Corporation Law of 1892, in which the privileged classes of claimants are designated as "labourers, servants, or employés other than contractors." But the alteration thus made is clearly unimportant, so far as the questions with which we are here under discussion are concerned, and as a matter of fact, the cases decided with reference to the original statute are still cited as controlling authorities[10]. The footing upon which that statute was construed by the Court

[8] *Ericsson* v. *Brown* (1862) 38 Barb. 390, construing the special Act of April 11, 1849, § 10.

[9] *Conant* v. *Van Schaick* (1857) 24 Barb. 87.

[10] See *Bristor* v. *Smith* (1899) 158 N.Y. 157.

of Appeal is indicated by the following extract from the opinion in a leading case: "In common parlance, it [*i.e.*, the term "servant"] is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial, character to an employer, varying in its nature, according to the business or occupation in which it is rendered, and not to extend to and include every employé or party who does work for another. The context in which it is used, in the section referred to, being associated with 'labourers' and 'apprentices,' indicates that it was intended to apply to a person employed to devote his time, and render his service in the performance of work, similar in its general character to that done by those employés"[11]. The doctrinal standpoint thus adopted is suggestive of two *criteria* with reference to which the right of an employé to avail himself of the statutory remedy may, according to circumstances, be considered.

One of those *criteria* is indicated by the statement that the employés for whose protection the enactment is designed are "those engaged in manual labour, as distinguished from officers of the corporation, or professional men engaged in its service"[12].

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[11] *Hill* v. *Spencer* (1874) 61 N.Y. 274.

In a later case it was observed: "To the language of the Act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together, they are understood to be used in their cognate sense, express the same relations, and give colour and expression to each other. Therefore, although the word 'servant' is general, it must be limited by the more specific ones, 'labourer and apprentice' with which it is associated, and be held to comprehend only persons performing the same kind of service that is due from the others. It would violate this rule to hold that the intermediate, or second class, represented a higher grade than the class first named."

[12] Bacon, J., in *Coffin* v. *Reynolds* (1868) 37 N.Y. 640. Grover, J., observed that "the design of the statute was to afford protection to a class of employés of the company known as labourers, servants and apprentices, and not as officers and agents of the company. It was deemed proper by the legislature to leave the latter class to their remedy against the company only. Section five of the Act provides for the appointment of a president and subordinate officers of the company. Had the statute designed to include these officers it would have used terms embracing them, but they are in the last section called officers and not servants of the company. Again, the officers of the company are not within the same reason for special protection as the labourers. The latter are occupied with their labour, and have no means of knowing any thing of the pecuniary condition of the company, while the former are usually better acquainted with that than the gen-

On this ground it has been held that the personal liability of stockholders cannot be enforced by the secretary of a company[11]; nor by an employé entrusted by a mining company with full power to control its property and manage its financial affairs in a foreign country[12]; nor by a person employed to take the

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eral creditors." Bacon, J., in his opinion referred with approval to the remark of Selden, J., in an earlier case: "In some extended sense, the directors and other principal officers of the corporation may be considered as its agents and servants; and yet no one would contend that the provision was intended for their benefit. The word 'servants' is qualified, and, to some extent, limited by its association with the word 'labourers,' according to the familiar maxim, *noscitur a sociis*."

See also the passage quoted in the following notes.

The limiting words in the text which exclude professional men from the purview of the statute would seem to have destroyed the authority of a case in which it was held that a man who was employed by a manufacturing corporation as its civil engineer and travelling agent, at an annual salary, and who, in the performance of his duties, was bound to follow the directions of the company, was a "servant." *Williamson* v. *Wadsworth* (1867) 49 Barb. 294. (not specifically mentioned in *Coffin* v. *Reynolds*).

Having regard to that limitation, it seems to be also impossible to accept as correct a decision of later date than *Coffin* v. *Reynolds*, in which it was held that a newspaper reporter and city editor, if he is not an officer of the employing company, is a "servant." *Harris* v. *Norvell* (Sup. Ct. Special Term 1876) 1 Abb. N.C. 127. The theory thus adopted, that all employés who are not officers are servants, is manifestly inconsistent with the language used by the Court of Appeals.

In a still later case it was held that a bookkeeper, *not an officer* of the corporation, and not charged with any *duty of superintendence, nor with any other duties than such as usually pertain to the position*, is a "servant." *Chapman* v. *Chumar* (1889) 54 Hun. 636, 7 N.Y. Supp. 230.

But the more extended assumption upon which the court here proceeded, viz., that the word "servant" included all employés who were neither officers nor persons exercising supervisory powers, ignores that part of the statement in the text which treats professional men as being outside the purview of the Act. That such men may be working under circumstances which place them outside the two classes of employés thus excluded, is manifest. It is no doubt questionable whether a bookkeeper can be said to be a "professional man" as that phrase is understood. But if this description is not applicable to him in such a sense as to bring him within the operation of the rule laid down by the Court of Appeals in *Coffin* v. *Reynolds*, *supra*, it seems clear that the more general doctrine stated by that court in the passage quoted at the beginning of this subsection, should have been deemed fatal to the enforceability of the claim of such an employé.

[12] *Coffin* v. *Reynolds* (1868) 37 N.Y. 640, overruling the decision to the contrary effect in *Richardson* v. *Abendroth* (1864) 43 Barb. 162.

[13] *Hill* v. *Spencer* (1874) 61 N.Y. 274, Rev'g. 2 Jones & S. 304. The court accepted, as a correct proposition, the statement of plaintiff's counsel, that the word "servants" must be taken to have been used "not in its broadest, most comprehensive, nor in its most limited and restricted sense, but according to the general and ordinary use of the term." The court also conceded that "to use it in its most comprehensive sense would include the president and other officers of a corporation; while its use in

place of the superintendent of a mine in a foreign country during his temporary absence[14]; nor by a person employed as bookkeeper and general manager[15]; nor by an attorney employed to attend to the legal affairs of a company[17].

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a limited and restricted sense would only indicate a domestic, a person employed in the house or family, or a menial who labours in some low employment; and that the term was not intended to extend to the former, nor to be limited or restricted to the latter class." It was also admitted that counsel had correctly asserted that, "unless it be when domestic or menial servants are referred to, there is no sense or use in which the word 'servant,' by its own force, indicates a mere bodily or manual service." But it was pointed out that this circumstance failed to show, that the plaintiff's services were those of a servant, "according to the general and ordinary use of the term,"—the sense for which the claimant's counsel had himself contended.

This decision was followed with respect to an employé holding a similar position, in *Krauser* v. *Ruckel* (1879) 17 Hun. (N.Y.) 463.

[14] *Dean* v. *De Wolf* (1878) 16 Hun. (N.Y.) 186, Aff'd, 82 N.Y. 626 (memo.). The court treated *Hill* v. *Spencer*, *supra*, as a controlling authority, and refused to allow any differentiating import to be attached to the circumstance that the claimant had sometimes performed manual labour in the course of the performance of his duties.

[15] *Wakefield* v. *Fargo* (1882) 90 N.Y. 213. The court said: "It is plain we think, that the services referred to are menial or manual services—that he who performs them must be of a class whose members usually look to the reward of a day's labour, or service, for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job under the direction of a superior. . . . A general manager is not *ejusdem generis* with an apprentice or labourer; and although in one sense he may render most valuable services to the corporation, he would not in popular language be deemed a servant."

In *Kincaid* v. *Dwinelle* (1875) 59 N.Y. 548, the sole question directly discussed was whether the claimant, the superintendent of a manufacturing company, had fulfilled the requirements of procedure which would entitle him to recover under the statute. For the purposes of its argument the court seems to have assumed that such an employé was within the purview of the statute. This position, if the language used is to be regarded as importing the adoption of it, is manifestly inconsistent with the cases cited in this and the preceding notes.

[17] *Bristor* v. *Smith* (1899) 158 N.Y. 157, 53 N.E. 42, Aff'g. 29 App. Div. 624, 52 N.Y. Supp. 1138, which aff'd. 22 Misc. 55, 49 N.Y. Supp. 404. The court said: "To the ordinary reader of the language of this statutory provision (the *amended* Act) I doubt that it would ever occur that the word 'employés' had any wider significance than to define, in a general way, such classes of persons as were engaged in serving the corporation in subordinate capacities; but, when we apply the rules of construction to the case, any other definition of the word becomes unreasonable, if not impossible, than that it means persons sustaining such relations to the corporation as do labourers and servants. The statute was a continuation of previous legislation, which had for its object the protection of those who earned their living by manual labour, and not by profe. ional

Another criterion is furnished by the language which has been used in contrasting the positions of supervising and subordinate employés. "'Labourer' or 'apprentice' are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed as before suggested without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another. They necessarily exclude persons of higher dignity, and require that one who seeks his pay as servant, should be of no higher grade, than those enumerated as labourers or of lesser quality. A statute which treats of persons of an inferior rank cannot by any general word be so extended as to embrace a superior; the class first mentioned is to be taken as the most comprehensive *'specialia generalibus derogant'*"[18]. The particular decision by which, in the case cited, a general manager was excluded from the purview of the enactment may be referred to the consideration that he was an "officer" of the company within the meaning of the statement already adverted to. But

services, and who were supposed to be the least able to protect themselves. To such persons, and to all who become employed in subordinate and humble capacities and to whom the hardship would be great, if their wages or salaries were not promptly paid, the legislative policy is to afford the protection of a recourse to the stockholders of a company, upon the latter's default. . . . When, in section 54 of the Stock Corporation Law, the general word 'employés' was added after the words 'labourers' and 'servants,' it could not have been intended, from the collocation of words and for the want of reason in the thing, to include persons performing services to the corporation of a higher dignity, such as its legal adviser. Indeed, the appellant would be utterly without any reason in claiming the protection of the statute, if he could not pretend that his agreement with the company made him its employé. But the only effect of that agreement, so far as it bore upon their relations, was to secure to each permanency in the relation of attorney and client and certainty as to the measure of compensation. The lawyer does not lessen the dignity and independence of his position towards his client, or in the community, by making such an agreement. He does not, thereby, descend into that inferior and subordinate class of persons who, being continuously employed in the corporate business for a compensation paid in wages, or in salaries, and being under the orders of the managers of the corporation, are usually regarded as its servants or employés."

The above case was followed in *Hallett* v. *Metropolitan Messenger Co.* (1901) 72 N.Y.S. 370, 35 Misc. Rep. 659; judgment modified (1902) 74 N.Y.S. 689, 69 App. Div. 258.

[18] *Wakefield* v. *Fargo* (1882) 90 N.Y. 213.

the unqualified nature of the phraseology by which supervising employés are placed in a class by themselves would seem to indicate that, in the view of the court, the lower as well as the higher grades of such employés are outside the scope of the enactment. How far the current of authority may ultimately run in this direction remains to be seen. All that need be observed in this place is that some decisions of the inferior courts of New York can scarcely be treated as correct, unless it is assumed that the broad differentiation which is propounded in the passage just quoted between employés who do, and employés who do not, exercise control, is subject to some limitations[19].

(*e*) *Labourers, servants, apprentices, and employés.* The word "employés," as used in this connection in the Indiana statute has been held not to be applicable to a corporation aggregate[20].

(*f*) *"Labourers, servants, or clerks."* Neither the superintendent of a mining company[20]; nor the manager of a hotel company[21], are entitled to the benefit of a provision containing this combination of descriptive terms.

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[19] In the opinion delivered in *Wakefield* v. *Fargo*, *supra*, it was *intimated* that the ruling in *Hovey* v. *Ten Broeck* (1865) 26 N.Y. Super. Ct. (3 Rob.) 316; to the effect that an employé who supervised the other servants managed his master's property, and kept the books of the establishment, but also performed manual labour in company with his subordinates was incorrect, in so far as it treated him as being within the statute in respect to his functions as a superintendent.

This criticism is also applicable to another case (not specifically referred to in *Wakefield* v. *Fargo*) in which a sort of engineer, or foreman in a mine, who showed the men how to work and worked with them, took the place of the superintendent when he was absent, and sometimes kept the time of the men, was a "servant" within the statute. *Vincent* v. *Bamford* (1871) 42 How. Pr. 109, 12 Abb. Pr. (N.S.) 252; and also to a case in which it was held that the statute covered a employé who acted as foreman, helped to manufacture stone, kept the time of the hands, solicited orders, and did whatever told to do by the superintendent. *Short* v. *Medberry* (1883) 29 Hun. (N.Y.) 39. (No reference was made to *Wakefield* v. *Fargo* which had been decided in the preceding year.)

[19] *Dukes* v. *Love* (1884) 97 Ind. 341 (Ind. Rev. Stat. 1881, § 3869, Burns Rev. Stat. (1894) and (1901), § 5077), applying the rule of construction, *Noscitur a sociis.*

[20] *Cooking* v. *Ward* (Ch. App. 1898) [Aff'd. by Sup. Ct.] 48 S.W. 287.

[21] *Wilson* v. *Patton*, (Tenn. 1894) MSS. Opinion (Tenn.), referred to in *Cooking* v. *Ward.*

(*g*) *"Labourers, servants, clerks, and operatives."* A provision which contains this combination of words has been held to apply to the services of a salaried employé whose time was spent partly in discharging the duties of a travelling salesman and collector, and partly in shipping and receiving goods, moving and handling stock, etc., in his employer's store, or making sales and collecting bills in the city where that store was situated[22].

(*h*) *"Clerks, servants, and labourers."* It has been held that a superintendent of a mining company, although he does not perform any manual labour, is within the purview of a statute in which these expressions are employed. The *ratio decidendi* was that the use of the word "clerk" showed that "it was intended to secure the benefits of the act to servants and labourers who are not usually termed either menial servants or manual labourers in the ordinary sense of those terms[23].

**13. Employés within the purview of statutes which render directors of companies personally liable for wages.**—In the Ontario statute to this effect the expressions used are "labourers, servants, and apprentices." This group of words has received a construction virtually the same as that which has been ascribed to it by the New York Court of Appeals. See preceding section, subd. (*d*). It has been declared not to be applicable to a person holding the position of a foreman who dismissed employés, made out payrolls, receives and paid out moneys for wages, performed no manual labour, and received wages fortnightly for his own services, with additional compensation for the use of machinery and horses[1].

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[22] *Cole* v. *Hand* (1890) 88 Tenn. 400, 7 L.R.A. 88, 12 S.W. 922 (Tenn. Gen. Incorp. Act, 1875, § 11).

[23] *Sleeper* v. *Goodwin* (1887) 67 Wis. 577. The court distinguished *Wakefield* v. *Fargo* (1882) 90 N.Y. 213, subd. (*d*), *supra*, note 16, on the ground that a wider scope was given to the Wisconsin statute by the inclusion of the word "clerks" in place of the expression "apprentices" which is found in the New York enactment.

[1] *Welch* v. *Ellis* (1895) 22 Ont. App. 255. Osler, J.A., said: "The object [of the Act] evidently was to protect, not the officers and agents,

**14. ——— of statutes imposing upon principal employers liabilities for the wages of persons performing labour for contractors.—** (*a*) *Footing upon which these statutes are construed.* It has been laid down that statutes of this description, although they are remedial, must be strictly construed as being in derogation of the common law, and imposing new burdens upon the persons subjected to liability [1].

(*b*) *Employés entitled to sue as "labourers."* In all the American statutes the class of employés for whose benefit they are enacted are designated by the use of the word "labourer" or "labour." So far as appears from the very few decisions which bear upon the point, they are not regarded as being applicable to any persons except those who work with their hands. They do not include such employés as a man employed as time-keeper and superintendent [2], or a superintendent of bridge-building [3].

(*c*) ——— *as "workmen."* The scope of this term, as used in the statutes which have been enacted in some of the British Colonies appears to be wider than that of the word "labourer," in the American enactments [4].

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and servants of a superior class but the inferior, and less important class. . . . Taking 'labourer' on one side, and apprentice on the other, we are driven to conclude that word 'servant' was not intended to include the higher grades of employment, but is controlled by the word which precedes it. . . . The servant, we must hold, intended by the Act, is one of a humbler character who does work similar to that required of a 'labourer,' a word which in common parlance, imports one who is engaged in manual toil, one who works, chiefly at all events, with his hands, and not with his head, and does not properly describe a person occupying the trusted and responsible position of the plaintiff. . . . I do not forget that the plaintiff's remuneration is called 'wages,' and not 'salary,' and that it is reckoned by the day and payable at short intervals; but taking all the circumstances together this is not enough to justify us in holding that he is a 'labourer' or 'servant' under the meaning of the Act."

[1] *Dudley* v. *Toledo, etc., R. Co.* (1887) 65 Mich. 657; *Chicago & N.R. Co.* v. *Sturgis* (1880) 44 Mich. 538; *Blanchard* v. *Portland & R.F.R. Co.* (1895) 87 Me. 241, 32 Atl. 890.

[2] *Missouri K. & T.R. Co.* v. *Baker*, 14 Kan. 563.

[3] *Blanchard* v. *Portland & R.F.R. Co.* (1895) 87 Me. 241, 32 Atl. 890.

[4] In *New South Wales* it has been held that a sub-contractor is entitled to sue a contractor under the Act. *Ex parte Walker* (New So. Wales 1885) 2 W.N. 112.

In § 2 of the New Zealand Workmen's Wages Act, 1893, the term

Having regard to the essential object of these Acts, it is clear that they are not applicable to persons hired directly by the principal employé, without the intervention of a contractor[5]; nor to persons who merely contract for the supply of articles and perform no labour[6].

**15. —— of statutes permitting claims for wages to be enforced against exempt property.**—(*a*) *"Labourer or servant."* It has been held with reference to a statute in which this combination of words occurs, that the term "labour," bears the meaning which is commonly attached to it in other enactments relating to the wages of servants, viz., an employé whose work is entirely or principally manual; and that this meaning controls that of the word "servant" with which it is coupled. Accordingly the scope of the statute is not so enlarged by the insertion of the latter word as to cover such employés or traveling salesmen[1].

(*b*) *"Debts or claims for labour."* This phraseology has been held to cover the remuneration of an attorney for services in having a homestead set apart, and in maintaining the application against the attacks of creditors[2]. These rulings, it is clear, are essentially inconsistent with the doctrine of the case cited in the preceding subdivision. They are also opposed to the general doctrine of which that case is merely a single illustration, viz., that the word "labour" is always to be taken as importing "manual labour," unless it is qualified by some words in the context from which the intention of the legislature to enlarge its ordinary scope can reasonably be inferred.

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"workman" is defined as "any person in any manner engaged in manual labour, or in work of any kind, whether his remuneration is to be according to time or by piece-work, or at a fixed price, or otherwise howsoever." Persons who did work under a written contract, and were paid by the cubic yard, and not by wages, were held to be "workmen" within the earlier Act of 1871. *German* v. *Pell*, 2 New Zeal. J.R.N.S. S.C. 91.

[5] *Cash* v. *Chaffee* (1897) 15 New Zealand L.R. (S.C.) 416.

[6] *Jones* v. *Conlon*, Tarl. (New So. Wales) 45.

[1] *Epps* v. *Epps* (1885) 17 Ill. App. 196.

[2] *Strohecker* v. *Irvine* (1886) 76 Ga. 6[illegible].

16. ——— of statutes exempting wages from attachment.—(*a*) "*Labourer.*" This word, as used in the Scotch statute, has been held to include a lamplighter of a burgh, although the contract of hiring required him to employ two assistants during the winter[1].

An overseer who by the terms of his agreement with his employer, was to pay his wages weekly in order to enable him to supply his family with the necessaries of life, has been declared to be within the Georgian statute by which "journeymen, mechanics, and day-labourers" are exempted from garnishment as regards their daily, weekly, or monthly wage[2]. This decision, it is apprehended, would not receive approval in other jurisdictions. It is difficult to see by what phraseology the legislature could more distinctly have manifested its intention to restrict the exemption, to subordinate employés performing manual labour.

(*b*) "*Labourers and employés.*" It has been declared that the president of a railroad company is not within a statute by which the "wages of labourers and employés" are exempted from garnishment[3]. The decision proceeded upon the grounds that the words used to designate the persons covered by the statute conveyed the idea of subordinate occupations and that the term "wages" was indicative of an inconsiderable remuneration.

(*c*) "*Labourer or other employé.*" With reference to a statute in which this combination of words is used, it has been held that a person who had contracted to erect, superintend, and otherwise direct the construction of a building for a percentage of the cost is an "employé" in the receipt of "wages or hire"[4].

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[1] *M'March* v. *Emslie* (1888) 15 Sc. Sess. Cas. 4th Ser. 375.

[2] *Caraker* v. *Mathews* (1858) 25 Ga. 571 (diss. Benning, J.).

[3] *South & N. Ala. R. Co.* v. *Falkner* (1873) 49 Ala. 115.

[4] *Moore* v. *Heaney* (1859) 14 Md. 558. The court argued thus: "A labourer, when engaged in service, under contract for compensation, is an employé, but after saying a 'labourer' there is added, 'or other employé.' Surely, in this was meant more than a labourer, or else, why, after using that word, add those which follow? If they only mean persons who are included within the meaning of the word labourer, they are mere tautology and useless."

(*d*) *Applicability to public employés.* Although the subject does not properly fall within the scope of this treatise it may be mentioned that the doctrine usually adopted in the United States, on grounds of public policy is, that the remuneration of such persons is not subject to garnishment, whether they are within the express terms of the exemption statutes or not[5]. In some jurisdictions, however, special provisions have been enacted with regard to the attachment or garnishment of their salaries or wages[6].

**17. ——— of statutes regulating the times at which wages are to be paid.**—The generality of the expression "employés" which is used in the New York statute is deemed to be somewhat restricted by the use of the word "wages" as descriptive of the character of the remuneration. That word is distinguished from "salary," and treated as covering only the pay of labourers entitled to be compensated on the footing of the services actually rendered, and not that of public officers or clerks who receive salaries not due till the end of the year[1].

**18. ——— of statutes enabling servants to recover attorneys' fees in suits for wages.**—In construing a statute which by its terms is for the benefit of "mechanics, artisans, miners, labourers and servants," the Illinois Court of Appeals proceeded upon the theory that the word "servants" included only employés *ejusdem generis* with those specifically enumerated, and refused to allow attorney's fees to a travelling salesman[1].

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[5] See note to *Dickinson* v. *Johnson*, 54 L.R.A. 566.

[6] For the American cases see the above note at p. 570.

[1] *People, Van Valkenburgh* v. *Myers* (Sup. Ct.), 25 Abb. N. Cas. 368, 33 N.Y.S.R. 18, 11 N.Y. Supp. 217 (Laws, 1890, ch. 388).
See also *People* v. *Buffalo* (1890) 57 Hun. 577, where it was laid down that the word "employés" when read in connection with the word "wages" and with reference to the considerations which induced the enactment of this statute is to be taken as being limited to labourers and workmen, and therefore not applicable to a clerk in the office of the mayor of a city, a secretary or treasurer of a park commission, a member of a fire department, a police patrolman, or a school teacher.

[1] *Standard Fashion Co.* v. *Blake* (1894) 51 Ill. App. 233.

**19. ——— of statutes regulating the hours of work.**— (*a*) *Public work.* Speaking generally, enactments by which the length of a legal day's work is fixed with respect to the employés of the State or a political division thereof are applicable to all persons who perform manual labour of any description[1]. But persons who hold regular offices, by election or appointment, and receive a stated salary, are not within their purview[2].

It has been held that the crew of a ship belonging to the War Department are not within the Federal Eight Hours Law as regards their ordinary duties upon the ship. The statutory penalty cannot be imposed unless they have been required, aside from those duties, to labour for more than eight hours in a day upon a public work—such as removing snags and obstructions from navigable waters[3].

(*b*) *Private work.* The question whether the statutes relating to private employments are applicable to servants permanently engaged or only to those who are hired for a day or other short period depends upon the phraseology used by the legislature, and the primary and essential purpose of the enactment in question. Provisions induced mainly by sanitary considerations are perhaps usually to be regarded as including only servants who are steadily employed[4]. On the other hand some

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[1] A person working on the streets of a city, under an ordinance requiring the performance of two days' work or the payment of a poll tax, has been held to be a "labourer" for the city, within the meaning of the Kansas "eight hour law" 1891, ch. 114. *Re Ashby* (1899) 60 Kan. 101, 55 Pac. 336.

The New York Labour Law which is applicable to "employés," and in which that term is defined as including "mechanics, workingmen, and labourers," in the service of municipal corporations, has been held to include a driver in the street-cleaning department of a city. *McNulty* v. *City of New York* (1901) 60 App. Div. 250, 70 N.Y.S. 133.

[2] *State ex rel. Ives* v. *Martindale* (1891) 47 Kan. 150.

The eight-hour law of New York, Laws 1870, ch. 385, which is made applicable to mechanics, workingmen, or labourers in the employ of the state or engaged upon public works, does not apply to town or other officers. Opinion of Atty-Gen. N.Y. 504.

[3] *United States* v. *Jefferson* (1894) 60 Fed. 736.

[4] The provision in Mass. St. 1874, ch 221, § 1, as amended by St. 1880, ch. 194, § 1, by which the hours of labour of minors and women "employed in labouring" in a manufacturing establishment, are regulated has been held to be applicable only to such persons as are permanently

of those which may be supposed to be chiefly intended to regulate the relations of employers and employés in a financial point of view have been construed as being designed for the benefit only of persons who perform casual labour[4]. In one statute of this latter type there is a express exception of monthly labour[5].

The terms in which these statutes are usually couched are usually such as to show unmistakably that they are not intended to apply to services of an official character—such as those performed by deputy sheriffs appointed to and in preserving the peace[7].

20. —— of statutes granting a preference to claims for wages in the administration of decedents' estates.—(*a*) *Scope as determined by the reasons for enacting them.* The statutes by which it is provided that, in the administration of the estates of deceased persons, the wages of their servants shall be treated as priority, have, like others of an analogous character, been induced by "motives of compassion towards a class of people whose poverty renders them not very well able to bear the loss of any part of the pittance they may have earned"[1].

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therein employed. *Comm.* v. *Osborn Mill* (1880) 130 Mass. 33. (Complaint which alleged that a manufacturing corporation employed a certain woman, without having posted a printed notice in a conspicuous place in the room where she was employed, stating the number of hours work required of such persons on each day of the week, was held to be insufficient.)

[5] It has been held that only labourers employed by the day are within Indiana Act of 1889, p. 143. *Helphenstine* v. *Hartig* (1892) 5 Ind. App. 172.

Similarly it has been held that the Michigan Act No. 137, Laws of 1885, making ten hours a legal day's work, does not apply to a contract with an expert in taking, finishing, and retouching photographs. *Schurr* v. *Sarigny* (1891) 85 Mich. 144, 48 N.W. 547. The court laid down the general rule that the statute was not intended to cover employment under a hiring by the week, month, or year.

[6] See *Bachelder* v. *Bickford* (1872) 62 Me. 526, where it was held that an employment under a contract to work in a grist mill at a certain rate per day to be paid weekly, was not within the exception.

[7] *County of Christian* v. *Merrigan* (1901) 191 Ill. 484, 61 N.E. 479, Aff'g. 92 Ill. App. 428. Hurd's Rev. Stat. 1899, p. 840, § 1.

[1] *Boniface* v. *Scott* (1817) 3 Serg. & R. 351. Compare also the remark in the later case, *Martin's Appeal* (1859) 33 Pa. 395, that the purpose of the Act was to afford protection to a class of persons which especially needs it.

(*b*) *On what footing construed.* It has been laid down that these statutes are to be liberally construed[2].

(*c*) *Employés within their purview.* By the courts of Pennsylvania the doctrine has been adopted that a statute of this description which uses only the expression "servants" is applicable only to those engaged in household duties[3].

In this point of view it is clear that priority cannot be claimed by a person who only worked as a clerk in a counting house[4]; nor by a person engaged exclusively in farm-work[5]. But the decisions as to claimants whose duties were partly domestic, and partly of another character are not entirely consistent. On the one hand the statute has been held to be applicable to a bar-

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[2] *Martin's Appeal* (1859) 33 Pa. 395.

[3] The leading case is *Ex parte Meason* (1812) 5 Binn. 16, in which three carefully written opinions were delivered. It will be useful to give some extracts from that of Yeates, J.: "The great difficulty of this case, is to affix a correct and precise meaning to the words servants' wages in this law. Upon all hands it is agreed, that they cannot be confined to slaves, or indented servants, who are not entitled to wages; and that they cannot be extended to the relation of master and servant in the general legal sense of those terms, where one acts under the direction or command of another, because no reasonable ground of preference can be assigned to the character of servants in such large and comprehensive acceptation. The ancient common law was highly favourable to the demands of servants in the order of administration, inasmuch as it is said they were to be paid among the first debts. Bracton, lib. 2, 4, 26, Fleta, lib. 2, ch. 57, § 10. By those authors they are called *servitia servientium et stipendia famulorum.*" The learned judge then referred to the significance of the fact that, in the statute under discussion, (Act of April 19, 1794, § 14), the provision of the earlier statute of 1705, by which the wages of "workmen and servants" were placed upon an equal footing, had been altered by the omission of the reference to "workmen." His conclusion was that "the word 'servant' must be restricted to its common and usual sense, as understood by householders. It signifies a hireling, one employed for money to assist in the economy of a family, or in some other matters connected therewith. I count it of no moment that the party hired does not sleep or eat within the walls of the house. I denominate a gardener, coachman, footman, etc., who live out of the family, as servants within the true meaning of the Act. Not so of a clerk or bookkeeper, who, however meritorious his services might be, would scorn to be placed in the rank of servitude. Nor can I conceive the smallest propriety in calling those persons who were employed by James Ashman in his life time in the manufacture of iron and business incident thereto, servants, and therefore entitled to a preference as such. They would justly be styled workmen, under the operation of the Act of 1705."

[4] *Boniface* v. *Scott* (1817) 3 Serg. & R. 351. Compare also the remark preceding note.

[5] *Re Seidler* (1877) 1 Chest. Co. Rep. 52.

keeper in a country tavern, the *ratio decidendi* being that, under such circumstances the concerns of the tavern were blended with those of the family[6]; and also to a man whose work was principally in a slaughter-house and store, but who lived in the decedent's family and performed domestic duties, when he was required to do so[7]. On the other hand priority has been refused to the wages of a man whose main duties were that of a farm-labourer, but who occasionally discharged some domestic offices[8].

The Supreme Court of Kansas has declined to follow the Pennsylvania doctrine, and held that a clerk is a "servant"[9].

**21. Applicability of statutes to persons other than the servants of the party charged with liability.**—Most of the provisions discussed in the preceding sections are drawn in terms which distinctly import that they are intended to be operative only in cases where the relationship between the person from whom and the person to whom the remuneration in question is due is that of master and servant. As a general rule, therefore, their applicability in any given instance is negatived if either one of these two situations is established by the evidence:

(1) That the person who performed the services was, in respect to the performance, under the control of some person other than the one from whom the remuneration is claimed[1].

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[6] *Boniface* v. *Scott* (1817) 3 Serg. & R. 351.

[7] *Re Miller's Estate* (1828) 1 Ashm. 323 (Orphan's Court). The court took the broad position that partial employment as a domestic servant was enough to bring a claimant within the Act.

[8] *McKim's Estate*, 2 Clark 224.

[9] *Cawood* v. *Wolfley* (1896) 56 Kan. 281, 31 L.R.A. 538, 43 Pac. 236.

[1] *United States* v. *Driscoll* (1871) 96 U.S. 421, 24 L. ed. 847. (Federal Eight Hours Law held not to give an employé of a contractor performing public work any rights against the Government); *St. Louis & N.A.R. Co.* v. *Rogers* (Ark. 1904), 79 S.W. 794; (person rendering services to a railroad contractor, held not to be within the scope of a statute giving a lien to every person who performs valuable services by which the railroad receives a benefit); *Guion* v. *Brown* (1851) 6 La. Ann. 112 (servant of accountant employed by a commercial firm to post its books not entitled to a privilege as against the firm); *Gallagher* v. *Ashby* (1857) 26 Barb. (N.Y.) 143 (statute making stockholders individually liable to "labourers and servants," not applicable to labourers hired by

The express object of one group of statutes, however, is to render principal employers liable for the wages earned by the servants of contractors. See § 10, *ante*.

(2) That the work was performed by an independent contractor or by a person engaged in a trade or profession on his own account. In the note below numerous authorities are cited in which the applicability of statutes of different descriptions to cases involving this situation was denied. In order to show more clearly the full effect of the decision the words or phrases used in the given provision for the purpose of designating the employés are specified[1].

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contractors); *Marks* v. *Indianapolis B. & W.R. Co.* (1871) 38 Ind. 440. In *Re Seider's Appeal* (1863) 46 Pa. 57, it was held that a helper employed and paid by the chief workman was entitled, under Pennsylvania Act of April 2, 1849, to a preference out of the assets of the latter's employer; but the decision proceeded upon the ground that the chief workman acted as an agent of his employer in employing the helper.

[1] (*a*) *Statutes concerning liens and preferences.* In the following cases independent contractors were declared not to be entitled to priority as regards their compensation. *Ex Parte Ball* (1853) 3 De G. & M. & S. 155 ("servants or clerk": for facts, see § 2, note 7, *ante*); *Vane* v. *Newcomb* (1889) 132 N.S. 220, 33 L. ed. 310 ("employés"); *Campfield* v. *Lang* (1885) 25 Fed. 128 ("labourers, servants, and employés"); *Bankers & M.T. Co.* v. *Bankder & M.T. Co.* (1886) 27 Fed. 536 ("employés"); *Todd* v. *Kentucky U.R. Co.* (1892) 18 L.R.A. 305, 52 Fed. 241 ("employés" and "labourers"); *Malcomson* v. *Wappoo Mills* (1898) 85 Fed. 907 ("labourers" and "employés"); *Cochran* v. *Swan* (1874) 53 Ga. 39 ("labourer"); *Re Clark* (1892) 92 Mich. 351 ("labour debts"); *Re Barr B.P. & D. Co.* (N.J. Eq. 1899), 42 Atl. 575 ("labourers"); *Lehigh Coal Co.* v. *Central R.R. Co.* (1878) 29 N.J. Eq. (2 Stew.) 252 ("labourers"); *Charron* v. *Hale* (Sup. Ct. 1899) 54 N.Y. Supp. 411, 25 Misc. 34 (employés, operatives and labourers"); *Re Repson C. & N.T. Co.* (1901) 32 Misc. 56 ("employés, operatives, and labourers") *Re Seider's Appeal* (1863) 10 Wright 57 ("labourers"); *Wentroth's App.* 82 Pa. 469; *Llewellyn's Appeal* (1876) 103 Pa. 458 ("labourers"); *Com.* v. *Marsh* (Pa. Q.S.) (1894) 3 Pa. Dist. R. 489, 14 Pa. Co. Ct. 369 ("labourers"); *Gross* v. *Eiden* (1881) 53 Wis. 543 ("labourer"); *Lang* v. *Simmons* (1885) 64 Wis. 525 ("labourers, servants or employés").

Compare also *Ney* v. *Dubuque R. Co.* (1866) 20 Iowa 347, in which a decree of a court providing for the payment of the "employés" of a railway company was held not to be applicable to an independent contractor.

In the two following cases the facts of which are stated in greater detail in § 2, note 7, *ante*, persons following independent occupations were held not to be entitled to a preference. *Ex parte Butler* (1857) 28 L.T. O.S. 357; *Ex parte Walter* (1873) L.R. 15 Eq. 412; 42 L.J.B. 49, 21 W.R. 53.

*In Conlee L. Co.* v. *Ripon L. & M. Co.* (1886) 66 Wis. 481, a carriage maker and blacksmith who kept a shop of his own and from time to time manufactured articles for the insolvent was held not to be within the description "labourers, servants, and employés."

In *Re Kimberley* (1899) 37 App. Div. 108, a person engaged in a general trucking business was held not to be an "employé."

In one case it has been denied that an insurance adjuster is not a

If the evidence shows that the claimant was under the control of his employer in respect of the details of the stipulated

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"clerk, servant or employé" of the insurance company. *Boston & A.R. Co.* v. *Mercantile T. & D. Co.* (1896) 82 Md. 535, Atl. . But this doctrine would clearly not be applicable to all employés of that description. For the facts of the case, see § 8(*c*), *ante*.

The doctrine applied in one case was that an attorney not employed for any particular period, nor at a fixed price, is not within a statute according a preference to the "wages" of "employés, operatives and labourers." *People* v. *Remington* (1887) 45 Hun.. 329, Aff'd. in 109 N.Y. 631, N.E. . The actual *ratio decidendi* was that sums due for professional services are not "wages." But the refusal to allow the claim might have been put on the ground the statute was obviously intended to be applicable to persons whose relation to the corporations in question was that of servants.

In another it was held that an attorney not on regular, continuous service was an "employé" under a statute preferring "clerks, servants, and employés." *Louis* v. *Fisher* (1894) 80 Md. 139, 26 L.R.A. 278.

The following decisions regarding attorneys, although they are, strictly speaking in point, may also be referred to in connection with the above cases.

The term "wages of employés" in an order requiring a railroad receiver to pay such wages, does not include services of counsel employed for special purpose. *Louisville R. Co.* v. *Wilson* (1890) 138 U.S. 531, 34 L. ed. 1033.

An attorney is not a "servant" or "employé," nor are the fees due to him for special services "wages" or "salary," within a statute according a preference to "wages or salaries to clerks, servants or employés." *Lewis* v. *Fisher* (1894) 26 L.R.A. 278, 80 Md. 139.

A lawyer employed by a railroad company at a fixed salary per month is within an order directing the payment of wages due to "employés" for labour and services. *Finance Co.* v. *Charleston C. & C.R. Co.* (1892) 52 Fed. 526.

A claim of counsel for professional services rendered to a railroad company is within an order appointing a receiver directing him to pay debts "owing to labourers and employés" of the company "for labour and services." *Gurney* v. *Atlantic & G.R. Co.* (1874) 58 N.Y. 358, Rev'g. 2 Th. & C. 446 (cases involving liability to stockholders referred to, *arguendo*).

That a person who lets out the services of another is not a "clerk" within the meaning of the provision regarding privileges in the Louisiana Code, was held in *Guion* v. *Brown* (1851) 6 La. Ann. 112.

The same rule has been made with regard to a man employed to sell goods, under a contract, which provided that he was to receive half the profits, and bear half the losses of the business. *Brierre* v. *Their Creditors* (1891) 43 La. Ann. 423. 9 So. 640.

(*b*) *Statutes making individual stockholders individually liable for labour debts.* *Peck* v. *Miller* (1828) 39 Mich. 504; *Taylor* v. *Manwaring* (1882) 48 Mich. 171; *Boutwell* v. *Townsend* (1866) 37 Bart. 205; *Coffin* v. *Reynolds* (1868) 37 N.Y. 640; *Moyer* v. *Pennsylvania Slate Co.* (1872) 71 Pa. 293 (decided on the ground of a strict construction of the words, "mechanics, workmen, and labourers").

In *Aiken* v. *Wasson* (1862) 24 N.Y. 482, thecourt, in discussing the import of the words "labourers and servants" as used in the New York Railroad Act, 1850, § 10, said: "It is obvious from the nature and terms of this and other provisions of the Act, as well as from a general policy

work, he is not excluded from the operation of these statutes, although he may have furnished at his own expense the instru-

indicated by analogous statutes, that the legislature intended to throw a special protection around that class of persons who should actually perform the manual labour of the company. To accomplish this design, it is not necessary that the words 'labourers and servants' should receive their broadest interpretation. Indeed, such a construction would scarcely harmonize with the general scope and object of this and similar Acts. In some very extended sense, the directors and other principal officers of the corporation may be considered as its agents and servants, and yet no one, I apprehend, would contend that the provision was intended for their benefit. The word 'servant' is qualified, and to some extent limited in its meaning, by its association with the word 'labourers,' according to the familiar maxim, *noscitur a sociis*. It clearly would not include every one who should perform any service in any form for the company. Such a construction is repelled, not only by the apparent reason for the enactment, but by the language used, which would naturally have been far more general if such had been its object."

(c) *Statutes making principal employers liable for the wages of the employés of contractors.* In *Chicago & N.E.R.R. Co.* v. *Sturgis* (1880) 44 Mich. 538, and *Martin* v. *Michigan & O.R.R. Co.* (1886) 62 Mich. 458, contractors and subcontractors were held not to be "labourers" within the meaning of a statute of this description. In Maine it has been held that such a statute does not apply to the personal labour of a subcontractor who has worked together with the crew employed by him upon a section of a railroad which he has contracted to build. *Rogers* v. *Dexter & P.R. Co.* (1893) 85 Me. 372, 27 Atl. 257 (Rev. Stat. ch. 51, § 141).

That the term "labourer" could not be construed as designating one who contracted for and furnished the labour and services of others, or one who contracted for and furnished one or more teams for work, whether with or without his own services, was held in *Balch* v. *N. Y. & Oswego Midland R. R. Co.* (1871) 46 N. Y. 521.

A subcontractor has, however, been held to be within the purview of Mass. Stat. of 1873, ch. 353, by which a right if Act against the owner of a railroad is given to "any person to whom a debt is due for labour performed, by virtue of an agreement with the owner, or with any person having authority from or rightfully acting for such owner in procuring or furnishing such labour." *Hart* v. *Boston* (1877) 121 Mass. 510.

(d) *Statutes exempting wages from attachment.* In two Pennsylvania cases it has been laid down that the "wages of labourers" which are protected by a statute of this description are the earnings which a labourer acquires by his personal toil, and not the profits which a contractor derives from the labour of others. *Smith* v. *Brooke* (1865) 13 Wright 147, following *Heebner* v. *Clave* (1847) 5 Ban. 115. This statement does not cover cases in which a single person works in the capacity of an independent contractor. But it can scarcely be supposed that the court intended to exclude such a situation from the operation of the doctrine affirmed.

(e) *Statutes regulating the hours of work.* In *Billingsley* v. *Marshall County* (1897) 5 Kan. App. 435, 49 Pac. 329, a contractor was held not to be within the descriptive terms, "labourers, workmen, mechanics, or other person."

(f) *Statutes requiring the payment of wages at certain intervals.* One employed by a corporation to cut merchantable timber, under a contract which provides for settlement each month, but for the retention of 25 per cent. of the amount due, not exceeding a specified sum, as security

mentalities necessary for the performance of that work[1]; or may have been aided in the performance by his own servants[2]; or may have been paid according to the quantity of work performed by him[3].

C. B. LABATT.

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for the satisfactory completion of the job, was held not to be an "employé," within a local statute providing for the appointment of a receiver of any corporation which neglects or refuses to pay its employés for the space of thirty days. *McCulloch* v. *Renninger* (Md. 1899), 44 L.R.A. 413; (Md. Acts of 1878, ch. 108).

[1] Thus a drayman, who furnishes his own team, but worked for a corporation regularly, and almost constantly and exclusively, and was entirely under its control as to all matters within the scope of the employment, was held to be a labourer within § 63 of the New Jersey Corporation Act. *Watson* v. *Watson N. Co.* (1879) 30 N.J. Eq. 588 (see § 7, note 8, *ante*).

[2] In *Hopkins* v. *Cromwell* (1904) 89 App. Div. 481, the claimant had in the name of a corporation engaged in the wholesale pickle business, purchased pickles in the vicinity of his residence, received the pickles, prepared them for shipment and shipped them as ordered by the corporation, under an agreement by which he was to receive a certain sum for every hundred pounds of pickles purchased when delivered on the cars. The work was done by him personally with the occasional assistance of his own man of all work, and the help of coopers furnished a few weeks during the spring by the corporation. Held, that he was entitled to a preference under New York laws of 1897, ch. 6, § 9.

[3] *Re Alsopp* (1875) 32 L.T.N.S. 43 (which overrides *Ex parte Grellier* (1831) Mont. 264); *Thayer* v. *Mann* (1848) 56 Mass. 371; *Hopkins* v. *Cromwell*, 89 App. Div. 481, N.Y. Supp.; *O'Brien* v. *Hamilton*, 12 Phila. 387; *Carlisle* v. *Brogden*, 1 New Zeal. Jur. Rep. 169; *Guinn* v. *Pell*, 1 New Zeal. Jur. Rep. S.C. 91.

## *AMENDMENT TO THE EXCHEQUER COURTS ACT.*

A bill relating to the Exchequer Court of Canada has recently passed the House of Commons, and will, no doubt, become law. One amendment to the present law provides that "In case of the illness of the judge of the court, or if the judge has leave of absence, the Governor in Council may specially appoint any person having the qualifications hereinbefore mentioned to discharge the duties of the judge during his illness or leave of absence; and the person so appointed shall, during the period aforesaid, have all the powers incident to the office of the judge of the court."

Another clause provides that "Any judge temporarily appointed to discharge the duties of the judge may, notwithstanding the expiry of the term of his appointment, or the happening of any event upon which his appointment terminates, proceed with and conclude the trial or hearing at that time actually pending before him of any cause, matter or proceeding, and pronounce judgment therein, and may likewise pronounce judgment in any cause, matter or proceeding previously heard by him and then under consideration or reversed," as the Act will take effect as from the first day of January last.

This amendment will cover the case of the judgments delivered by the late acting judge, Sir T. W. Taylor, on the morning of the day Judge Burbidge died. While it is possible that the judgments might be valid it was thought advisable to settle the question by legislation.

Another clause of the bill provides that if the judge has "other judicial duties" which make it impossible for him to hear, without undue delay, any case or matter, the Governor in Council may, upon the written application of the judge, appoint another person to act as judge pro hac vice. This clause was intended by the Minister of Justice to cover the case of Mr. Justice Cassells, who is now conducting an enquiry into the

Department of Marine and Fisheries. Whether or not it has this effect is we think open to very serious doubt. We cannot see how this service can be said to be covered by the words "other judicial duties." The duties are not judicial in any sense and they might appropriately be performed by a layman. There is nothing calling for the services of a judge as such.

The registrar of the court is also given the powers of a judge of the Exchequer Court sitting in chambers. Similar power has already been given to the registrar of the Supreme Court of Canada. We have referred to this matter, ante, p. 291.

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Whilst thanking our correspondent, Mr. Gamble, K.C., for his letter published in our last issue in reference to our note on p. 298 respecting *Labelle* v. *O'Connor*, we think he is not borne out by the judgments of the majority of the court. We refer particularly to what is said by MacMahon, J., at p. 539 of 5 O.L.R. and by Anglin, J., at p. 559, from which it is perfectly plain that the decisions of the Court of Appeal in *Fraser* v. *Ryan*, 24 A.R. 441, and of Street, J., in *Gibbons* v. *Cozens*, 27 O.R. 356, to the effect that a purchaser failing to complete his contract forfeits not only any deposit but also all payments made on account of his purchase money, were not followed in *Labelle* v. *O'Connor*. The court held that the money in question had not been paid as a deposit, but as an instalment of purchase money, and practically ordered it to be refunded. *Fraser* v. *Ryan* was we see referred to, but this makes the refusal to follow it the more pointed.

## *REVIEW OF CURRENT ENGLISH CASES.*



LIQUOR LICENSES—PERMITTING DRUNKENNESS—LODGER AT HOTEL —ARRIVAL OF LODGER IN DRUNKEN CONDITION — LICENSING ACT, 1872 (35-36 VICT. C. 94) S. 13—LICENSING ACT, 1902 (2 EDW. VII. C. 28) S. 4—(R.S.O. C. 245, SS. 75, 76).

*Thompson* v. *McKenzie* (1908) 1 K.B. 905 was a prosecution for permitting drunkenness by the defendant on licensed premises. The facts were, that a person in a drunken condition applied at the defendant's hotel for lodging after closing hours and was admitted, he was subsequently discovered on the premises by a police officer. The Act of 1872, s. 13, is in somewhat similar terms to R.S.O. c. 245, s. 76, but the Act of 1872 also expressly authorizes any licensed person to refuse to admit to his premises any person in a state of intoxication. The Ontario Statute, s. 75, imposes a penalty on a tavern keeper refusing to supply lodging except for some valid reason. In the present case a Divisional Court (Lord Alverstone, C.J., and Lawrance and Sutton, JJ.) on a case stated by a magistrate, held that the defendant in not exercising the power given him by statute of refusing to admit the drunken applicant, thereby rendered himself unable to discharge the onus cast upon him of shewing that he took all reasonable steps for preventing drunkenness on his premises, and that it was immaterial that he had not himself supplied the drunken person with liquor. In view of this case, it would seem that under the Ontario Act, the fact that an applicant for lodging at a tavern is drunk would be "a valid reason" for refusing him admission, and the tavern keeper would subject himself to a penalty under s. 76 if he did not refuse to receive such an applicant.

MARINE INSURANCE—WARRANTY AGAINST CONTRABAND OF WAR— "CONTRABAND PERSONS"—BREACH OF WARRANTY.

In *Yangtze Insurance Association* v. *Indemnity Mutual M. A. Co.* (1908) 1 K.B. 910, the short point was whether a warranty in a policy of marine insurance against carrying "contraband of war" was broken by the transport of military officers of a belligerent state. In some text-writers the phrase contraband persons is used, but Bigham, J., was of the opinion that the ordinary meaning of the term "contraband of war" is that it applies only to goods and not to persons, and, therefore, the

carriage as passengers of military officers of a belligerent state, was not a branch of the warranty.

WATERWORKS—NEGLECT TO SUPPLY WATER FOR DOMESTIC PURPOSES—INSUFFICIENCY OF SUPPLY.

*Simpson* v. *South Oxfordshire Water & Gas Co.* (1908) 1 K.B. 917. By a statute a water company neglecting or refusing "to furnish to any owner or occupier entitled under this or any special Act to receive a supply of water (sic) during any part of the time for which the rates for such supply have been paid" were liable to a penalty. The plaintiff who was entitled to receive a supply of water for domestic purposes, complained that the supply furnished was insufficient and the application was brought to recover the penalty, but on a case stated by justices a Divisional Court (Lord Alverstone, C.J., and Lawrance and Sutton, JJ.) it was held that the provision above referred to only applied to a total cessation of the supply and not to a neglect to furnish a sufficient quantity and therefore the applicant could not succeed.

BANKRUPTCY—SHAM SALE BY BANKRUPT—PART PAYMENT OF PURCHASE MONEY—RIGHT OF PROOF BY SHAM PURCHASER FOR MONEY ACTUALLY PAID.

*In re Myers* (1908) 1 K.B. 941, although a bankruptcy case is one that deals with a point of general interest. Joseph Myers purchased a business and stock in trade for £1,000 to secure which he gave promissory notes on which his brother Abel became surety. Joseph subsequently got into pecuniary difficulties and made a sham sale of the business to Abel and by way of part payment Abel assumed the liability for the notes given on the original purchase. Joseph subsequently became bankrupt and the sale to Abel was declared null and void. Abel paid the notes which he had thus assumed and claimed to prove as a creditor of Joseph for the amount so paid, but it was held by Bigham, J., upon the authority of *In re Cross* (1848) 4 DeG. & Sm. 364 n. and *Ex parte Phillips* (1888) 36 W.R. 567, that although the debtor's estate had profited by the payment of the notes yet Abel could not be allowed to prove against his estate in respect thereof as the money had been paid in the course of carrying out a transaction devised in fraud of creditors. The result was that so much of the fraudulent agreement as was disadvantageous to Abel and precluded him from having recourse against Joseph or his estate was binding on him, though the

part which was advantageous to him did not bind the other creditors. A somewhat similar state of things arose in the case of *Pringle* v. *Obspinetsky* recently before a Divisional Court (26 March, 1908). In that case an exchange of lands was attacked as fraudulent against creditors, and the transaction set aside, but it was held that the fraudulent grantee was entitled to get back the lands which he had given in exchange.

ASSAULT—SCHOOLMASTER—ASSISTANT TEACHER—CORPORAL PUNISHMENT OF PUPIL—SCHOOL REGULATIONS—NEW TRIAL—BIAS OF JURY—WEIGHT OF EVIDENCE.

*Mansell* v. *Griffin* (1908) 1 K.B. 947. This was an appeal from a Divisional Court (Phillimore and Walton, JJ.) (1908) 1 K.B. 160 (noted ante, p. 198), granting a new trial. The appeal was dismissed by the Court of Appeal (Lord Alverstone, C.J., and Farwell and Kennedy, L.JJ.). That court declined to express any opinion as to whether or not an assistant teacher in an elementary school had any authority to inflict corporal punishment on a pupil otherwise than in accordance with school regulations.

PRACTICE—ACTION FOR "DEBT OR LIQUIDATED DEMAND IN MONEY"—CLAIM FOR INSTALMENT OF PRICE OF SHIP—RULE 115—(ONT. RULE 603).

*Workman* v. *Lloyd Brazileno* (1908) 1 K.B. 968. In this case the action was brought to recover an instalment of purchase money agreed to be paid for the price of a ship. The plaintiff applied for judgment under Rule 115 (Ont. Rule 603) and the motion was resisted on the ground that the action being for the first of five instalments of the purchase money an action of debt would not lie until the whole of the instalments were due and that the demand was not liquidated because the measure of damages in an action for an instalment was not necessarily the amount of the instalment but unliquidated damages for breach of contract. The master granted the order which was affirmed by Walton, J., and the Court of Appeal (Lord Alverstone, C.J., and Farwell and Kennedy, L.JJ.) affirmed the order of Walton, J. We may note that a somewhat similar point was before the Ontario Court of Appeal recently in the case of *Vivian* v. *Clergue* in which the contract was under seal for the purchase of land; and that court also held that the plaintiffs were entitled to recover an instalment of purchase money notwithstanding that they still retained the property in the subject-matter of the contract.

# REPORTS AND NOTES OF CASES.

## Dominion of Canada.

### SUPREME COURT.

Ont.] BATTLE *v.* WILLOX. [May 5.

*Contract—Share of profits—Absolute or conditional undertaking —Construction of contract—Damages.*

A contract between W. and B. recited that W. owned land to be worked as a gravel-pit; that he was about to enter into contracts for supplying sand therefrom; and that he had requested B. to assist him financially to which B. had consented on certain conditions; it then provided that "the said W. is to enter into contracts as follows" naming five corporations and persons to whom he would supply sand to a large amount at a minimum price per hard; that B. would endorse W.'s note to the extent of $5,000 and have 60 days to declare his option to take one-fourth interest in the profits from said contracts, or purchase a one-third interest in the property and business; that each party would account to the other for moneys received and expended in connection with the property; that if either party wished to sell his interest he would give the other the first choice of purchase; and that "each of the parties hereto agrees to carry out this agreement to the best of his ability according to the true intent and meaning of the same and to do what he can of mutual benefit to the parties hereto." B. indorsed notes as agreed. W. entered into two of the five contracts, sold a quantity of sand and then sold the property without notice to B. who brought an action claiming his share of the profits that would have been earned if the five contracts had been entered into and fully carried out.

*Held*, FITZPATRICK, C.J., and MACLENNAN, J., dissenting, that the undertaking by W. to enter into the five contracts was absolute and having by the sale put it out of his power to perform it he was liable to B. who was entitled to damages on the basis of the contracts having been carried out.

*Held*, also, DUFF, J., hesitante, that the clause quoted did not modify the rigour of the absolute covenant by W. to procure these contracts in any event.

Judgment of the Court of Appeal reversed, and the judg-

ment of the Divisional Court reversing that of ANGLIN, J., restored.

*Battle*, for appellant. *Collier*, K.C., and *Griffiths*, for respondent.

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Que.] MEIGHEN *v.* PACAUD. [May 5.

*Title to land—Construction of deed—Easement appurtenant—Use of lane in common with others—Overhanging fire-escape—Encroachment on space over lane—Trespass—Right of action.*

A grant of the right to use a lane in rear of city lots "in common with others," as an easement appurtenant to the land conveyed, entitled the purchaser to make any reasonable use not only of the surface but also of the space over the lane. The construction of a fire-escape, three feet wide, with its lower end 17 feet above the ground (in compliance with municipal regulations), is not an unreasonable use, nor inconsistent with the use of the lane in common by others; consequently, its removal should not be decreed at the suit of the owner of the land across which the lane has been opened. Judgment appealed from affirmed, MACLENNAN, J., dissenting.

*Campbell*, K.C., and *Brosseau*, K.C., for appellant. *Mignault*, K.C., and *Beullac*, for respondent.

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Que.] [May 5.

QUEBEC RAILWAY, LIGHT AND POWER CO. *v.* FORTIN.

*Negligence—Master and servant—Scope of employment—Insulation of electric wires—Onus of proof.*

An electric line foreman in the company's employ, met his death from contact with imperfectly insulated live wires while at his work in proximity to them in the power-house. From the evidence, it was left in doubt whether the duties of deceased included the inspection and care of the wires both inside and outside of the power-house, there being no positive evidence to shew that he had been engaged to perform the duties in question except as to the wires outside the power-house walls.

*Held*, that the onus of proof as to the point in dispute was on the defendants, and such onus not having been satisfied, they were liable in damages. Appeal dismissed with costs.

*Stuart*, K.C., for appellants. *Alleyn Taschereau*, for respondent.

# Province of Ontario.

## HIGH COURT OF JUSTICE.

Riddell, J.—Trial.] REEVES *v.* REEVES. [May 13.

*Will—Devise to "my wife" naming her by testator's surname, though not legally his wife.*

The question at issue was as to the validity of a devise by one Frank Reeves to "my wife Jennie Reeves." One Switzer married Jennie Gordon and they lived together for several years. Switzer subsequently went to Detroit where he was granted a so-called divorce from his wife Jennie, who subsequently married Frank Reeves. The trial judge held that the divorce proceedings were illegal, and consequently that Jennie Reeves was not the lawful wife of the testator.

*Held*, that the devise of the property to "my wife Jennie Reeves" was good. The following cases were referred to: *Russel* v. *Lafrancois*, 8 S.C.R. 335; *Schloss* v. *Stiebel*, 6 Sim. 1; *Giles* v. *Giles*, 1 Keen 685; *In re Wagstaff* (1908) 1 Ch. 162.

*Eyre*, for plaintiff. *Hollis*, for defendant.

# Province of Nova Scotia.

## SUPREME COURT.

Full Court.] JOHNSTON *v.* ROBERTSON. [April 4.

*Discharge on habeas corpus—False imprisonment—Liability of solicitor procuring imprisonment.*

The plaintiff was convicted for unlawfully selling liquor to an Indian in violation of the Indian Act, before the defendant as a stipendiary magistrate, who sentenced him to fine and imprisonment absolute. He appealed to the County Court where both penalties were reduced in his absence as he was confined in jail on a conviction under another penal statute. On the hearing of the appeal the defendant acted as counsel for the prosecutor, prepared the conviction and warrant, and by appointment handed them to the sheriff who executed them. The plaintiff

had been discharged by the court in banco, under a writ of habeas corpus, on notice to the defendant, the order reciting an adjudication that the conviction was illegal and without jurisdiction (*R.* v. *Johnston*, 41 N.S.R. 105, 11 Can. Cr. Cas. 10) and on that application the defendant filed an affidavit against the motion. In an action by the plaintiff against the defendant in his capacity as solicitor, for false imprisonment, the trial judge withdrew it from the jury at the close of the plaintiff's case, on the ground that there was no evidence of malice, and that the defendant's privilege as a solicitor protected him.

*Held*, dismissing the plaintiff's appeal and motion for a new trial that the plaintiff could be legally sentenced to imprisonment absolute in his absence by the County Court judge on the appeal, but assuming he could not, that the action of the County Court judge in so sentencing him was a mere error which did not invalidate the conviction, and as the defendant was not shewn to have acted maliciously or officiously, he was not liable in trespass.

*Per* TOWNSHEND, C.J., dissenting, that the conviction having been adjudged illegal, and without jurisdiction by the court, on the return to the habeas corpus, and defendant being shewn to have been the instrument in procuring, enforcing and upholding the invalid conviction, he was liable in damages, and the case should be remitted for a new trial.

*J. J. Power*, K.C., for the appellant. *W. B. A. Ritchie*, K.C., contra.

NOTE.—The plaintiff has appealed from the above decision to the Judicial Committee of the Privy Council.

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# Province of Manitoba.

## COURT OF APPEAL.

Full Court.] McMANUS *v.* WILSON. [April 13.

*Set-off—Unliquidated damages—Unconnected transactions.*

Plaintiff sued for the balance due by defendant under an agreement to purchase land from one Walton, who had assigned the agreement to plaintiff. Defendant did not dispute the debt, but claimed the right to set off damages against Walton in

respect of some dealings in stocks, entirely unconnected with the agreement of sale.

*Held*, that such damages could not be set off against the assigned debt in the hands of the plaintiff.

Under s. 39(*f*) of the King's Bench Act, R.S.M. 1902, c. 40, anything of which the debtor could avail himself as an equitable set off to the assigned debt would be a defence to which the assignment would be subject, but a counterclaim for unliquidated damages arising out of a cause of action in no way connected with the claim assigned is not a defence or set-off, which would at any time have been recognized in a court of equity.

*Government of Newfoundland* v. *Newfoundland Ry. Co.*, 13 A.C. 199, distinguished.

*O'Connor* and *Blackwood* for plaintiff. *Affleck*, for defendant.

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Full Court.] TEAGUE *v.* SCOULAR. [May 6.

*Promissory note—Presentment for payment—Pleading in County Court action.*

1. Under section 95 of the County Courts Act, R.S.M. 1902, c. 38, a plaintiff suing upon a promissory note payable at a particular place is not required to allege presentment for payment or to prove it at the trial unless non-presentment is set up by the defence.

2. Under ss. 114, 116 and 118 of the Act, a defendant intending to rely on non-presentment of such a note, must set up that defence in his dispute note or he cannot raise it at the trial except by special order of the judge.

*Morley*, for plaintiff. *St. John*, for defendant.

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Full Court.] VOPIN *v.* BELL. [May 6.

*Husband and wife—Liability of wife for goods supplied to household.*

Appeal from verdict of County Court judge holding a married woman living with her husband liable on an account for groceries and meat supplied by the plaintiffs for use in the household on the ground that the plaintiffs had always charged the goods to the wife and rendered the accounts from time to time in her name without objection.

*Held*, that there was nothing in that circumstance to displace

the presumption of law that the wife in ordering the goods was acting as her husband's agent, and that, as the plaintiffs knew that the wife was living with her husband, and there was no evidence of any special contract by which the wife made herself personally liable, the verdict against her must be set aside with costs.

*Paquin* v. *Beauclerk* (1906) A.C. 160 distinguished.

*Dennistown*, K.C., and *Hannison*, for plaintiffs. *Fillmore*, for defendant.

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## KING'S BENCH.

Mathers, J.] [March 27.

RE CANADIAN NORTHERN RAILWAY CO. *v.* ROBINSON.

*Costs—Arbitration under Railway Act—Taxation of costs—Arbitrator's fees—Counsel fees—Fees of expert witness.*

The sum awarded by the arbitrators having exceeded the amount offered by the company, the owner applied, under section 199 of the Railway Act, R.S.C. 1900, c. 37, for taxation of the costs of the arbitration by the judge. Following the practice in Ontario: *In re Oliver* v. *Bay of Quinte Ry.*, 7 O.L.R. 567, the judge referred the bill to the senior taxing master. The parties afterwards applied to the judge for directions to the taxing officer as to whether the costs should be taxed as between party and party or as between solicitor and client.

*Held*, following *Malvern Urban District* v. *Malvern*, 83 L.T. 326, that, under sub-section (5) of section 2 of the Act, interpreting the word "costs" as including "fees, counsel fees and expenses," the costs mentioned in section 199 should be taxed as between solicitor and client.

*Held*, also, that where, in the opinion of the taxing officer, the costs fixed by the tariff for ordinary litigation are inadequate compensation for the services necessarily and reasonably rendered, he is not bound by it and should not follow it.

After the taxing officer had completed his taxation, it was brought to the judge for confirmation, when the following rulings were made:—

1. For the purposes of the taxation of costs, the arbitration began when the company served notice upon the owner offering an amount which they were willing to pay, and naming its arbitrator, and items for work done even before that date should

be allowed if they were for work that would properly be costs of the arbitration if done after the date; for example, fee perusing the order of the Railway Commissioners giving leave to expropriate, and taking instructions.

2. The owner was entitled to tax the fees paid to the arbitrators as taking up the award. *Shrewsbury* v. *Wirral* (1895) 2 Ch. 812 distinguished.

3. Counsel fees allowed by the taxing officer were reduced to $100 per day for first counsel and $75 per day for second counsel.

4. The fees actually paid to expert witnesses should not necessarily be allowed, but only fair and reasonable fees for the time occupied in attending before the arbitrators and in qualifying themselves to give evidence.

5. The costs of the taxation, including a fee of $25 for the argument before the judge, should be borne by the company.

*A. B. Hudson*, and *Ormond*, for Robinson. *Clark*, K.C., for the railway company.

## Province of British Columbia.

### SUPREME COURT.

Full Court ] HUNTTING *v.* MACADAM. [April 29.

*Landlord and tenant—Forfeiture of lease—Relief against—Non-payment of rent excused by oral assurance—Authority of landlady's husband—Mental incompetence—Knowledge of tenant.*

Plaintiff as lessee, and defendant, as lessor, on January 1, 1906, entered into a lease for a term of five years at a rental of $70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to January 23, 1907, inadvertently allowed the rent for January to fall into arrear, but on the latter date tendered defendent, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced.

*Held*, following *Newbolt* v. *Bingham* (1895) 72 L.T.R. 852, that no third party having intervened, plaintiff was entitled to relief against non-forfeiture, and that the case coming within Rule 976 of the Supreme Court Rules, 190 , plaintiff should also get the costs of the action.

Observations on the effect of s. 20, s-s. 7, Supreme Court Act.

Decision of HUNTER, C.J., affirmed.

*Sir S. H. Tupper*, K.C., for respondent. *Joseph Martin*, K.C., for respondent.

## Book Reviews.

*The Criminal Code and the Law of Criminal Evidence.* By W. J. TREMEEAR, of the Toronto Bar. Toronto: Canada Law Book Co., Limited, Law Book Publishers, 32 Toronto St. Philadelphia: Cromarty Law Book Co., 1112 Chestnut St. 1908. 1030 pp.

As stated in the title page this is an annotation of the Criminal Code of Canada and of the Canada Evidence Act; with special reference to the law of evidence and the procedure in Criminal Courts, including the practice before justices and on certiorari and habeas corpus.

This second edition comes really in answer to a demand therefor by the profession who have evidenced their desire not merely by letters to that effect, but by the fact that the first edition was in a very few years exhausted. Moreover there was a necessity for a second edition in view of the re-arrangement of the sections of the Criminal Code by the revision of the statutes of Canada in 1906, and the many changes made in both the Code and the Canada Evidence Act since the first edition.

The volume before us is larger by several hundred pages than the first edition, and an examination of its contents shews that the whole work has been thoroughly re-written, and that much additional information is now given on subjects which were sparingly dealt with in the former edition. A noticeable feature is the addition of many new forms.

Mr. Tremeear has established his reputation as a careful and methodical compiler, and he shews that familiarity with the principles of criminal law and procedure necessary for one who undertakes to give others full information on the subject.

The mechanical arrangement and the typographical execution of the book is of the highest character. A great improvement has been made by giving marginal notes, following in this particular the best specimens of English law books.