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CARTWRIGHT, MASTER. JANUARY 23RD, 1905.

CHAMBERS.

WATT v. MACKAY.

Evidence — Foreign Commission — Examination of Plaintiff abroad—Terms—Costs.

Motion by plaintiffs for a commission to New York to take the evidence of one of the plaintiffs, who resided there.

F. J. Roche, for plaintiffs.

N. F. Davidson, for defendant.

THE MASTER.—The question in what circumstances such an order should be made is fully discussed and the authorities collected in Robins v. Empire Printing and Publishing Co., 14 P. R. 488. . . . In view of the principles laid down there and also in Rule 312, it does not seem right to debar plaintiffs from presenting to the Court all material evidence that they may be able to adduce.

The material in support of the motion is, no doubt, scanty. It would have been more satisfactory and more in accordance with the usual practice to have had an affidavit from Mrs. Maclay (the plaintiff whose evidence was sought) herself.

I think, however, that the order I propose to make will test the good faith of plaintiffs.

An order may go to examine Mrs. Maclay as asked at New York, before William Seton Gordon, a member of the Ontario Bar resident at New York. This examination is to be taken also as her examination for discovery if defendant desires. Plaintiffs, before issuing the order, are to pay to defendant's solicitor $40 to enable him to attend on the execution of the commission. In the event of the success of plaintiffs no greater costs are to be allowed against the defendant for and

incidental to the commission than would have been taxed if plaintiff Maclay had attended and given evidence at the trial, and the $40 is not to be chargeable to defendant in any event. See Mills v. Mills, 12 P. R. 473.

Subject to the foregoing provisions, the costs of this motion and order will be in the cause to defendant only.

If plaintiffs do not accept these terms, motion dismissed with costs in any event to defendant.

ANGLIN, J. JANUARY 23RD, 1905.

CHAMBERS.

RE WAKEFIELD MICA CO.

Company—Winding-up—Contributories—Order as to—Leave to Appeal—Terms—Costs.

Motion by the liquidator of the company for leave to appeal from order of ANGLIN, J. (4 O. W. R. 535) removing King and Johnson from the list of contributories.

A. J. Russell Snow, for the liquidator.

W. N. Tilley, for King and Johnson.

ANGLIN, J.—I am disposed to yield to this application if I can safeguard the rights of all parties by imposing proper terms, not because I entertain any doubt of the correctness of my decision, but to enable the parties to secure the opinion of an appellate Court upon a question in which I found myself obliged to differ from the conclusion reached by the learned Master at Ottawa.

Mr. Tilley urges that, if leave be given as asked, it should be on condition that the liquidator appeals also from that part of my judgment upholding the Master's refusal to place Messrs. Chubbuck and Holland upon the list. This I think only fair in order that the appellate Court may be free to do complete justice between the parties interested. But, inasmuch as the liquidator is not desirous of appealing against the latter part of my judgment, and such appeal, if prosecuted, would be largely for the benefit of Messrs. King and Johnson . . . I think it only just that they should indemnify him against all costs to which he may by reason of bringing such appeal be put. . . .

Should Messrs. King and Johnson not furnish such indemnity to the satisfaction and under the direction of the Registrar within 2 weeks, the liquidator will have unconditional leave to appeal as he desires. In any event costs of

this application will be costs in the appeal against Messrs. King and Johnson. I extend for one month from this date the time for serving notice of appeal and giving security in the case of both appeals.

This memorandum will form part of the appeal case.

JANUARY 23RD, 1905.

C.A.

METALLIC ROOFING CO. OF CANADA v. LOCAL UNION No. 30, AMALGAMATED SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

Writ of Summons—Service—Unincorporated Foreign Voluntary Association—Trade Union—Service upon Person in Ontario—Incapacity of Association—Parties—Action for Tort—Representation of Classes—Rule 200—Members of Association—Parent Society and Local Branch—Officers.

Appeal by plaintiffs from order of a Divisional Court (MEREDITH, C.J., MACLAREN, J.A.), reported 5 O. L. R. 424, 2 O. W. R. 183, setting aside service on the Amalgamated Sheet Metal Workers' International Association, added as defendants by an order in Chambers not appealed against, by serving defendant J. H. Kennedy for the association. The Divisional Court held that the association, not being a corporation, individual, partnership, nor a quasi-corporate body, could not be so served. The plaintiffs also appealed from an order of MACMAHON, J., 2 O. W. R. 819, refusing to allow representation of the association by individual defendants. Defendants cross-appealed from the same order of MACMAHON, J., in so far as it allowed representation of the local union by individual defendants.

W. N. Tilley, for plaintiffs.

J. G. O'Donoghue, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A., TEETZEL, J.), was delivered by

OSLER, J.A. (after stating the facts):—The questions raised by the appeal are: (1) whether the Local Union No. 3, A. I. A., and the A. I. A. are corporations or quasi-corporations or partnerships and capable of being sued and served with process as such in the ordinary way; and, if not,

(2) whether they or either of them can be sued in a representative action for such causes of action as are disclosed in the statement of claim.

It is, I think, quite sufficiently proved for the purpose of the present proceeding that neither the Local Union No. 30, A. I. A., nor the A. I. A., is a corporate body. Nor does either of them appear to be registered anywhere by the name of their association so as to constitute them a quasi-corporate body such as was sued in the Taff Vale Case, [1901] A. C. 426. Nor do I see that either of these bodies can be regarded as a partnership. They are simply voluntary associations united for the purpose of promoting the interest of the members in relation to their employment and against their employers—trade unions, in short, combinations of the character described in sec. 2 of the Trade Unions Act, R. S. C. ch. 131, though of course not trade unions within the Act, because not registered as the Act requires. They are not in any sense associations for the purpose of trade or of deriving gain or profit from their transactions. The position of their members, as has been more than once remarked, is more like that of the members of an unincorporated club than anything else. Neither of these associations being an entity known to the law, and no provision having been made by statute or Rule of Court to meet the case, it follows that they cannot be effectively sued by their adopted name nor served with process merely by serving one of their members, no matter how exalted the position or high-sounding the title he bears in the association.

I agree with what has been said by Meredith, C.J., on this point: 5 O. L. R. 424, 427. The judgment of the Divisional Court must, therefore, be affirmed.

The remaining question is, whether bodies of this nature can be sued in tort in a representative action, under the large words of Rule 200. . . .

It was stoutly contended that Rule 200 did not apply to an action for a tort, and that plaintiffs were practically without remedy for the injuries alleged except by a (probably) useless action against the individual offenders. Templeton v. Russell, [1893] 1 Q. B. 435, was strongly relied on in support of this view, and if that case stood alone we should probably feel ourselves bound to follow it. Its authority, however, as laying down any rule of general application has been impugned and weakened, if not destroyed, by the later cases of Duke of Bedford v. Ellis, [1901] A. C. 1, and Taff Vale R. W. Co. v. Amalgamated Society of Railway Engineers, ib. 426. It has been explained as a case in which the only point

decided was that the persons sued were not fairly representative of the union or association. . . .

In the Taff Vale case it was held that a trade union registered under the Trade Union Acts of 1871 and 1876 might be sued in its registered name. But the larger question is very fully dealt with. Lord Macnaghten, after pointing out that bodies of this nature, registered or unregistered, are not above the law, said that the question of how they should be sued was one of form, and adds (p. 438): "I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants are persons who from their position may be taken fairly to represent the body." . . .

And Lord Lindley, who must be said to speak with high authority on such a subject, says: "The principle on which the Rule—that is, the Rule as to representation—is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. The Rule itself has been embodied in and made applicable to the various Divisions of the High Court by the Judicature Act and Order 16, Rule 9"—which corresponds with our Rule 200—"and the unfortunate observations on that Rule in Temperton v. Russell have been happily corrected in this House in Duke of Bedford v. Ellis, and in the course of the present argument." Elsewhere he adds: "I have, myself, no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and damages could be obtained in a proper case in an action so framed." . .

For my own part, I think we are at liberty to adopt the views expressed in the passages I have quoted. It would be a most deplorable result if a plaintiff should be found to be practically without remedy in a case of this kind—I of course do not speak of the merits of this particular litigation—as he would be, if he were unable to proceed in a representative action. As was said in the case cited, we have not to consider how the judgment can be enforced; we have only to determine that the action is properly framed, and therefore, as regards Local Union No. 30, A. I. A., the order of my brother MacMahon should be affirmed.

As to the A. I. A., I can see no reason why, in the circumstances, a similar order should not have been made. If they were parties to the wrongs of which plaintiffs complain,

those wrongs were committed within the jurisdiction, and the only question would be who should be made defendants as representing their body. If the motion were before us now for the first time, it might well be said that a wider selection should have been made, and that representation should not have been confined to their first vice-president, but I think it must have been overlooked that these defendants were content with that representation and consented to it. . . . The only question reserved to be decided was whether the Court had any jurisdiction to make the order in such an action as this, and as that ought, in my opinion, to have been decided adversely to respondents, it follows that they must be held to their consent as to the sufficiency of the representation. I cannot see that the fact, if it be a fact, that they are a foreign body, seeing that they have many branches and an executive officer in this country, can affect the question save as regards the extent to which it might have been thought proper to direct representation if that had not been consented to.

I am, therefore, of opinion that the order of my brother MacMahon should be varied in this respect and representation ordered as provided by the consent.

The appeal from the order of the Divisional Court will, therefore, be dismissed with costs; that from the order of MacMahon, J., allowed with costs; and defendants' cross-appeal will be dismissed with costs.

JANUARY 23RD, 1905.

C.A.

McLENNAN v. GORDON.

Sale of Goods — Refusal of Purchaser to Accept — Tender — Measurement of Cordwood — Resale by Vendor — Recovery of Loss upon Resale — Evidence — Letter Written "without Prejudice" — Objection on Appeal.

Appeal by defendant Gordon from order of a Divisional Court vacating the judgment pronounced by BOYD, C., at the trial.

The action was for breach by defendant Gordon of a contract for the sale to plaintiff of certain cordwood and timber. Defendant Gordon alleged failure by plaintiffs to pay or tender the price, in consequence of which he became entitled to resell, and did resell to defendants Barrett Brothers; and he counterclaimed for loss and damages on the resale. The

Chancellor found that plaintiffs should be charged with the loss and expenses of the resale, and that, deducting these, and giving credit for what plaintiffs had paid on account and the price realized on the resale, plaintiffs were entitled to recover only $45.50. The Divisional Court held that defendant Gordon was not entitled to anything upon his counterclaim, and that plaintiffs should have judgment for $279.30, with interest and costs.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

D. B. Maclennan, K.C., for appellant.

W. R. Smyth, for plaintiffs.

MOSS, C.J.O.—Plaintiffs sued defendant Gordon and a firm of Barrett Brothers, alleging a breach by defendant Gordon of a contract for the sale to plaintiffs of certain cordwood and timber, in that he refused to deliver the same to them, and had, in contravention of his agreement, assumed to make sale thereof to Barrett Brothers, and claiming a declaration that the property had passed to plaintiffs, an injunction restraining the removal thereof by defendants, and damages against defendant Gordon.

Defendant Gordon alleged failure by plaintiffs to pay or tender the price of the cordwood and timber, after due demand therefor, in consequence whereof he became entitled to resell, and he did resell the same to Barrett Brothers. He further set up that the resale was at a lower price than the contract price, whereby he suffered loss and danger, and he counterclaimed for such loss and damage. He also set up that the sale to Barrett Brothers was made with the assent of plaintiffs, and that they were estopped from impeaching it.

Under the terms of the agreement plaintiffs advanced to defendant Gordon the sum of $1,000 on account of the price of the cordwood and timber to be delivered.

Defendant Gordon delivered 201 cords of wood and a small quantity of timber to plaintiffs, who accepted the same and credited defendant with the price thereof ($721.50). Defendant also delivered and piled at Christie's siding on the Canada Atlantic Railway, the place named in the agreement, a further quantity of cordwood. Disputes and differences arose as to the quantity so delivered and piled, and on 21st March, 1903, defendant Gordon notified plaintiffs in writing that unless they settled for the wood before 1st April he would resell. On 25th March plaintiffs wrote defendant

Gordon expressing their readiness to pay, but saying that they proposed to send a competent man to measure the quantities, that he would be at Christie's on 31st March, and they suggested that defendant Gordon should send a man to measure with theirs. In accordance with this letter the parties met at Christie's on the 31st, each accompanied by a man. There is a dispute on the evidence as to what took place, but the fair result seems to be that the two men arrived at almost the same result as to the number of cords. But Brown, plaintiffs' measurer, wished to make a reduction for bad piling, and finally was willing to accept a reduction of 6 per cent. Sinclair was not wiling to agree to this, but offered 5 per cent. This was not accepted, and no agreement was come to. Defendant Gordon was not willing to allow any reduction, asserting that the cordwood was well piled. Owing to this and to some discrepancy between the figures of the measurer, which was afterwards found to be due to errors in extending figures, the parties parted without definite arrangement.

On 2nd April, plaintiffs, alleging that the measurement shewed 355 cords, and that this was subject to a deduction of 6 per cent. for piling, leaving 334 cords, made a tender on that footing of $873.02, which they alleged was sufficient with the balance of the $1,000 to satisfy the price of the cordwood. It is now admitted that this tender was insufficient, because Brown's actual measurement made the number of cords 382¾, and, even if the 6 per cent. deduction was proper, the number of cords to be paid for was 359, instead of 334.

Now at this time all things had happened to entitle defendant Gordon to payment for the cordwood. It had been delivered at the named place, it had been piled and measured, and nothing remained but for plaintiffs to pay for it and take it away. But they did not do this. Instead, they caused a letter to be written to defendant on 6th April, in which, while acknowledging that they had been mistaken in insisting on 355 cords as the measurement, and admitting that it was 382¾ cords, they insist on a deduction of 6 per cent. on that quantity. There had been no agreement to such a reduction, and defendant was under no obligation to agree to its being made. In point of fact, as the learned Chancellor found, there were at least 380 cords, and he charged defendant with that number on the resale to Barrett Brothers. In the circumstances, the proposal that defendant should accept payment for 359 cords was not a reasonable one, or one that defendant could be considered unreasonable in not acceding

to. He had done all that his contract required of him, and it rested with plaintiffs to make payment. It has been found in the Courts below, and it is not disputed, that the letter of 6th April did not constitute a tender. But it is said that defendant ought not to have disregarded the letter of 6th April, and it is argued that it was unreasonable not to have accepted the offer it contained. No doubt, it would have been more courteous to have replied to the letter, since it requested an answer. But, unless defendant wished to accept the offer, he was not obliged to reply, and there is no reason for holding that he should have agreed to plaintiffs' proposal. It meant taking $75 less than the evidence shews he was entitled to receive under the terms of the agreement, and the evidence affords no valid ground for plaintiffs' assumption that there had been an agreement to deduct 6 per cent. of the actual measurement. Defendant allowed ample time to elapse between the measurement and the resale to enable plaintiffs to have paid for and removed the cordwood if they were so inclined, and, they having done nothing, he took proper and reasonable measures for obtaining the best price on a resale. In these circumstances, there is nothing to prevent defendant from recovering the difference between the contract price and the price obtained on the resale, and his reasonable expenses.

No doubt, where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it by reasonable efforts, it is his duty to do so. But the rule does not require a vendor to agree without further consideration to a substantial deduction from the purchase money, or enable a vendee to impose a new bargain upon his vendor. In the present case defendant could not have accepted plaintiffs' offer without foregoing any claim upon them for their breach of the contract. Yet that is the position that is sought to be imposed upon him. He was not in the wrong when he declined to place himself in that position. That being so, he was entitled to resell at the best price he could obtain, and it is immaterial whether plaintiffs agreed to or acquiesced in the sale he made.

And it is not necessary to inquire into the extent of Smith's authority after the dissolution of the partnership between him and his co-plaintiff. Neither is it necessary to determine whether the letter of 6th April, which was expressed to be "without prejudice," was properly admitted in evidence. Objection was made to it, and it cannot be said that defendant's counsel agreed that it should be received. And unless he did agree, the objection may be made on the appeal, the

case having been tried without a jury: Jaekers v. International Cable Co., 5 Times L. R. 13; Webb v. Ottawa Car Co., 2 O. W. R. 62.

But, assuming that it was properly in evidence, yet, for the reasons already given, it cannot affect defendant's rights.

The result is that the appeal should be allowed and the judgment of the Chancellor restored, with costs.

OSLER, J.A., gave reasons in writing for the same conclusion.

MACLENNAN, GARROW, and MACLAREN, JJ.A., also concurred.

JANUARY 23RD, 1905.

C.A.

REX v. BEAVER.

Criminal Law—Distributing Obscene Printed Matter—Criminal Code, sec. 179 (a)—Knowledge of Contents—Meaning of "Obscene."

Case reserved under sec. 743 of the Criminal Code by the Judge of the County Court of Essex, sitting in the County Judge's Criminal Court.

The prisoner, a woman, was indicted under sec. 179 (a) of the Code for, unlawfully, knowingly, and without lawful justification or excuse, distributing and circulating certain obscene printed matter tending to corrupt morals, contained in a printed paper bearing the title: "To the public; the evil exposed; the plot against Prince Michael revealed:" the said obscene matter being the following—setting forth the contents of the paper at length.

The Judge found the offence proved as charged, and reserved the following points for the opinion of the Court of Appeal:—

1. Is the printed matter complained of obscene within the meaning of sec. 179 (a) of the Criminal Code?

2. Did the prisoner, without lawful justification or excuse, distribute or circulate such obscene printed matter?

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

J. W. Hanna, Windsor, for prisoner.

J. R. Cartwright, K.C., for the Crown.

OSLER, J.A.—The second point involves only the question of the prisoner's knowledge of the nature of the printed pamphlet she was found to have distributed, and I think there was some evidence of that in her own statements made at the trial, sufficient to justify the finding of the learned Judge.

As to the first point I have had more doubt.

Section 179 of the Act is not aimed at merely libellous publications, nor at those couched in merely coarse, vulgar, and offensive language. The word "obscene" has a great variety of meanings, but its meaning in this section is to be ascertained from the company in which it is found. The section is one of a group forming part XIII. of the Code, which is headed "Offences against Morality." With the exceptions mentioned in sec. 177 (a), the doing of any indecent act in a public place, 179 (b), publicly exhibiting any disgusting object, and 180 (c), transmitting by post any letter or circular concerning schemes devised or intended to deceive the public, or for the purpose of obtaining money under false pretences, this part of the Code strikes at conduct involving sexual immorality and indecency, and it is in that sense, in my opinion, that the word is used in sec. 179.

One class of meanings given to it in the Oxford Dictionary, as contrasted with others "somewhat archaic" and latinisms, is: "(2) offensive to modesty or decency: expressing or suggesting unchaste or lustful ideas: impure, indecent, lewd." It is within this class that the word as here used falls.

In United States v. Mabs, 51 Fed. Rep. 41, the question was very much considered, and many authorities are cited. . .

The whole of the printed matter set forth in the record, disgusting as it is, is suggestive rather of the disconnected ravings of a lunatic than of anything tending to corrupt morals, but there are one or two wretched punning allusions to the name of some person which may be said to have warranted the County Judge in concluding that it had or might have such a tendency, and therefore that it was a "document of obscenity" within the meaning of the section.

I would, therefore, affirm the conviction.

MACLAREN, J.A., gave reasons in writing for the same conclusion, referring on the first point to The Queen v. Hicklin, L. R. 3 Q. B. at p. 371, and on the second, to Sherras v. De Rutzen, [1895] 1 Q. B. at p. 291, Bank of New South Wales v. Piper, [1897] A. C. at p. 389, and Mullins v. Collins, L. R. 9 Q. B. 202.

MOSS, C.J.O., MACLENNAN and GARROW, JJ.A., also concurred.

JANUARY 23RD, 1905.

C.A.

GLASGOW v. TORONTO PAPER MANUFACTURING CO.

Master and Servant—Injury to Servant—Negligence—Defective Machine—Fault of Superior Workman—Workmen's Compensation Act—Damages — Evidence — Deposition of Witness at Former Trial—Rejection—No Substantial Miscarriage.

Action to recover damages for injuries sustained by plaintiff while working for defendants at a paper cutting machine in their shop. Plaintiff sought to fix defendants with liability either at common law or under the Workmen's Compensation Act. The case was tried before BOYD, C., and a jury at Cornwall in October, 1903, and plaintiff had a verdict and judgment for $8,000, from which defendants appealed, on the ground that the evidence disclosed no cause of action either at common law or under the statute. In the alternative they asked for a new trial, on the ground of the rejection of evidence by the trial Judge, and on the ground that the damages were excessive.

H. Cassels, K.C., and R. S. Cassels, for defendants.

A. B. Aylesworth, K.C., and G. I. Gogo, Cornwall, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.—The defendants are an incorporated company carrying on business as paper manufacturers. They use in their business a powerful machine known as the Seybold paper cutter for cutting and trimming heavy or thick masses of paper, and it was while engaged in working at this machine that plaintiff suffered the injuries complained of.

For the purposes of the case and of describing the operation of the machine it will be sufficient to say that the paper intended to be cut or trimmed having been placed in position on the table of the machine, the operator takes hold of what is called the throw-off handle, gives it a quarter turn, and then pulls it down towards him across the front of the

machine. The effect of these two simple movements is: (1st) to connect the effective parts of the machine with the power; (2nd) to cause the clamp which holds the paper in the required position, and the knife which cuts it, to fall; and (3rd) to cause the clamp and the knife to return, automatically, as the witnesses say, to their first position, where they should remain locked or at rest until again set in motion by a repetition of the movements of the throw-off handle.

The downward and return movements are a single operation of the machine, the power being first connected and then thrown off as the movement goes round in the successive and continuous inter-action of its various parts. If the power is not disconnected in the course of the upward movement, as by the operator continuing to hold down the throw-off handle or for any other reason, the clamp and knife will necessarily continue to move up and down.

The evidence at the trial briefly stated was that on the 19th June, 1902, the plaintiff, a young man between 18 and 19 years of age, who had been working at the machine for a week and to whom the manner of working it had been explained by one Shepherd, the foreman of the finishing department, had placed a thick ream of paper in position to be cut. He made the necessary movement of the throw-off handle and cut the paper in two. According to his own account, which was substantially corroborated by the evidence of a fellow workman, one Albert Hollister, and in some respects also by another workman, Robert Smith, he then reversed the right hand one of the two blocks or reams into which the paper had been cut, for the purpose of trimming the rough edges at one end, brought the knife down again and trimmed them, put his left hand under the rising knife and removed the trimmings, and was proceeding with both hands to turn the right hand block for the same purpose as before, when the knife unexpectedly fell, severing his right hand and seriously mutilating his left. He denied that he had kept his hand on the throw-off handle or had done anything to cause the knife to fall. He was not himself familiar with the various parts of the machine, other than the clamp and knife,, which were set in motion by the movements of the throw-off handle, except by seeing them as it became necessary to oil them, but attributed the fall of the knife on this occasion to the weakness of a spring which should release the friction clutch which engages with the sleeve or friction band on the flywheel, and which thus communicates the power. The knife was found to be up in its proper posi-

tion and the machine in its normal condition when examined immediately after the accident. . . .

[Statements of the evidence given by witnesses for plaintiff.]

For the defence evidence was given of statements made by plaintiff after the accident tending to shew that it had been caused by his own negligence, that he had probably kept down the throw-off handle; also that the machine and its various parts, the friction clutch, the knock-off lion, the adjusting screw, the cushion spring, and other parts spoken of by the witness Nelson and other witnesses for the plaintiff, were in good order and effective at the time of the accident and afterwards, and not in need of repair, so that the accident was, as it was contended, almost necessarily attributable to some neglect on the part of plaintiff. . . .

[Statement of the evidence given by witnesses for defendants.]

At a former trial of the case John R. Barber, the president of defendant company, had given evidence. While on his way to attend the present trial as a witness, he was suddenly taken ill and became unable to appear. Defendants' counsel tendered as evidence his deposition at the former trial. Plaintiff objected on the ground that some matters had been developed in the evidence at the present trial as to the condition of the machine which the witness had not been cross-examined upon before, and that the evidence could not be used unless there was an opportunity of cross-examining him upon these points and others.

The evidence was rejected.

The trial Judge left the case to the jury with a direction of which the defendants had no reason to complain, pointing out the distinction between the liability at common law and under the statute. He said that it was difficult to see upon the evidence how there could be liability here on the former ground. The only direction as to damages was that at common law there was no limit to the damages which might be recovered, while under the statute the damages were limited.

The jury answered the questions submitted to them as follows:

1. Was the injury to John Glasgow from his own want of care? Ans. No. If not, was the injury owing to any defect in or about the machine at the time? Ans. Yes.

2. If so, state what was the defect? Ans. A loose adjusting screw and weak spring.

3. If defect existed did any one in the employ of the company superior to Glasgow know of such defect before the injury, and if so, who was the person superior to Glasgow? Ans. The foreman.

4. Was the company guilty of negligence in not providing and having a proper machine and plant for cutting paper, and if so, what was the negligence? Ans. Company found to be negligent.

5. Was John Glasgow injured in consequence of such negligence without blame on his part? Ans. We find he was and without blame on his part.

6. If Glasgow is in your opinion entitled to recover, fix the damages? Ans. $8,000.

On these answers judgment was directed for the amount found by the jury.

At a former trial the jury had, on the same evidence as to damages, assessed them at $2,500.

On the above evidence, which, owing to the importance of the case to the parties, I have set forth more fully than was perhaps necessary, plaintiff, in my opinion, made out a case which could not have been withdrawn from the jury, of a defect in the condition of the machine within the meaning of sec. 3 (1) and sec. 6 (1) of the Workmen's Compensation for Injuries Act, and that such defect was the cause of plaintiff's injuries. Whether the accident was attributable to such neglect or to plaintiff's own negligence was a question on which there was evidence both ways. If the jury accepted plaintiff's account of the matter, and they were the proper judges of its credibility, it is needless to say that we could not interfere with their conclusion in that respect, looking at the evidence as a whole, by which I mean that the case is not one in which it is made out that the accident is, as the defendants contended, inconsistent with any other theory than that of plaintiff's own negligence. That there might be some defect in the machine which would result occasionally in its being thrown out of gear and the knife consequently not locking automatically, as it should do on its return to its proper position when at rest, was shewn by the evidence of Nelson and some of the other witnesses for plaintiff, as well as by some of those who testified for defendants, and that there was in fact such a defect was deposed to by Nelson, whom the jury might regard as a competent expert, and there was other similar evidence for plaintiff, not perhaps entitled to the same weight, but which was all, as well as the

evidence for defendants, fit for the consideration of the jury. They also had a view of the machine and its various parts and method of working, and it is impossible to say that, if they accepted the evidence for plaintiff, they were not warranted in finding that the machine was defective in the parts specified in their answer to the second question, and that these defects caused the injury, as they say in the answer to the second part of the first question. Then there was evidence, which strongly supported the expert evidence, that the machine, which, if in proper order, ought, having performed one complete movement, to lock or remain at rest, a condition on which the safety of the workman depended and on which he was entitled to rely, had, once at least, shortly before the accident, and again at least once not long after it, displayed the same irregular action which happened when plaintiff was working it, and that both these mischances were brought to the notice of Shepherd, the foreman, whose duty it was in connection with Girard, the machinist, to see that proper means were taken to avoid their recurrence. I think, therefore, that defendants' liability under the Workmen's Compensation Act is fully established, but this, I also think, agreeing with what appears to have been the view of the trial Judge, is the full measure of their responsibility. They had procured a good machine, well constructed, the best in the market, fit for the purpose for which it was made and used, and had employed competent machinists and persons to look after it, and keep it in repair. That I think was all that their duty required of them, and they are not open to the objection that their system was defective in this respect. The jury indeed in their answer to the 4th question do not find them to have been so, and that answer is no more than the complement of their answers to the first three questions.

The judgment must, therefore, be reduced to the maximum amount fixed by the statute, viz., $1,500, and it thus becomes unnecessary to consider whether a new trial ought not to be granted on the ground that the damages are excessive, a very serious question, considering that the jury had no direction on this point beyond the statement that if defendants were liable as at common law there was no limit to the amount of damages recoverable, and the fact that a former jury on similar evidence had given no more than $2,500.

As regards the rejection of the evidence of Mr. Barber taken at a former trial, assuming though not deciding that a proper case was made out for its reception, considering the stage which this trial had arrived at when it was tendered,

and the sudden and unexpected illness which prevented the witness from appearing at the trial, though on his way there to give his evidence at the proper time: Phipson on Evidence, 3rd ed., pp. 396, 398; Randall v. Atkinson, 30 O. R. 242, 620; it appears to me, looking at the evidence given at the former trial, that the case is one for the application of Rule 785, because no substantial wrong or miscarriage has been occasioned by its rejection. It was at most corroborative to some extent of the other evidence on behalf of defendants, and seems hardly, if at all, to bear upon the new and more precise evidence of the working of the machine and its defects relied on by plaintiff. I do not think the result would have been varied by its admission, and therefore a new trial should not be granted on this ground: Copeland v. Corporation of Blenheim, 9 O. R. 19. I do not find the evidence tendered among the exhibits put in at the trial, and perhaps it would be enough to say that it is not before us, and therefore that we have not been placed in a position to judge of its importance, as we ought to have been, but I have looked at it as it appears on the reporter's notes of the evidence at the last trial in the former appeal book, and have thus given the defendants, quantum valeat, the benefit of their objection.

The judgment must be varied and reduced to $1,500, but, success being divided, there should be no costs of the appeal.

We should perhaps again draw the attention of the parties to the fact that the action is improperly brought in the name of the infant's father as plaintiff, instead of by the infant himself by his father and next friend. An amendment in this respect may and ought to be made.

JANUARY 23RD, 1905.

C.A.

ASSELSTINE v. SHIBLEY.

Penalties—Ontario Election Act—Bribery—Right of Action—Conviction—Procedure.

Appeal by plaintiff from judgment of BOYD, C., on motion for judgment, dismissing an action for the recovery of penalties under the Ontario Election Act.

A. B. Aylesworth, K.C., for plaintiff.

H. M. Mowat, K.C., for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.—Action for the recovery of penalties incurred for breaches of various provisions of the Election Act of Ontario, chiefly for different acts of bribery struck at by sec. 159 (1). These penalties are fixed by sub-sec. (2) of that section. Penalties for other election offences, imposed by other sections of Act, are also sued for, but these I pass over for the present, as they stand on a different footing. The principal question argued was whether the pecuniary penalties provided for by sub-sec. (2) can be sued for and recovered in an action like the present, which is brought under sec. 195 of the Act, and the appeal, though in form from the decision of the Chancellor, is really brought for the purpose of asking the Court to review that of Britton, J., in Carey v. Smith, 5 O. L. R. 209, 2 O. W. R. 16, which the learned Chancellor followed without expressing any opinion of his own.

Section 159 (1) enacts that "the following persons shall be deemed guilty of bribery and punished accordingly." Clauses (a) to (e) inclusive specify the various forms of bribery for which the persons committing them (bribers) are so punishable, and sub-sec. (2) enacts that "every person so offending shall on conviction incur a penalty of $200, and shall also be imprisoned for a term of six months with or without hard labour."

As this sub-section stood in the Election Act of 1892, it provided simply that any person so offending should "incur a penalty of $200." It took its present shape by the amendment of 63 Vict. ch. 4, sec. 21.

Section 160 should be referred to, which deals with the case of persons accepting bribes, and sub-sec. (2) enacts that such persons "shall, in the discretion of the trial Judges, be liable to imprisonment for a term not exceeding six months, with or without hard labour, or to a penalty of not more than $200 or to both." The Act of 1892 merely provided that such persons should be liable to a penalty of $200. It was amended as above by 63 Vict. ch. 4, sec. 22.

Section 195 enacts that, subject to the provisions of secs. 187 and 188, all penalties imposed by this Act shall be recoverable with full costs of action by any one who sues for the same in any of His Majesty's Courts of Justice; and in default of payment of the amount which the offender is condemned to pay, within the period fixed by the Court, the offender shall be imprisoned in the common gaol until he has

paid the amount which he has been condemned to pay and the costs. (2) It shall be sufficient for the plaintiff in any such action to allege that the defendant is indebted to him in the sum of money demanded, and the particular offence for which the action is brought, and that the defendant had acted contrary to law. (3) The action shall be commenced within one year next after the act committed or the omissions complained of, and shall be tried by a Judge without a jury. No amendment was made in this section by the Act of 63 Vict.

In my opinion, the effect of the amendment of sec. 159 (2) made by 63 Vict. ch. 4, is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under sec. 195. It is clear to me that only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed. The words "on conviction" precede both consequences which are to follow therefrom. I am, however, with all respect, unable to agree with Britton, J., in holding—if that is what he does hold—that those words import that a prior conviction for the offence in some independent proceeding would be a condition precedent to an action for the penalties under sec. 195, if in such an action the punishment of imprisonment may be awarded, which is, to my mind, the real difficulty. The phrase properly enough describes the result of judgment against the offender in whatever may be the appropriate form of proceeding. See Wilde v. Bowen, 37 U. C. R. 504, per Wilson, J., and the authorities there cited. He must of course be found guilty—convicted—before the punishments are adjudged, but, if there is to be a prior conviction in some other proceeding, what is to be the consequence—what the punishment adjudged in that? None is provided for, unless it be that specified in sub-sec. (2) itself, and therefore the words necessarily mean on conviction in the prosecution for the offence. You cannot attach the imprisonment to the conviction and then sue for the penalty or vice versa. Both must follow on the conviction in one and the same proceeding taken to enforce them, if I am right in thinking that only one such proceeding was intended.

Then what is that proceeding to be? Is it an action under sec. 195? Does imprisonment follow or can it be adjudged in such an action? I think not. Every word of that section seems to me to intend a proceeding by action to recover the money penalty alone, and not a proceeding in which the substantive punishment of imprisonment is sought or is to be imposed in addition to the penalty. . . .

It seems to me, that there is great difficulty in saying that the words "on conviction" in sec. 159 (2) are intended to refer to an adjudication in a civil action, when we find that by secs. 187 and 188 (to which the provisions of sec. 195 are expressly made subject), a forum and code of procedure are created for the prosecution and trial of election offences, including those under secs. 159 and 160, in which the Court is expressly empowered to award both the pecuniary penalty and the imprisonment: sec. 188, sub-sec. (14).

The reference to "the trial Judges" in sec. 160, sub-sec. (2), which provides for the punishment of persons accepting bribes, seems to support this conclusion, as also does the fact that the Legislature did not think proper, when amending secs. 159 and 160, as above mentioned, to make any change in sec. 195 to meet the altered conditions. Where there cannot be a prosecution under secs. 187, 188, as in the case where no petition has been presented against the election, some other form of prosecution, as by indictment, may be followed, in which, under sec. 159 at all events, on conviction both punishments may be imposed.

It is true that sub-sec. (14) of sec. 188 contemplates the case of an action having been brought for a penalty, which is also the subject of a prosecution under that section, but this, in my view, creates no difficulty, as there are numerous election offences for which a pecuniary penalty only is imposed, and for which, therefore, there is no reason why an action should not lie under sec. 195. Such are the penalties sued for in paragraph 14 of the statement of claim, undue influence, sec. 166; paragraphs 16 and 19, corruptly providing refreshment to voters, sec. 162; paragraphs 17, 20, corrupt treating, sec. 163; paragraph 21, hiring teams, sec. 165; paragraph 28, procuring persons to vote who had no right to vote, sec. 168. As to these I see no reason to hold that the action is not maintainable under sec. 195, and Britton, J., did not hold otherwise in Carey v. Smith. The judgment below must, therefore, be varied in this respect. But, as the point does not seem to have been called to the attention of the learned Chancellor, this should make no difference in the disposition of the costs of the appeal, which should be borne by the appellant.

The costs of the motion before the Chancellor may be costs in the cause.

JANUARY 23RD, 1905.

C.A.

ARCHER v. SOCIETY OF SACRED HEART OF JESUS.

Religious Society—Expulsion of Member—Insanity — False Imprisonment—Damages for Dismissal — Wages — Residence of Society — Branch in Ontario — Jurisdiction — Statute of Frauds—Contract—Religious Profession—Illegality—Public Policy—Damages—Release.

Appeal by defendants and cross-appeal by plaintiff from judgment of BOYD, C., upon the findings of a jury, in favour of plaintiff for $5,000 and costs, against defendants the Society of the Sacred Heart of Jesus and Elizabeth Sheridan, the action having been dismissed as against defendants the Mount Hope Institute.

The appeal and cross-appeal were heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

G. F. Shepley, K.C., and J. B. McKillop, London, for defendants.

F. P. Betts, London, and H. Cronyn, London, for plaintiff.

GARROW, J.A.—The Society of the Sacred Heart of Jesus, as alleged in the statement of claim and not specifically denied in the statement of defence, is a corporation incorporated under the laws of France. As set forth in the constitution and by-laws, the object of the society is "to glorify the Sacred Heart of Jesus by labouring for the salvation and perfection of its members through the imitation of the virtues of which the Divine Heart is the centre and model, and by consecrating its members, as far as it is possible for persons of their sex, to the sanctification of others as the work dearest to the Heart of Jesus." "The means which the society adopts are chiefly: (1) the education of children as boarders; (2) the gratuitous instruction of poor children as day scholars; (3) retreats afforded to persons living in the world; (4) such intercourse with persons living in the world as springs necessarily from its works."

For the purpose of carrying on its affairs the society apparently acts through local organizations, of which there are several in the United States, one in the Province of Quebec, and one in the Province of Ontario, which, however, all appear to be separate corporations; the whole being under the

spiritual direction and control of the hierarchy of the Roman Catholic Church. The society itself is composed of two classes of women, those destined for teaching, and those who are employed in household duties, the latter called lay sisters. For both classes there is, first, as a condition of becoming a member a period of probation of three months, at the end of which the candidate, if accepted, is admitted to take the three vows of poverty, chastity, and obedience, and is thereafter called an aspirant, in which condition she remains for a further period of five years, at or towards the end of which there is still further period of probation of three months, and then, if finally accepted, she is admitted to take the final vows of stability. Rule xxii. provides that "the society does not bind itself to its members until they make their last vows, but up to that time the society retains the right of dismissing them for grave causes (which are specified in the constitution) and then by the very fact the subject is released from her vows."

The rules further provide that the power of dismissal belongs of right only to the Superior General, who, however, may communicate it to others.

Plaintiff became a member of the society, in the class known as lay sisters, at the city of St. Louis, in the State of Missouri, in the month of April, 1884, at the age of 19 years, and, after the period of probation, was admitted to the three vows of an aspirant. But, for some reason not clearly stated, she proceeded no further, but remained an aspirant only, until she was dismissed as hereafter stated. From St. Louis plaintiff was, in the month of March, 1901, transferred, without any apparent reason, to the Mount Hope Institute at the city of London, Ontario, where she remained until the following month of June, when, in consequence of great disturbance and destruction of property in the Institute, ascribed to her, she was removed to the Longue Point Insane Asylum in the Province of Quebec, upon the certificate of two physicians that she was insane, and she remained there until the following September, when she was declared to be cured, and was discharged.

While the matter of plaintiff's alleged insanity was still in doubt, the Superior at the Mount Hope Institute, defendant Elizabeth Sheridan, reported the facts to the Superior General at Paris, and asked for the discharge from her vows of the plaintiff, and upon her report the Superior General at Paris transmitted to defendant Elizabeth Sheridan a written release of plaintiff from her vows, dated 10th June, 1901, to

be used as defendant Elizabeth Sheridan should consider expedient.

Defendant Elizabeth Sheridan, who was herself familiar with all the facts, and acting apparently from no improper or malicious motive, caused this release from her vows to be delivered to the plaintiff at the city of Montreal, in the Province of Quebec, on 6th September, 1901, after her release from the asylum, whereby it is said plaintiff ceased to be a member of the society. A day or two afterwards, while still at the city of Montreal, plaintiff executed a release under seal, dated 7th September, 1901, prepared by the society, whereby, in consideration of $300, then paid to her, she released the society, the Mount Hope Institute, and Les Dames Religieuses du Sacre Coeur, and any and all persons who are members of the said society, from all manner of actions, debts, accounts, covenants, contracts, claims, and demands.

Then on 13th May, 1902, this action was brought against the society, the Mount Hope Institute, and Elizabeth Sheridan, claiming wages, damages as for a wrongful dismissal, and also damages for the alleged false imprisonment and imputation of insanity; plaintiff contending that she was not at any time insane. No claim is made for reinstatement.

Plaintiff's claim for wages is based, in the statement of claim, upon the allegation that there was an implied contract to pay her a reasonable sum for her services in case the society dismissed her wrongfully or in contravention of the constitution; while her claim for damages as upon a wrongful dismissal is based upon the allegation that by reason of such dismissal she has lost the benefit of the home and support and maintenance during her life to which she was entitled as a member of the society.

A number of defences were pleaded by the several defendants.

The society, protesting against the jurisdiction, obtained leave to enter a conditional appearance, and pleaded to the jurisdiction that it is a French association for religious purposes, not formed to carry on business, but that, as part of its religious and charitable work, some of the members thereof conduct schools, that it has no business branches or agencies, but that groups of its members reside together in various places, that plaintiff, a citizen of the United States of America, was permitted to become a member of the society there, and to reside in the establishments wherein the members of the society reside in the United States, that after her short residence in the Mount Hope Institute (in which

the members of the society reside and carry on a school in this Province), she went to the city of Montreal and there became a patient in the asylum for the insane, and that afterwards, while resident in that Province, she was released from her vows and from being a member of the society, for grave and serious reasons, and they submit that in the circumstances plaintiff cannot maintain an action in Ontario.

They further denied any contract with plaintiff, express or implied, and pleaded the Statute of Frauds and the release before mentioned as defences.

These defences are common to all the defendants, but in addition the Mount Hope Institute pleaded that it is a separate corporation incorporated under the laws of Canada, and is not identical with the parent society, and that plaintiff was never a member of the Institute, and had no contract or relation whatever with it. And defendant Elizabeth Sheridan, by her defence, denied the malicious acts charged against her.

To the defence of the release plaintiff replied that the same was obtained from her by the importunity and undue influence of defendants and their agents, but she retained the $300, and at no time offered to return it to the society.

At the trial, upon opening the case, it appears from the notes of evidence that the following took place: "Mr. Betts (counsel for plaintiff); "Before addressing the jury I wish to say this. A release is set up, and it is also set up that it was obtained by undue influence. I presume in regard to that your Lordship will follow the recent English practice and leave that as well as the other to the jury." His Lordship: "The release is in the pleadings?" Mr. Betts: "Yes, my Lord." His Lordship: "I suppose it will all go to the jury. I will let the whole thing go to the jury."

Then evidence at great length was given on behalf of both plaintiff and defendants, the trial lasting some four days—and in the end questions of fact were submitted to the jury. In his charge the Chancellor pointed out that the great or controlling question was to determine if the plaintiff was or was not of sound mind when she did the acts complained of, if she did them, or whether the acts of destruction were committed by other inmates as the result of a plot against plaintiff, for the purpose of getting rid of her, that having been her main contention on this head; and as to the latter event he said: "If you think there was a plot, you should not let the release interfere, but if you really think she was insane, and that this Mother was acting in the best interests of the

woman herself and of the community over which she presided, then you ought to find that the release is worth something and should bar the action."

As to the dismissal from the society he said: "Then when the woman recovered, what was the society to do? Were they acting reasonably or not in doing as they did, paying her $300, and letting her be at liberty, freeing her from her vows, so that she could go abroad again and make her own living, or were they obliged or should they in justice have taken her back? Now it may be a question of law, but I will leave it to you to pronounce upon that question, whether this was a reasonable step, a proper step, on the part of the community, to say that they would not receive her back. . . . I leave it to you to say whether you think they have acted rightly or wrongly in this matter. If you think they should take her back and have not taken her back, wrongfully, say what damages there should be. Many questions of law will arise on that, which I need not trouble you with. . . . If you think she should get wages, say how much they should be. I myself do not think she can have any claim for wages, because during the 17 years she was there she got all that she contracted for. . . . If you think there was the plot to trump up a charge of insanity and put the woman in prison, then you can give most substantial damages for such a piece of misconduct as that."

These extracts seem to succinctly and sufficiently formulate the aspect in which the several heads or leading ideas were placed before the jury.

To the charge several objections were taken. Plaintiff's counsel, among other objections not necessary to set out, objected that it was improper to say that the release might only be disregarded in case the jury found there had been a plot, that the proper instruction was that it might be disregarded if upon any ground plaintiff was entitled to recover, and to this objection the learned Chancellor finally acceded, and so instructed the jury. Then counsel for defendants in turn objected thus: Mr. Magee: "I would ask your lordship to reverse what you have just done, that if plaintiff is entitled to recover on any ground then the jury may disregard the release. I would ask your Lordship to rule the other way." Then the Chancellor continued to the jury: "Now, gentlemen, about that release, I want to call your attention to this that the lawyer Mr. Lamothe says this about it, 'I explained to her—I told her that she had been dismissed from the society—and I explained to her that by accepting the money

she would lose all right of action. She told me she was going to see some lady when she went away. I told her not to sign if she did not want to abandon her claim. I did not know they were anxious to have it signed. She was well aware of the effect of the document and was free to sign it or not to sign it. There is no etiquette in Quebec to have another lawyer called in.' And what the plaintiff says herself about it is this: 'I had no money, no clothing, and I went to the Jesuit College to get an English speaking priest, and I asked counsel of him. I said I did not want to sign the release. He said sign it, sign it with the intention of going home, and I did so.' Now you have to say on that whether you think that release should bind plaintiff or not. If she knew her rights, if she got advice, and signed it deliberately, intending to give up any right of action and take this money, and be satisfied, you may find upon that." Mr. Magee: "Her intention in signing the release would not affect defendants." His Lordship: "No, the intention was not disclosed. I think I will leave it as I have with the jury."

After the jury had been out for about two hours, they were sent for by the Chancellor, when this took place:—A juror: "Your Lordship, there are some of the jury would like it explained to see if they could put in damages not for this incarceration but for dismissal." His Lordship: "You can take that into consideration. If you think there should not have been a dismissal, you can give damages simply on that head, leaving out the incarceration. If you think the incarceration was all right, but that there should not have been a dismissal based upon it, you can give damages simply for the dismissal, and 10 of you can agree." The jury then again retired, and after an absence of 25 minutes returned with this verdict as their only findings: The jury: "We have agreed upon wages for the last six years $3,000; dismissal $5,000." And upon these findings the Chancellor gave judgment for plaintiff for the $5,000 damages against defendants the society and Elizabeth Sheridan, and otherwise dismissed the action.

And from this judgment defendants the society and Elizabeth Sheridan appeal, and plaintiff cross-appeals, claiming to hold defendants the Mount Hope Institute and to recover the $3,000 found as wages as well as the $5,000 for wrongful dismissal.

The questions before us on this appeal are, in effect, the questions of law to which doubtless the learned Chancellor referred in his charge to the jury, and which I think are still open, notwithstanding the verdict. . . .

I am of the opinion that there was jurisdiction to entertain the action in this Province against the society, upon the ground that the society "resides" in this Province within the meaning of that term as used in the authorities upon the subject. See Haggin v. Comptoir D'Escompte de Paris, 23 Q. B. D. 519; Macharde v. Fontes, [1897] 2 Q. B. 231; Tytler v. Canadian Pacific R. W. Co., 26 A. R. 467. And for the further reason that to the action as framed the defendants Elizabeth Sheridan and the Mount Hope Institute, both resident in this Province, were proper parties and were properly joined with the society as defendants: see Rule 162 (g).

I think the defence of the Statute of Frauds fails: see McGregor v. McGregor, 21 Q. B. D. 424.

I think the action was properly dismissed as against defendant the Mount Hope Institute. That defendant is clearly a separate corporate entity incorporated by a Canadian statute. And with it as a separate corporation there is no pretence for saying that plaintiff ever had any contract or other connection whatever.

And I think also, for a similar reason, that the action should have been dismissed against defendant Elizabeth Sheridan. Plaintiff never had a contract of any kind with her. The jury have by the verdict absolved her from all liability in tort, and the result must be that she too is entitled to be dismissed from the action.

This brings me to the main question, the liability of the society (1) for the wages assessed by the jury, and (2) for the damages for the wrongful dismissal. As to the first of these, I agree with the judgment of the Chancellor, and for the reasons which he stated. As to the second I have had more difficulty, but after consideration my opinion clearly is that plaintiff's case fails. The action is not brought for an injunction, or to compel a restoration to membership, as in the so-called "club" cases which were cited to us, but is necessarily based wholly upon contract in so far as the causes of action for wages and wrongful dismissal are concerned, the two causes of action to which the verdict is confined. That contract, whatever it was, was made in the State of Missouri. There is no evidence before us that the laws of that State differ from the laws in force in this Province, and, in the absence of such evidence, I am at liberty to assume that no such difference exists: Hope v. Hope, 8 DeG. M. & G. 731; Lloyd v. Guibert, 6 B. & S. 100, L. R. 1 Q. B. 115. But, even if such differences did exist and had been proved,

the Courts in this Province would not enforce here a contract which by our law is illegal or contrary to public policy, as that term is understood in this Province.

We are now dealing with the future. As to the past the law might and usually would, in the absence of express contract, imply one to pay a reasonable price for services rendered. But there can be no similar implication as to the future. There must in the latter case be an existing agreement, legally binding on both parties at the time of the breach complained of, based upon valuable consideration, which may of course as here consist of mutual promises, and the things promised or contracted to be done must be lawful things, otherwise the contract is no contract in law and as to the future binds neither side. The only consideration moving from plaintiff was her vows of poverty, chastity, and obedience. In pre-reformation days a profession of religion as it was called, which consisted in taking similar vows, had, if made in England at least, the curious effect of creating civil death, and the professed became thenceforth subject only to the canon law. But there is now no such escape from the ordinary law by which every one else is bound. See Evans v. Cassidy, 11 Eq. R. Irish, 243. Religious societies, whether Roman Catholic or Protestant, are merely tolerated. They are not illegal, but they have no special status before the law, and their contracts must be construed from the same standpoint and be subject to the same rules as apply to ordinary contracts.

Assuming, then, that these vows were simply so many promises made to and accepted by the society, followed by the promise on the part of the society to maintain, and that thereby at least the outward form of a contract was created, I proceed to the next step, which necessarily is to examine in a legal sense the nature and extent of plaintiff's promises or vows.

By the vow of chastity, as interpreted in the light of the constitution, it is quite beyond question that plaintiff engaged never to marry.

By the vow of poverty she promised to divest herself of all her property of every kind, present and future, retaining absolutely nothing for herself.

And by the vow of obedience she promised implicit obedience at all times and in all things to the orders, whether reasonable or unreasonable, and indeed whether legal or illegal, for there is no expressed exception, of the Superior, whose voice the constitution declares is to be to her as the

voice of God. She is given no part or share in the management of the society. She is as a lay sister simply to labour, in practically a menial position (plaintiff was a cook or cook's assistant), for the rest of her life. And the only financial consideration for this total surrender of liberty is simply to be such maintenance as the society may choose to supply.

In my opinion, such a contract, however meritorious the object, is incapable of enforcement—and is wholly illegal and void, on grounds of public policy. The law will not enforce a contract in general restraint of marriage. See the case of Crowder v. Sullivan, 4 O. W. R. 397, recently before this Court. Nor will it permit a person to surrender or to transfer in advance all the duties and obligations of organized society which inherently attach by law to every member of such society, into the keeping of another, and especially will it not allow, under the name of service, a servility which even if voluntary is in effect neither more nor less than slavery. . . . [Reference to Davies v. Davies, 36 Ch. D. 359, 393, and In re James Sommersett, a negro, 20 St. Trials 1, 49, 50, 80.]

And in this Province not only have we inherited the common law of England, but we have apparently gone further, for we have here an express statutory provision in R. S. O. 1897 ch. 157, the first section of which in express terms prohibits slavery, or "a bounden involuntary service for life" on the part of a negro "or other person." And the second section provides that "no voluntary contract of service or indentures entered into by any parties shall be binding on them or either of them for a longer time than a term of nine years from the day of the date of such contract."

But the plaintiff was not only bound to prove a legal contract, and a breach, but also the resulting damages. The jury have, it is true, awarded $5,000, but a perusal of the evidence leads me not merely to the expressed opinion of the learned Chancellor, that this sum is too large, but that it is wholly unsupported by the evidence. On the contrary, there was in fact clear proof by the plaintiff herself, in her effort to make a case for large wages for the past years, that she had financially gained rather than lost by the dismissal.

In these circumstances, the damages should in any event have been merely nominal.

And finally, and with deference, I think the defence based upon the plaintiff's release should have been sustained.

The plaintiff admits that she knew perfectly what the meaning and effect of the document was. She at first refused to execute. She had it in her mind then to sue the society and so informed the attorney, and she was distinctly told by him not to execute if she was still of that intention. She then consulted an adviser of her own selection, an English-speaking priest, who advised her to execute and to go home, and she, acting on this advice, returned to the attorney's office and did execute, and received the money. She was not importuned nor coerced, nor in any way imposed upon by the society or its agents. Nor was her act, in my opinion, even an improvident one, except as viewed in the false light of the very extravagant assessment of damages made by the jury.

Then she accepted and kept the money and at no time offered to return it. She cannot be allowed, in the language of the old cases, to "approbate and reprobate."

The case cited by Mr. Betts of Barnes v. Richards, 18 Times L. R. 328, is entirely different. There was there an admitted balance due to plaintiff exceeding the amount he had received on executing the release. No such thing exists in the present case.

The burden of proof was, of course, upon plaintiff. She was bound to adduce proper evidence to shew some legal ground of attack. She only succeeded in shewing that she was in poverty and needed the money, but she quite failed to shew that defendants had taken any advantage of her poverty by any kind of importunity or pressure of other influence of any kind to secure a release which she would not otherwise have given; indeed she says in her evidence at the trial that if the $300 had been given to her in cash instead of in the shape of a troublesome cheque she would probably have been satisfied with it.

I think the appeal should be allowed, the cross-appeal dismissed, and the action dismissed with costs.

OSLER, J.A., gave written reasons for the same conclusion.

MOSS, C.J.O., MACLENNAN and MACLAREN, JJ.A., concurred.

JANUARY 23RD, 1905.

C.A.

McVITY v. TRENOUTH.

Limitation of Actions — Real Property Limitation Act — Right of Entry—Mortgagee—Mortgage after Statute has Begun to Run against Mortgagor—Interruption—Registry Act — Notice — Authority of Decisions of English Court of Appeal.

Appeal by defendants from judgment of BOYD, C., in favour of plaintiffs (mortgagees) in an action for possession of a farm in the township of Cavan. The farm was conveyed by defendant Rachel Trenouth (formerly Maxwell) to one Sootheran, and reconveyed by Sootheran to her and her husband (co-defendant). Before the latter conveyance was registered Sootheran, as alleged, fraudulently mortgaged to plaintiffs, who registered their mortgage. Defendants set up notice to plaintiffs and title by possession.

The appeal was heard by OSLER, MACLENNAN, and MACLAREN, JJ.A.

G. H. Watson, K.C., and R. Ruddy, Milbrook, for defendants.

H. J. Scott, K.C., for plaintiffs.

OSLER, J.A.—In Thornton v. France, [1897] 2 Q. B. 143, C. A., it was held that the section of the Imperial Real Property Limitation Act which corresponds with sec. 22 of our Act R. S. O. 1897 ch. 143, does not confer a new right of entry on a mortgagee when at the date of the mortgage a person is in possession in whose favour the statute has already begun to run against the mortgagor; see also Ludbrooke v. Ludbrooke, [1901] 2 K. B. 96; Archibald v. Lawlor, 35 N. S. Reps. 48. So far, therefore, as Cameron v. Walker, 19 O. R. 212, decides to the contrary of this, it must be taken to be overruled, in accordance with the rule laid down for our guidance by the Judicial Committee in Trimble v. Hill, 5 App. Cas. 342. It may be that cases will arise in which we should not consider ourselves bound to follow that rule, but the language of the Acts being the same, and the question being one relating to real property, the present case would seem to be one for its application, if the circumstances call for it, as I think they do.

Substantially the question is, when the right of entry of the plaintiffs, or of the person through whom they claim,

namely, Sootheran, is to be taken to have arisen. If the statute ought to be taken to have been running in defendants' favour before August, 1895, the date of Sootheran's mortgage to plaintiffs, Thornton v. France shews that the mortgage did not interrupt it, and defendants would have acquired a title by possession before the commencement of the action.

The circumstances in which the question arises are somewhat novel, and from one aspect of the case there is a difficulty in seeing how or against whom the statute was set running before plaintiffs' mortgage. Defendants put in and proved the deed of June, 1891, from Sootheran to themselves, and therefore it is said that from then until August, 1895, they were in possession under that deed, and their possession was attributable to it and to it only. No one was in existence whose right of entry was affected by their possession. Sootheran's conveyance, though unregistered, was good as between the parties, though being unregistered it became fraudulent and void as against the plaintiffs when the latter registered their mortgage, by virtue of sec. 87 of the Registry Act.

On the other hand, it is to be observed that the Registry Act only deals with and protects the registered title. It is only for the purpose of supporting that title, and giving full effect to the Act, that possession is held not to be notice of a prior unregistered deed under which it may be held: Roe v. Braden, 24 Gr. 589; Grey v. Ball, 23 Gr. 390; Sherbonneau v. Jeffs, 15 Gr. 574; and, subject to this, the subsequent purchaser or mortgagee may be adversely affected by it, as Thornton v. France shews. For the purpose of supporting their registered title, plaintiffs are obliged to rely upon the Act, but for which defendants' paper title would have been perfectly good as against them; and the question is, whether, having invoked the Act in order to destroy defendants' deed, they can set up the deed for any purpose, e.g., for the purpose of giving a character to the possession which defendants had enjoyed up to the date of their mortgage.

Pushed to its extreme but legitimate length, plaintiffs' argument seems to lead to the somewhat surprising conclusion that if defendants' possession between 1891 and 1895 is to be disregarded because between those dates it was not adverse to Sootheran or opposed to any right of entry he can be supposed to have had, then no length of possession, even for 20 or 30 years or more, would have been of any avail to defendants in similar circumstances who might be cut out by the subsequent deed of their vendor at any distance of

time subsequent to the prior but unregistered deed. I think that we may safely deny this to be the law without fear of going counter to the policy of the Registry Act, because, while possession does not affect the subsequent purchaser or mortgagee with notice of the prior unregistered deed, he must still take the risk that by means of it some one may be acquiring a title of a different nature. . . .

[Reference to Stephens v. Simpson, 15 Gr. 594.]

If Sootheran had never re-conveyed to defendants, his legal right of entry under their deed to him, though no doubt defeasible by their equity to a reconveyance, would also in time be barred by the operation of the Statute of Limitations, upon their continued possession adverse to the legal title he had acquired under their deed.

If the deed which he in fact made is now avoided by plaintiffs for the purpose of supporting their registered title, and is to be treated as void ab initio, defendants' possession must also be treated as having been adverse to Sootheran from the commencement, and plaintiffs, having avoided the deed for one purpose, cannot set it up for another in order to give a character to such possession which, in the absence of the deed, would not attach to it.

I am of opinion that the defendants had acquired a good title under the Statute of Limitations before the commencement of the action, and, therefore, with all respect, that the appeal should be allowed.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

MACLAREN, J.A., also concurred.

JANUARY 23RD, 1905.

C.A.

REX v. RYAN.

Criminal Law—Theft of Post Letter and Money—Evidence—Confession—False Statements—Person in Authority—Decoy Letter—"Post Letter"—Addresses to Jury—Order of—Reply—King's Counsel Representing Attorney-General.

Application by the prisoner for leave to appeal from a conviction and for a stated case under the provisions of the Criminal Code.

The application was heard by Moss, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

L. V. McBrady, K.C., for prisoner.

J. R. Cartwright, K.C., for the Crown.

Moss, CJ.O.—The prisoner was placed on trial before Falconbridge, C.J., and a jury, on a charge of stealing a post letter and of theft of money.

At the trial James Henderson, the inspector at the post office at Toronto, was about to testify with respect to a statement or confession made to him by the prisoner, when counsel for the prisoner objected and was allowed to examine Henderson as to the circumstances in which the statement was made. Upon the testimony thus elicited counsel for the prisoner contended that it was shewn that the statement or confession was not admissible, because it was made, as he contended, to a person in authority, and was procured by means of threats or inducements or by false statements made by Henderson to the prisoner. The statement was admitted in evidence. At the close of the evidence for the Crown, counsel for the prisoner objected that the letters alleged to have been stolen were not post letters within the meaning of the Act 1 Edw. VII. ch. 19, sec. 1. The Chief Justice ruled against the objection. The prisoner called no witnesses. Counsel for the prisoner submitted that he was entitled to address the jury last, and that Mr. Proudfoot, K.C., who appeared for the Crown, representing the Attorney-General, was not entitled to reply. The learned Chief Justice ruled that Mr. Proudfoot had the right of reply if he chose to exercise it.

Counsel for the prisoner thereupon addressed the jury, and was followed by Mr. Proudfoot. The jury found the prisoner guilty. Counsel for the prisoner applied to the Chief Justice to reserve a case upon the three questions raised, but he declined to do so and remanded the prisoner for sentence. Thereupon counsel for the prisoner applied to this Court.

As to the last objection he relied upon the arguments which had been addressed to the Court on a previous day in the case of Rex v. Martin. As to the other grounds he argued the case very fully, with reference to the decisions in England and in our own and the American Courts.

With regard to the objection that the letters were not post letters, the Act 1 Edw. VII. ch. 19 contains language not to be found in the Imperial Post Office Act. By our Act the expression "post letter" is made to include any letter deposited in any post office, and the question is,

whether, upon the evidence, the letters alleged to have been stolen can be said to have been deposited in the Toronto post office so as to render the taking and non-delivery of them by the prisoner the offence of stealing post letters.

It is not necessary to state the evidence in detail. The prisoner was a letter carrier employed in the Toronto post office. He was assigned to a certain district in the city, within which to deliver letters. The letters in question were written by Henderson, the inspector, were enclosed in envelopes, and addressed by him to persons within the prisoner's district, and were stamped and handed to one Stoddard, the superintendent of the letter sorters, with instructions to place them or cause them to be placed in the usual place for letters intended for delivery by the prisoner. Stoddard handed them to one Humphries, a letter sorter, whose business it was to sort letters and distribute them among the various letter carriers for delivery by them. Humphries placed the letters in the prisoner's wicket and saw him take them out. They were thus placed by Humphries in the ordinary and usual way, and were received by the prisoner in the regular course of his duty.

Unless it is to be held that no letter that is not dropped into the post office from the outside can be a letter deposited in the post office, the letters in question were deposited. If they had been taken and dropped from the outside into the receiving box, there could be no question of their having been deposited. They could not have been reclaimed by the sender; they had become the property of the persons to whom they were addressed: R. S. C. ch. 35, sec. 43.

Can it signify that they came to the hands of the proper official in such manner as to render it his duty to see that they were put in due course for delivery to the persons to whom they were addressed, and were then by him placed in the proper place in the post office from which it was the duty of the prisoner to receive and deliver them, without their having been brought into the post office from the outside? It is difficult to see why they are not as well deposited in the post office in the one case as in the other.

The statement or confession was properly admitted by the Chief Justice. It cannot be said that threats were made or inducements held out by Henderson, and if it be assumed, though it is not to be taken as so found, that Henderson made an untrue statement as to his possession of one of the bank bills which were enclosed in the letters, that would not render the statement inadmissible.

The last ground is disposed of by what has been said in Rex v. Martin (post).

The application must be refused.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

OSLER, MACLENNAN, and GARROW, JJ.A., concurred.

JANUARY 23RD, 1905.

C.A.

MITCHELL v. TORONTO R. W. CO.

Street Railways—Injury to Child Crossing Track—Negligence—Failure of Motorman to Keep Look-out—Contributory Negligence.

Appeal by defendants from the judgment in favour of plaintiffs at the trial before MEREDITH, C.J., and a jury, of an action brought by Irene Pearl Mitchell, an infant, by her father as next friend, and also suing on his own behalf, for damages caused by defendants' negligence.

The evidence shewed that the infant plaintiff (aged about 9 years) had been sent on a message by her mother, and was returning home and was running in a north-easterly direction across Bathurst street, between Ulster street and Harbord street, in the city of Toronto, on 25th March, 1903, about 4.30, p.m., when she was struck by a north-bound car in charge of defendants' servants, and severely injured.

The jury, in answer to questions, found that the accident was caused by the negligence of defendants, that such negligence consisted in not seeing the child, the road being clear, and not keeping a proper look-out, and in not sounding the gong, and that considering the age of the child she had not been guilty of contributory negligence. And they awarded $700 to the father, and $2,500 to the child as damages.

G. Kappele and J. W. Bain, for defendants.

H. A. E. Kent and E. Bristol, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

GARROW, J.A.—The question upon this appeal is, was there evidence upon which the jury, acting reasonably, might reach the results they did? In my opinion, there was.

The infant plaintiff was of tender years, although said to be a bright, clever child. She was hurrying home, running, and was proceeding in the same direction to some extent as the car, but with the obvious intention to cross the street. She might, of course, if she had looked, have seen the approaching car, and the fair inference is, I think, that she did not look before attempting to cross. This in an adult might be inexcusable, especially when crossing in the middle of a block, as was the case here, but with a child of tender years it is, I think, different. She was only bound to be as reasonably careful as children of her age usually are, and the question is properly one for the jury: Tabb v. Grand Trunk R. W. Co., 3 O. W. R. 885, 8 O. L. R. 203.

On the other hand, it is clear, I think, upon the evidence, that the motorman might, indeed must, have seen the child when she left the boulevard, if he had been looking out, as was his duty. She left the boulevard at about street No. 616, and had proceeded in a long diagonal about 60 feet before the collision took place, and during the greater part, if not all, of that distance, she was plainly within his line of vision. The street was otherwise vacant, the view wholly unobstructed. She was seen by three witnesses from a less favourable position to see than that of the motorman. . . . Bathurst street is not a wide street. The distance from the boulevard to the first rail is only about 20 feet. The child was obviously, to the other witnesses at least, about to cross the street, but, even if her destination had been less obvious, it would, I think, have been the duty of the motorman, had he seen an unattended child of 9 between the boulevard and the rails, to have, at least, sounded the gong as a warning.

And the evidence shews that the car itself might have been stopped or certainly slowed down in time to have avoided the collision, for it was afterwards stopped within about 60 feet, shewing that it was well under control.

In these circumstances, the conclusion seems well warranted, and indeed inevitable, that the collision occurred because the motorman failed in his duty to keep a proper look-out.

The appeal should be, I think, dismissed with costs.

JANUARY 23RD, 1905.

C.A.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railways—Contract with Municipality—Mileage Payments — Construction of Portion of Railway — Whether Constructed for another Company—Territorial Limits of Municipality—Interest as Damages—Delay in Payment —Rate of Interest.

Appeal by defendants from order of a Divisional Court (3 O. W. R. 204) affirming the findings and report of the Master in Ordinary (2 O. W. R. 225).

Action for the recovery by plaintiffs from defendants of moneys alleged to be due under an agreement between plaintiffs and defendants dated 1st September, 1891, which provided, amongst other things, for the payment to plaintiffs of $800 per annum per mile of single track, $1,600 per mile of double track, occupied by defendants upon the streets of the city (clause 15 of the agreement and clause 9 of the conditions).

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

J. Bicknell, K.C., and J. W. Bain, for defendants.

J. S. Fullerton, K.C., and W. C. Chisholm, for plaintiffs.

MOSS, C.J.O.—By the judgment pronounced at the trial, as varied by the judgment of this Court, which was affirmed by the Judicial Committee of the Privy Council on 2nd August, 1901, it was referred to the Master in Ordinary to inquire and report by whom a portion of track, measuring 940 feet, on that part of Queen street or the Lake Shore road west of Roncesvalles avenue, was constructed and at what time and what rights of running upon the said track defendants possessed, and also to ascertain the amount due and payable by defendants to plaintiffs in respect of mileage, having regard to the declarations contained in the judgment.

Before the reference was proceeded with, the parties settled and agreed upon the amount of principal moneys due and payable by defendants to plaintiffs, having regard to the declarations of the judgment, with the exception of the amount claimed in respect of the 940 feet, and the amount so agreed upon was paid by defendants to plaintiffs. Plaintiffs, however, claimed . . . interest on the principal

from the dates when the quarterly payments composing the same became payable from time to time up to 31st March, 1902, when the principal sum was paid. And on the reference the Master dealt with two matters: (1) the construction of the 940 feet of track and defendants' rights in respect thereof; and (2) the liability of defendants for interest.

The Master found and reported that the 940 feet of track were constructed by defendants as part of their own undertaking, and that defendants' rights of running upon the same are governed by the agreement, and are subject to the same obligations as are conferred and imposed upon defendants with reference to their other tracks. He also found and reported that defendants were liable to pay interest as claimed by plaintiffs. . . .

The first question presented was as to the 940 feet of track. Defendants' contention is, that this piece of track was not constructed by them as part of their undertaking, but was constructed by them for and on behalf of the Toronto and Mimico Electric Railway and Light Company, and that it forms part of the property of the latter company, and is not subject in any respect to the agreement between plaintiffs and defendants.

At the date of that agreement (1st September, 1891), the portion of Queen street or the Lake Shore road on which the 940 feet of track are laid, formed part of the York roads, and was the property of the county of York. By an agreement dated 23rd December, 1890, between the county of York and the Toronto and Mimico Electric Railway and Light Company, confirmed by an Act of the Legislature, assented to on 4th May, 1891, the county gave the company permission to construct, maintain, complete, and operate an iron or steel railway track or tramway in, upon, and along a portion of the York roads, embracing the part on which the 940 feet of track are now laid (clause 1), for a period of 21 years (clause 17), the company to construct and have open for travel their proposed line of railway or tramway within two years from 1st January, 1891, and in default to forfeit all their rights, privileges, and advantages under the agreement or acquired thereunder, which would cease and determine as if the agreement had not been made (clause 21); the company to have the exclusive right and privilege to construct a railway or tramway upon the said portion of the road, subject to the observance of the conditions and agreements (clause 22).

By sec. 2 of the confirming Act, 54 Vict. ch. 96, it is provided that the councils of the municipalities may from time to time by resolution extend the times for beginning or

completing the lines of the company's railway, subject to certain restrictions as to the periods of such extensions.

By the agreement between plaintiffs and defendants (clause 11), defendants are given the exclusive right for a period of 30 years (as enacted by the Legislature) to operate surface street railways in the city of Toronto excepting on the island, a portion of Yonge street, and "the portion, if any, of Queen street west (Lake Shore road) over which any exclusive right to operate surface street railways may have been granted by the county of York, and also the exclusive right for the same term to operate surface street railways over the said portions of Yonge street and Queen street west (Lake Shore road) above indicated, so far as the said corporation can legally grant the same." Clause 1 of the conditions of sale, which form part of the agreement, describes the grant in substantially the same way.

Now in this agreement we find, in the first place, a grant in very wide terms, the exclusive right for a period of 30 years to operate surface street railways in the city of Toronto. Standing alone, without the exceptions, this embraces every part of the territorial area comprising the city of Toronto, not only at the date of the agreement, but during the period of 30 years over which the right is to extend. The grant extends to every portion of territory acquired or made to form part of the municipality during the 30 years. Of the exceptions the only absolute one is that of the island. The others are qualified. As to them the main grant was intended to take effect and operate save only so far as the existence of any existing conflicting grant might create a restriction. If those portions of Yonge street and Queen street west were part of the city at the date of the agreement, they were covered by the main grant, subject to the restriction. If they were not then part of the city, they would, on becoming part, be covered by the main grant, subject to the restriction. And once they formed part of the city, it would not be open to plaintiffs to contend that upon the removal of the restriction during the period of 30 years they could withhold from defendants the exclusive right to operate upon those parts in the same manner as upon the other streets of the city. As to the part of Queen street or the Lake Shore road in question, plaintiffs granted the exclusive right for the same term, i.e., 30 years, so far as they could grant the same.

By an agreement dated 3rd February, 1893, between the county of York and plaintiffs, the former granted and conveyed to the latter the Lake Shore road, including the portion thereof on which the 940 feet of track are now laid.

This agreement and grant were validated and confirmed by an Act of the Legislature, 56 Vict. ch. 35, assented to 27th May, 1893. Thereupon plaintiffs became possessed of and entitled to the roadway now in question, which, with the other territory described in sec. 4 of the Act, was annexed to the city. The portion in question may be described generally as that portion of the Lake Shore road lying between the western limit of Roncesvalles avenue produced southerly on Queen street and the line where the Grand Trunk Railway crosses the Lake Shore road to the west of Roncesvalles avenue.

Up to the time of the acquisition of this piece of roadway by plaintiffs, no track had been laid upon it. The Toronto and Mimico Electric Railway and Light Company had constructed a portion of their line upon the Lake Shore road on the west side of the Grand Trunk crossing, and were operating that portion. But they had done nothing towards availing themselves of the right to lay a track from the western limit of Roncesvalles avenue to the Grand Trunk crossing, and the time limited for the completion of their line had expired on 1st January, 1893.

But at the end of June or the beginning of July, 1893, the track in question was constructed and laid by defendants. It was connected with and made to form part of defendants' tracks in Queen street, and from that time to the present it has been in use and operation as part of defendants' lines of railway. It ends east of the line of the Grand Trunk crossing. It is not connected with the track of the Toronto and Mimico Electric Railway and Light Company, which is situate some distance to the west of the crossing. The only cars operated over it are defendants' cars, carrying their passengers. To all appearance and to all intents and purposes, it is part of defendants' system of surface street cars in the city of Toronto, and it has been so recognized by plaintiffs from the time it was laid down.

In the first account rendered after 1st July, 1893, viz., that of 5th and 6th October, covering period up to 30th September, 1893, a charge is made of $30.39 for 77 days' user of this piece, and the engineer's measurement is enclosed. Defendants acknowledge the receipt of the account, say they should not be charged for new lines they have not been able to use, but make a payment on account and promise to meet the engineer and adjust the mileage and pay whatever additional sum they find there is to pay. Then, as appears by the exhibits filed at the trial, there follow accounts for each quarter thereafter, each one containing a claim in respect of the 940 feet. Payments on account are

made up to the time of the commencement of this action. But, while defendants dispute the measurements, there nowhere appears the contention that they are not liable for the 940 feet because it is not part of their system or undertaking. So far as appears, that contention was first made in the proceedings in this action.

Now in this state of the case it lies upon defendants to establish some clear ground of exemption from liability to pay mileage in respect of this piece of track. They endeavour to do this by seeking to shew that it is part of the track of the Toronto and Mimico Electric Railway Company. But the Master in Ordinary and the Divisional Court have found against them, and upon the evidence it is impossible to say that they have come to an erroneous conclusion. In many respects the evidence is not satisfactory, and there are many circumstances opposed to some of the statements made. There is no pretence on the evidence that by any corporate act the Toronto and Mimico Railway Company manifested a desire to construct this piece of track for the purpose of using it as part of their line of railway, or even of letting it to defendants, if their original right extended to that. It is to be borne in mind also that by their agreement with the county of York, the Toronto and Mimico Railway Company were to construct and have open for travel their proposed line of railway or tramway within two years from 1st January, 1891. That is, they were to have constructed and open for travel whatever they proposed was to be their line of railway or tramway. They did construct and open for travel that part beginning on the west side of the Grand Trunk crossing and extending to the west side of the Humber river. Did they not thus make that their proposed line of railway? That they allowed the two years to expire without action, that they have now a line complete without this piece, that they never use and cannot use this piece, and that they derive no benefit from it, go to support this view. There is not a single fact or circumstance which tends to shew an intent on the part of the Toronto and Mimico Railway Company to construct this part of the line for their own purposes under the terms of their agreement with the county. And at the time when it is said that the president was on the ground with defendants' officials, there had been no extension of time given by the county, and the property and the county's rights had become vested in plaintiffs. The only lawful way in which the line could then be laid was under authority from plaintiffs. Can it be doubted that if plaintiffs had supposed or been informed that

the Toronto and Mimico Railway Company were assuming to authorize or to undertake themselves the construction of the line, they would have taken steps to prevent it and have asserted their rights in the premises? But it was not so constructed, and plaintiffs have recognized it as done under the agreement between them and defendants.

Defendants have been rightly found liable to pay mileage in respect of the piece of line in question, and as regards that the judgment appealed from should be affirmed.

Then as to the claim for interest as damages. The means of ascertaining by measurement the exact amount of the indebtedness under the agreement were equally open to both parties. Plaintiffs made efforts to arrive at the sum by making measurements from time to time, and furnishing them to defendants, accompanied by a demand for payment. Defendants contented themselves with objecting to plaintiffs' measurements, and made no measurements or attempts to ascertain the sum. They procured delay from plaintiffs on promises to settle and pay the proper sum, but finally, as the correspondence shews, compelled plaintiffs to bring action. Plaintiffs' claim was greater than they were ultimately able to establish, but the chief default was on the part of defendants, upon whom lay the legal duty to pay. In the circumstances, it is a case in which defendants should not entirely escape payment of interest, but there is no rule requiring that the full legal rate should be imposed. It is for the tribunal to order such rate as it thinks is just in all the circumstances. There were faults on both sides, and, passing on the whole without entering upon details, justice will be done by awarding interest at a lesser than the usual rate. The Master has allowed 6 per cent. as the measure of damages. This is more than the present legal rate of interest, and at the most not more than 5 per cent. should have been allowed. But, in the particular circumstances of this case, we think that 4 per cent. is a reasonable rate to fix.

The judgment and report will be varied accordingly. The point as to the measure of damages was not raised by defendants, and the variation should make no difference in the costs of the appeal, which should be paid by defendants to plaintiffs.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

OSLER, J.A., also concurred, though not entirely satisfied that any interest was recoverable.

JANUARY 23RD, 1905.

C.A.

HIGGINS v. HAMILTON ELECTRIC LIGHT AND CATARACT POWER CO.

Master and Servant — Injury to Servant — Negligence — Superintendent of Works—Workmen's Compensation Act— Findings of Jury—Inconsistency—New Trial.

Appeal by defendants from judgment of MACMAHON, J., in favour of plaintiff for the recovery of $1,200, on the findings of a jury, in an action for damages for personal injuries sustained by plaintiff, a labourer, who, while excavating a trench at defendants' power station, received a shock from an electric cable which resulted in permanent injuries, in consequence of which he was incapacitated for manual labour.

H. E. Rose, for defendants.

G. Lynch-Staunton, K.C., and T. F. Battle, Niagara Falls, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.—The first 6 questions may be disregarded, all of them having been answered favourably to defendants, excluding liability for negligence in respect of any matters to which they refer. In answer to the 7th question, the jury say that Vangster, the superintendent, did not warn plaintiff against going behind the slats, which he had placed to prevent workmen from passing between the east and west switch boards. To the 8th and 9th questions, they say that plaintiff was injured by reason of the negligence of a person in defendants' service to whose orders he was bound to conform and did conform. To the 10th question, they said that the person guilty of negligence was the superintendent, and that his negligence was in not appointing a competent man to oversee the job.

The answers to the 8th and 10th questions appear to me to be inconsistent. The former imputes plaintiff's injury to his having complied with a negligent order given by a person in defendants' service, to whose orders he was bound to conform and did conform, while the answer to the 10th, instead of indicating the negligent order or direction, which, looking at the answer to the 7th question, might be the sending

plaintiff to work without warning in a dangerous place, merely says that the superintendent's negligence was in not appointing a competent man to oversee the job, an answer which not only has no bearing on the negligence found by the jury in the 8th answer, but points to something for which there is nothing in the evidence to shew that defendants would be liable.

I think there should be a new trial; the costs of the former trial to abide the event; costs of the appeal to be costs in the cause to defendants in any event.

JANUARY 23RD, 1905.

C.A.

RE McINTYRE, McINTYRE v. LONDON AND WESTERN TRUSTS CO.

Will—Infants—Legacies—Interest on—Application for Maintenance — Absence of Express Provision for — Infants Entitled to Share in Residue in Addition to Specific Legacies — Setting apart Sum to Answer Legacies —Quantum of Allowance for Maintenance—Whole Interest or Part.

Appeal by plaintiff from order of STREET, J. (3 O. W. R. 258, 7 O. L. R. 548), in so far as it allowed the infant defendants interest for maintenance from the death of Hugh McIntyre, the testator, and upheld the validity of an order which declared that $4,000 should be set aside for each infant to answer the legacies.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

A. B. Aylesworth, K.C., for plaintiff.

J. Folinsbee, Strathroy, for adult defendants.

H. Cronyn, London, for official guardian.

MOSS, C.J.O.—The question chiefly discussed upon this appeal was whether Street, J., was right in declaring that the legacies of $4,000 given to each of the testator's infant sons, Mowat and Ross McIntyre, carry interest from the death of the testator for the purposes of their maintenance, and in directing the retention and setting apart by the executors of $8,000 to provide for the payment of $4,000 each to the infants when they attain the age of 25 years, and the payment

(subsequent to an order made by Mr. Justice Lount on 16th March, 1901), out of the interest or income to accrue from the said sums, of the sum of $200 annually to their mother, or such further or lesser sum as may be needed for their maintenance, and may be subsequently ordered to be paid by a Judge in Chambers until they attain the age of 21 years, and that any interest not so distributed when the infants attain that age, be added to the residue of the estate.

By his will the testator, after providing for payment of his debts and funeral expenses, bequeathed to his wife the sum of $400 a year during her life to be paid quarterly out of his general funds, and also $100 out of his homestead farm for 10 years "until my sons Mowat and Ross have possession." He then devised his homestead farm to his sons Mowat and Ross. Next he provided as follows: "I also will Mowat and Ross when they become 25 years of age $4,000 each." He then devised to his son Hugh certain real property and the use of the homestead farm from his death, Hugh to pay $100 a year to the testator's wife. After making provision for certain other small benefits to be received by his wife out of the homestead farm, and devising and bequeathing other portions of his estate to some of his sons and daughters, he willed that the balance of his estate, if any, after all claims were paid, was to be divided equally among his heirs. He also gave a number of annuities, and finally willed to his son Hugh the use of his stock and implements for 10 years.

He made no express provision for the maintenance of his sons Mowat and Ross during their minority. The will is dated 5th September, 1899, and the testator died the following day. His sons Mowat and Ross were then in the 7th year of their age, having been born on 29th December, 1892.

His will was proved by the London and Western Trusts Co., the executors named therein. On 16th March, 1901, the mother of the infants Mowat and Ross applied to Mr. Justice Lount and obtained from him an order authorizing the payment to her by the executors, out of the income to be derived from the legacies of $4,000 each, the sums of $100 each per annum to be applied towards their support and maintenance.

As the result of proceedings subsequently taken for the purpose of ascertaining and adjusting the rights of the persons entitled to benefits under the will, the Master at London made his report, dated 9th December, 1903.

The report finds that the executors have in hand belonging to the infants Mowat and Ross as their present share of the residue of the estate the sum of $3,027.28.

It further states that it is not necessary or proper for the executors to set apart for payment of the legacies of $4,000 each, payable to Mowat and Ross, the sum of $8,000, inasmuch as these legacies are contingent on the infants attaining 25 years of age, and that the proper amount to be set apart will be the sum of $4,442.16, which, invested at 4 per cent. and compounded yearly until the infants attain their majority, will produce $8,000.

These findings and the directions given consequent thereon determined in effect that neither for the purposes of maintenance nor otherwise do the legacies of $4,000 carry interest until the day named for payment.

On appeal Street, J., held that the legacies carried interest from the testator's death for the purpose of maintenance, and he varied the report in this and other respects, as stated in his order. Against this there is an appeal on behalf of plaintiff, supported by others interested in the residuary estate.

As I have already pointed out, there is no express provision for the maintenance of the two infants during their minority. But the appellants contend that the other devises and bequests in favour of the infants contained in the will are a sufficient provision for their maintenance.

The well settled rule is that when a legacy is given to a minor by a parent or by a person in loco parentis, payable at a future period, if no other provision is made for maintenance, interest will be allowed for that purpose, even though by the terms of the will the legacy is contingent on the legatee living to the period which is mentioned for payment of the legacy.

This rests upon the principle that a parent is bound to provide for the maintenance of his children, and the Court infers that for that purpose he meant to give interest, though he has not expressly said so.

In Houghton v. Harrison, 2 Atk. 329, Lord Hardwicke stated the rule, "If a legacy be left upon no condition but to be paid at the age of 21, and not given over, it is a legacy vested and not transmissible, but still no interest can be demanded unless in the case of a child who had no other maintenance or provision, for a parent is bound by nature to support a child."

Again he stated it in Heath v. Perry, 3 Atk. 101, and in Hearle v. Greenbank, ib. at p. 717. . . .

So in Wynch v. Wynch, 1 Cox 430. . . .

Nearly 90 years later, the rule and exceptions were compendiously stated by Lord Justice James in In re George, 5 Ch. D. 837. . . .

In Binkley v. Binkley, 15 Gr. 649, Spragge, V.-C., said (p. 650): "It is clear law and it is undisputed that a legacy by a parent to an infant child payable upon coming of age or upon that event or marriage, the will being silent as to interest upon the legacy, stands upon a different footing from a legacy to a stranger; the latter not carrying interest; while in the case of a legacy to a child the child is entitled to maintenance to the extent, if necessary, of the interest upon the legacy—this as a general rule—it is otherwise when other provision is made by the will for the maintenance of the infant."

To the same effect Mowat, V.-C., in Clark v. Perrin, 17 Gr. 519, and Proudfoot, V.-C., in Rees v. Fraser, 26 Gr. 234.

In the very recent case In re Bowlby, Bowlby v. Bowlby, [1904] 2 Ch. 685, the question to what extent is a child, to whom a legacy payable in futuro or contingent is given, entitled to the interest which the legacy bears or carries—whether to the whole interest as such or only to so much as may be necessary for maintenance—was fully discussed in argument and considered by the Court of Appeal. Although Vaughan Williams, L.J., argued strongly that the effect of giving interest at all was to entitle the infant to the whole, the conclusion of the Court was that by the practice of the Court the infant is only allowed so much as is necessary for maintenance, thus affirming the view expressed by Spragge, V.-C., in Binkley v. Binkley, that the child is entitled to maintenance to the extent, if necessary, of the interest upon the legacy.

I think that is the proper rule where the will makes no other provision or provides no other fund for the maintenance of the infant legatee.

But where there is in the will an express provision for maintenance from some other source, and the amount is specified, the legacy will not bear interest for the purposes of maintenance, even though the provision made should be deemed insufficient for the purpose. This is upon the principle that, as interest is allowed in other cases, because it will not be assumed that the father intended no maintenance, there is no ground for the assumption where a provision is made.

So that where the amount of maintenance is specified, that is in general the limit: Simpson on Infants, 2nd ed., p. 304.

Where there is a general provision for maintenance, and no amount specified, there seems to be no absolute bar to recourse, if necessary, to interest upon the contingent legacy. Much less should there be where there is no express provision of any kind. The amount of the allowance in such cases must be governed by a consideration of the other circumstances and a due regard to such other sources or funds as may be properly resorted to for maintenance.

In the present case, although it may be surmised that in making the provisions and arrangements in his will with reference to the payment to his widow by his son Hugh of $100 a year for the use of the homestead farm for 10 years until the infants should have possession, and the other benefits to his widow out of the same farm, he was intending to provide for the infants' maintenance by their mother until they could maintain themselves on the farm, he has not given expression to that intention.

Upon the construction of the will I think there is no provision for maintenance out of the farm. The gift of an immediate share in the residue indicates a fund or source from which maintenance is derivable, but not in such form as to preclude recourse for maintenance to the interest upon the legacies. But, in my opinion, it should be taken into consideration in dealing with the allowance to be made for maintenance out of the interest of the legacies. I therefore think that the Master was wrong in determining that no part of the interest on the legacies could be devoted to the maintenance of the infants. I think that to the extent necessary for their maintenance, having regard to their shares of the residue and the income derivable therefrom, they are entitled to have recourse to interest on their legacies, but only to that extent. It follows that the order of Lount, J., was proper at the time it was made, and that the whole sum of $8,000 must be set apart to provide maintenance, if necessary.

The order of Street, J., in this case does not in terms give to the infants the whole interest upon the legacies. The amount allowed by Lount, J., is continued subject to being increased or reduced by a Judge. But that sum was manifestly arrived at without reference to the income from the infants' shares in the residue; and the question of the proper amount to be allowed, having regard to such shares and the time when they were ascertained, should be now settled by the Master unless otherwise agreed upon.

It is said that the decision of Kekewich, J., in In re Moody, Woodroofe v. Moody, [1894] 1 Ch. 101, shews that the infants' interest in the residue is not to be taken into account. But I do not think so. The learned Judge was dealing with the argument that the gift of a share in the residue without any provision for maintenance was a bar to a claim for maintenance out of contingent legacies. He excluded the 43rd section of the Conveyancing Act, 1881, and treated the gift of a share in the residue as not subject to any provision for maintenance, and, so treating it, he held that it was not a bar to maintenance out of the income of the legacies. But he did not consider and apparently was not called upon to consider the question whether in fixing the maintenance the infants' rights in the residue were to be taken into consideration. And, in the light of the discussion in In re Bowlby (supra), his declaration that the infants were entitled to interest, qua interest, would probably only apply to the circumstances of that case.

I think that, subject to any variation that may be needed in accordance with what I have stated, the order of Street, J., should be affirmed, but, in the circumstances, the costs of the appeal should be borne by the estate.

GARROW and MACLAREN, JJ.A., concurred.

OSLER and MACLENNAN, JJ.A., gave written reasons for holding that the order of STREET, J., should be affirmed without variation.

JANUARY 23RD, 1905.

C.A.

UNION BANK OF CANADA v. BRIGHAM.

Fraudulent Conveyance — Action to Set aside — Execution Creditors—Amendment—Action on Behalf of all Creditors —Family Arrangement—Change of Trustees—Formation of Company—Assignment of Interest in Estate—Invalidity against Creditors—Equitable Execution—Form of Judgment.

Appeal by plaintiffs from judgment of MEREDITH, C.J., 2 O. W. R. 699, dismissing the action.

E. D. Armour, K.C., and J. F. Smellie, Ottawa, for plaintiffs.

Glyn Osler, Ottawa, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.—Plaintiffs are judgment creditors of defendant Isaac R. Brigham, they having on 17th September, 1901, recovered judgment against him for $72,073.81. Execution for the amount of the judgment was issued and placed in the hands of the sheriff of the county of Carleton, where it remained and was at the date of the commencement of this action. The main purpose of the action was to set aside . . . as against plaintiffs and the other creditors of Isaac R. Brigham, a certain conveyance of lands in the county of Carleton and the district of Nipissing, dated 27th March, 1901, and made by one John Charles Browne, the sole surviving executor of one Charles James Smith, to defendants the C. J. Smith Estate Company, Limited. Plaintiffs also attacked as fraudulent and void an instrument of assignment, dated 4th June, 1901, made by defendant Isaac R. Brigham to defendant Thomas George Brigham, purporting to transfer to the latter defendant all the interest of defendant Isaac R. Brigham in the estate of Charles J. Smith and in the defendant company, and a further instrument of assignment dated 4th October, 1901, made by defendant Isaac R. Brigham to defendant company, purporting to transfer to the company all the interest or share of defendant Isaac R. Brigham in the estate of Charles J. Smith. Defendants averred that the impeached transactions were made in good faith, for valuable consideration, without intent to defeat or delay creditors. Defendant company also set forth at length that by the terms of the will of Charles J. Smith his estate was vested in the executors thereof upon trust to sell and realize, and, after the death of the testator's two brothers, to divide the residue of the estate amongst the defendants other than the company in the proportion of 35 per cent. to each of the defendants Isaac R. Brigham and Thomas George Brigham, and 10 per cent. to each of the other individual defendants, but subject to a provision that should either Isaac R. Brigham or Thomas George Brigham be indebted to the estate at the date when they became entitled to receive their shares, such indebtedness should be deducted from his share, and that at the date of the impeached transactions with the company Isaac R. Brigham was indebted to the estate in a sum exceeding the amount or value of his share. Plaintiffs, on the other hand, contended that no such indebtedness existed, or, if a debt had ever existed, it was for a much smaller amount, and at all events it had ceased to exist by reason of the dealings of defendant Isaac R. Brigham and the failure

of the executor to deduct such indebtedness, if any, from the share of Isaac R. Brigham before making the conveyance of the lands to the company.

At the trial defendants gave up all claim under the transfer from defendant Isaac R. Brigham to defendant Thomas George Brigham, and they also expressed their willingness, without admitting that there was anything fraudulent in their transactions, that plaintiffs should be entitled to execution against what might appear, on taking a proper account, to be Isaac R. Brigham's interest in the estate of Charles J. Smith. Plaintiffs were not willing to rest satisfied with that measure of relief. The Chief Justice expressed the opinion that the action was not maintainable, inasmuch as it was not brought on behalf of all the creditors, but, upon plaintiffs' counsel stating his willingness to amend in that respect, the Chief Justice allowed the amendment, and the trial proceeded. . . .

It may be observed that, inasmuch as plaintiffs had an execution in the hands of the sheriff, which embraced goods as well as lands, they were entitled to maintain the action on behalf of themselves alone. That is clearly the case in so far as impeaching the conveyance of the lands was concerned. And if, as seems to have been the intention, the amendment was for the purpose of enabling plaintiffs to obtain equitable execution of Isaac R. Brigham's share of interest as an alternative to the relief of setting aside the conveyance, the action was properly constituted as regards parties. . . . The necessary statements and the claim appropriate to the alternative relief were lacking. There is nothing from which it can be inferred or assumed that in accepting the suggestion of the amendment plaintiffs were required to or intended to give up their claim for the major relief. Evidence was adduced bearing on all branches of the case, but the trial closed without any formal amendment of the record.

The Chief Justice determined that the impeached conveyance of the lands was valid, and that plaintiffs' action failed in respect of that relief. He was of opinion also that it was not made out that the executor and the brother and sisters of Isaac R. Brigham had discharged or released his share or interest in the estate from the lien or charge of his indebtedness, and that his shares in the company were subject to the amount properly owing by him. The Chief Justice then declared that in his opinion the utmost relief to which, on a properly framed record and suing on behalf of themselves and all the other creditors of Isaac R. Brigham,

plaintiffs were entitled, was a judgment declaring that his shares in defendant company, subject to a lien or charge thereon in favour of the other residuary legatees for their proper proportions of what, if anything, remained owing by him to the estate of Charles J. Smith, after allowing or crediting payments on account, were liable to be sold for satisfaction of the claims of plaintiffs and other creditors.

We agree with this view of the facts and the law. The evidence establishes that the conveyance was not intended and did not operate to defeat, delay, or hinder plaintiffs and the creditors of Isaac R. Brigham. It was intended merely to give effect to a family arrangement by which the property which was held by the surviving executor of Charles J. Smith was to be transferred to defendant company to be held and dealt with by it subject to the same trusts, rights, and equities as affected it in the hands of the executor. Each beneficiary retained his share or interest to the same extent and subject to the same terms as before. In effect there was nothing more done than the substitution of one trustee for another. The creditors' remedies remained as before. While the property was in the executor's hands, the creditors could not have obtained execution at law against their debtor's share or interest. They were entitled to resort to equitable process, and they have not been deprived of this remedy by the conveyances. On the contrary, as the Chief Justice determined, they are entitled to recourse to the debtor's interest by what may be termed the equitable process of a judicial sale under the direction of the Court. And their remedies in that respect have not been injured or affected by the conveyance.

The assignments of Isaac R. Brigham to Thomas George Brigham and the company, which did assume to deal with and affect Isaac R. Brigham's share or interest, did operate to prejudice, defeat, and hinder plaintiffs and other creditors. These have been declared invalid and have been set aside, and, as far as they are concerned, plaintiffs' remedies are no longer affected by them.

The share or interest of Isaac R. Brigham remains in the hands of defendant company, as it had previously been held in the hands of the executor, not freed in any way by the conveyance, or by anything that has been done, from the claim of the estate imposed by the will of Charles J. Smith, and the plaintiffs' rights as creditors are subject to that claim, as determined by the Chief Justice.

If, therefore, the judgment had been directed to issue in the form indicated, we think plaintiffs would not have had

anything to complain of. But the Chief Justice, apparently overlooking what had been determined as to the amendment, came to the conclusion that in strictness plaintiffs' case had failed, because they did not sue on behalf of themselves and other creditors, and because they did not ask any relief in respect of Isaac R. Brigham's shares in the defendant company, representing his interest in the estate of Charles J. Smith.

But he thought the better course was to give plaintiffs leave to amend so as to make the action one on behalf of themselves and the other creditors, and to state a case on the pleadings for the relief he thought they were entitled to. And he directed that, if plaintiffs elected on or before 15th September to make such amendments, there should be judgment for that relief, but, if plaintiffs did not avail themselves of the leave, the action should be dismissed with costs.

Now, if the conditions imposed had been left in the form indicated by the Chief Justice, plaintiffs need not have felt any difficulty in complying with them. The direction amounted to no more than putting in a formal shape what had been directed at the trial. But, as appears by the judgment subsequently issued, plaintiffs were required not only to make the amendments mentioned, but also to strike out of their pleadings the allegations therein contained as to the conveyance of the land, thus confining them to a claim for the relief granted, and deprivng them of their right to carry the case further upon the question of the effect of the conveyance. This was obviously not intended by the Chief Justice, and should not have been insisted upon. Plaintiffs declined to accept the amendments on these terms, but, by a memorandum filed with the deputy registrar of the Court at Ottawa, accepted so much of these suggestions as required the action to be taken as on behalf of themselves and the other creditors. This was treated as not an election to accept the offer of the Chief Justice, and the action was dismissed with costs.

This result was not in accordance with the Chief Justice's judgment. The amendment as to parties—and probably all amendments necessary to make a case entitling plaintiffs to claim against Isaac R. Brigham's share as an alternative measure of relief—having been allowed to be made during the trial, all that should have been required of plaintiffs was to make these amendments in the record, and thereupon the judgment should have issued in the form indicated by the Chief Justice in his indorsement on the record.

We think plaintiffs are now entitled to be afforded this measure of relief. The judgment as issued should, therefore, be set aside, and in place thereof judgment should issue declaring plaintiffs entitled as declared in the indorsement on the record, and directing a reference to the Master to ascertain the amount of the prior lien or charge in respect of Isaac R. Brigham's indebtedness to the estate, with all the usual and proper directions in such a case. There was much argument, pro and con, on the question whether the amount of the indebtedness exceeded the value of the interest, or whether in fact any indebtedness existed. But we think that is a matter that must be settled in the Master's office. Further directions and costs subsequent to the trial are reserved.

The Chief Justice gave no costs up to and inclusive of the trial. We do not interfere with this, and we think there should be no costs of the appeal.

CARTWRIGHT, MASTER. JANUARY 24TH, 1905.

CHAMBERS.

LANGLEY v. COSTIGAN.

Writ of Summons—Renewal—Ex Parte Order—Withholding Material Evidence—Statute of Limitations.

Motion by defendant John Costigan to set aside an order, made on the ex parte application of plaintiff, renewing the writ of summons for one year.

J. R. Code, for applicant.

A. E. Knox, for plaintiff.

THE MASTER.—The material on which Mr. McAndrew made the order in question was an affidavit of Mr. Knox stating that the writ had been served on the other two defendants, but that plaintiff had been unable to serve the remaining defendant, though efforts had been made to have him served.

This question was dealt with in Canadian Bank of Commerce v. Tennant, 2 O. W. R. 277, 393, 5 O. L. R. 524, also in Williams v. Harrison, 2 O. W. R. 1061, 1118, 6 O. L. R. 685. In both these cases . . . the result of a renewal was, if granted, to bar the operation of the Statute of Limitations. In both . . . it was laid down that such an order could only be rescinded by the Master in Chambers if material

evidence had been withheld from the officer granting the order.

I see nothing of the kind here, so that this motion fails and must be dismissed with costs to plaintiff in cause.

Had the application come before me in the first instance, I think I should have made the order. No question of the statute arises, and, if plaintiff had been obliged to discontinue, it would only have been a question of costs. In this very important particular the present case differs essentially from the two cited and followed.

MACMAHON, J. JANUARY 25TH, 1905.

CHAMBERS.

RE GHENT, GHENT v. GHENT.

Administration Order—Application for—Will—Direction to Executors to Sell—Failure to Sell Real Estate—Legatee—Payment of Sum on Account of Legacy.

Motion by Henry A. Ghent, a son and one of the beneficiaries under the will of Sampson H. Ghent, who died 10th November, 1902, for a summary order for the administration of the testator's estate.

M. G. V. Gould, Hamilton, for the applicant.

W. W. Osborne, Hamilton, for the respondents, the executrices.

MACMAHON, J.—The will is dated 25th October, 1901, and the testator's widow and daughter are appointed executrices. They have taken administration.

The whole estate, real and personal, is scheduled at $48,000, but some portions of the real estate are not likely to realize the amounts at which they have been valued.

The will directs the executrices to sell the real and personal estate, except the household furniture (which he gives to his widow), "as soon as they in their uncontrolled discretion can, and on such terms as to price, time and terms of payment and credit, as to them may seem meet," and out of the proceeds of sale and conversion to pay the debts, and, after payment of $5,000 to his widow, to divide the residue into 7 equal shares, 6 of which are given to 6 of his children therein named, and the other share is given to the applicant, Henry A. Ghent, "less the sum of $3,400, being the value of the farm which I have given him."

There has been realized out of the personal estate and a part of the real estate $18,425, and, after payment of the legacy of $5,000 to the widow, there was in the hands of the executrices $13,425, which, it is admitted, has been divided amongst the legatees other than the applicant.

The affidavits shew that the executrices have endeavoured to sell the remaining parcels of the real estate. The hotel property, which was valued at $22,000, had, it is said, been in occupation of a succession of undesirable tenants, and on the death of the testator, the tenant who was then in possession, having chattel-mortgaged the furniture, etc., left the province. As a consequence, the property had as an hotel been considerably diminished in value, and, it is stated, could not then have been sold at more than half the sum at which it had been valued. The executrices on 1st February, 1903, leased it to one Gray for 5 years, and through his management it is getting back the good reputation it at one time enjoyed.

The 15 acres of land valued at $4,000 is useful only for a quarry, and difficult to sell; and if sold is not likely to realize more than $2,000.

While it is most desirable that the hotel property should be sold without unnecessary delay, it is apparent, from what is disclosed on the material before me, that the executrices have done all they were called upon to do, and they could not have sold the hotel unless at such a sacrifice as would be most detrimental, if not ruinous, to the estate.

Assuming that the estate, when it is got in, will realize $35,000, then each of the 7 shares would represent $5,000; and on this assumption the applicant would when the rest of the estate has been realized, be entitled to $1,600. . . .

As the executrices have received $13,425 for division, they should pay the applicant $500 on his share. At present there is not a case made for administration by the Court, and, on payment of the above sum, the motion will be dismissed without costs.

HODGINS, MASTER IN ORDINARY. JANUARY 26TH, 1905.

MASTER'S OFFICE.

RE BOSTON WOOD RIM CO.

Company—Winding-up—Lien of former Solicitor on Documents — Delivery to Liquidator "without Prejudice"— Payment for Services—Preference over Ordinary Creditors.

Upon a reference for the winding-up of a company the former solicitors for the company asserted a lien upon books

and documents of the company which were in their possession.

C. W. Kerr, for the solicitors.

F. E. Hodgins, K.C., for the liquidator.

Grayson Smith, for a creditor.

THE MASTER.—In the Am. & Eng. Encyc. of Law, vol. 3, p. 448, it is stated that "an attorney's lien on papers or other property of his client in his possession may extend so far as to secure any general balance due for professional services."

And the Cyc. of Law and Procedure, vol. 4, p. 1005, thus summarizes the rule: "The attorney is entitled to protection as an officer of the Court, or as one holding an equity superior to the claims of general creditors."

In the Winding-up Act, sec. 81, sub-sec. 2, this lien is recognized in the following words: "In cases in which any person claims any lien on papers, deeds, writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien."

In this case the former solicitors for the company had certain books and documents in their possession on which they claimed a lien, and an order was made for their production "without prejudice to such lien." Some of the books and documents are not within the rule as to lien, but some are. And Re Capital Fire Ins. Co., 24 Ch. D. 408, illustrates the classes of documents to which the lien attaches.

In that case the Court held that certain of the documents which came into the solicitor's hands before the winding-up were subject to his lien, "and his lien, which was good before the winding-up commenced, is not interfered with by the winding-up order;" adding that "here a good lien was acquired before liquidation" (p. 420).

Boyd, C., in Turner v. Drew, 17 P. R. 475, said: "A solicitor's lien is a right to the equitable interference of the Court not to leave the solicitor unpaid for his services." And Cordery on Solicitors says: "The solicitor by virtue of his retaining lien is entitled to retain the property (documents) till payment of the full amount of his bill subject to taxation" (p. 294).

The former solicitors of the company having produced to the liquidator certain documents which come within the rule

laid down in Re Capital Fire Ins. Co. (supra), on which a good lien had been acquired before the liquidation, are entitled to the benefit of that lien, which, according to the definition given above, extends so far as to secure to them any general balance due to them for professional services.

I may add that the statement in Cordery on Solicitors, p. 299, that the term "without prejudice to his lien (if any)" "does not entitle the solicitor to be paid out of the assets (of a company) in preference to general creditors," is not supported by the case cited, nor by any other case to which I have been referred, and is in conflict with the rule quoted above that the solicitor is entitled to protection "as one holding an equity superior to the claims of general creditors."

MACMAHON, J. JANUARY 26TH, 1905.

CHAMBERS.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Consolidation of Actions — Identity of Parties — Identity of Issues — Stay of Proceedings — Consent to be Bound by Judgment in Earlier Action.

Appeal by plaintiffs from order of Master in Chambers staying proceedings in this action until the final determination of a certain other action between the same parties, in which the writ of summons was issued on 3rd May, 1901, and in which judgment was entered in favour of plaintiffs on 23rd September, 1904.

W. R. Riddell, K.C., for plaintiffs.

E. D. Armour, K.C., for defendants.

MACMAHON, J.—In the action commenced on 3rd May, 1901, plaintiffs claimed certain percentages on the earnings of defendants' railway between 1st January, 1895, and 31st December, 1900. In the present action, which was commenced on 18th November, 1904, plaintiffs claim the like percentages between 1st January, 1901, and 31st December, 1903, the amount claimed being about $2,200.

Mr. Levy, the solicitor for defendants, in his affidavit states that an appeal from the judgment in the first action is now pending in the Court of Appeal, and is expected to be heard at the present sittings of that Court, and that no other question is raised in this action than is raised in the said first

action, and that the bringing of the present action is vexatious and harassing to defendants.

During the argument I suggested that, if the same questions were raised in both actions, defendants should consent to be bound by the judgment of the Court of Appeal, if the second action were stayed. Counsel for defendants, however, considered (notwithstanding the statement in Mr. Levy's affidavit) that a question was raised in the second action which was not raised in the first.

If the questions in both actions are the same, defendants should be bound by the judgment in the first action. If the questions are not the same, then no stay should be granted.

If defendants consent within five days to be bound in this action by the judgment of the Court of Appeal in the first action, the order of the Master in Chambers will be varied accordingly. If such consent be not given, the order of the Master will be set aside with costs in the cause to plaintiffs.

JANUARY 26TH, 1905.

DIVISIONAL COURT.

SOVEREIGN BANK v. GORDON.

Promissory Note — Holder in Due Course — Indorsement in Blank — Special Indorsement by Transferee — Attempted Cancellation and Delivery to Further Transferee—Title—Right of Action—Undertaking—Amendment—Bills of Exchange Act.

Action in the County Court of York upon a promissory note made by defendants for $433.33, dated 19th November, 1901, payable 1st March, 1903, to one G. M. Boyd or order, of which plaintiffs alleged themselves to be the holders in due course.

Defendants denied that plaintiffs were holders of the note, and alleged that the note had been obtained by fraud on the part of the payee.

After issue joined defendants moved to change the place of trial from Toronto to Sault Ste. Marie. The motion was refused upon plaintiffs undertaking to prove at the trial that they were entitled to the rights of a holder in due course, as defined by sec. 29 of the Bills of Exchange Act, and in default that the action should be dismissed.

The action was tried by MORGAN, Jun. J. of the County Court of York, when the following facts appeared:—

G. M. Boyd, the payee of the note, indorsed it in blank and delivered it to a firm of Graham Bros., about 10 months

before it became due, and Graham Bros. then delivered it to the Standard Bank of Canada at their office at Stouffville, as collateral security, with other notes, for a debt of $13,800 owed by them to that bank. The manager of the bank, upon receiving this note, stamped on the back, over the blank indorsement of G. M. Boyd, the words "Pay Standard Bank of Canada or order," thus converting it into a special indorsement to that bank. On 23rd April, 1903, plaintiffs, at their Stouffville office, agreed to take over from the Standard Bank the account of Graham Bros., and paid the Standard Bank the $13,800, and received from them the collateral notes held by them, including that sued on in this action. The managers of the two banks met to complete the transfer of these collateral notes, and, as each note was handed to the manager of plaintiffs, he stamped the words "Pay to the order of the Sovereign Bank of Canada" over the words already there, "Pay Standard Bank of Canada or order," so as partly to obliterate them, but not so that both indorsements could not be plainly made out. The manager of the Standard Bank initialled the alteration effected by the second stamp.

Upon these facts the Judge found that the intention of the two managers was to transfer to plaintiffs all the title of the Standard Bank to the note, and that the effect was that plaintiffs became the holders of the note and entitled to maintain the action. He found that the note was duly made by defendants, and directed judgment to be entered for the amount of it, with interest and costs. The terms of the order made upon the motion to change the venue were fully stated to the Judge at the opening of the case.

Defendants appealed from the judgment.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

Grayson Smith, for defendants.

S. B. Woods, for plaintiffs.

FALCONBRIDGE, C.J.—. . . The vital question for decision in this case is whether plaintiffs succeeded in proving what they undertook to prove when the motion to change the place of trial was dismissed.

I agree with the trial Judge in holding that the transaction was intended by the banks to be a transfer from the one to the other, and that plaintiffs are holders in due course. The mode adopted, no doubt with a view of saving a little

time and trouble, was a very rough and ready one, and one that, in view of the conflict of judicial opinion on the subject, is not likely to be adopted in the future.

Formerly when a bill was indorsed in blank, its negotiability could not afterwards be restrained by a special indorsement: Smith v. Clarke, 1 Peake 295, 1 Esp. 179; Walker v. Macdonald, 2 Ex. 527. And in the United States it has often been held that where the draft or bill was indorsed by the payee in blank, and was by the next holder indorsed specially, the first indorsement being in blank, the bill was afterwards transferable by mere delivery, and that a holder by delivery may strike out the special indorsement and in a suit against the acceptor declare and recover as the indorsee of the payee: see Mitchell v. Fuller, 15 Penn. R. 268; Johnson v. Mitchell, 50 Tex. 212, stating the rule, "If a bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawee, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer, though as against the special indorser himself title must be made through his indorsee;" Bank of Utica v. Smith, 18 Johns. (N.Y.) 229 (where, however, the holder filled up the blank merely for the purpose of collection); Haversham v. Lehman, 63 Ga. 80.

It is said, however, that since the Bills of Exchange Act this is no longer law: Byles on Bills, 16th ed., p. 178, note (c); Maclaren, 3rd ed., p. 67.

I rest my judgment, therefore, on the ground taken by the trial Judge.

Appeal dismissed with costs.

BRITTON, J., gave written reasons for the same conclusion, basing it on the ground that the Standard Bank had the right to cancel or alter their special indorsement, and referring to Grimes v. Piersol, 25 Ind. 246; Vincent v. Horlock, 1 Camp. 442; Walters v. Neary, 20 Times L. R. 555; Porter v. Cushman, 19 Ill. 572; Clerk v. Pigot, 12 Mod. R. 192.

STREET, J., dissented, setting out the facts as above, and holding upon them that plaintiffs were not holders in due course, but that the legal title was still in the Standard Bank, and on account of the undertaking of plaintiffs, the Standard Bank could not be added as plaintiffs by amendment.

MACMAHON, J. JANUARY 28TH, 1905.

CHAMBERS.

NISBET v. HILL.

Summary Judgment — Promissory Note — Defence—Collateral Security—Sureties—Extent of Liability.

Appeal by plaintiff from order of Master in Chambers dismissing plaintiff's application for summary judgment under Rule 603.

F. Arnoldi, K.C., for plaintiff.

W. J. Tremeear, for defendants.

MACMAHON, J.—The action is on a promissory note for $10,000, dated 23rd June, 1904, made by defendants jointly and severally, payable 6 months after date to the order of J. B. Hill & Co., and by them indorsed to plaintiff.

The firm of J. B. Hill & Co. was indebted in sums aggregating $18,190.35 to several persons and firms in Toronto, who were pressing for security, and J. B. Hill & Co., on 23rd June, 1904, wrote to plaintiff as follows: "I beg to submit the following offer or proposition in consideration of my present indebtedness to (four firms or companies), viz., I agree to remit you weekly, commencing on Monday 27th June, 1904, the sum of $350, and a like sum or thereabouts on the Monday of each and every week thereafter, so that you will have on hand the sum of $1,500 for distribution during the following months, July and August, and will so increase my weekly remittances on the Monday of each week during the months of September, October, November, and December, 1904, that you will have on hand the sum of $2,000; the said moneys to be held by you in trust for pro rata distribution among the above named creditors, and I will give you a promissory note made jointly and severally, Geo. Hill and W. G. Hill, indorsed by ourselves, for the sum of $10,000, dated 23rd June, 1904, at 6 months after date, to be held by you in trust to collaterally secure the payment of our indebtedness to the above named creditors. If they accept this proposition, we will give them any agreement they may deem necessary."

This offer was accepted by the creditors named, and the note now sued upon was forwarded to plaintiff.

According to a statement prepared by plaintiff and embodied in his affidavit, the firm of J. B. Hill & Co. had between the date of the note and December, 1904, paid $7,300.

Defendants' contention is, that, although the note was given as collateral security for the payment of the whole

indebtedness of J. B. Hill & Co., of $18,190.53, yet defendants, being merely sureties, are liable only for a pro rata share of the said indebtedness.

As the note is collateral security for the whole indebtedness of J. B. Hill & Co., and there still remains nearly $11,000 due on the indebtedness, what is sought to be set up cannot form a defence to the action.

Appeal allowed with costs, and judgment granted for plaintiff against defendants for the amount of the note, with interest and costs.

JANUARY 28TH, 1905.

DIVISIONAL COURT.

THOMPSON v. CITY OF CHATHAM.

Municipal Corporations — Contract for Municipal Work — Variation—Necessity for By-law—Mode of Payment for Work.

Appeal by defendants from judgment of County Court of York in favour of plaintiff in an action to recover $400 retained by defendants in lieu of a bond to guarantee defendants in respect of possible defects in electrical machinery supplied by plaintiff.

The appeal was heard by BOYD, C., MACMAHON, J., IDINGTON, J.

E. E. A. DuVernet and W. E. Gundy, Chatham, for appellants.

H. L. Drayton, for plaintiff.

BOYD, C.—The argument that the contract, being manifested in and adopted by by-law, could not be changed in some details unless by means of another by-law, does not appear to be well founded, having regard to the circumstances and dealings in this case. The contract had been completed to the satisfaction of the engineer named, and payment of the whole price recommended upon the furnishing of a written guarantee by plaintiff to make good certain defects if they should develop within a given time. Had the bond been given, the whole contract price of $1,675 would have been then paid to plaintiff. But, instead of the bond, it was agreed on both sides that $400 of the price should be retained by defendants to make good any such defects if default was made by plaintiff in remedying the same. This could be well carried out without any further by-law; it was, without futher by-law, a mere modification of the

manner of payment; and the right to do so is more than covered in point of authority by Canadian Pacific R. W. Co. v. Township of Chatham, in its various stages (25 O. R. 465, 22 A. R. 330), and as finally reported in 25 S. C. R. 608.

In brief, and in substantial effect, the $400 retained was the money of plaintiff—to be paid him if no default was made within 5 years on his part in providing for the re-armatures, and if the difficulty arose from inherent defect attributable to temperature or insulation.

That was a question of fact, upon which there is no good reason to disagree with the conclusions reached by the Judge after hearing the witnesses and a patient examination of the case, as set forth in his written opinion.

Appeal dismissed with costs.

MACMAHON, J.—I agree.

IDINGTON, J., gave written reasons for the same conclusion.

JANUARY 28TH, 1905.

DIVISIONAL COURT.

SCHWOOB v. MICHIGAN CENTRAL R. W. CO.

Master and Servant—Injury to Servant—Consequent Death—Negligence—Workmen's Compensation Act—Defect in Engine—Repair—Inspection—Reasonable Care—Person Intrusted by Master to Provide Proper Appliances—Evidence for Jury—New Trial.

Appeal by plaintiff from judgment of MEREDITH, J., after trial with a jury, dismissing the action, on the ground that plaintiff had not made out a case for the jury.

The action was brought by the widow and administratrix of the estate of Robert H. Schwoob to recover damages for personal injuries which, as she alleged, were sustained by him owing to the negligence of defendants, and resulted in his death, and it was founded on the Workmen's Compensation Act.

T. W. Crothers, St. Thomas, for plaintiff.

D. W. Saunders and E. C. Cattanach, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), was delivered by

MEREDITH, C.J.—The deceased was in the employment of defendants as fireman on locomotive engine No. 480, which was of what is known as the "Atlantic" type, and was

provided with arch flues or hot water pipes which passed through the fire box and had their ends inserted into the hot water tank surrounding the fire box.

On 17th November, 1903, while the engine was on its journey from Windsor to Niagara Falls, and at a point about 75 miles east of St. Thomas, one of these tubes drew out of the tank, with the result that the boiling water and steam from it escaped, and the deceased was so badly scalded that he died a few hours afterwards.

Plaintiff's case as presented at the trial was: (1) that the use of arch flues or hot water pipes was improper, because, as it was attempted to be shewn, it was highly dangerous to use them, owing to their being very liable to draw out; (2) that this danger was increased by an unsafe and improper method of keeping the pipes in place, which was adopted and in use by defendants; and (3) that the pipe which drew out when deceased received his injuries was insecurely and negligently fastened into the side of the tank to which it was attached.

It was also alleged that defendants had not made proper provision for the inspection of these appliances; and it was contended that, having regard to the liability of the hot water pipes to become displaced and to draw out, special care and vigilance should have been exercised to see that they were always in good and efficient repair and condition.

It appeared in evidence that the pipe which drew out when the deceased was injured had been put in, in defendants' workshop, to replace one that had become defective, but it was not shewn by whom this was done or in what circumstances the engine was sent to the workshop to be thus repaired.

There was evidence that in making this repair the pipe had not been properly secured, and the inference might be drown that it was owing to this that the pipe drew out.

The trial Judge at the close of plaintiff's case ruled that negligence for which defendants were answerable had not been shewn.

We concurred in the ruling as to the 1st and 2nd grounds of complaint, and disposed of that branch of the case on the argument. . . .

As to the 3rd ground, the ruling proceeded upon the view that the negligence charged was the negligence of a fellow-servant of deceased, and that for that negligence defendants were not answerable either at common law or under the Act.

On the argument before us counsel for plaintiff relied upon sub-sec. 1 of sec. 3 and sub-sec. 1 of sec. 6 of the Workmen's Compensation Act, in support of the 3rd ground

of complaint, his contention being that the person who made the repair in defendants' workshop was a person intrusted by them with the duty of seeing that the condition of the engine, in as far as the taking out of the defective pipe and replacing it by another were concerned, was proper, and it was also contended that there was evidence to justify the inference being drawn by the jury that either the system in operation on defendants' railway was defective in not providing for careful inspection, at frequent intervals, of the pipes which ran through the fire-box, or, if such an inspection was provided for, that those intrusted with the duty of making it were negligent in the performance of that duty, and that this negligence was the cause of deceased being injured.

In endeavouring to ascertain what is the effect of sub-sec. 1 of sec. 3, as qualified by sub-sec. 1 of sec. 6, it is necessary to consider what is at common law the duty of the employer as to the matters with which the sub-sections deal. What that duty is, is thus stated by Lord Herschell in Smith v. Baker, [1891] A. C. 315: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk:" p. 362.

It is also clear that at common law the employer is not bound in person to execute the work in connection with his business, but he is bound, if he does not personally superintend and direct the work, to select proper and competent persons to do so, and to provide them with adequate materials and resources for the work, and that, having done this, he has done all that he is bound to do, and for the negligence of the persons so selected he is not answerable: per Lord Cairns in Wilson v. Merry, L. R. 1 Sc. App. 326, 332.

One of the duties flowing from this obligation of the employer is to take due and reasonable care that machinery which, if out of order, will cause danger to his employee, is safe and in such a condition that the employee may use it properly without incurring unnecessary danger. What is due and reasonable care is a question of degree in each case, and depends upon the nature of the machinery, its liability to get out of order, and the danger incurred by the employee if he is suffered to use it when not in a condition to be safely used: Murphy v. Phillips, 24 W. R. 649, 35 L. T. N. S. 477.

The employer who omits to discharge this obligation to his employee, either by performing it personally or by employing a competent person to do it, is liable at common law

to answer in damages to his employee (unless the employee himself knew of the defect) for any injury happening to him owing to a defect in the condition of the machinery which, by reasonable examination from time to time, might have been discovered.

The purpose of sub-sec. 1 of sec. 3 and sub-sec. 1 of sec. 6 was, in my opinion, to take from the employer this immunity from liability for the neglect of the person to whom he has intrusted the duty of providing and maintaining in proper condition the appliances for the work in which his employees are engaged, but it was not intended otherwise to affect the common law liability of the employer, and it does not do so.

If, therefore, defendants in this case did not provide for a proper examination from time to time of the locomotive upon which the deceased was working, and the defect in it which caused the injury to him would have been discovered had such an examination been made, they are, in my opinion, answerable for a breach of the duty which they owed to deceased of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and if, on the other hand, they did provide for such an examination, if the defect could have been discovered they are answerable for the negligence of the person or persons whom they intrusted with the performance of that duty.

Defendants are also, in my opinion, answerable for the negligence of any person whom they had intrusted with the duty of seeing that the locomotive was repaired so as to make it fit to be safely used, for such a person would be, I think, a person intrusted by them with the duty of seeing that the machinery was proper, within the meaning of sub-sec. 1 of sec. 6: Markle v. Donaldson, 7 O. L. R. 376, 3 O. W. R. 147, affirmed in appeal, 4 O. W. R. 377.

The evidence adduced at the trial as to the means adopted or in use by defendants to ensure the proper discharge of the duty which they owed to deceased was very meagre, but there was enough, in my opinion, to entitle plaintiff to have her case passed upon by the jury.

There was, I think, evidence which, if believed, would support a finding by the jury of negligence in the discharge of the duty which defendants owed to deceased, and that deceased came to his death owing to that negligence. . . .

Appeal allowed and new trial ordered; costs of appeal and of last trial to be costs in the cause; upon the new trial it is not to be open to plaintiff to rely upon the 1st and 2nd grounds of complaint, and as to these the action remains dismissed.