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WHAT CONTRACTS OF EMPLOYMENT ARE BINDING UPON INFANTS.

1. **Contracts for the services of infants, where the father contracts with the employer.**—At common law, a father may assign the services of his son to another for a consideration to enure wholly to the father[1].

[1] *Day* v. *Everett* (1810) 7 Mass. 145, where it was held that the Massachusetts statute of 1794, c. 64, did not take this power from the father. All contracts of service, legal at the common law, remained legal after the statute had been passed, but the only remedy, which either party could have, was upon the contract, and not under the statute, unless the provisions of the statute were complied with in forming the contract.

It was stated as "undoubted law" that, if a parent contract for the services of his minor child, in consideration of a remuneration to the latter, the contract is valid, and that the child may maintain an action for the breach of it in his own name. *Eubanks* v. *Peak* (1831) 2 Bailey (S.C.) 407.

In an early Pennsylvania case it was held that a parent had no power to bind his minor child as a servant, so as to render him subject to the penalties imposed by a statute upon absconding servants. *Resp* v. *Keppele* (1793) 2 Dall. 197. Presumably the decision would have been different if the effect of the contract had not been to place the infant in a position in which he became liable to punishment. Whether this supposition is or is not well founded, the case seems to be antagonistic to those in which the English courts have held infants to be amenable to the provisions of similar statutes. See § 4, *post*.

Such an assignment constitutes in effect a license by the father to undertake the custody of his son, and employ him in the manner stipulated, and gives the assignee a right for the time being to the services of the son[2]. An agreement of this description ceases to be binding on the minor when he arrives at full age[3]. It is also terminated by the death of the father[4], unless it is made with reference to some statutory provision which allows parents to bind their children to service until they reach their majority; in which case the terms of the statute must be strictly complied with in order to create a continuing obligation[5].

Where a minor son is so hired out by his father the employer cannot, without the assent of the father, make a new contract with the minor himself which will have the effect of superseding the original contract[6]. This rule is applicable, although that contract provides that the employer may discharge the boy if he does not like him. It is not deemed to be a discharge according to the spirit of the contract, if he tells the boy that he can not keep him under its terms, and then makes a new and different agreement, without the knowledge of the father[7].

A person to whom the employer of a minor has lent the latter's services has no concern with the efficacy or inefficacy of the contract between the father and the employer of the minor, and cannot set up the invalidity of such contract in an action by the employer to recover compensation for the services[8].

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[2] *Campbell* v. *Cooper* (1856) 34 N.H. 49.

[3] *Day* v. *Everett* ('810) 7 Mass. 145.

[4] *Day* v. *Everett* (1810) 7 Mass. 145; *Campbell* v. *Cooper* (1856) 34 N.H. 49. In the latter case this rule was explained as resting upon the principle, that "the common law, while it imposes upon the father no obligation to make provision for the support or education of his infant children after his decease, does not confer upon him the right correlative to it,—to bind them to service after his decease."

[5] *Campbell* v. *Cooper* (1856) 34 N.H. 49.

[6] *McDonald* v. *Montague* (1858) 30 Vt. 357.

[7] *McDonald* v. *Montague* (1858) 30 Vt. 357.

[8] *Johnston* v. *Bicknell* (1843) 23 Me. 154.

2. —where the services are to be rendered to the infant's father.— There is ample authority for the doctrine that the relation of parent and child does not destroy the capacity to contract, and that it is therefore competent for an infant to become the servant of his father, under an express contract,—at all events in regard to any services which are not obligatory by reason merely of the relation of parent and child[1]. This doctrine obviously holds, irrespective of the question whether the infant has or has not been previously emancipated; for if the infant has not been emancipated before the contract is entered into, the mere fact of the father's agreeing to take him as a servant and pay him wages amounts in itself to an emancipation.

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[1] *R.* v. *Chillesford* (1825) 4 B. & C. 94 (a case in which the infant was held to have acquired a settlement by his service). Littledale, J. argued thus: "There is by law a species of service due from a son or daughter to the parent, which, as to the latter, is the foundation of the action of seduction, and there it is not necessary to prove actual service; and if there be any species of service due by law from the child to the parent, why may not the obligation of serving the parent be extended by allowing him to hire the child at certain wages for a specific time? It is admitted that an infant may hire himself to a third person, but it is said, that being already under the control of the parent, and owing some services to the parent, the child cannot make a contract with him; but there is no reason why a child may not contract to render to a parent other services than those which are due in consequence of the relation of parent and child." Bayley, J. concurred, pointing out that the capacity for contracting clearly existed in the case of emancipated children, or of natural children, or of step-children, *Rex* v. *St. Peter's Dorset*, Burr. Sett. Cas. 515. If there was a *bonâ fide* contract it produced new rights and new relations. It gave the father a new right of control, and the child a right to wages, which was beneficial to him; and it also gave him a settlement in that parish, where he served under the contract.

Services rendered under an express contract to her father by his emancipated daughter during her minority are a good consideration for a conveyance of land to her. *Kain* v. *Larkin* (1892) 131 N.Y. 300, 43 N.Y.S.R. 107, 131 N.Y. 300, 30 N.E. 105, reversing 42 N.Y.S.R. 571, 17 N.Y. Supp. 223.

A promise by a father to his infant daughter to pay her so much for labour to be thereafter performed by her for him is not void. *Fort* v. *Gooding* (1850) 9 Barb. 371.

In a Canadian case it was doubted, whether if an infant hire himself for wages to his parent by an express contract, the contract is binding on the infant. *Perlet* v. *Perlet* (1857) 15 U.C.Q.B. 165. Robinson, C.J. intimated strongly that, in his opinion, a mother is entitled to the labour of her infant children while they live with her and are supported by her, and that an agreement by her infant son to labour for her was a contract not sustained by a valuable consideration. The English case above cited was evidently not brought to the attention of the learned judge. Nor did he give due regard to the circumstance that a parent may emancipate his child, and so relinquish his parental rights to the labour of the child.

3. —where the infant contracts in his own behalf with a stranger.— An infant who has been emancipated by his parent acquires, as a necessary result of the emancipation, the right to enter into contracts of service on his own behalf[1]. But the authorities also shew that an unemancipated infant is entitled to make such contracts without the actual concurrence of his parent[2]. Any contract which

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[1] It has been held by an American court that, by marrying with the consent of his father, an infant is emancipated only to the extent of being enabled to make contracts for his own services, and to apply his wages to the support of his family;—that otherwise the marriage does not enlarge his power to contract, nor deprive him of the privilege of avoiding all his contracts, except those for necessaries. *Burns* v. *Smith* (1902) 29 Ind. App. 181, 64 N.E. 94. The exception to the power of avoidance must be extended, so far as regards jurisdictions in which the English doctrine is controlling, to contracts which are beneficial to the infant. See § 41, *post.*

[2] *R.* v. *Chillesford* (1825) 4 B. & C. 95; *Nashville R. Co.* v. *Elliott* (1860) 1 Coldw. (Tenn.) 611; *Houston R. Co.* v. *Miller* (1879) 51 Tex. 270.

In one case it was laid down by Yates and Willes, JJ. that the pauper in question, being an infant, could not hire himself out for a year, so as to acquire a settlement. *R.* v. *All Saints* (1770) Burr. Sett. Cas. 656. But this ruling is contrary to that made in *R.* v. *Chillesford, supra.*

In a Scotch case the judges were all of the opinion that, if a contract of apprenticeship entered into by a minor was not shewn to be prejudicial to him, it was not avoided by the fact that his father had not given his consent to its execution. *Stevenson* v. *Adair* (1872) 10 Sc. Sess. Cas. 3d series, 919. The same doctrine was taken for granted in the earlier case of *Campbell* v. *Baird* (1827) 5 Sc. Sess. Cas. 1st series, 335.

In one Quebec case, we find it laid down that an infant has the right to hire himself out as a servant. *Colleret* v. *Martin* (Quebec, 1886) 9 L.N. (Rec. Ct.) 212. But in another it was stated, *arguendo*, that the binding of an infant is not valid without the consent of his parent. *Ex parte Peletier* (1880) 3 L.N. (S.C.) 331. Possibly the former ruling may be reconciled with the latter on the footing, that the parent's consent is presumed to have been given in all cases where it is not shewn to have been expressly withheld.

The enlistment of an infant in the army or navy is binding on him at common law, the parental authority being suspended, though not annihilated. *R.* v. *Rotherfield Greys* (1823) 1 B. & C. 345, followed in *Com.* v. *Gamble* (1824) 11 S. & R. 93; *United States* v. *Bainbridge* (1816) 1 Mason, 71; *United States* v. *Blakeney* (1847) 3 Gratt. 405 (declaring that the infant would not be released either on his own application or on that of his father or on that of his master, or on that of all three combined); *Com.* v. *Murray* (1812) 4 Binn. 487 (enlistment in navy held binding, on account of its beneficial and necessary character under the circumstances).

The Military and Naval Discipline of Victoria, 1870, No. 389, § 2, provides that the Governor of the Colony may engage the services of any person to serve in the military and naval forces of the Colony on certain specified terms. Held, that an infant is a "person" within this section, and may enter into an engagement to serve, without his father's consent. *Re Hayes* (1873) 4 Austr. J.R. 34 (application by parent for infant's discharge,—not entertained).

is thus entered into by the infant on his own behalf stands good, until the latter asserts his paramount right to demand the services of his child[3], or, supposing the contract to belong to the voidable class, until it has been disaffirmed by the infant himself[3].

As infancy is a personal privilege, of which no one can take advantage but the infant himself[4], the employer, if himself an adult, continues to be bound by a voidable contract of service, as long as the infant forbears to exercise his right of disaffirming it[5].

That the school law of Wisconsin (Laws of 1872, ch. 101) contemplates that a contract by an infant to teach in a school shall be made with the teacher, and not with the father was the opinion of the court in *Monaghan* v. *School Dist. No. 1* (1875) 38 Wis. 100.

[3] *Nashville R. Co.* v. *Elliott* (1860) 1 Coldw. (Tenn.) 611, 78 Am. Dec. 506 (infant held to occupy the same position as an adult servant in respect to injuries received in the course of his employment); *Houston R. Co.* v. *Miller* (1879) 51 Tex. 270 (same point).

In *United States* v. *Bainbridge* (1816) 1 Mason, 71, it was said, *arguendo*, that an infant's contract which is voidable by the common law cannot be confirmed or avoided by any assent or dissent of his parent, and that it is binding or not solely at the election of the infant himself. But this statement seems to be clearly erroneous, as ignoring the superior right mentioned in the text, a right which may be suspended by the emancipation of the infant, but which is susceptible of revival at any time.

[4] Bacon's Abr. Infancy (1) 4; Leake, Contr., p. 476; Wharton, Contr. § 32; 1 Parsons, Contr, p. *330.

[5] In *Woolston* v. *King* (1813) Penn. (N.J.L.) 764, where suit was brought by the plaintiff, after he had come of age, for the failure of the defendant to perform his agreement to teach him his trade, the court rejected the contention that there was no consideration for the agreement, as the plaintiff was an infant when it was made.

A., while still a minor, contracted with B. to work for certain wages, and to be instructed in a trade, till the age of twenty-one, if the parties should so long agree. Under this agreement, he worked for B. some time, and then left him. After A. became of full age, he brought an action to recover wages at the stipulated rate. *Held*, that a non-suit, based on the theory that, as A. was under age when the contract was made, B. was not bound by it, was erroneous. *Voorhees* v. *Wait* (1836) 15 N.J.L. 343.

Where an agreement, in writing, intended to be an indenture of apprenticehip, was entered into with an adult, by an infant and his parent, but was not executed, as prescribed by a statute (S.C. Act of 1740), it was held that, as a contract between the adult and the infant, alone, it was binding on the former, at common law; and that the infant, on performing the services stipulated on his part, might maintain an action for a breach of the agreement on the part of the adult. *Eubanks* v. *Peak* (1831) 2 Bailey L. 497.

An infant who had rendered services for three years under a contract of apprenticeship, was held entitled to maintain an action for compensation,

A contract of hiring made by an infant in the naval or military service in inconsistent with the duties which he owns to the state and therefore void.[8]

4. By what contracts made in his own behalf an infant is bound. English doctrine.—(*a.*) *Generally.* In the view of the English courts there are two distinct classes of contracts of service which are *primâ facie* binding on infants:—

(1) Those which he enters into for the express purpose of procuring necessaries[1]. In this instance, if the servant is an apprentice who has bound himself by deed for the payment of a premium, he can be compelled to perform his stipulation. "But the case must be treated just as if there were no deed. The court must inquire whether the things in question were in fact supplied to the infant, and whether, according to the ordinary rule, that which was supplied was necessary. The court must do exactly what it would do, if there were no deed, and what it certainly

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although the contract would not have been binding upon him, owing to the fact that the provisions of the statute as to apprentices had not been complied with. *Davies* v. *Turton* (1860) 13 Wis. 185. The theory advanced on behalf of the defendant was that the statute, (Ch. 81, stat. of 1849; Ch. 113, Stat. of 1858), was inconsistent with, and abrogated the rules of the common law, and prescribed the only method by which contracts for the hire of infants could be made, the result being, that the agreement sued upon was rendered void as to both the parties by their failure to comply with the statute. But the court said: "We cannot take this view of the statute. It appears very clearly to us that it was not the design of the legislature to interfere with the benign doctrines of the common law, but to add to the privileges of infants, by enabling them, with the advice and consent of some experienced and discreet person of full age, to make contracts which away from them advantages which they already possessed, but to add new ones; it was, by removing disabilities which existed at common law, to give them the benefits which would arise from possessing the capacity of persons of full age, and not to destroy the liability of parties who dealt with them, according to previous regulations. The legislature did not mean, any more than the authors of the common law, to confine them to any rigid or technical mode of proceding, nor to leave them at the mercy of those who might desire to cheat or defraud them. The power, under certain circumstances, to bind themselves during minority, for the purpose of being nurtured and educated, and trained to the exercise of some useful trade or calling, was considered beneficial, and it was to confer it that the statute was enacted."

[8] *R.* v. *Chillesford* (1825) 4 B. & C. 94, per Abbott, C.J.

[1] See authorities cited in note 3.

would not do in the case of an ordinary deed not given by the infant'"[2].

(2) Those which appear to be in the whole for his benefit. "It has always been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which a plea of infancy is a complete defence. The question has always been, whether the contract, when carefully examined in all its terms, is for the benefit of the infant'"[3]. The general principle

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[2] Lord Esher, M.R. in *Walter* v. *Everard* (C.A. 1891) 2 Q.B. 369, 65 L.T.N.S. 443. In that case the defendant, being then seventeen years old, bound himself to the plaintiff to learn the business of an auctioneer etc., for the term of four years, and covenanted to pay at the end of the term the balance of the premium left unpaid when the contract was executed. The jury found that the deed was a provident and proper arrangement for the defendant, if he wished to learn auctioneering etc., and that the premium was a fair and reasonable one. The defendant insisted that as the covenant was contained in a deed which was executed at a time when he was an infant, he was not bound by the deed even after he had come of age. The Lords Justices, however, were unanimously of the opinion that an infant can be sued upon his single bond, that is, a bond without a penalty—given for necessaries supplied to him, provided it is shewn that the thing for the price of which the action is brought was necessary, and the charge made for it was reasonable. The conclusion of the jury that the education given was a necessary was approved of.

For cases recognizing the rule that an infant cannot be sued on his covenants of indenture, see note 9, *infra*.

[3] *Clements* v. *London & N.W. R. Co.* (1894) 2 Q.B. 482.

"From a very early date it has been held that one exception as to the incapacity of an infant to bind himself relates to a contract for his good teaching or instruction whereby he may profit himself afterwards, to use Lord Coke's language. There is another exception, which is based on the desirableness of infants employing themselves in labour; therefore, where you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be, *primâ facie*, binding upon an infant." *De Francesco* v. *Barnum* (1890) 45 Ch. Div. 430, 438, 439, per Fry, L.J.

The precise words of Lord Coke here referred to (Co. Lit. 172a) are quoted in the following passage from the judgment of Martin, B. in *Cooper* v. *Simmons* (1862) 7 H. & N. 707, where other earlier authorities are also mentioned: "'An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards.' It does not say that there is any particular mode of binding an infant apprentice, but it says generally that an infant may bind himself 'for his good teaching or instruction, whereby he may profit himself.' The question is, whether this contract is for the benefit of the infant, for I find it laid down by Eyre, C.J., in *Keane* v. *Boycott*, 2 H. Black. 512, that for those things which are necessary for an infant, he may bind himself even by deed, and that the court only makes void such contracts as they can pronounce to be to his prejudice. And in a note to the 8th edition of Sheppard's Touchstone, p. 56, it is said: 'Deeds or contracts made by an

upon which the courts proceed in dealing with this class of agreements is that "a contract is binding on an infant, unless it is manifestly to his prejudice, or at least so plainly so that the court can say that it is to his prejudice; it is then not voidable only, but absolutely void"[4].

(*b.*) *Enforcement of beneficial contracts in summary statutory proceedings.*—It is well settled that, by entering into a beneficial contract of service, an infant becomes amenable to the summary remedies provided by the various statutes relating to masters and servants[5].

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infant from which no apparent benefit can arise to him, are considered as absolutely void. But such as he may derive a benefit from are only voidable.'"

The competency of an infant to bind himself as an apprentice rests upon the ground that such a contract is "manifestly for his benefit." *R.* v. *Great Wigston* (1824) 3 B. & C. 484, per Abbott, C.J.; *R.* v. *Arundle* (1816) 5 M. & S. 257. See also *Cooper* v. *Simmons* (1862) 7 H. & N. 707, (p. 721).

The decision of Manisty, J. in *Fellowes* v. *Wood* (1888) 59 L.T.N.S. 513, proceeds upon the broad principle that "an infant may enter into a contract which is beneficial to himself, and is bound by it."

As it is expressly provided in § 2 of the Infant's Relief Act of 1874, that the "enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable," the obligatory quality of a beneficial contract of service has not been affected by the passage of that statute. See *Fellowes* v. *Wood*, *supra*.

The doctrine that beneficial contracts of hiring are binding upon an infant servant is obviously of a much broader scope than that which declares his contracts for necessaries to be valid. It has been stated by Mr. Eversley, in his work on Dom. Rep. p. 753, that the former principle is an extension of the latter. But it seems to be at least equally probable that the latter principle is merely a special application of the former.

[4] *Cooper* v. *Simmons* (1862) 7 H. & N. 707, per Wilde, B., with whom Martin, B. agreed on this point. Sir F. Pollock, Contr. p. *66 has, however expressed the opinion that the principle is too strongly stated in this passage.

In an earlier case it was said by Abbott, C.J., to be "a general rule of law, that an infant cannot do any act to bind himself, unless it be manifestly for his benefit." *R.* v. *Great Wigston* (1824) 3 B. & C. 484.

In *Wood* v. *Fenwick* (1842) 10 M. & W. 195, Alderson, B., remarked, during the argument of counsel: "The court must see that on the whole he derives a benefit under the contract. Here he is hired and receives wages. It is clear he derives a benefit, though he may also be subject to some inconveniences, but that is not necessarily so."

[5] In *R.* v. *Chillesford* (1825) 4 B. & C. 94, where an infant was held to have acquired a settlement under a contract of service, Bayley, J. observed, *arguendo*: "An infant may make a contract for his own benefit; he may therefore make a contract for hiring and service, for that will be beneficial to him. It will give him a right to sue for wages. If he does

His liability to be called to account in a proceeding of this

not perform his contract, although no action may be maintained against him, he will be liable to the statutable regulations applicable to masters and servants." Having regard to the remark of Abbott, C.J., in this case, that "the contract of an infant, made for his own benefit, according to the general principles of law is not void, but voidable only at the election of the infant," it is possible that these words of Bailey, J., might be construed as meaning merely that, while the contract is allowed by the infant to subsist, he is subject to the statutable regulations.

A similar point of view seems to be indicated by an earlier case in which the court, although holding that a settlement had been acquired by an apprenticeship deed by which an infant had bound himself till his majority to learn husbandry, seems to have regarded the contract as voidable. *R.* v. *St. Petrox* (1791) 4 T.R. 196, 2 Bott. P.L. 377, Cald. 444.

But the obligatory force of the contract is clearly and categorically asserted in later cases.

In *Wood* v. *Fenwick* (1842) 10 M. & W. 204, where an infant was prosecuted under the act, 4 Geo. 4, ch. 34, § 3, for abandoning his contract, the actual decision turned upon technical points of procedure. But during the argument of counsel, Lord Abinger, C.B. remarked: "There can be no doubt that, generally speaking, a contract by an infant to receive wages for his labour in binding upon him." In reply to the contention, that an infant may at all events determine a binding contract at any time, he also said: "That would be a contradiction in terms; because to say that he may contract, is to say that he may bind himself by the contract; how then can it be determined at his election the next day."

In *Cooper* v. *Simmons* (1862) 7 H. & N. 707, an infant apprentice was held liable to be convicted under the statute 4 Geo. 4, ch. 34, § 3, for absenting himself from service without leave. Discussing the provisions of the deed, Martin, B. said: "How can we say that it must necessarily be a disadvantage to an infant to bind himself apprentice for a certain term, if his master lived so long, and in the event of his death to continue apprentice with his executor, provided he carries on the same business in the same town? It is possible that the executor may be a person with whom it may not be beneficial for the apprentice to continue; on the other hand it may be of the greatest benefit to the apprentice to remain in the service of the executor; and we must clearly see that it is not before we can avoid the contract. Wilde, B. thus stated his views: "It was said, and I think correctly, that the contract must be looked at with reference to the time when it was made; and regarding it in that view, the question is whether such a contract as this will bind an infant. . . . It is laid down in the books that the binding of an infant as an apprentice is beneficial to him. Then is it less beneficial by reason of this clause, perhaps unusual, certainly not universal, by which he binds himself to serve the executors? That seems to me to make the contract more beneficial; at all events, I cannot say that the contract is manifestly to his prejudice."

It has also been laid down that an indenture of apprenticeship cannot be avoided by the mere act of the apprentice absenting himself from his master's service. He must formally declare his intention to depart. *Gray* v. *Cookson* (1812) 16 East, 13, citing an unreported decision of the Court of King's Bench, *R.* v. *Evered* (1777).

It has been held that the provisions of the Master and Servants Act of Newfoundland (Consol. Stat. Ch. 109) cannot be engrafted on an infant's contract of service, and that he was not subject to the penalties imposed by that act for breaches of it by servants, although it was conceded that the contract belonged to the beneficial class. *Newfoundland Furniture Co.* v. *O'Reilly* (1874-84) Newfoundl. Rep. 435. The English cases were dis-

sort is not necessarily negatived by the fact that the contract contains some unilateral provisions in favour of the master. "Whether they are inequitable or not depends on considerations outside the contract. If such provisions were at the time common to labour contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment, and the means of maintaining himself'"[5].

(*c.*) *In other kinds of actions.*—The general expressions used by the courts in cases of the type just discussed might seem to warrant the conclusion that any contract of service which is on the whole beneficial to an infant, is in England considered to be enforceable for all purposes and in all kinds of legal proceedings. But the authorities, although on the whole they may fairly be said to sustain that conclusion, are not sufficiently harmonious

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tinguished on the ground that the Employers and Workmen Act was by its express terms applicable to infants. But a perusal of the judgments in those cases shews that they were not decided on any such narrow ground.

[5] *Leslie* v. *Fitzpatrick* (1877) L.R. 3 Q.B. Div. 229, per Lush, J. (p. 232). In that case an infant contracted to serve shipbuilders as a plater and riveter for five years, at increasing weekly wages mentioned in the agreement, provided that, if they should cease to carry on their business, or find it necessary to reduce the operation of their works for any cause over which they should not have any control, they were to be at liberty, on giving fourteen days' notice, to terminate the agreement and discharge the infant from their service. *Held*, that the agreement was not void on the face of it, so as to prevent its enforcement under the Employers & Workmen Act, 1875, 38 & 39 Vict. c. 90.

By a deed of apprenticeship of an infant it was provided that the apprentice should serve for a term of years, excepting the usual holidays and days on which the master's business should be at a standstill through accident beyond the control of the master, and that during the said term, excepting and subject as aforesaid, the master should pay the apprentice wages for her services. *Held*, that the provision that the master should not be liable to pay wages to the apprentice during the excepted period was not so disadvantageous to her as to render the apprenticeship deed incapable of being enforced against her under the Employers and Workmen Act, 1875. *Green* v. *Thompson* (1899) 2 Q.B. 1. Darling, J. was of the opinion that the case was covered by the remark of Lindley, L.J. in *Corn* v. *Matthews* (1893) 1 Q.B. 310, to the effect that, if the proviso (as to the suspension of wages) were addressed to a state of things over which the master might

to warrant a commentator in stating positively that a doctrine of this comprehensive scope is accepted by the courts[s].

(*d.*) *Infants not bound for any purpose by non-beneficial contracts.*—Where an infant's contract of service is seen to be on the whole prejudicial to him, a court will not permit it to be enforced against him either in proceedings taken under the

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have no control, such as a strike, the case before him would not have been so clear.

[s] In *Fellows* v. *Wood* (1888) 59 L.T.N.S. 513, an infant contracted with a dairyman to enter his employment at a salary of £1 a week, and agreed that he would not serve for his own benefit any of his employer's customers during the time he remained in such employment, or for two years afterwards, and that two weeks' notice to leave was to be given on either side. *Held*, that this contract was beneficial to the infant, and could be enforced against him, and that sect. 1 of the Infants' Relief Act 1874 (37 & 38 Vict. c. 62) does not apply to such a contract. Manisty, J. said: "I consider that this contract was decidedly beneficial to the defendant; the notice the plaintiff was obliged to give was short, but the salary was reasonable, and the defendant had the opportunity of learning his business, and had plenty of time to get to know all the plaintiff's customers; so, for this reason, the plaintiff was justified in binding him not to serve them for two years after leaving him."

In *De Francesco* v. *Barnum* (1890) 43 Ch. Div. 165, Chitty, J. said that he was persuaded from a careful examination of the report that the injunction in the above case was not granted against an infant, but against a man of full age, who, to a certain extent, appeared to have acted upon the contract after the infancy had terminated. On the appeal (45 Ch. D. 165), no reference was made by Fry, L.J. to this particular aspect of the contract. But in *Evans* v. *Ware* (1892) 3 Ch. 502, North J. suggested that Chitty, J. had not in his mind the exact facts of the *Fellows Case*, and confused it with *Cornwall* v. *Hawkins* (1871) 41 L.J. Ch. 435, 36 L.T.N.S. 607, where there actually was a ratification of the contract by the infant after he had reached majority (see §7, note 3, *post*). The present writer ventures to think that, whether this suggestion is well founded or not, there is nothing in the language used by Manisty, J. in the *Fellows Case* to justify its being explained on the footing propounded by Chitty, J.

In *Evans* v. *Ware*, *supra*, it was held that an agreement by an infant in consideration of employment, that he would not compete in business with his employer for two years after leaving, within a radius of 5 miles, was for his benefit, and would be enforced upon his leaving and engaging in business in violation thereof after attaining his majority. North, J. distinguished *De Francesco* v. *Barnum*, *supra*, as being a decision relating to a contract of apprenticeship. But having regard to the very general statements found in the judgment of Fry, L.J. on the appeal of this case, it is perhaps unnecessary to rely on this circumstance as a means of reconciling the two decisions.

From the language used in *De Francesco* v. *Barnum* (1890) 45 Ch. Div. (see note 9, *infra*) it is perhaps permissible to infer that the remedies there asked for would have been granted, if the contract had not been regarded as non-beneficial. But such deductions as to the hypothetical converse of an actual decision are somewhat unsafe.

In *R.* v. *Chillesford* (1825) 4 B. & C. 94, it was assumed by Bayley, J., *arguendo*, that no action can be maintained against an infant to enforce a beneficial contract. But this remark cannot be reconciled with the later cases cited in notes 4, 5, *supra*.

statutes which regulate the relation of master and servant[7], or in an ordinary civil action for damages caused by his breach of his engagements[8].

Nor will he be enjoined from violating an express provision in the contract which binds him not to enter the employment of any other person during the stipulated period[9]. Nor can his

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[7] In *R.* v. *Lord* (1848) 12 Q.B. 757, 3 New Sess. Cas. 246, 12 Jur. 1001, 17 L.J.M.C. 181, one of the grounds on which a conviction of the infant, under Stat. 4 Geo. 4, ch. 34, § 3, for absenting himself from service without leave, was quashed, was that the contract bound the infant not to engage in any other service or business during the whole term, while it reserved to the master the right to stop the work and the wages whenever he pleased. Lord Denman, C.J., declared that such an agreement could not be considered as beneficial to the servant, but that it was inequitable and wholly void.

An infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out employ himself in any other manner or with any other person for his own benefit. *Held*, that, this provision not being for the benefit of the infant, the apprenticeship deed could not be enforced against the infant under the Employers and Workmen Act, 1875, ss. 5, 6. *Meakin* v. *Morris* (1884) 12 Q.B.D. 352.

An infant was apprenticed by a deed containing a provision that the masters should not be liable to pay wages to the apprentice so long as their business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out, and for such reasonable time thereafter as might be necessary for him to enable him to determine such employment as thereinafter mentioned, employ himself in any other manner or with any other person for his own benefit, and that in case the apprentice should elect so to employ himself the master should not, during the time he should so employ himself, be bound to teach or instruct him. *Held*, that the apprenticeship deed could not be enforced against him under the Employers and Workmen Act, 1875, §§ 5, 6. *Corn* v. *Matthews* (1893) 1 Q.B. 310. The general rule laid down by A. L. Smith, L.J. was that "if there be a stipulation in the contract entered into by an infant so much to the detriment of the infant as to render it unfair that the infant should be bound by it, then the deed cannot be enforced at all."

[8] In such an action it was held that an agreement which binds an infant to serve for the space of five years, with a clause that, in case of illness, or absence from any cause whatsoever, the stipulated payments should cease, is not a contract for the benefit of the defendant. *Birkin* v. *Forth* (1875) 33 L.T.N.S. 532.

[9] *De Francesco* v. *Barnum* (1890) 45 Ch. Div. 165. Aff'g 43 Ch. Div. 165. The decision on the appeal was put upon the broad ground, that a contract was unreasonable, which placed the infant almost absolutely at the disposal of the master, which required him to undertake any engagements at any theatre in England, or any theatre in the United Kingdom or anywhere else in the world, which provided that he was to receive no remuneration and no maintenance, except when employed, which did not create any correlative obligation on the master to find employment for him, and which empowered the master to put an end to his chances of success at any time

master maintain an action against a third person for enticing him away from the employment[10].

The mere fact that some conditions in the contract are against the servant or apprentice does not enable the court on that ground only to say that it is void. To have such an effect the stipulation which is objected to must be so unfair that it makes the whole contract, as between the infant and the master, an unfair one to the infant[11]. This description is applicable to any stipulation which violates the rule of law under which "an infant is incapable of contracting himself out of his acquired rights, or subjecting himself to a penalty"[12].

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after trial. In the lower court Chitty, J. relied on the more technical ground that the deed which defined the rights of the parties was one of apprenticeship, and that it had been decided in the old case of *Gylbert* v. *Fletcher* (1629) Cro. Car. 179, that no action would lie in such a deed against the apprentice himself, although it was for his advantage to be bound apprentice to be instructed in a trade, and that the only remedy available to the master, if the apprentice misbehaved himself was to correct him, or complain to a justice to have him punished. The learned judge considered that, as the right to the injunction asked for depended upon the master's legal right to sue upon the covenant in the deed to the effect that the apprentice should neither "contract professional engagements, nor accept such unless with the full written permission of his master," the non-enforceability of that covenant necessarily involved the consequence that, apart from any question whether the contract was for their benefit or not, the master was not entitled to an injunction.

The rule applied in *Gylbert* v. *Fletcher*, *supra*, is also recognized in *Jennings* v. *Pitman* (1624) Hutton, 63; *Lylly's Case* (1702) 7 Mod. 15; *Whitley* v. *Loftus* (1824) 8 Mod. 190; *Knight* v. *Hogg* (1812) 3 Brevard, 44; *Frazier* v. *Rowan* (1806) 2 Brevard, 41.

It was from a very early period deemed to be subject to the qualification that, by the custom of London, an infant might bind himself in an indenture of apprenticeship, so as to subject to an action, even in the superior courts at Westminster. *Stanton's Case* (1583) Moore, 135; *Horn* v. *Chandler* (1671) 1 Mod. 271, cited in Chitty, Contr. 13th ed., p. 177, note (u).

In *Walter* v. *Everard* (1891) 2 Q.B. 369, (see note 2, *supra*), Lopes, L.J. remarked that the decision which was being rendered did not in any way conflict with the cases in which it had been held that an action could not be maintained for the breach of an infant's covenant to serve his master as an apprentice.

[10] *De Francesco* v. *Barnum* (1890) 45 Ch. Div. 165.

[11] *Corn* v. *Matthews* (1893) 1 Q.B. 310 (for facts see note 7, *supra*, per Lord Esher, M.R., stating what he understood to be the rule formulated by Fry, L.J., in *De Francesco* v. *Barnum*, note 8, *supra*.

[12] Lush, J. in *Leslie* v. *Fitzpatrick* (1877) L.R. 3 Q.B. Div. 229. He pointed out that this was a second and distinct ground upon which the decision in *R.* v. *Lord* (1848) 12 Q.B. 757, 3 New Sess. Cas. 246, 12 Jur.

It has also been declared that, wherever "extraordinary or unusual stipulations" are found in a contract, the court at least must be "on the watch lest the infant should be held to be bound by a contract which is not reasonable and which is not good in law and which is not maintainable'"[13].

5. American doctrine.—A few traces of the English doctrine, that an infant is *primâ facie* bound by any contract of service which is beneficial to him, are to be found in the American reports[1]. But, speaking generally, that doctrine may be said to have been rejected in the United States. The footing upon which the limits of the class of binding contracts are determined in Massachusetts will be apparent from the following statements:

"There is no case in which it has been held that an executory contract by an infant, except for necessaries, is binding"[2].

If the contract of an infant be "clearly prejudicial to him, it is void. If it may be for his benefit, or to his damage, it is voidable at his election, and he may avoid it during his minority, or when he becomes of full age. If the contract be clearly beneficial to him, he is bound. And whether the contract comes

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1001, 17 L.J.M.C. 181 (see note 7, *supra*), might be regarded as resting,—viz., that the contract in question rendered the infant liable to be dismissed for any misconduct or disobedience, and upon dismissal to forfeit all his wages which should then be due and unpaid.

Compare also the following remarks of Fry, L.J.: "It has been held from the time of Lord Coke, that an infant cannot bind himself to be liable to a penalty; that the contract to impose a penalty on an infant is void. Again, it has been held that a contract by which an infant renders his vested interest subject to forfeiture is void against the infant." *De Francesco* v. *Barnum* (1890) 45 Ch. Div. 430.

[13] *De Francesco* v. *Barnum* (1890) 45 Ch. Div. 430, per Fry, L.J.

Compare the remark of Lush, J. that "if advantage was taken of the infant to exact conditions which were unusual and unreasonable, or to secure his services for wages which were unreasonably low and inadequate, the infant is not bound." *Leslie* v. *Fitzpatrick* (1877) L.R. 3 Q.B. Div. 229.

[1] In Arkansas it has been held that action lies against an infant for the abandonment of an apprenticeship contract which is for his benefit. *Woodruff* v. *Logan* (1845) 1 Engl. 276.

See also *Com.* v. *Murray* (1812) 4 Binn. 487; (§ 30, note 2, *ante*); *Pardey* v. *American Co.* (1897) 20 R.I. 147, 37 Atl. 706 (note 3, *infra*.)

[2] *Moses* v. *Stevens* (1824) 2 Pick. 332. Virtually the same words are used in *Whitmarsh* v. *Hall* (1846) 3 Denio, 375.

within one or other of these distinctions, is to be determined by sound judicial discretion. Those contracts of a binding character are such as come within the description of necessaries; for example, for suitable food, clothing, and education''[3].

The effect of the two passages here quoted is to withdraw all contracts of service except those for necessaries from the class of ''clearly beneficial'' contracts which are binding upon infants. The doctrine thus adopted, which, in all essential respects, is the same as that which is applied in nearly all the other American states may be enunciated in the form of two complementary propositions.

(1) A contract of which the specific and express purpose and object is to furnish an infant with necessaries, is binding upon him, if it is on the whole reasonable and beneficial, and free from fraud[4].

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[3] *Vent* v. *Osgood* (1837) 19 Pick. 572.

[4] "Contracts made for maintenance and education according to the degree of the infant, if he have no parent or guardian, are to be enforced from regard to the infant himself; for if he may avoid such contracts none will trust him, and he may be left to present want and without the means of providing a future living." *Moses* v. *Stevens* (1824) 2 Pick. 332.

In a later case it was laid down, that a contract to serve until full age in consideration of receiving subsistence, clothing and education, was a contract for necessaries, and was one which, if reasonable and beneficial, would be supported by the law. *Stone* v. *Denison* (1832) 13 Pick. 1. It appeared to the court that, taking into account the age of the minor, namely fourteen when the contract was made, and the circumstances attending it, it was reasonable and beneficial. The employer, it was observed, took upon himself the risk of the health, life and bodily and mental capacity of the plaintiff to labour. Had he been sick or otherwise incapable of performing any labour, the defendant was nevertheless, by the terms of his contract, bound to support him. These considerations might have rendered the contract equal and beneficial at the time, although in the event, which could not then be foreseen, the plaintiff's labour may have been of greater value than the subsistence and education which he obtained as an equivalent. The circumstances also, that the contract was made with the consent and approbation of the guardian, evinced by his becoming a party to it, went strongly to shew that the contract was entered into deliberately and with a just regard to the rights and security of the minor. The opinion was expressed that it would be injurious rather than beneficial to minors, to hold that a contract thus made is of no legal force and effect. In this case the actual point decided was that the contract could not be repudiated after it had been fully executed (see next section); but the language of the court is perfectly general.

This case was one of the authorities cited in a Rhode Island decision, where it was held that an infant may, with the consent of his father, bind himself by a contract providing for his services in consideration of teaching him a trade and paying him reasonable wages. *Pardey* v. *American Ship-*

(2) A contract by an infant to render services will not be held binding for the mere reason that, upon a reasonable view of its terms, it must be pronounced beneficial to him[5].

Windlass Co. (1897) 20 R.I. 147, 37 Atl. 706, (infant who had left the service voluntarily after attaining his majority, and before the end of the stipulated term,—held not to be entitled to recover the sum which under the agreement was to be retained out of his wages until he had completely performed the contract). The court laid down the doctrine that an infant may bind himself by a contract for necessaries, if reasonable, or by a contract beneficial to him. This is undoubtedly the doctrine embodied in the English case cited by the court, *Cooper* v. *Simmons*, 7 H. & N. 719 (see last section, note 4). It seems most probable, however, that the court did not intend to follow that case to the full extent and that its decision is merely of the same scope as that in the Massachusetts case just referred to.

That contracts for necessaries are binding was conceded, *arguendo*, in *Burns* v. *Smith* (1902) 29 Ind. App. 181, 64 N.E. 94.

[5] In *Moses* v. *Stevens* (1824) 2 Pick. 334, the position of the court was thus explained by Parker, C.J.: "If it were true, as alleged in the argument, that this contract for work and labour is binding on the infant because it is for his benefit, then it ought to follow that a violation of it should deprive him of the right to obtain compensation for a partial performance. But we apprehend that this contract is voidable by the infant, it not coming within the exception to the general rule of law, that all contracts by infants may be avoided by them either before or after they arrive at full age."

In *Lowe* v. *Sinklear* (1858) 27 Mo. 308, contracts for personal services and for necessaries are contrasted in respect to the ability of infants to avoid the former kind, but not the latter

In *Clark* v. *Goddard* (1803) 39 Ala. 164, it was laid down that independently of some statutory provision, an infant's contract of apprenticeship under seal may be avoided by him at any time during his minority, and that neither the conduct of the infant's mother, in inducing another person to enter into a contract with him, nor the act of her agent in drawing the deed, can estop the infant from avoiding his indenture of apprenticeship.

For other cases in which ordinary contracts of service, from which the infant derived no other specific benefit than the stipulated compensation were treated as voidable by him, see *Breed* v. *Judd* (1854) 1 Gray, 455; *Vent* v. *Osgood* (1837) 19 Pick. 572 (desertion from a ship by an infant seaman, held to be a legal avoidance of his contract of service); *Whitmarsh* v. *Hall* (1846) 3 Denio, 375; *Peters* v. *Lord* (1847) 18 Conn. 337; *Ray* v. *Haines* (1869) 52 Ill. 485; *Dallas* v. *Hollingsworth* (1850) 3 Ind. 537; *Wheatley* v. *Miscal* (1854) 5 Ind. 142; *Van Pelt* v. *Corwine* (1855) 6 Ind. 303; *Judkins* v. *Walker* (1840) 17 Me. 38; *Derocher* v. *Continental Mills* (1870) 58 Me. 217, 4 Am. Rep. 280; *Vehue* v. *Pinkham* (1871) 60 Me. 142; *Spicer* v. *Earl* (1879) 41 Mich. 191, 32 Am. Rep. 162, 1 N.W. 923; *Lufkin* v. *Mayall* (1852) 25 N.H. 82; *Campbell* v. *Cooper* (1856) 34 N.H. 49; *Hoxie* v. *Lincoln* (1840) 25 Vt. 206; *The Hotspur* (1874) 3 Sawyer, 194.

Under the English doctrine, as stated in the last section, the contracts in all the above cases would, it seems, have been treated as *primâ facie* binding. See especially the remarks of Fry, L.J. in note 2.

The facts involved in other cases are such as to place them in a still more decided antagonism to that doctrine. *Hagerty* v. *Nashua Lock Co.* (1833) 62 N.H. 516 (contract to work in consideration of being instructed in a trade); *Voorhees* v. *Wait* (1836) 15 N.J.L. 343 (similar contracts); *Francis* v. *Felmit* (1839) 4 Dev. & B.L. 498 (contract to work for a certain time in consideration of the employer's boarding and clothing the in-

That an essentially non-beneficial contract of service is not binding on an infant is apparent on general principles, the only logical distinction between the English and American doctrines on this point being, that the latter doctrine may be regarded as *a fortiori* deduction from the rule as to the non-obligatory quality of merely beneficial contracts[6].

5a. Conflict between English and American decisions discussed.—An examination of the earlier Massachusetts decisions which in that State established the doctrine that no executory contracts of employment are binding upon infants except those entered into

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fant, and teaching him a trade); *Meeker* v. *Hurd* (1850) 31 Vt. 639 (minor was to work until she became of age, she to receive for her services her support and clothing, be sent to school a portion of the time, and at her majority received a certain sum in money); *Wilhelm* v. *Hardman* (1858) 13 Md. 140 (minor agreed to work for seven years in consideration of food, lodging, clothing, and schooling, whenever a school was available). Indeed it is difficult to see how any of these decisions can be reconciled with the doctrine that contracts of service made for the purpose of procuring necessaries are *primâ facie* binding on infants. Are not food, clothing, and education, all necessaries?.

By the Iowa Code (§§ 2238, 2239, 2240) a minor is bound by contracts for necessaries and for all other contracts, unless he disaffirms them within a reasonable time after attaining majority. Disaffirmance before majority is of no effect. If a minor renders personal services under a contract, and accepts payment for them according to the contract, he cannot maintain an action by next friend, upon the contract, to recover again. *Murphy* v. *Johnson* (1876) 45 Iowa 57, disapproving of an instruction which recognized the doctrine that the minor may disaffirm the contract during his minority. In stating that such a doctrine is "unknown to the common law," the court is clearly in error. See the quotation, note 4, *supra*, from the judgment in *Moses* v. *Stevens*.

[6] In *Nickerson* v. *Easton* (1831) 12 Pick. 110, a written agreement not under seal, signed by a minor, his mother and step-father, of the one part, and by the defendant, of the other part, recited that the minor had been living with the defendant as an apprentice to learn the trade of a cooper, but that no indenture had been executed, and stipulated that the minor should go on a whaling voyage, and should do "the duty he ships to perform," and that the defendant should furnish him outfits, and should receive all his earnings on the voyage, and that at the end of the voyage the minor should be free from his apprenticeship. It was held, that so far as the relation of master and apprentice subsisted *de facto* by the actual residence of the minor with the defendant, it was waived and terminated by the written agreement; that the written agreement itself did not constitute a contract of apprenticeship; that independently of the supposed relation of master and apprentice, the contract was not reasonable and beneficial to the minor; and not binding upon him; and that he was entitled to recover his earnings on the voyage to his own use.

An infant is not bound by a stipulation as to the forfeiture of wages, if he should leave without notice. *Danville* v. *Amoskeag Mfg. Co.* (1882) 62 N.H. 133. Compare cases cited in the last section, note 10.

for the specific purpose of obtaining necessaries fails to disclose any intention on the part of the judges to diverge from the main current of the English authorities. In fact it is clear that they supposed themselves to be simply following those authorities. That this was a misapprehension is sufficiently demonstrated by the English cases reviewed in § 4, *ante*.

It is also sufficiently evident that this misapprehension would not have arisen if the attention of the court had been properly directed to some of the earlier authorities which are there noticed. The consequence of its defective knowledge in this instance was, that it was led to invoke an argument based upon a principle which, as a means of determining the proper effect of precedents is never entirely satisfactory, and which has not infrequently led to the propounding of doctrines which upon subsequent consideration have been admitted to e erroneous or to require qualification—the argument, that is to say that, as "there was no case" in which it had been held that an executory contract by an infant, except for necessaries, is binding, merely beneficial contracts of employment must necessarily be regarded as standing outside the obligatory class.

It is manifest, therefore, that any courts in the United States which have not yet committed themselves in the question, and which regard the English authorities as being controlling with respect to a matter of this kind, would be fully warranted in adopting the English doctrine. When the various courts to which this description is applicable have occasion to choose between the two opposing doctrines, it will be for them to consider whether the mere fact that one of them has obtained a foothold in a limited number of the American States is a sufficient reason for rejecting the construction put upon a common law principle in the country from which the common law is derived. Th · will also be called upon to form an opinion as to the weight of the independent arguments by which it has been attempted to justify the exclusion of merely beneficial contracts from the obligatory class. The present writer ventures to express the opinion that those arguments are far from being satisfactory. It is asserted that a contract for the infant's services only,

"although he is to receive wages, ought not to be binding, because he is not presumed to be capable of judging of the value of his services, nor of the kind of labour most suitable for him'"[1]; that the law, having regard to this presumption, gives him the privilege of judging whether the contract is beneficial or not, and of avoiding it, if he should prefer to do so[2]; that it would contravene the principle on which the main rule as to the voidability of an infant's contracts is founded, viz., the benefit of the infant

[1] Parker, J. in *Moses* v. *Stevens* (1824) 2 Pick. 332. The learned judge fortified his statement by the following additional remarks: "Even a contract of apprenticeship, by means of which he is to acquire a knowledge of some mechanical or other business, is not by the principles of the common law obligatory; certainly a contract by which he disposes of his personal labour without any stipulation for instruction, is less deserving of legal protection. The cases cited to prove that this was a binding contract upon the plaintiff, because it was for his interest, only shew that it was not absolutely void, but only voidable. He has avoided it by leaving the service before the time expired, and by bringing his action upon a *quantum meruit*, instead of an action upon the contract. There are some cases from which it has been inferred in argument, that certain acts done by an infant are not only not void, but cannot even be avoided by him; but that doctrine has been only applied to cases of land, which it is said are necessarily required by law to be binding, otherwise the land would lie unoccupied. There is no case in which it is holden that an executory contract by an infant, except for necessaries, is binding. If the ground taken by the defendant could be maintained, that this contract could not be avoided, because it is for the benefit of the infant, then every loan of money of which he might make a profitable use, and every sale of goods upon which he might get an advanced price, would form a consideration for a promise which he could never avoid; and in order to determine his right of rescinding, it would be necessary to look into the consequences of his contract. But the law has established the general rule from a regard to the general effect of allowing minors to make valid contracts, not with a view to the particular benefit or mischief which might result from them."

Compare also the following passages:

"This cannot be considered a contract for necessaries and therefore binding, as an infant cannot judge for himself as to the value of his services, the time suitable to bind himself, or the nature of the employment. An express contract to pay for necessaries to be thereafter furnished for a length of time would not be valid." *Thomas* v. *Dikes* (1839) 11 Vt. 273. In this case the court also rejected the contention that the contract might be considered as binding because the infant might be compelled to go out to work by his guardian or the overseer of the poor. It was declared that he could not have been compelled to make a contract of this nature.

"The plaintiff's contract in this case with the defendant can not be considered as a contract for necessaries. This is a contract for service, and the plaintiff could not, in the eye of the law, judge as to the value of those services, the time suitable for her to engage, or the proportion of time which she ought to go to school, nor what her compensation ought to be, over and above her support and schooling." *Meeker* v. *Hurd* (1859) 31 Vt. 639.

[2] *Gaffney* v. *Hayden* (1872) 110 Mass. 137, 14 Am. Rep. 580, adopting a conception put forward in *Vent* v. *Osgood* (1837) 19 Pick. 572.

—if it were left to the court or jury to determine which contracts are beneficial and which are not[1]. With respect to the presumption which is supposed to be entertained for the protection of infants, it undoubtedly constitutes a good reason for treating all contracts as voidable, which, as a matter of fact, are not beneficial. But it is not at all apparent why it should be deemed to be an element of any greater significance than this. Nor is it easy to see why the interests of infants should be more seriously endangered by the operation of a doctrine which should affirm the obligatory quality of every contract which a jury should find to be beneficial, than they are at present by the operation of the statutes which enable them, by complying with certain forms, to bind themselves absolutely to the performance of contracts of apprenticeship.

Furthermore, even if we set aside these general objections to a theory which gives infants an indefeasible right to repudiate beneficial contracts, it is difficult to concede that there is not an essential inconsistency in a conception of their rights, which attaches a controlling importance to the express terms of the contract, and virtually excludes all evidence as to the real considerations which may have induced the infant to hire himself out. On principle it would seem that the courts should at least have admitted into the class of obligatory contracts all those which are shewn to have been, as a matter of fact, made for the purpose of procuring necessaries, and which are in other respects not inequitable or unreasonable. Granting that, in any case where the contract is not on its face one for necessaries, it may be proper to start with the presumption that the infant was incapable of forming a sound judgment as to the expediency of making the contract, it does not by any means follow that this presump-

[1] Stone, J. in *Clark* v. *Goddard* (1863) 39 Ala. 164 (note 4, *supra*). The learned judge remarked that this question could not well be determined by an unvarying rule based upon a classification of certain trades as being either beneficial or prejudicial. The quality would vary according to the capacity and circumstances of the infant. "No one could know or tell, until the decision should be pronounced at the end of a litigation, whether the particular trade or employment would be beneficial or otherwise. A rule of such uncertain operation would lead to most ruinous results."

tion should be treated as a finally decisive element, and a basis for an unvarying rule of law. So far as can be seen he would be quite sufficiently protected by a doctrine which should simply declare that he is not bound by such a contract, unless it is proved by satisfactory evidence, that he could not have obtained certain necessaries in any other way than by making it, and that it was on the whole not inequitable or unreasonable.

6. Distinction, in respect to the right of avoidance, between executory and executed contracts of service—In Massachusetts and Michigan it has been laid down that a contract to furnish an infant with necessaries, in return for his services during a certain period, cannot be repudiated by him, after it has been executed, unless it is shewn that he was in some way imposed upon by the employer[1]. But apparently the decisions in the cases cited would

[1] If an infant of the age of fourteen years enters into an agreement to labour until he shall come of age, in consideration of being furnished with his board, clothing and education, and he is not overreached, and the agreement is not so unreasonable as to raise any suspicion of fraud, and it is sanctioned by his guardian, and is fully performed on both sides, he cannot, after attaining his majority, maintain a *quantum meruit* for his services, merely on the ground, that in the event which has happened, his services were worth more than the stipulated compensation. *Stone* v. *Dennison* (1832) 13 Pick. 1 (see further as to this case in § 981, note 3).

In *Squier* v. *Hydliff* (1861) 9 Mich. 274, the contract was exclusively for necessaries,—and it was held, that evidence should have been admitted, which tended to prove, that the labour was performed under and with knowledge of an agreement between the defendant and an older brother of the minor (whose parents were dead), in pursuance of which and in payment for the labour the minor had been sent to school, clothed, his washing and mending done, etc. The jury might have found from such evidence that the minor had given his assent to the agreement.

In *Spicer* v. *Earl* (1879) 41 Mich. 191, 32 Am. Rep. 152, the same doctrine was applied in an action brought while the plaintiff was still a minor. The court refused to accept the special contention, that the fact of the contract's being only partially for necessaries was sufficient to distinguish the case from the one last cited. Upon the more general question the court expressed its views as follows: "It is a harsh rule which permits the infant to repudiate his contract after he has executed it, where no advantage has been taken of him, and where the party dealing with him was not aware of his infancy. Where only the infant's services are in question, the rule should not be extended beyond what is absolutely necessary to proper protection; it should not be allowed to become a trap for others, by means of which the infant may perpetuate frauds. If a contract for service is apparently fair and reasonable under the circumstances, the infant who has performed it should be held to its terms, and if he attempts to repudiate it, the attention of the jury should be directed to the question whether or not an unfair advantage has been taken of him, instead of their being required to find a subsequent affirmance. So long as the employer who is

have been the same, if the contracts involved had been executory. See preceding section.

In Massachusetts, however, the doctrine has been distinctly recognized, that a merely beneficial contract, although it may be subject to avoidance by the infant as long as it remains executory, cannot be repudiated after it has been executed[2].

In any jurisdiction it would doubtless be held, as it has been held in Massachusetts, that a contract of service which is neither for necessaries nor beneficial may be avoided by the infant, after he has attained his majority, although it has been executed, and although he cannot put the employer in *statu quo*, or return the consideration received[3].

7. Effect of the infant's avoidance of the contract.—The effect of the infant's disaffirmance of a voidable contract of service is to nullify and render the contract void *ab initio*, not prospectively. "It is a total, not a partial destruction. If it were otherwise, the infant might and practically would be ruined by a part

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acting in good faith is not notified of any dissent, he has a right to understand that his responsibility is measured by his agreement. On the other hand, the infant may abandon the service when he pleases, or stipulate for any new terms he may see fit to demand and can procure assent to. He is bound by the terms of the contract so far as he executes it without dissent, but no further."

[2] An infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one-third of all the avails of his labour during his absence, which he afterwards sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held, that he could not, in an action brought after he reached full age, rescind the agreement and recover back the amount so sent, deducting the amount of the outfit and any other money expended for him by the other party in pursuance of the agreement. *Breed* v. *Judd* (1854) 1 Gray, 455. The court said: "The plaintiff was desirous of engaging in this new field of labour. . . . . To carry out this purpose, certain necessary expenses of outfit and voyage must be incurred. Not having means of his own, he enters into an arrangement with the defendants to furnish them, upon a special agreement, indeed, but reasonable and beneficial in its terms. Viewing the contract in this light, or as an agreement for the services of the plaintiff for a limited time, to be repaid by the advancement and by retaining also two thirds of the fruits of his labour, it would, if fairly made and fully executed, be within the principles, if not within the direct authority, of *Stone* v. *Dennison*, 13 Pick. 1."

[3] *Dube* v. *Beaudry* (1890) 150 Mass. 448, 6 L.R.A. 146, 23 N.E. 222 (contract to work for a creditor of the infant's deceased father, and apply half the wages earned to the liquidation of the debt).

execution of the contract. A partial or prospective avoidance would afford no protection at all. By the avoidance the contract is annihilated, and the parties are left to their legal rights and remedies, just as if there had never been any contract at all'"[1].

Under no circumstances does his abandonment of a voidable contract render him subject to an action for the damages caused thereby to his employer. The plea of infancy is a bar to such an action even though he may have received the consideration of the contract, and does not offer to restore it[2].

In England it has been held that no action can be maintained by a master against a third person who induces an infant to abandon performance of an essentially non-beneficial contract of service[3]. On the other hand, the position has been taken in two American cases that an infant's voidable contract of service should be deemed, so far as third persons are concerned, to be in force for an indefinite period, and that the master is consequently entitled to maintain an action for damages against anyone who entices away the infant from his employment[4]. These antagonistic doctrines, it will be observed, represent opposing views as to one particular phase of the general question, whether it is legally wrongful to induce a person to abandon a contractual relation from which he has a right to withdraw at any time. This is a question which has recently been much discussed with reference

[1] *Vent* v. *Osgood* (1837) 19 Pick. 572.
"Any act done by the minor, clearly indicative of his intention not to be bound by it (the contract) would avoid it, and from the time of the avoidance it becomes a nullity for all purposes." *Campbell* v. *Cooper* (1856) 34 N.H. 49.

[2] *Craighead* v. *Wells* (1855) 21 Mo. 404 (agreement to do work in another state in consideration of an outfit furnished by the employer).

[3] *De Francesco* v. *Barnum* (1890) 45 Ch. Div. 165 (see § 981, note 9).

[4] *Peters* v. *Lord* (1847) 18 Conn. 337; *Campbell* v. *Cooper* (1856) 34 N.H. 49. In the latter case, the court used the following language with respect to the contract under review: "Such a contract on the part of the infant is not void except at his election. Until avoided by him it is valid as between the parties and as to third persons, in the same manner as if made by an adult. The minor having entered upon its fulfilment, thereby created the relation of master and servant between the plaintiff and himself; and until he chose to disaffirm the contract the master may properly be said to have a legal right to the services rendered."

to the liability of the members of labour organizations for procuring the discharge of employees obnoxious to them. In the present connection it is sufficient to remark that, under either doctrine, the effect of an actual avoidance of the contract by the infant is to deprive the master of all claim to future services, and to incapacitate him from maintaining an action against a third person who subsequently receives the infant into his employment[5].

8. Ratification of voidable contract by infant after attaining majority. —In any jurisdiction where the matter is not regulated by some statutory provision which declares that an infant's ratification of his contracts must be in writing[1], or which absolutely debars him from ratifying a promise made during his nonage[2], the fact that the infant continued the performence of a voidable contract for a longer period after he reached full age than was reasonably necessary to enable him to decide what to do will ordinarily be regarded as conclusive evidence that he had elected to affirm and be bound by it[3].

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[5] See cases cited in the last note.

[1] See 1 Parsons, Contr. p. *320.

In *Birkin* v. *Forth* (1875) 33 L.T.N.S. 532 (§ 4, note 8, *ante*), it was held that a ratification in writing, in accordance with 9 Geo. 4, ch. 14, § 5, could not be inferred from the infant's continuing in the service after he came of age, and then giving notice of his intention to quit the service. The case cited in support of this latter point was *Harmer* v. *Killing* (1800) 3 Esp. 102, where it was held that no ratification can be implied from a promise given after age, unless the infant knows that he was discharged by his non-age.

[2] In England it has been enacted that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." Infants Relief Act, 1874, chap. 62, s. 2.

[3] *Cornwall* v. *Hawkins* (1871) 36 L.T.N.S. 607, 41 L.J. Ch. 435 (injunction granted to restrain a servant, who had continued in his employment eighteen months after reaching full age, from violating a stipulation not to set up business on his own account within a certain distance of his master's house); *Forsyth* v. *Hastings* (1855) 27 Vt. 646 (servant who had abandoned an entire contract without sufficient cause a month after reaching full age,—held not to be entitled to recover the value of that part of his services which was rendered during his minority); *Spicer* v. *Earl* (1879) 41 Mich. 191, 32 Am. Rep. 152 (contract deemed to have been affirmed in

9. Contracts made by infants as employers.—The general rule as to the obligatory character of an infant's contracts for necessaries involves the corollary that a contract by him for the hire of a servant suitable to his station in life is binding upon him, to the extent at least of rendering him liable for the compensation earned by the servant[1]. In cases where that rule is not controlling the effect of such a contract is somewhat obscure.

Upon the analogy of the doctrine applied in respect to other contracts, it would seem that the contract of an infant for the hire of a servant, should, if not clearly prejudicial, be regarded as being merely voidable at his own option, and that, until it has actually been disaffirmed by him, it should be deemed to subsist for all purposes both as between himself and the servant, and with reference to third persons. This theory as to the juridical situation would involve the following consequences—that he would be liable for any wages earned while he treated the contract as valid, at all events for such wages as were already due and payable at the end of the last of the periods with reference to which their amount was measured; that he would be entitled to maintain an action for damages against a third person who might interfere wrongfully with the contract by enticing away the servant or otherwise; and that he would be liable for such torts as might be committed by the servant in the course of his employment. There is, however, a singular dearth of judicial authority on the questions thus indicated, and in the only case which has come to the notice of the present writer, the validity and effect of an ordinary contract by an infant for the hire of a servant has been treated as being determinable not by the general

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respect to the amount of the stipulated wages, the infant having gone on working for two months after he became of age).

[1] "A servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life." *Chapple* v. *Cooper* (1844) 13 M. & W. 252; per Parke, B., *arguendo*. The actual point decided in this case was that an infant widow is bound by her contract for work and labour done in furnishing the funeral of her husband, who has left no property to be administered. Such a contract was regarded as being for her personal benefit and in a broad sense reasonably necessary.

In *Hands* v. *Slaney* (1800) 8 T.R. 578, Lord Kenyon refused to say that it was not necessary for a captain in the army to have a servant.

rule which serves to differentiate his voidable from his void contracts, but by the more specific rule which defines the extent of his power to appoint an agent. The decision referred to proceeds upon the theory, adopted by many American courts[2], that an infant is incapable of making a valid appointment of an agent, this theory being considered to involve the corollary that his appointment of a servant must be treated as void, in such a sense that he can not be held liable for injuries caused by the negligence of the appointee[3].

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[2] Mechem, Ag. S. 51.

[3] *Burns* v. *Smith* (1902) 29 Ind. App. 181, 64 N.E. 94. The court refused to infer any higher degree of liability from the fact that the infant was married. The conclusion arrived at was fortified by a quotation from the following passages from a standard treatise: "As the doctrine *respondeat superior* rests upon the relation of master and servant, which depends upon contract, actual or implied, it is obvious it can have no application in the case of an infant employer, and he therefore is not responsible for torts of negligence by those in his service." Cooley, Torts, 2d ed. p. 128. It should be observed, however, that the only authority cited in support of this statement is a decision by one of the lower courts of New York. *Robbins* v. *Mount* (1867) 4 Rob. 553, 33 How. Pr. 34. Moreover the ratiocination of the learned author seems to be open to the objection, that it assumes all contracts of employment made by infants to be void in themselves,—a doctrine which is manifestly untenable as regards contracts for the hire of services which answers to the description of necessaries, and which, if analogy is to be regarded, cannot,—at least under the English rule—be affirmed of contracts which are beneficial in their nature. Moreover, even as respects the validity of appointments of agents by infants, it is impossible to state the rule in the unqualified form which is required to sustain the decision in the Indiana case which we are considering. It is unquestionable law, that an infant may appoint an agent to do an act which is clearly to his advantage. Story, Agency, § 6; Evans, Pr. & Ag. p. 13; Mechem, Agency, §54. On the whole, therefore, it is submitted that this case and the authorities upon which it is based have left the rights and liabilities of an infant master in many important respects an open question which is sorely in need of further judicial discussion.

The following letter has been received by the editor of this journal from Rt. Hon. Lord Alverstone, K.C.M.G., Lord Chief Justice of England. Lord Alverstone had exceptional opportunities of estimating Mr. Robinson's character, and so appreciative a tribute from one occupying such an exalted position cannot but be most grateful to Mr. Robinson's family and personal friends, as well as to the members of the profession and the people of this Dominion who valued him so highly. The letter is as follows:—

Royal Courts of Justice,
LONDON, January 29, 1906.

SIR,—I have read with the deepest interest the touching and appreciative notice in the *Canada Law Journal* of the late Christopher Robinson. I venture to send you a few lines which will I trust be of interest to the Bar and people of Canada. The high appreciation of Mr. Robinson's learning, ability and judgment was shared by all the members of the English Bar (and they were numerous) with whom he came in contact either as a colleague or an opponent.

I first met him in connection with appeals to the Privy Council; but, in the year 1892, it was my privilege to be intimately associated with him in the preparation of the British case on the Behring Sea Arbitration. In this work Mr. Robinson and I had the honour of supervising the drafts of Sir Charles Hibbert Tupper and the late Dr. George Dawson, another of Canada's greatest sons, alas too early called away.

From the first I discovered the extraordinary value of Mr. Robinson's profound and varied knowledge of the law and of his ripe judgment. Later in the course of the proceedings on the preparation of the counter case and written argument and the oral conduct of the case in Paris, Sir Charles Russell, who, as Attorney-General to Mr. Gladstone's Government, had succeeded to the position of leading counsel, often expressed to me the opinion that Robinson's assistance was invaluable. On more than one occasion when Sir Charles Russell and I could not see

our way clearly Robinson's foresight and judicial mind kept us out of difficulties.

The warm friendship formed under these circumstances lasted until his death; and when it fell to my lot to discharge the anxious duties of a member of the Alaska Boundary Tribunal, it was no surprise to me that no one presented the case for Great Britain with greater clearness or force than Christopher Robinson, although he did so under conditions of health which rendered his task of addressing the Court of no small effort to himself. It was a great privilege to be permitted to enjoy his friendship and I shall cherish his memory as long as I live.

I am, with great respect,

Faithfully yours,

To HENRY O'BRIEN, ESQ., K.C., ALVERSTONE.

It is somewhat strange to us in this country to read the severe criticisms which occasionally appear in the legal journals of England on the judicial utterances and other actions of the English judges. The *Law Times*, in referring to a recent appointment describes it as "a job" and continues: "We are sorry to say that of recent years there has been a growing tendency to fill vacancies, even upon the Bench, without regard to the great responsibilities that rest upon the nominator. Political and domestic considerations are only too often painfully conspicuous, and it is a state of things one can only deeply regret." Some of our Canadian judges would probably feel very much aggrieved, and perhaps not a little surprised, should as strong language be used by legal journals in this country as is common in England. Occasions for criticisms arise here as well as there, and will continue to do so, as long as judges are only human beings. Complaints by the profession here may run in other directions from those above referred to, and will differ from time to time. At present, for example, it might not be out of place to comment upon the occasional want of courtesy by a judge to members of the Bar, especially junior members; lack

of judicial dignity (arising sometimes from the persistency of counsel in pressing points—though this is no excuse, as he is within his rights in so doing); delays in deciding cases, etc. But we refrain from comment, even though these matters have been referred to in the lay press; we would merely remark that the avoidance of causes of offence, such as have been publicly stated to exist and as to which we presume there is some foundation in fact, would tend to uphold, and would not impair, the noble traditions of our Bench, and would increase, and not tend to destroy, the kindly and reverent feeling which the Bar has for those of their number who have been appointed to preside as judges. It may be noted that as to some of the occasions on which alleged frictions have recently occurred, the matters before the Court have been connected with criminal procedure. In this branch of the law it has always been recognized that a prisoner has the right to catch at any straw; and it is probably the duty of his counsel to take advantage of and present to the Court any technicality or informality in the proceedings which may aid his client. Judges are appointed for the purpose of hearing such matters as these as well as any other question raised by counsel.

It will be remembered that Mr. Justice Farwell gave a decision in the *Taff Vale case*, which caused much comment then and since, in reference to labour unions; and this judgment, it is said, was a factor in the growth of the labour party in the English Parliament. It seems to be the lot of this learned judge to deal with cases which bring into prominence such political and governmental problems as these. Last month he gave judgment restraining the corporation of the City of Manchester from municipal trading in acting as carriers and delivery agents for parcels. This brings up the much agitated question of state and municipal ownership. Our English contemporary, the *Law Times*, expresses its pleasure that Mr. Justice Farwell has by his judgment placed some check on the attempt of this corporation to set up in business as carriers, using for that purpose

money which has been placed at their disposal for the purposes of their tramways.

The great and insurmountable objection to municipal ownership is that it more or less comes into competition with private capital and independent trading. It is contrary to public policy and subversive of the true principles of trade that the vast capital at the disposal of a corporation should be used to enfeeble, to smother or to destroy the enterprise and capital of private citizens. Every country is prosperous in comparison to the extent that such enterprise and capital is in active operation. The wise thought of some of those best able to form a sound opinion on such subjects was in the same direction when the House of Lords, some time ago, prevented the London County Council from running omnibuses in competition with those of the ordinary omnibus proprietors. Our contemporary concludes its article on this subject with the following observation: "If private enterprise is not to be crushed out altogether, it is eminently necessary that a hard-and-fast line be drawn to prohibit these schemes of the various public bodies, who, with the whole of the rates at their backs, can successfully compete with and defeat any private concern."

Thinking men in the United States, as here, are beginning to discuss the over-production of law with a special reference to new legislation and the tinkering of statutes. In the United States the grievance is said to be very serious; some 14,000 statutes being enacted yearly as compared with 292 in England. We would present that "horrid example" to our legislatures in the sessions which are rapidly approaching.

REVIEW OF CURRENT ENGLISH CASES.

DEED—ALTERATION AFTER EXECUTION—IMPERFECT EXECUTION—FILLING UP BLANKS IN DEED—ALTERATION IN DATE—IMMATERIAL ALTERATION.

In *Crediton* v. *Exeter* (1905) 2 Ch. 455 the only point involved was whether a deed which was executed by certain of the parties to it on or about 21 October, 1899, (the date in the testimonium clause, except the year, being at that time left blank) was invalidated by reason of the year being struck out and the date "twenty-sixth day of January, 1900," being inserted on the subsequent execution of the deed by another of the parties thereto on that date. Eady, J., held that the alteration was immaterial and did not invalidate the deed, the rule in *Pigot's case*, 11 Rep. 26*b*, having been modified by the later decision of *Aldous* v. *Cornwell* (1868) L.R. 3 Q.B. 573.

WORKMEN'S COMPENSATION—DEPENDENT ON DECEASED WORKMAN—WIDOW—(FATAL ACCIDENTS ACT, R.S.O. c. 166, s. 3.)

Coulthard v. *Consett Iron Co.* (1905) 2 K.B. 869 was an action brought by the widow of a deceased workman to recover damages for the death of her husband by accident while engaged in the defendants' employment, and the only question was whether the plaintiff was at the time of the deceased's death dependent on her husband's earnings. It appeared that the plaintiff had lived with her husband and been maintained by him from her marriage up to June, 1904, when being out of work he left her and never afterwards contributed to her maintenance. Her only means of subsistence thereafter consisted of her earnings from casual work and the charitable gifts of relatives, and she was a week in the workhouse. About three weeks before his death which occurred in October, 1904, he obtained employment with the defendant and was earning wages. The widow stated that she was expecting him back every day to provide a home. The County Court judge found that she was dependent on her husband's earnings at the time of his death and entitled to compensation, and the Court of Appeal (Collins, M.R., and Romer, and Mathew, L.JJ.,) affirmed his decision.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.W.T.] [Nov. 27, 1905.

ANDREAS v. CANADIAN PACIFIC RY. CO.

Negligence—Finding of jury—Evidence.

A., as administratrix, brought an action against the defendants, claiming compensation for the death of her husband by negligence and alleged in her declaration that the negligence consisted in running a train at a greater speed than six miles an hour through a thickly peopled district, and in failing to give the statutory warning on approaching the crossing where the accident happened. At the trial questions were submitted to the jury, who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality and that the death of deceased was caused by neglect or omission of the company in failing to reduce speed as provided by the Railway Act. A verdict was entered for the plaintiff and, on motion to the Court en banc to have it set aside and judgment entered for defendants, a new trial was ordered on the ground that questions as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored and the defendants, by cross-appeal, asked for judgment.

Held, IDINGTON, J., dissenting, that by the above findings of the jury the defendants were exonerated from liability on the other grounds of negligence charged, as to which they had been properly directed by the judge, and the new trial was improperly granted on the ground mentioned.

Held, also, that though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district it was necessarily imported in the finding given above; that this fact had to be proved by the plaintiff and there was no evidence to support it; and that, as the evidence shewed it was not a thickly peopled portion the plaintiff could not recover and the defendants should have judgment on their cross-appeal.

Ford Jones, for appellant. *G. Tate Blackstock*, K.C., for respondents.

Quebec.] [Nov. 29, 1905.

PERRAULT *v.* GRAND TRUNK RY. CO.

Railways—Farm crossings—Board of Railway Commissioners—Jurisdiction—Appeal.

Orders directing the establishment of farm crossings over railways subject to the Railway Act, 1903, are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of 16 Vict. c. 37 (D.), incorporating the company.

An application to have the appeal quashed on the grounds that the cost of establishing the crossing demanded, together with the damages sought to be recovered by the plaintiff, would amount to less than $2,000, and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the Province of Quebec, was dismissed.

Lafleur, K.C., and *P. H. Coté*, K.C., and *Beckett*, for appellants. *Beaudin*, K.C., and *J. E. Perrault*, for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Mulock, C.J. Ex., Anglin, J., Clute, J.] [Nov. 22, 1905.

SMITH *v.* TRADERS BANK.

Practice—Striking out pleadings—Final order—Interlocutory order—Rule 261.

Appeal from an Order in Chambers of the County Court judge of the County of Bruce, striking out certain paragraphs of the statement of defence under Rule 261, upon the ground that they disclosed no reasonable defence to the plaintiff's claim.

Held, 1. The order was in its nature final and not merely interlocutory, and an appeal lay under R.S.O. 1897, c. 55, s. 52. While the order stood it disposed of the right of the defendants to set up or have the benefit of any defence which the facts

alleged in their pleading would afford them, and was a final adjudication against them upon this portion of their alleged rights; and the defendants should not be deprived of the right to appeal merely because an adjudication, in its nature final, had been made by an order in form intermediate.

2. The jurisdiction conferred by Rule 261 may not be invoked for the excision of a portion of a pleading. It is only when the entire pleading discloses no reasonable ground of action or answer that this rule applies.

C. A. Ross, for defendants, appellants. *Kilmer*, for plaintiff.

Meredith, J.] CARTWRIGHT *v.* NAPANEE. [Nov. 27, 1905.

Municipal corporations—By-law—Electrical works—Motion to quash—Irregularity.

The jurisdiction to quash by-laws on motion conferred upon a judge of the High Court by Municipal Act, 1903, s. 378, ought, generally speaking, to be exercised in every case of an illegal by-law which cannot be validated. In the case of an invalid by-law which can be cured, again generally speaking, the jurisdiction ought to be exercised when the irregularities which render it invalid affect or might have affected the passing of it, but ought not to be exercised when they could not.

Motion to quash a by-law of the defendants, providing for the construction of electric light works and debentures for that purpose, upon the ground that the Municipal Act, 1903, s. 569 (5), had not been complied with, inasmuch as there had been only publication in four weekly issues of a weekly paper, instead of publication for one month as required by the section.

Held, that this was a substantial objection, but that the by-law was within the category of invalid ones which could become validated, and inasmuch as the application seemed really made solely in the interests of a company, the business of which, if continued, would be injured by the business to be done by the municipal corporation, under the by-law, and it was clear the applicant had not been in any way prejudiced or affected by any irregularity in the proceedings, and there had been many months' delay in launching the present motion, and the by-law would undoubtedly again be passed if now quashed, and extensive proceedings and operations had been begun under it—the case was one for letting the curative provisions of the Act operate, and declining to exercise the jurisdiction to quash.

Held, also, that the same considerations applied to the objection based on the omission to give notice of the appointment of a day for finally considering the by-law in Council, as required by s. 569 (5).

Middleton, for the motion. *Bruce*, K.C., and *Harrington*, K.C., for defendants.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Jan. 9.

PHILLIPS v. CITY OF BELLEVILLE.

Municipal corporation—Sale of lands of—Sale to other than the highest bidder—Reason actuating alderman—Good faith.

Appeal by the above corporation from the judgment of MAGEE, J., upon re-trial of this case pursuant to the judgment of the Divisional Court, 9 O.L.R. 732, in order to ascertain the reasons which actuated the minds of the members of the above corporation in selling real estate of the corporation to a person other than the highest bidder, with a view to pronouncing upon the sufficiency of those reasons, which the said Divisional Court held it was the duty of the Court to do.

Held, that the Court should not attempt to decide the question upon so doubtful and elusive an enquiry as that of the respective weights that the different aldermen may have given to the various reasons on which they have acted, and it was sufficient if the Court found (1) that the council acted in perfect good faith, and (2) that they had reasons before them which they might reasonably have considered sufficient to justify their action, which the Court had found in this case upon the evidence at the said re-trial.

Mikel, for City of Belleville. *Armour*, K.C., for plaintiff. *Porter*, K.C., for Caldwell.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] ANDERSON v. PHINNEY. [Dec. 18, 1905.

Vendor and purchaser—Possession under agreement to purchase—Liability to pay interest—Equitable relation of parties.

Defendant purchased a lot of land from A. for the sum of $1,140 under an agreement in writing by the terms of which A.

was to give a deed of the land to defendant or to any other person named by him on receipt of the purchase price, and to accept a mortgage of the property for the sum of $1,000 part of the purchase price, on receiving from defendant all moneys due over and above that amount. After the making of the agreement defendant paid A. the sum of $140 and entered into possession of the premises, and for a period of two years paid A. interest on the sum of $1,000 as if the deed and mortgage had been executed, although as a matter of fact he had not received the deed or given the mortgage as agreed. No further interest was paid on the ground that A. and plaintiffs claiming under him after his death wrongfully and in breach of the agreement refused and neglected to convey the land to plaintiff and that the agreement itself contained no provision calling for the payment of interest.

Held, reversing the judgment of the trial judge, that defendant being in possession of the property and enjoying the fruits of it was bound to pay interest pending the carrying out of the terms of the agreement and that the question whether the delay was due to the action of the deceased or not was immaterial.

Per RUSSELL, J.—The position of the parties in equity was that of mortgagor and mortgagee and interest was due by the defendant on that footing notwithstanding the absence of any stipulation in the agreement, defendant having gone into possession and enjoyed the fruits.

Roscoe, K.C., for appellant. *J. J. Ritchie*, K.C., for respondent.

Province of New Brunswick.

VICE-ADMIRALTY COURT.

McLeod, J.] POULIOT *v.* LADY EILEEN. [Dec. 14, 1905.

Security for costs—Admiralty Court Rule No. 134—Plaintiff intending to remain in jurisdiction.

The plaintiff, former master of the defendant's ship running between ports in New Brunswick, was staying at Dalhousie, New Brunswick, at the time the libel was issued. The plaintiff had described himself as of Quebec, but it appeared by affidavit that he had no fixed residence and intended to remain in New Brunswick until after the trial of the action. On application made for security for costs, the same was refused, with costs.

Hazen, K.C., for plaintiff. *Mott*, for defendant.

McLeod, J.] [Dec. 20, 1905.

MASON *v.* STEAMER ST. HELENS.

Security for costs—Admiralty Court Rule No. 134—Plaintiff intending to remain in jurisdiction until trial—Effect of absence from jurisdiction.

Plaintiff was in the jurisdiction of the Court on Feb. 8, 1905, when summons was issued. He left the province, April 10, and stayed in Montreal for some two months. When the case came down to hearing, application was made for security for costs on affidavit that plaintiff was a non-resident. Plaintiff returned to New Brunswick when application was being argued, and made affidavit that he intended to remain until judgment. It was contended that since the application must have failed at the time the summons was issued, it could not be made later with success, but there being no other affidavit to shew residence other than the above, the application was granted.

Coster, K.C., for plaintiff. *McLean*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Dubuc, C.J.] MALCOLM *v.* MCNICHOL. [Dec. 22, 1905.

Negligence—Landlord and tenant—Liability of employee for negligence of contractor—Principal and agent—Presumption of negligence from circumstances.

Plaintiff was tenant of a store owned by defendant McNichol. The lease provided that the premises should be sufficiently heated by the landlord. In December, 1904, the heating was found deficient and, the landlord being absent from the province, his agent, Pepler, employed the other defendants, a firm of plumbers, to put in an additional radiator and do what should be found necessary to heat the premises adequately. During their operations the safety valve in one of the radiators was left open all night, presumably by the carelessness of a workman employed by the plumbers, and such a quantity of steam escaped into the store that the large stock of millinery and other goods owned by the plaintiff in the store were very seriously damaged and were afterwards sold by the plaintiff by auction at twenty cents in the dollar of invoice prices.

The other findings of fact were that the agent Pepler had

been employed by McNichol as his agent to attend to the renting of the premises in question and of other stores belonging to him in the same block, the collection of the rents and doing necessary things in connection therewith, including repairs, and that Pepler had, before or about the same time, ordered some repairs to the other stores and paid for them with McNichol's money; and that the latter had not objected to or questioned what Pepler had done in that respect; also that there was, upon the evidence, no other way of accounting for the escape of the steam than by assuming that the plumber had negligently left the safety valve open, as it was found open in the morning and no person had been in the store that night after he left.

Held, 1. Pepler had sufficient authority from McNichol to employ the plumbers as he had done, and that McNichol was liable to the plaintiff to the same extent as if he had himself ordered the work to be done.

2. It must be presumed that the workmen had negligently failed to close the safety valve, and that the damages suffered by the plaintiff had been caused by his negligence, and that the defendants, the plumbers, were liable to the plaintiff therefor: *Scott* v. *London & St. Katherine Docks Co.*, 3 H. & C. 596; *Gee* v. *Metropolitan Ry. Co.*, L.R. 8 Q.B. per BRETT, J., at p. 175, followed.

3. That the employment of independent contractors to do the repairs ordered did not relieve McNichol from liability for the consequence of their negligence. *Hole* v. *Sittingbourne & Sheerness Ry. Co.*, 6 H. & N. 497; and Am. & Eng. Encycl. of Law (2 ed.) vol. 16, p. 200, and Beven on Negligence, p. 731 followed.

Judgment that all defendants are liable to plaintiff for the loss suffered by her, with a reference to the Master to ascertain and report the proper amount. Plaintiff to have the costs of the action, costs of the reference reserved.

Howell, K.C., and *Ormond*, for plaintiff. *Aikins*, K.C., and *Robson*, for defendant McNichol. *Wilson* and *A. C. Ferguson*, for other defendants.

Book Reviews.

MECHANICS' LIEN LAWS IN CANADA, by HIS HONOUR WILLIAM BERNARD WALLACE, LL.B., Judge of the County Court of Nova Scotia. Toronto: Canada Law Book Company, 1905.

This book contains the Acts of Ontario, Manitoba, British Columbia, Nova Scotia and New Brunswick and the Ordinances of Alberta and Saskatchewan relating to mechanics' liens, with forms of procedure. There are given also the articles of the Quebec Civil Code and the sections of the New York and Massachusetts Acts in relation to the same subject.

The author has thought well, and the thought is a good one, to include in his work judicial interpretations of similar enactments in various States in the adjoining Republic. Some of these provisions are almost identical with our own.

Judge Wallace takes the parent statute of Ontario around which to group his collection of authorities on the various sections discussed, therein referring to the law in the other provinces. The first chapter is historical; the second deals with the nature and scope of mechanics' liens; chapter three with the construction of the Mechanics' Lien Act; chapter four deals with liens upon personality. We are given next the Ontario Act, which is taken up section by section; the authorities bearing thereon or applicable thereto being cited and discussed. Then follow a number of forms; and then the statutes of the other provinces.

The expectation raised by seeing a book on this subject from so good a lawyer and so careful a writer as Judge Wallace has not been disappointed, and we congratulate him upon his work. Whilst in some minor details of book-making we might find some points to criticise, we rather leave them to be remedied in a second edition, which, as the book is such a good one, we have no doubt will soon be called for.

The Law Quarterly Review, edited by SIR FREDERICK POLLOCK, Bart, D.C.L., January, 1906.

In addition to the usual editorial notes there are articles on the following subjects: Is International Law part of the law of England? by J. Westlake, K.C.: The Law Society on officialism, by Sir Howard W. Elphinstone: The false passports case: The origin and development of the Bengal School of Hindu law;

Changes in the law of husband and wife; Notes on Maine's ancient law, by the editor. As to the article on husband and wife, one is not surprised at the conclusion the writer arrives at, namely, that "the subject wants revising not so much by amended details as by being put on a consistent basis with consistent underlying principles. That a woman ought to have great responsibility, that she ought to have no responsibility whatever; that the spouses must not contemplate separation, that a wife shall be perfectly free to leave her husband if she wishes; that one or other or both ought to be liable for the expenses of their joint household, that neither of them need be, are contradictory propositions for each of which the cases and statutes quoted above stand as authority." The writer very reasonably submits that such bewildering paradoxes "would be out of place in the law of any country at any time, and, a fortiori, in England at the opening of the twentieth century."

Bench and Bar.

England.

Mr. John Fletcher Moulton, K.C., has been appointed Lord Justice of Appeal in succession to Lord Justice Mathew, retired. This appointment is said to be above criticism in every respect. It has also been remarked that as a result of this promotion, one-half of the Court of Appeal now consists of Senior Wranglers, which takes the sting out of the old gibe that no Senior Wrangler is good for anything in life but higher mathematics.

Ontario.

His Honour John E. Harding, junior judge of the County Court of the County of Victoria, to be judge of the said County Court in place of Judge Dean, deceased.

Hugh MacMillan of the City of Guelph, barrister-at-law, to be junior judge of the above County Court in place of Judge Harding, promoted.

George Edward Deroche, of Deseronto, barrister-at-law, to be judge of the County Court of the County of Hastings in place of Judge Lazier, deceased.

The above appointments bear date February 3rd, 1906.