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

(Continued.)

7. **Specific examples of "defects."**—(*a*) *Defects in the condition of the ways.*—This phrase embraces only those inherent imperfections which render the ways themselves less fit for the use for which they are intended (*a*). See sec. 6, ante. That the master is not liable for casual obstructions arising from the use of his ways, see sec. 8, post.

(*b*) *Defects in the condition of the works.*—Very few decisions specifically referable to this rather vague term are found in the reports except the cases discussed in sec. 5 (b), ante, in which the liability of masters for the condition of the premises of another person upon which they have contracted to do something is in question (*b*). See also the remark of Lord Watson, quoted in the last section. For some cases in which the term occurs in

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(*a*) Plaintiff's servants injured by the following defects have been held entitled to go to the jury: A loose plank extending over a hole at a place which the servant has to pass, and so laid as to trip up when he steps on it. *Bromley* v. *Cavendish, &c., Co.* (C.A. 1886) 2 Times L.R. 881. The unsafe adjustment of a plank in a temporary staging across which materials are to be carried. *Giles* v. *Thames, &c., Co.* (Q.B.D. 1885) 1 Times L.R. 469. A plank 8 in. wide and 30 ft. from the ground furnished as a means for a servant to reach and repair a defective steam pipe. *United States Rolling-Stock Co.* v. *Weir* (1892) 96 Ala. 396, 11 So. 436. [Complaint averring insufficiency, not demurrable.] A plank of insufficient strength to sustain the weight of the men who have to walk along it. *Caldwell* v. *Mills* (1893) 23 Ont. R. 462. A defective track on a railway. *Coughlan* v. *Cambridge* (1896) 166 Mass. 268. An open ditch across the track along which the plaintiff had to pull a car. *Gustafson* v. *Washburn, &c. Co.* (1891) 153 Mass 468. An unprotected aperture in a staircase which the workman has to use in the course of his employment. *Wood* v. *Dorrall* (Q.B.D.) (1886) 2 Times L.R. 550. The narrowing of the space between the wall of a passageway in a mine and cars passing therein, so as to cause the cars to pass dangerously near to the wall. *McNamara* v. *Logan* (1893) (Ala.) 14 So. 175. The roof of an adit in a mine so defectively timbered as to allow a large stone to fall on a miner. *McMullen* v. *Newhouse Coal Co.* (1896) 23 Sc. Sess. Cas. (4th Ser.) 759. A rock on the roof in tunnel which is so loose that it may fall at any moment. *Tutwiler &c. I. Co.* v. *Ensley* (Ala. 1901) 30 So. 600. The master's liability is a question for the jury where the evidence is conflicting as to whether a gudgeon pin used to fasten the arms of a derrick to a mast was large enough for safety. *Richmond &c. R. Co.* v. *Weems* (1892) 97 Ala. 270.

(*b*) *Thomas* v. *Quartermaine* (1887) 17 Q.B.D. 417, 18 Q.B.D. (C.A.) 685, a boiling vat and a cooling vat were placed in the same room in the defendant's brewery. A passage only three feet wide in one part ran between them, the rim

conjunction with others descriptive of various kinds of instrumentalities, see sec. 4 (a), ante.

(c) Defects of the condition of the machinery.—The cases cited below indicate sufficiently the kind of abnormal conditions which may properly be found by a jury to fall within this description (*c*).

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of the cooling vat rising sixteen inches above the passage. Underneath the barley vat was a board which the plaintiff had occasion to use. To draw it out he had to give it a jerk, and it came away so suddenly that he fell back into the cooling vat. In the Divisional Court, Wills, J., said that he could see no evidence of any defect. But in the Court of Appeal it was considered that the finding of the trial judge, sitting as a jury, that there was a defect in the condition of the works must be allowed to stand, as there was some evidence to support his conclusion. (See pp. 687 and 703 of the report.) A roof which proved too weak to support the snow which was allowed to accumulate on it seems to be treated in a Massachusetts case as a defect in the "works," but the point actually decided was merely that an allegation of defective conditions was sustained by proof that the weight of snow was one of the causes of the fall. *Dolan* v. *Alley* (1891) 153 Mass. 380.

(*c*) Defective pressure, causing a hydraulic crane to work erratically. *Bacon* v. *Daxes* (Q.B.D. 1887) 3 Times L.R. 557. A band which is constantly slipping off a shaft, thus creating a necessity for a frequent readjustment. *Baxter* v. *Wyman* (Q.B.D. 1888) 4 Times L.R. 255. A belt which is liable to slip off of a pulley. *Ellis* v. *Pierce* (1898) 172 Mass. 220, 51 N.E. 974. Defective appliances for controlling the speed of a push car, which collided with the plaintiff, knocking him down a high trestle, stated a cause of action. *Central of Georgia Ry. Co.* v. *Lamb*, 26 So. 969. A part of a machine in a paper mill so constructed that the rags, etc., which are fed to it are apt to catch, the result being a frequently recurring necessity to remove them. *Paley* v. *Garnett* (1885) 16 Q.B.D. 52. The absence of a guard to a circular saw provided by the owner of a saw mill, but improperly removed by the sawyer for his own purposes. *Tate* v. *Latham* (C.A.) (1897) 1 Q.B. 502. The want of a fence to protect employés from moving machinery. *Wallace* v. *Culter &c. Co* (1892) 19 Sc. Sess. Cas. (4th Ser.) 915. [Denying that this result was affected by the fact that the danger was a palpable one.] A loom in which either the shuttles are neither so fixed as not to be constantly flying out, nor protected by proper guards. *Smith* v. *Harrison* (Q.B.D. 1889) 5 Times L.R. 406. Unguarded machinery, which is operated by children. *Morgan* v. *Hutchins* (C.A. 1890) 59 L.J.Q.B. 197; *Gemmells* v. *Gouroch &c. Co.* (1861) 23 Sc. Sess. Cas. (2nd Ser.) 425. [Here unboxed cog-wheels were maintained in such a position that girls of twelve or thirteen years of age were required, in the course of their duties, to place their hands and dress within some eight or ten inches of the wheels when in motion.] Unfenced machinery in a jurisdiction where a penalty is imposed by a Factories Act for not having machinery guarded may properly be found to import negligence See sec. 6, ante. In the most recent case in which this doctrine was applied it was held that the absence of a guard is a defect, if the machinery is thereby rendered dangerous to the workmen using it, even if the machinery is in itself well constructed and suitable for the purpose for which it was designed. *Godwin* v. *Newcombe* (1901) 1 Ont. L.R. (C.A.) 525. Evidence that an injury received by a weaver in a cotton mill while he was assisting an inexperienced hand in consequence of the shuttle flying out of the loom was caused by a bolt breaking when the shuttle came in contact with it, is fit to go to the jury upon the question of negligence. *Canadian Colored Cotton Mills* v. *Talbot* (1897) 27 Can. S.C. 198. At the trial of an action against a railroad corporation for the death of an employé caused by the falling upon him of a locomotive, which had been placed on a truck in the repair shop, it is competent for the jury to find that, although the iron was sound where the wheel of the truck broke, yet, by reason of its long use and the

(d) Defects in the condition of the plant. As the term "plant" carries the very extensive meaning explained in sec. 4 (e) ante, the cases involving it cover a great variety of appliances. Some of them might presumably be referred to the instrumentalities discussed in the preceding subscriptions (*d*).

8. Conditions not amounting to defects. — The mere fact that a machine is dangerous to manipulate unless the servant takes certain precautions which any intelligent man would see to be appropriate under the circumstances will not warrant a feeling that the machine is defective within the meaning of the Act. There can be no recovery unless the defect is one which implies negligence on

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increase in the weight of engines, the truck had become unsuitable for the use to which it was put, and that, if the wheel had been of proper strength, it would have withstood the strain caused by meeting the obstruction on the rail. *Gunn* v. *New York &c. R. Co.* (1898) 171 Mass. 417.

(*d*) The following defects have been held to come under the head of "defects in plant":—The want of ventilation for the hold of a coal ship, the result being that gas accumulated and exploded when the hatches were removed and the men engaged to unload the coal entered the hold with their lanterns. *Carter* v. *Clarke* (Q.B.D. 1896) 14 Times L.R. 172, 78 L.T.N.S. 76. A horse intended for a particular kind of work, and so vicious as to be unfit for that work. *Yarmouth* v. *France* (1887) 19 Q.B.D. 647. A vicious horse. *Fraser* v. *Hood* (1887) 15 Sc. Sess. Cas. (4th Ser.) 178. A horse who is constantly falling. *Haston* v. *Edinburgh &c. Co.* (1887) 14 Sc. Sess. Cas. 4th Ser.) 621. The want of some means either to prevent loose bodies from falling upon men working below, or to protect those men from any of those bodies which may fall. *Heske* v. *Samuelson* (1883) 12 Q.B.D. 30. [Piece of coal fell from a lift the sides of which were not fenced on to an unroofed platform]. A ladder which, by the direction of the defendant, is used to support a scaffold, and not being strong enough for the purpose, breaks under the weight of a servant. *Cripps* v. *Judge* (1884) 13 L.R.Q.B.D. 583. A bolt so weakened by constant strains that it breaks. *Irwin* v. *Dennystown &c. Co.* (Ct. of Sess. 1885) 22 Sc. L. Rep. 379. A sliding-door to be used in case of fire without any provision for protecting the hands of an employé from being crushed when it is pulled to. *Johnson* v. *Mitchell* (Sc. Sess. Cas. 1885) 22 Sc. L. Rep. 698. An inflammable brattace-cloth allowed to stand in a place where sparks frequently fall on it. *Thomas* v. *Great Western &c. Co.* (C.A. 1894) 10 Times L.R. 244. Car buffers of different heights, overlapping in coupling so as to afford no protection to the person making the coupling. *Bond* v. *Toronto R. Co.* (1895) 22 Ont. App. 78, aff'd (without opinion), 24 Can. Sup. 715. [Construing the phrase, "defect in the arrangement of the plant," which occurs in the Ontario Act]. A switch not provided with a lock nor securely guarded in any other way. *Rombough* v. *Balch* (1900) 27 Ont. App. 32. An insufficiency in the number of scrapers supplied for cleaning out a brick-pressing machine. *Race* v. *Harrison* (C.A. 1893) 10 Times L.R. 42, per Kay, L.J. The failure to supply a boy with proper materials for the cleaning of machinery. *Thompson* v. *Wright* (1892) 22 Ont. Rep. 127. The inadequate manning of cars which are "kicked" on to a side track, the result being that their speed cannot be controlled and they come into collision with other cars. *Louisville &c. R. Co.* v. *Davis* (1890) 8 So. 652, 91 Ala. 487.

the part of the master or the agents for whose defaults he is answerable (*a*).

(*a*) In *Walsh* v. *Whitely* (C.A. 1888) L.R. 21 Q.B. 371, the trial judge left it to the jury to say whether there was a defect in the condition of the machine was indicated by evidence that the accident would not have happened if the disc of the wheel of a carding machine had been solid, and instructed them that to be defective a machine must be such as a reasonable, careful, experienced man, reasonably careful of the safety of his workmen, would not use. The jury found that there was a defect, but the Court of Appeal held that the evidence did not warrant this conclusion. The following passage shews the position taken by the majority of the Court, (Lindley and Soper L.JJ.): "To determine the meaning of the words 'defect in the condition of the machinery' we must look, not only at sec. 1, sub-s. 1, but also at s. 2, sub-s. 1. Reading these sections and sub-sections together we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine or a defect arising from its not being kept up to the mark, but it is essential that there should be evidence of negligence of the employer or some person in his service entrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer. What evidence is there of this? Is there any evidence of the machine being defective even in the abstract? It was perfect in all respects. It was not impaired by use. It had been properly kept up to the mark. The only suggestion is that the wheel which might have been solid had holes in it, and that, if the wheel had been solid, the plaintiff could not have put his thumb where he did, and the accident would not have happened. There was, however, no evidence worth mentioning of improper construction in this respect. But the plaintiff had used the same kind of machine for thirteen years and had sustained no injury. It is to our mind clear that he would have suffered no injury on the present occasion if he had used proper care and caution. In these circumstances we can see no evidence of any defect in the condition of the machine even apart from negligence of the employer. It may be that a solid wheel would have been safer, but it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improvement in machinery. We do not believe that such was the intention of the Legislature, nor do we think it was intended to relieve workmen from the exercise of that care and caution without which most machinery is dangerous. But in our opinion the defect in the condition of the machinery must be such as to shew negligence on the part of the employer. It seems to us that in this case there is not a particle of evidence of any defect arising from the negligence of the employer. It was a machine generally used, used by the plaintiff for thirteen years without any complaint or mischief arising, perfect and unimpaired, and never thought by the plaintiff himself to be unsafe. It is said there is evidence of the machine being dangerous. So are most machines, so is even an ordinary sharp knife, unless used with care, but that does not make it defective in its condition, nor does it imply negligence in the employer if an accident happens." Q.B.D. 371, 377. The following passage from the dissenting opinion of Brett, M.R., shews the theory adopted by that eminent judge: "Remembering that this is a statute passed to extend the liability of the employer in favour of the workmen and for their greater safety, I do not think that, in considering what is a defective machine, we can confine that consideration to the question of the purpose for which it is used. The defect contemplated by the Act is not, in my opinion, a defect with reference to the purpose for which the machine is employed, but a defect with reference to the safety of the workmen using it; and that defect may be either in the original construction of the machine or in the use to which the machine is put. Upon the findings of the jury and the true construction of the

Accordingly, under the statute as at common law, (see ante), an employer is not bound to provide the very best machinery that can possibly be invented. It is enough if he provides that which is reasonably sufficient for the purpose (*b*).

Culpability is negatived by proof that the instrumentalities furnished were the same in character and quality as those commonly used under similar circumstances by persons carrying on the same business as the defendant (*c*). But in order to be conclusive in

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enactment I am of opinion that the case is brought within the statute." The general language of the decision is somewhat qualified by *Morgan* v. *Hutchins* (C.A. 1890) 59 L.J.Q.B. 197. (See sec. 6, note (e), ante). There Lord Esher referring to the earlier case, made the following remarks: "I think it was assumed by the whole Court that, if the machine were dangerous to a workman without any fault of his own, it came within the Act. The only doubt that existed in the minds of two of the members of the Court was whether the defect had arisen from the negligence of the employer." The general rule has been enunciated, that machinery is not defective which is fit and proper for the purpose for which it is designed, and there is a reasonable mode, known to the injured servant, in which he could have operated it. *Newman* v. *Dublin &c. Co.* (1893) L.R. Ir. 399.

(*b*) *Robins* v. *Cubitt* (1881) 46 L.T.N.S. 535, per Lopes, J. Want of reasonable care is not established by evidence which merely shews that a particular safety catch of a different pattern from that on the defendant's elevator had been used ten years before by others. *Black* v. *Ontario Wheel Co.* (1890) 19 Ont. Rep. 578. The rule "an employer is not bound to provide against every possible danger, or to supply in all cases the safest and most approved appliances" was applied in *Mitchell* v. *Patullo* (1885) 23 Scotch L. Rep. 207. There the folding doors of a shed on a farm flapped in a horse's face, so that he backed a wagon, and crushed the plaintiff. Held, that the farmer was not in fault for having failed to provide sliding-doors. A defect in apparatus for hoisting ice is not shewn by the fact that a gin-wheel is hung so low that the employé's hand was drawn into it and injured by failure to stop the rope soon enough, where it does not appear that it could have been hung any higher in the building, and proper arrangements were made for stopping the rope if the engineer had observed it. *Carbury* v. *Downing* (1891) 154 Mass. 248, 28 N.E. 162. There the plaintiff did not suggest that the means employed to stop the engine was not sufficient, or that any other should have been provided, but contended that the means for indicating to the engineer the time for stopping the engine, viz., a mark upon the rope to indicate to the engineer when to stop the engine, was not sufficient. It was held that the jury could not properly have found that this was an insecure mode of indicating to the engineer when the ice arrived at the top of the run, and that the engine ought to have been inside the building, where the engineer could see the ice and the upper gin-wheel, and decide in that way when the engine should be stopped. A servant cannot recover, as for a "defect," where he is injured by the fall of a bar which was used for fastening flap-doors in a floor, and which, instead of being secured by a chain or otherwise, so as to prevent its falling, is left loose. *Poole* v. *Hicks* (1889) 5 Times L. R. 353. A draw bar on the car of another railway company which is of a different height from those on the defendants' own cars is not a defect. *Ellsbury* v. *New York &c. Railway Co.* (1899) 172 Mass. 130, 51 N.E. 415. It is not, as matter of law, the duty of persons operating coal mines to cut a manway, different and separate from the slope through which coal was brought to the surface, for the ingress and egress of their employés. *Whatley* v. *Zenida Coal Co.* Ala. (1899) 26 So. 124.

(*c*) An open hook without a catch to which a bucket is attached for raising and lowering loads cannot be held to be a defect, where the plaintiff's evidence is that such a hook was always used in work of a similar kind, and no proof is

the master's favour, as a matter of law, the usage appealed to must be, in a reasonable sense, a general one. Evidence which merely goes to shew that he conformed to the practice of a few well-regulated concerns of the same description as his own will not justify a court in pronouncing him to be free from culpability (*cc*). On the other hand, if usage is the controlling factor in the case, a jury will not be permitted to find him guilty of negli-

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given of the occurrence of any previous accident. *Claxton* v. *Mowlen* (C.A. 1888) 4 Times L.R. 756. The failure of an ironmaster to fence in about ten feet of the lower end of a shaft through which ore was raised to a furnace gangway will not render him liable for injuries to a workman struck by a piece of the ore which fell through the opening if it is shewn that it was usual in the trade to leave so much of these shafts unfenced. *Murray* v. *Merry* (1890) 17 Sc. Sess. Cas. (4th Ser.) 815. No negligence can be inferred, where a scaffold alleged to be defective was the ordinary kind of scaffold used by masons, and as strong as they are usually made. *Thompson* v. *Dick* (1892) 19 Sc. Sess. Cas. (4th Ser.) 804. A trap-door without a railing such as is commonly maintained in factories is not a "defect." *Moore* v. *Ross* (1890) 17 Sc. Sess. Cas (4th Ser.) 796. A projecting set-screw in a shaft, being a common device for the purpose for which it is used, is not of itself a defect. *Donahue* v. *Washburn &c. Co.* (1897) 169 Mass. 574; *Demers* v. *Marshall* (1899) 172 Mass. 548, 52 N.E. 1066; same case (1901) 59 N.E. 454; *Ford* v. *Mt. Tom Sulphite &c. Co.* (1899) 172 Mass. 544, 52 N.E. 1065. [In the last case recovery was denied though the screw had been placed on the shaft after the servant had entered the employment]. Nor is a key-way with sharp edges in a shaft. *Connelly* v. *Hamilton Woolen Co.* (1895) 163 Mass. 156. An engineer employed in fitting up the boilers in a steamer in course of construction cannot recover for injuries caused by falling into an open manhole, while threading his way between decks in a dim light, on the theory that the master was bound to protect the manhole. *Forsyth* v. *Ramage* (1890) 18 Sc. Sess. Cas (4th Ser.) 21. In a later case the court explained that this decision was based upon the ground that the risk in question was an ordinary one incidental to the work undertaken, and disclaimed the intention of laying any such general rule as that a workman on a ship in course of construction cannot recover for injuries due to the dangers of the place of work. *Jamieson* v. *Russell* (1892) 19 Sc. Sess. Cas. (4th Ser.) 898, where the representative of an employé killed by failing into an open tank was allowed to recover for the reason that the tank was usually covered and lighted, and that neither of these precautions had been observed on the occasion when the accident occurred. A workman injured through the slipping of some planks out of the loop in a hempen rope by means of which they are being lowered to the bottom of a trench cannot recover on the ground that a wire rope should have been used, where it appears that hempen ropes were ordinarily used for such a purpose. *Pack* v. *Hayward* (Q.B.D. 1889) 5 Times L.R. 233. In the case of a machine of a simple character the plaintiff is not entitled to go to trial merely upon averment that the machine was dangerous and that it was usual to fence such machines. *Cameron* v. *Walker* (1898) 25 Sc. Sess. Cas. (4th Ser.) 409; following *Milligan* v. *Muir* (1891) 19 Sc. Sess. Cas. (4th Ser.) 18. As to unfenced machinery, see also sec. 7 (c), ante, and the majority opinion in *Walsh* v. *Whitely*, as quoted in the last note.

(*cc*) *Louisville &c. R. Co.* (Ala. 1901) 30 So. 586. [Charge held erroneous, which proposed as a standard test, the custom of eight railway companies to use ratchet jack-screws for holding up the body of a derailed car]; *Richmond &c. R. Co.* v. *Weems* (1892) 97 Ala. 270. [Charge held erroneous which assumed the usage of five railway companies to be a decisive test].

gence where it is apparent that there is no uniform usuage in regard to the subject-matter (*d*).

The statute is not construed so as to make him an insurer of his servants' safety to such an extent that he is bound to have his machinery so constructed and arranged as to provide for the contingency that one of the men whose duty it is to attend to it may, by negligently absenting himself from his post, cause it to operate in such a manner as to injure another servant (*dd*).

An accident attributable to what is merely a condition of the material on which the employés were working and necessarily incident to the business in which they were engaged does not constitute a cause of action (*e*).

9. Defective system, employes liable for. — Under the various is also the case Employers' Liability Acts, as is also the case at common law, the master is "no less responsible to his workman for personal injuries occasioned by a defective system of using machinery, than for injuries caused by a defect in the machinery itself." In other words, "a master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used" (*a*).

(*d*) Failure to provide a temporary scaffold or platform around a "bleeder" used for the escape of gas above an iron furnace, on which the master mechanic could stand to repair the bleeder, does not constitute a defect in the ways etc. where such scaffold was sometimes used in furnaces, but repairs were also made by means of a ladder. *Birmingham Furnace & Mfg. Co.* v. *Gross* (1892) 97 Ala. 220, 12 So. 36.

(*dd*) *Robins* v. *Cubitt* (1881) 46 L.T.N.S. 535.

(*e*) *Welch* v. *Grace* (1897) 167 Mass. 590, 46 N.E. 386, where the court rejected the contention that the death of an employé due to subsequent explosion of a misspent blast which, owing to the character of the rock in which it had been placed, failed to explode in the first instance deemed to be caused by a defect in the "ways, works, or machinery" of the employer.

(*a*) Lord Watson in *Smith* v. *Baker* [1891] A.C. 325, (p. 353), where a verdict was allowed to stand which found negligence in the system, where the plaintiff was injured by the fall of a stone from a crane which worked over his head intermittently, while he was engaged in drilling, and was thus prevented from being on his guard to avoid danger when, in the course of the work, the stones lifted by the crane were swung round over his head. The absence in hoisting machinery of a sufficient safeguard against such a probable occurrence as a slip in the management of the machinery, is a defect in the system. *Stanton* v. *Scrutton* (Q.B.D. 1893) 9 Times L.R. 236. A master cannot be held liable, as for a defective system where the evidence is that the plaintiff, a boy, was injured by the sudden starting of a brick-press while he was cleaning out the under part with his hands during a temporary stoppage of the machinery but it was also shewn that he had been warned not to use his hands for this purpose. *Race* v. *Harrison* (1893) 9 Times L.R. 567. One who has contracted to take down a building which

This principle was, strangely enough, quite lost sight of in a case which recently came before the Ontario Court of Appeal (*f*). There it was correctly decided that the plaintiff was entitled to recover at common law upon a special finding that the master had made no provision for the inspection of appliances like that which caused the injury. But in the course of his opinion Chief Justice Armour took occasion to observe that, if the right of recovery had depended upon the Employers' Liability Act, it would have been necessary to send the case back to another jury to determine whether some employé superior to the plaintiff was aware that the appliances were defective. It is manifest that this theory as to the effect of the verdict is erroneous. The declaration of the jury that the defendant had made no proper provision for the inspection of the appliances in question was clearly tantamount to a declaration that his system was defective in this regard. The finding, therefore, was expressive of a fact which implied personal negligence on the part of the master himself, and it was wholly unnecessary to ascertain whether the particular defect which caused the injury was known to a superior employé.

In many instances, it will be observed, the adoption of a defective system virtually resolves itself into negligence in the exercise of superintendence. Under such circumstances a default of this

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has been gutted by fire cannot be held to have adopted an improper method of doing the work, where he arranges to remove one of the walls piecemeal by means of a scaffold constructed alongside the wall of the adjacent house. Hence a workman injured by the fall of the former wall against the latter cannot recover on the theory that the omission to shore the wall to be demolished was negligence, inasmuch as the process of shoring would have been fully as dangerous as that of erecting the scaffold. *McManus* v. *Greenwood* (Q.B.D. 1885) 52 L.T. Journ. 160. The Court of Appeal reversed the judgment of the Divisional Court (1886) 2 Times L.R. 603. The question whether the method of demolition adopted was not discussed, the reversal being put upon the ground that defendant, although he knew that there was imminent danger of the collapse of the wall, and that the workmen were ignorant of the conditions did not give them any warning. A servant injured by an explosion of gunpowder is not entitled to go to the jury on the question whether the system of work was defective, where the complaint merely alleges that the powder was stored in a magazine five minutes' distance from the work in small barrels; that, when it was desired to fire a charge, a barrel was carried from the store and opened at the place of work; and that while the plaintiff was firing a charge, a gust of wind carried a piece of fuse to a barrel from which powder had been taken, thus causing the powder to explode and injure him. Such allegations indicate rather the occurrence of an accident through the carelessness of the servant himself in not covering the barrel while the charge was being fired. *Mulligan* v. *M'Alpine* (1888) 4 Sc. Sess. Cas. (4th Ser.) 789. The common law cases on this subject are collected in a note by the present writer in 43 L.R.A., pp. 305, et seq.

(*f*) *Sim* v. *Dominion &c. Co.* (1901) 2 Ont. L.R. 69.

kind may be referred to either of the categories which are covered by this provision of the Acts and the one which will be discussed in another article.

10. **"Not discovered or remedied owing to the negligence."**—(*a*) *Generally.*—The qualifying declaration in this statute, by which liability is excluded unless negligence can be predicated of the failure to discover a remedy the defect which caused the injury, merely embodies, so far as the employer himself is concerned, the common law doctrine that negligence cannot be imputed to a person who is not shewn to have had actual or constructive knowledge of the abnormally dangerous conditions from which the injury resulted (*a*).

The converse proposition which is implied in this doctrine, viz., that a master is culpably negligent if he permits the continuance of abnormally dangerous conditions which, by the exercise of due care, he might have ascertained, suggests a reason for doubting the correctness of the decision of the Ontario Court of Appeal which is criticized on another ground in the preceding section (*b*). It seems not unreasonable to say that, for the purposes of sustaining the judgment, a court of review would have been warranted in construing the finding of the jury, that the defendant had made no provision for a proper inspection, as being equivalent to a declaration by the jury that the defect in question would have been discovered, if such an inspection had been made. This would be tantamount to saying that the master ought to have known of the defect and was therefore as culpable as if he had actually known of it and failed to remedy it. If this view be correct, the finding virtually attributed personal negligence to the master, and there was clearly no necessity to obtain the opinion of the jury upon the question whether the defect was known to a superior employé.

The imposition of liability for the defaults of the class of agents designated by this clause may be regarded as being, for practical purposes, a legislative adoption of that doctrine of non-delegable duties which has been evolved, independently of statutes, in most of the American States (*c*).

(*a*) See this note by the present writer in 41 L.R.A. p. 33, where this doctrine is analysed and discussed at considerable length.

(*b*) *Sim* v. *Dominion &c. Co.* [1901] 2 Ont. L.R. 69.

(*c*) See the note by the present writer in 54 L.R.A. pp. 33, et seq., where a complete collection of the authorities will be found.

(*c*) "*Not discovered.*"—Whether the gravamen of the servant's complaint be the default of the master himself or of his agents in failing to discover a defect, the existence or absence of culpability is tested by considerations of precisely the same kind as those which are applied in common law actions. The servant cannot succeed in his action where neither the employer himself nor his representative within the meaning of this sub-section had knowledge, actual or constructive, of the existence of the defect which caused the injury (*d*), nor where there was no reason to apprehend the particular casualty which occurred (*e*).

On the other hand, evidence that the defect might have been discovered if the instrumentality had been examined by a skilled person will justify a verdict for the servant (*f*).

(*d*) *Groves* v. *Fuller* (Q.B.D. 1888) 4 Times L.R. 474 [plaintiff non-suited]; *Walsh* v. *Whitely* (1888) L.R. 21, Q.B. Div. 371, 57 L.J.Q.B.N.S. 586, 36 Week. Rep. 876, 53 J.P. 38; *Morgan* v. *Hutchins* (1890) 59 L.J.Q.B.N.S. 197; *Griffiths* v. *London & St. K. Docks Co.* (1884) L.R. 13 Q.B. Div. 259, 53 L.J.Q.B.N.S. 504, 51 L.T.N.S. 533, 33 Week. Rep. 35, 49 J.P. 100, per Fry, L.J., followed in *Rudd* v. *Bell* (1887) 13 Ont. Rep. 47; *Louisville & N. R. Co.* v. *Campbell* (1893) 97 Ala. 147; *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21; *Wilson* v. *Louisville & N.R. Co.* (1887) 85 Ala. 269. The mere fact of a stick which broke while being used as a lever was old and had been long in use will not justify a finding that the employer ought to have known the stick to be defective. *Allen* v. *G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557. Under the original Massachusetts act the common-law rule established by *Mackin* v. *Boston & A. R. Co.* (1883) 135 Mass. 201, 46 Am. Rep. 456, that a railway company was not liable for the negligence of its car inspectors, was declared not to have been changed in regard to foreign cars received merely for forwarding. *Thyng* v. *Fitchburg R. Co.* (1892) 156 Mass. 13. Compare also *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21. But this decision is no longer a correct statement of the law since the passage of the Amendatory Act of 1893, ch. 359, declaring that the mere fact of a car being in possession of a railroad company makes it a part of its "ways, works, or machinery."

(*e*) *Booker* v. *Higgs* (Q.B.D. 1887) 3 Times L.R. 618. Recovery denied for lack of positive evidence on this point in a case where a labourer was injured by the fall of a bank of earth which he has been ordered by the foreman to excavate by entering a hole in a wall against which the earth lay.

(*f*) *Fraser* v. *Fraser* (1882) 9 Sc. Sess. Cas. (4th Ser.) 896 [rope broke]. A judgment for the plaintiff will not be disturbed where he was injured by the breaking of a bolt, not shewn to have any latent defect, and the evidence was that, although it had been subjected to usage which tended to diminish its strength, its strength had not been tested as it should have been with reasonable frequency. *Irwin* v. *Deningstown &c. Co.* (Sc. Sess. Ct. 1885) 22 Sc. L. Rep. 379. The fact that the machinery which caused the accident was changed after it occurred is admissible as evidence that the master knew the machinery to be defective. *Dodd* v. *Dunton* (1890) 16 Vict. L.R. 531. Evidence that defects in a truck had existed for several weeks prior to the accident is relevant on the question of negligence. *Kansas City &c. R. Co.* v. *Webb* (1892) 97 Ala. 157. A finding that a foreman should have seen that a plank which gave way was cross-grained and knotty, and consequently unsafe to walk upon in the position in which it was placed will not be disturbed. *Caldwell* v. *Mills* (1893) 24 Ont. R. 462.

The mere fact that no accident has happened for several years does not prove that the master ought not to have known there was danger. "Long immunity from accident does not prove absence of carelessness. It may only prove long-continued habitual negligence" (*g*).

In determining the question whether the instrumentality ought to have been inspected by the defendant or his agents, the fact that it was furnished by a competent contractor, or that an express statement as to its condition had been made by such a contractor, under circumstances in which it was apparently justifiable to rely upon his opinion is in England deemed to be conclusive against the inference of negligence (*h*).

(*c*) "*Not remedied.*"—A remedy of a "defect in the condition of the machinery" does not mean putting the machinery in perfect condition for working purposes, but the removal of the source of danger to employés, which may be done by a temporary device, as well as by permanent repairs (*i*).

The failure to stop a machine which is not working properly is a failure to "remedy" its defects (*j*).

Negligence cannot be inferred where a defect came to the knowledge of the master or superior so short a time before the accident that there was not sufficient time to remedy it (*k*).

(*g*) *Thomas* v. *Great Western &c. Co.* (C.A. 1894) 10 Times L.R. 244, reversing decision of Divisional Court.

(*h*) A master is not liable for injuries caused by the fall of a staging which only the day before had been erected by a contractor. He is not, under such circumstances, bound to inspect the staging himself or to employ anyone specially to inspect it. *Kiddle* v. *Lovett* (1885) 16 Q.B.D. 605, per Denman, J. (sitting without a jury). [The master had paid a sum of money to the servant, and was suing the contractor to recover the amount. It was held that he could not maintain the action.] No negligence is proved, where a foreman, relying upon the assurance of a contractor engaged in reinstating a building which had been partially destroyed by fire, that one of the walls had been safely shored up, sends his subordinates back to work near it, after having withdrawn them when he noticed the unsafe condition of the fabric. *Moore* v. *German* (Q.B.D. 1889) 5 Times L.R. 177, 58 L.J. Q.B. 169.

(*i*) *Willey* v. *Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L.R.A. 723, 46 N.E. 395. [Defendant had argued that it was not liable because the defect could not have been permanently remedied before the accident.]

(*j*) *Bacon* v. *Dawes* (Q.B.D. 1887) 3 Times L.R. 557.

(*k*) *Seaboard Mfg. Co.* v. *Woodson* (1891) 94 Ala. 143. [Complaint demurrable which merely alleges that the defect "was known to the superior officers of plaintiff and known to defendant."

When the danger is not constantly present, but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach (*l*).

(*d*) "*Person entrusted with the duty, etc.*"—To bring an employé within this description there should be evidence shewing that he was charged with the specific duty of keeping the defective instrumentality in proper condition (*m*). But it is not necessary to show that he was discharging the functions of a superintendent (*n*).

The negligence of a superior employé not charged with that duty who attempts, at the request of a servant who is using an appliance, to remedy a defect therein, is not imputed to the master (*o*). Nor is the clause applicable to an employé whose duty it is, under a rule of his master, to examine for his own security the appliances which he uses (*p*). Still less is the master liable for the negligence of a mere labourer working under or with others, even though it may be a part of his duty at some particular

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(*l*) *Smith* v. *Baker* (1891) A.C. 325, Lord Watson said (p. 354) "The employer may protect himself in such cases either by removing the source of danger, or by making provision for due notice heing given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning through the negligence of himself or of his superintendent."

(*m*) The employer has been held liable for the negligence of the following agents: An assistant roadmaster whose duty it is to inspect cars and have them run upon the repair track when they are found to require repairs. *Somerville &c. R. Co.* v. *Davis* (1890) 8 So. 552, 91 Ala. 487. A supervisor and section foreman in a case where a defect in a switch caused a train to be derailed. *Kansas City M. & B. R. Co.* v. *Webb* (1892) 97 Ala. 157. A lineman sent out to search for and remedy a defective insulation on an electric wire. *Willey* v. *Boston &c. L. Co.* (1897) 168 Mass. 40; 37 L.R.A. 723. A carpenter who understands and looks after machinery, although subject to the orders of a superintendent who is also a salesman. *Copithorne* v. *Hardy* (1899) 173 Mass. 400, 53 N.E. 915. An employé in charge of the stables of a street car company one of whose horses was in an unfit condition to be worked. *Haston* v. *Edinburgh &c. Co.* (1887) 14 Sc. Sess. Cas. (4th Ser.) 621. A "fireman" of a mine whose duty it is to inspect the workings before the miners go to work, and report as to the state of the ventilation. *Cowler* v. *Moresby Coal Co.* (Q.B.D. 1885) 1 Times L.R. 515. In *Canadian &c. Mills* v. *Talbot* (1897) 27 Can. Sup. 198, it was held that evidence shewing that an employé called a "loom-fixer" whose duty it was to examine a loom, after being notified that something was wrong with it, had failed to make an examination, justified submitting the case to the jury.

(*n*) *Copithorne* v. *Hardy* (1899) 173 Mass. 400, where the master was held liable for the negligence of one who attended under the superintendent's orders, to the adjustment of machinery.

(*o*) *Thomas* v. *Bellamy* (1900) 28 So. 707, 126 Ala. 253.

(*p*) *Memphis &c. R. Co.* v. *Graham* (1891) 94 Ala. 545. [Conductor and brakeman denied to be "persons entrusted, etc."]

moment in the progress of the work to look after and attend to certain instrumentalities (*q*).

11. **Abnormal conditions resulting from the use of the appliances furnished by the master, how far regarded as defects.**—Injuries resulting from these abnormal conditions which, in all kinds of industrial work, are temporarily created by the user of the appliances furnished by the master are not considered to be caused by "defects" within the meaning of these statutes. "The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes" (*a*). Especially

(*q*) *O'Connor* v. *Neal* (1891) 153 Mass. 281, where the court refused to hold the master liable for the negligence of a painters' assistant, who aided his principal in moving from place to place the planks and barrels from which a temporary scaffold was constructed, and adjusted one of the barrels so carelessly that the scaffold collapsed.

(*a*) *Whittaker* v. *Bent* (1897) 167 Mass. 588, denying recovery for an injury resulting from the temporary dampness of moulds used in an iron foundry, which can be ascertained only at the moment when they are set up, the reason assigned being the moulds were small and numerous, the danger transitory, and any further inspection than that of employés setting them up impracticable. The absence of stanchions on the sides of a trolley is not a "defect" where the placing of such stanchions is the duty of the servants who put on the load. *Corcoran* v. *East Surrey &c. Co.* (Q.B.D. 1888) 45 Times L.R. 103, 58 L.J.Q.B. 145. The liability of a bank of earth which an employer is engaged in levelling for the purpose of grading the land of a third person, and upon which labourers are at work, to fall when undermined, if not properly shored up is not a "defect in the ways" etc. *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N.E. 550. A defect in the "ways" is not predicable, unless there is some alteration in the permanent condition of the way itself. Obstacles lying on or near the way which do not in any degree alter the fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it are not within the purview of this provision. *McGiffin* v. *Palmers &c. Co.* (1882) 10 L.R.Q.B.D. 1, denying recovery where a car on which a workman was conveying heavy iron balls struck against a piece of a substance used for lining the furnaces which had been negligently placed projecting into the roadway on which the car ran, the result being that one of the balls fell on him. The words "ways, works and machinery" do not cover a pile of lumber in the yard of a lumber dealer. *Campbell* v. *Dearborn* (1900) 175 Mass. 183, 55 N.E. 1042. To the same effect see the following cases where the abnormal conditions were of the nature mentioned in the memorandum of the facts appended to the citations. *Willetts* v. *Watt* (C.A.) [1892] 2 Q.B. 92. [Temporary removal of the cover of a catch-pit lying in the line of a path along which servants had to pass in the course of their duties]; *May* v. *Whittier Mach. Co.* (1891) 154 Mass. 29, 27 N.E. 768. [Employé stumbled over some small pieces of wood which had been piled against the back of a planing machine, near which he had to pass, and was hurt by his hand coming into contact with the machine]; *Kansas City M. & B. R. Co.* v. *Burton* (1892) 97 Ala. 240, 12 So. 88. [Car left standing on a railway track], over-ruling on this point, *Highland Ave. &c. R. Co.* v. *Walters*, 91 Ala. 435; *Louisville &c. R. Co.* v. *Bouldin* (1895) 110 Ala. 185. [Oil-box standing near the track which came into contact with plaintiff's foot while he was standing on the pilot of an engine and threw him off]; *Carrol* v. *Wilcut* (1895) 163 Mass. 221, 39 N.E. 1016. [The presence of a ledge stone on a scaffolding]. Both on the principle applied in these

is this rule applicable when the abnormal conditions would not have existed if the plaintiff himself had done his duty (*b*). In cases of this class the only ground on which the master can be held liable is that he was guilty of negligence in not warning his servants of the increased risk to which they would for the time being be exposed (*c*).

The temporary nature of the abnormal conditions complained of will not, however, protect the master if they amounted to a structural alteration of the appliance in question and that alteration was made by the employé in charge of it (*d*).

A fortiori, where such a structural alteration was intended to be permanent, the servant will not be excluded from the benefits of the statute simply for the reason that the new arrangements were only completed the day before the accident (*e*). Moreover it would

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cases, and also on the ground that the accident was an unexpected one, it has been held that a master cannot be held liable under the statute for an injury due to a railway tie with a projecting spike in it which has been taken up with a view to repairing it and placed by the side of a road, where the cause of the injury was the fact that a horse which the plaintiff was leading was frightened and, backing against him knocked him down upon the tie. *McQuade* v. *Dixon* (1887) 14 Sc. Sess. Cas. (4th Ser.) 1039. Whether this proximate cause of the injury was the negligence of a fellow-servant in regard to the mere use of appliances of the work, is primarily a question for the jury. *Knight* v. *Overman Wheel Co.* 54 N.E. 890, 174 Mass. 455.

(*b*) A verdict for the plaintiff should be set aside, where his own evidence shews that, if the machine had been properly attended to by himself, the accident would not have happened. *Kay* v. *Briggs* (Q.B.D. 1889) 5 Times L.R. 233. An employer is not liable for the death of an employé while laying pipe in the bottom of a sewer trench in process of construction by the employer, through the caving in of the walls of the trench, due to insufficient shoring and bracing, where such employé was himself entrusted with superintendence of the shoring and bracing and paid higher wages because of it. *Conroy* v. *Clinton* (1893) 158 Mass. 318, 33 N.E. 525. This particular situation, however, would seem to be more appropriately referred to the conception of an inability to recover predicated from the contributory negligence of the injured person.

(*c*) *Willett* v. *Watts* (C.A.) [1892] 2 Q.B. 92.

(*d*) See *Tate* v. *Latham* (C.A.) [1897] 1 Q.B. 502, holding the absence of the guard of a saw was held to be a "defect," where it had been temporarily removed by the sawyer. This decision practically overrules the dictum of Fry, L.J., that the defects contemplated by the statute are those of a "chronic character." *Willett* v. *Watts* [1892] 2 Q.B. 92. [In the report in (61 A.L.J.Q.B. 540) the phrase used is "somewhat chronic."] It was pointed out in the latter case by Bruce, J., (Divisional Court), this theory is not necessary to sustain the conclusion arrived at. That conclusion indeed might well be put upon the ground that no negligence was established, as the catchpit into which the plaintiff fell had been opened to allow work to be done, and was left unfenced because it was not possible to do the work while a fence surrounded it.

(*e*) *Copithorne* v. *Hardy* (1899) 173 Mass. 400, 53 N.E. 915. [Shaft attached to the ceiling of a room by brackets and screws, held not to produce conditions belonging to that transitory class for which the employer is not responsible beyond furnishing a choice of proper materials or instrumentalities].

seem that conditions which, in the first instance, are merely temporary in their nature, will, if they are allowed to become permanent, be assimilated, for the purposes of these statutes, to defects inherent in the substance of the instrumentalities themselves (*f*).

When the master keeps a readily-accessible stock of simple appliances he is not bound under the statute any more than at common law to see that a servant asks for a new one when that which he has been using is worn out (*g*). These decisions suggest that the temporary or permanent nature of the defect is not the true differentiating factor in this class of cases, and that the essential questions are rather, (1) whether the abnormal conditions were mere incidents in the progress of the work or structural, and, (2), supposing them to be of the latter description, whether they were brought about by the act, or volition of the employé who was in charge of the instrumentality to which the injury was due.

12. Defects in temporary appliances constructed by the servants themselves, not deemed to be chargeable to the employer.—A special application of the principle exemplified in the preceding section is the doctrine enforced in several American cases that there can be no recovery under this provision of the statute, where the

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(*f*) This seems to be the rationale of a Scotch case in which it has been held that a manhole at the side of a railway in a mine so obstructed with rubbish that a miner is unable to use it as a refuge when cars are approaching is a "defect in the ways" *Ferris* v. *Cowdenbeath* (1897) 24 Sc. Sess. Cas. (4th Ser.) 615.

(*g*) There can be no recovery for the death of an employé caused by the breaking of a wooden lever by which a fellow workman was helping to raise a heavy iron door on its hinges, causing the door to swing down and strike an iron lever held by deceased, driving it into his abdomen, in the absence of any evidence that the broken stick was defective, or, if so, that the defect could have been discovered. *Allen* v. *G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N.E. 581. The court said: "The whole matter was in the hands of the deceased. He was the person in immediate charge of the furnace. If a new stick was needed, it was his business to know it. The primary duty rested on him, not on the superior officer. Again, if a new stick had been needed, it could have been obtained of the carpenter by the deceased at any time. The defendant kept a stock of lumber of the proper size on hand, and the deceased had only to ask for what he wanted. If such a stick can be said to be part of the works or machinery, the defendant's duty to the deceased did not require it to see that he called for a proper one. It was enough that it had proper ones within convenient reach." One of a number of chains furnished for use as required is regarded, when it is applied to the purpose for which it was designed, as a permanent instrumentality and not one of those small things which go through a rapid course of wearing out and replacement, as to which the rule is that it may be left to the judgment of the workmen when one of them is to be discarded. The making of a link for such a chain, therefore, is not one of those merely transitory adjustments which the master is under no personal obligation to see carefully performed. *Haskell* v. *Cape Ann &c. Works* (Mass. 1901) 59 N.E. 1113.

injury was the direct result of the negligent manner in which the servants themselves constructed a temporary appliance from adequate and suitable materials furnished by the master (*a*). This rule is the counterpart of that which, in common law actions, prevents recovery under similar circumstances. See the writer's note in 54 L.R.A., pp. 136, et seq. The rule under the statute is subject to the same qualification as the common law doctrine, viz., that it does not protect the master, if the defective appliance was one which he was bound to furnish in a completed condition (*b*). From the case cited it would appear that the servant has the burden of proving the existence of such an obligation, whenever the appliance was one of an essentially temporary description, and to be used only for the particular piece of work then in progress.

Another possible qualification of the rule is that the master might be held responsible if the temporary appliance was one con-

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(*a*) The action has been held not maintainable where the cause of the injury was one of the following appliances: Two ladders selected by employes from a supply furnished by the employer, and fastened together for use in painting a building. *McKay* v. *Hand* (1897) 168 Mass. 270, 47 N.E. 124 [The Court said: "From the description of the ladder which broke it is difficult to see from the evidence that the defendant was negligent in keeping it among his lot of ladders and in permitting it to be used, and if the sole negligence was that the ladders were fastened together and improperly placed against the house, that was the fault of the plaintiff and his fellow workman, and it was known to and appreciated by the plaintiff at the time. A ladder may be a sound light ladder of sufficient strength to be used by itself, but not suitable to be made the butt of two ladders fastened together." [A temporary staging put up for the purpose of erecting a building. *Burns* v. *Washburn* (1894) 160 Mass. 457, 36 N.E. 190. A temporary staging put up by workmen themselves who are slating a roof. *Reynolds* v. *Barnard* (Mass.) 46 N.E. 703 (1897) 168 Mass. 226. A temporary staging used by painters in painting the walls of a building. *Adasken* v. *Gilbert* (1896) 165 Mass. 443, 43 N.E. 199. The master cannot be held liable as for a defect, where a scaffold falls owing to the fact that a barrel by which it was supported was placed upon some rubbish of an accidental or temporary character on the floor of the room where the plaintiff was at work. *O'Connor* v. *Neal* (1891) 153 Mass. 281. The employers' liability for injuries sustained by the giving way of a part of a staging is not established where the evidence does not tend to shew that the employers furnished the staging as a completed structure, or that they assumed to exercise any control or supervision as to how it should be built or kept or adapted for work, or that they failed to furnish a sufficient quantity of suitable materials, or that they employed incompetent workmen, but does shew that the staging in use in the building had been in the care of the workmen themselves for several months. *Brady* v. *Norcross* (1899) 52 N.E. 528, 172 Mass. 331. The gravamen of a declaration shewing that the plaintiff, a journeyman painter, was injured owing to the negligence of another painter in failing to fasten properly his end of the hanging scaffold on which they were working, is the negligence of a fellow servant in handling or using an appliance, and therefore no cause of action under the statute is alleged. *Ashley* v. *Hart* (1888) 1 L.R.A. 355, 147 Mass. 573, 18 N. East. 416

(*b*) See *Brady* v. *Norcross* (1899) 52 N.E. 528, 172 Mass. 331.

structed by a superintending employé, unless it should be held that proof of negligence on the part of such an employé would not sustain an allegation of injury caused by a "defect," and that, under the circumstances supposed, the complaint must be based on the words of the provision in the following sub-section of the Act. In the absence of any direct authority on the point, all that can be said is that, in any case where it may be uncertain whether the master can be held liable simply on the ground of the existence of a defect, it would be well to insert an alternative court averring negligence in the exercise of superintendence.

18. Duty of servant to report defects.—(*c*) *Statutory and common law doctrines compared.*—There is the high authority of Lord Watson for the doctrine that this provision puts the servant in a more favourable position than he occupied under the common law (*a*), and his view has been adopted by the Supreme Court of Canada (*b*). But with all deference to this very distinguished

(*a*) See *Smith* v. *Baker* [1891] A.C. 325, where, in the course of his comments on the clause, he remarked: "I think the object and effect of the enactment are to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer."

(*b*) *Webster* v. *Foley* (1892) 21 S.C.R. 580. It is perhaps not amiss to introduce here a few remarks as to the singularly unsatisfactory character of the expositions of principles in this case, more particularly when it is considered with reference to the special findings which are set out in the record. The answers of the jury to three of the questions propounded by the trial judge were to this effect: (1) That the plaintiff had complained of the defect to the person who appeared to be the proper person to receive a complaint; (2) that the defendant did not know of the defect; (3) that the member of the defendant firm who was himself acting as manager ought to have been cognizant of the defect.

In view of the first of these findings it is not apparent why the effect of the failure of the servant to notify the master of the defect should have been regarded as a material question in the case. There is no intimation that the evidence was insufficient to warrant the conclusion arrived at by the jury, nor that the notification was inadequate to charge the master with knowledge, for the reason that it was made to a mere fellow-servant. So far as the report shews, it may have been made to the manager of the concern, who as already stated, was one of the partners in the defendant firm. But, even if we assume that this finding could not be treated as an element in the case for some reason, evidential or doctrinal, which is not disclosed, there still remains the difficulty that the jury also declared that this managing partner "ought to have been cognizant" of the defect. That this finding was, so far as the defendant's liability was concerned, equivalent to a finding, is indisputable, both on principle and authority. See *Mellors* v. *Shaw* (1861) 1 B. & S. 437, where Blackburn, J., remarked during the argument of counsel that an allegation that an instrumentality was known by the defendant to be in an unsafe condition is established by proof that he "ought to have known" that it was in that condition. Other English cases which declare or assume that liability on the Master's part is negatived by his ignorance of the defect only where it appears that such ignorance was excusable are, *Weems* v.

jurist, it seems open to doubt whether this theory is correct. There is, it is true, no English decision which in terms lays down the rule that a servant who learns of a defect is bound to communicate his knowledge to his master, and that his failure to give such information constitutes a breach of a specific duty which of itself is enough to prevent his recovering for any injury which he may thereafter receive owing to the existence of the defect. But the reason for the lack of direct authority on the point is sufficiently obvious. In all the cases decided under common law doctrines up to the time when Lord Watson delivered this opinion, the circumstances were necessarily such as to bring them within the scope of the principle, that the servant's action was absolutely barred, whenever it was shewn that he went on working with a full appreciation of a risk resulting from the master's negligence. The

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Mathieson (1861) 4 Macq. H.L. 215 (p. 222); *Feltham* v. *England* (1866) L.R. 2 Q.B. 33; *Patterson* v. *Wallace* (1854) 1 Macq. H.L. 748; *Roberts* v. *Smith* (1857) 2 H. & N. 213; *Webb* v. *Rennie* (1865) 4 F. & F. 608. For the American decisions to the same effect see note by present writer in 41 L.R.A., pp. 44, et seq. In view of this doctrine the finding in question manifestly puts the master in the same position as if notice of the defect had actually been given by the servant, and rendered it a mere matter of supererogation to inquire whether or not he was relieved from liability by the servant's failure to give notice. The defendant firm was plainly answerable on the simple ground that one of its members had been personally negligent in not remedying a defect of which he had constructive knowledge. See *Mellors* v. *Shaw* (1861) 1 B. & S. 437; *Ashworth* v. *Stanwix* (1861) 3 El. & El. 701.

Thus far we have been discussing the case in the assumption that the court, in deciding that a judgment for the plaintiff should not be set aside for the mere reason that the defendant "had no notice" of the defect, used the phrase in the sense of "had received no notification from the servant." This is the construction put upon the decision in the reporter's head-note, and the reliance placed by Strong, J., upon the passage from Lord Watson's opinion, where this is undoubtedly the import of the words, shews that the court intended at all events, to assert the doctrine that the servant did not forfeit his right of action by not giving notice of a defect which was known to him. But it may be desirable to advert in passing to the ambiguity of phrase "had no notice," which so far as the words themselves are concerned may also be taken to mean "had no actual knowledge." The significance of this fact when considered with reference to the substance of the findings above referred to is obvious. Such a construction of the phrase would render Mr. Justice Strong's remarks applicable to the second of those findings, and upon this circumstance, taken in connection with the further circumstance, already commented upon, that the findings as to the complaint made by the servant, and the master's possession of constructive knowledge of the defect, a plausible argument might be based, that the court also intended to stand sponsor for the doctrine that it is the existence or absence of actual knowledge that determines whether the master is or is not liable. Such a doctrine, as is very plainly shewn by the English cases cited above, would be erroneous. But the inquiry is not worth pursuing in the present connection. We have merely drawn attention to the point, as being one of the obscure aspects of a case which, to say the very least, is neither a model of lucid statement nor a favourable exemplification of the manner in which a court of review should deal with the special findings of a jury in actions of this sort.

natural result was that, although the failure of the servant to report or complain of a defect was mentioned in some of the cases (*c*) this fact was never treated as a material element in the case, the master's defence being regarded as complete without any reference to the question whether the servant had communicated his knowledge. In none of these cases was the evidential significance of the servant's silence considered in any other point of view than as a circumstance tending to shew his acquiescence in the conditions that is to say, as a circumstance, corroborating a presumption already absolute that the risks in question had been accepted. Such being the state of the authorities, the mere fact that the existence of a duty on the servant's part to notify his master of a defect was never affirmed cannot fairly be adduced as a ground for denying that there was such a duty. When subjected to the test of to general principles, the correctness of Lord Watson's theory seems be equally disputable. It is impossible to adopt it without accepting the conclusion, that, if a jury has, in a common law action, found that the servant was guilty of contributory negligence in failing to give notice of the defect which caused his injury, and it is clear that the verdict was based on the hypothesis that there was a legal duty incumbent on the servant to give the notice, a court of review would be constrained to set the verdict aside. Such a proposition seems too preposterous to entertain. The extreme improbability of such a verdict's even being rendered may be readily conceded, but this practical consideration is immaterial in a discussion of the abstract point of law which is involved.

The general effect of the American decisions in this connection is inconclusive for the same reason as that which has been adverted to in commenting on the English cases. The failure to report a defect is usually treated merely as a cumulative ground for denying the servants' right of recovery, and not as the breach of a specific duty (*d*).

Inasmuch as a servant frequently finds himself relegated to his common law rights, owing to his having failed to give due

(*c*) For example, *Skipp* v. *Eastern &c. R. Co.* (1853) 9 Exch. 223.

(*d*) See, for example, the language used in *Baltimore &c. R. Co.* v. *Baugh* (1893) 149 U.S. 368; *Hough* v. *Texas &c. R. Co.* (1879) 100 U.S. 213 (p. 224) *McQueen* v. *Central Branch &c. R. Co.* (1883) 30 Kan. 691; *Pollock* v. *Sellers* (1890 42 La. Ann. 623.

notice that the injury was sustained, or to bring the action within the statutory period, the true doctrine on this subject is still a question of more than theoretical interest in England and her Colonies, where it has not yet been determined how far the doctrine enunciated in *Smith* v. *Baker* (*e*) may, when the question arises, be held to have modified, in common law cases, the theory of the older decisions that the servant's acceptance of a risk is to be inferred, as matter of law, from his continuance of work with a knowledge of its existence. In Massachusetts it seems to be immaterial in this point of view, whether the action is brought at common law or under the statute, as the English doctrine that the servant's assumption of risks is a question for the jury where the statute is relied upon, has been definitely repudiated in recent decisions (*f*).

(*b*) *Position of a servant who fails to report a defect.*—In an action brought under a statute which merely declares that the servant cannot recover unless he reports the defect, it is clear that if he fails to make the report, and goes on working without knowing that the master is aware of the defect, he cannot recover for any injuries which he may thereafter receive by reason of its existence (*g*). The doctrine laid down in *Smith* v. *Baker* (*h*) is presumably not applicable under such circumstances, though the writer is not aware of any case in which the point has been discussed. In Ontario and British Columbia, the position of the servant is more favourable, the legislature having expressly enacted that the servant is not debarred from recovery merely by reason of his having continued to work with knowledge of the risk. If the extreme unlikelihood that any jury will even, in a case of this description, pronounce the risk to have been assumed by the plaintiff is adverted to, it will be apparent that the practical effect of this provision is to render almost nugatory the protection afforded to the master by the clause which makes it the duty of the servant to give notice.

(*e*) [1891] A.C. 325. It is significant that in this case Lord Watson was prepared to hold that, apart, from the Act of 1880, the plaintiff's remedy was not necessarily taken away by the mere fact that, in the knowledge of the risk and after remonstrance, he continued to work (p. 352).

(*f*) *O'Maley* v. *South Boston &c. Co.* (1893) 158 Mass. 135; *Davis* v. *Forbes* 1898) 171 Mass. 548.

(*g*) *Thomas* v. *Bellamy* (1900) 28 So. 707, 126 Ala. 253.

(*h*) [1891] A.C. 325.

By the express words of the statutes a servant is not bound to give information of a defect where he knows that it is already known to the master (*i*).

(*c*) *Position of a servant who has reported a defect.*—The rights of action acquired by a servant who has duly reported a defect in compliance with the statute and then goes on working depend largely upon the extent to which the maxim, Volenti non fit injuria. A full treatment of the subject, therefore, would carry us beyond the scope of the present article. But a brief reference to the effect of the cases, in so far as they bear directly on the provision now under discussion will not be out of place.

In an oft-cited case Lord Esher expressed the opinion that the effect of this provision was that the servant was always entitled to recover, if he gave information of the defect (*j*). Bowen, L.J., did not refer specifically to this point in his celebrated opinion, but the theory upon which he and Lindley, L.J., proceeded in giving judgment against the plaintiff, viz., that the maxim was, under the circumstances a bar to the action, necessarily implies a disapproval of the doctrine that the right of recovery became absolute as soon as the servant had made a complaint to the proper person.

In another case decided in the same year Lord Esher remarked that it was very difficult to give a sensible construction to the provision, and enunciated a view somewhat different from that intimated in the earlier case, holding the meaning of the words to be that, if the servant did give notice, and the defect was not remedied, he might recover unless he was brought clearly within the maxim (*k*). The plaintiff's action was held by the majority of the court to be maintainable, and the fact that Lindley, L.J., who had concurred with the views of Bowen, L.J., in *Thomas* v. *Quartermaine*, agreed in the judgment, and that he did not give any intimation that his views had undergone a change since the earlier case was decided, shews that he did not intend to go to the length of holding that the servant had done everything that was required to give him an indefeasible right of action when he had given notice of the defect. The subsequent decision of the House of

(*i*) *Truman* v. *Rudolph* (1895) 23 Ont. App. 250.

(*j*) *Thomas* v. *Quartermaine* (1887) 18 Q.B.D. 685 (p. 689).

(*k*) *Yarmouth* v. *France* (1887) 19 Q.B.D. 647 (p. 656).

Lords in *Smith* v. *Baker* (*l*) also falls short of the extreme theory suggested by Lord Esher in *Thomas* v. *Quartermaine*, as it simply decides that the servant does not forfeit his right of action merely because he goes on working after remonstrating against the manner in which the master's appliances are used (*m*).

In Alabama it has been held that, in order to fulfil his statutory duty as to the reporting of a defect, a servant must notify either the master himself or the employé whose specific function it is to see that the instrumentality in question is kept in proper condition. It is not sufficient to notify a superior servant, who is not entrusted with that function (*n*). The rule is possibly more favourable to the servant in Ontario, though the point has not been directly raised in any case that has come to the writer's notice (*o*).

(*l*) [1891] A.C. 325.

(*m*) The testimony on the record was that one of the plaintiff's fellow-workers had, in his hearing, complained to the foreman of the danger of slinging stones over their heads with the crane, and that he himself had told the crane-driver that this was not safe. But in the various opinions delivered these facts were referred to merely as evidence tending to shew that the servant was fully aware of the risks he was running. The question whether the servant by giving notice of the abnormal danger acquires an absolute right to recover damages for such injuries as he may thereafter sustain from the existence of those conditions was not discussed.

(*n*) *Thomas* v. *Bellamy* (1900) 28 So. 707, 126 Ala. 253.

(*o*) In *Sim* v. *Dominion &c. Co.* (1901) 2 O.L.R. 69, Armour C.J.O., said that if the servant's right of action had depended on the statute it would have been necessary to send the case to a jury in order to determine where a superior employé knew of the defect—a remark which may perhaps be construed as an intimation that a notification to any superior employé would have been sufficient.

C. B. LABATT.

The learned writer of the article which appeared in a previous issue on the Criminal Law of Canada, desires to note (in reference to his remark on p. 234, ante) that sec. 744 of the Criminal Code was changed by the Criminal Code Amendment Act of 1900, so as to do away with the necessity for an application to the Court of Appeal for leave to appeal under that section. The remarks of Osler, J.A., in dealing with the Code and the above amendment in the case of *Rex* v. *Burns*, 1 O.L.R. 336, are worthy of note. "It would almost seem that, contrary to the whole spirit of English law as it has for ages been administered in courts of justice, the Criminal Code has been so framed as to afford ground for the contention that an accused person may be placed a second time in jeopardy of life or liberty after he has been acquitted upon a trial before a competent tribunal: sec. 744 (63 & 64 Vict. c. 46 (*d*))."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

WILL — CONSTRUCTION — REMOTENESS — ABSOLUTE GIFT SUBJECT TO TRUSTS WHICH FAIL.

In *Hancock* v. *Wilson* (1902) A.C. 14, the House of Lords (Lords Davy, Shand, Brampton, Robertson, and Lord Halsbury, L.C.,) have affirmed the well-established principle that where a gift over is made on one or more contingencies, one of which would be valid and the other invalid for remoteness, the gift must be read as a whole and cannot be split, in order to give effect to the contingency which, if it stood alone, would be valid. Their Lordships have also determined that where there is an absolute gift to a legatee, and trusts are engrafted or imposed on that absolute interest which fail from lapse or invalidity, or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be.

MORTGAGE—"CLOG ON REDEMPTION"—TIED PUBLIC HOUSE—MORTGAGE OF LEASEHOLD PUBLIC HOUSE — COVENANT BY MORTGAGOR TO BUY BEER OF MORTGAGEE ONLY.

In *Noakes* v. *Rice* (1902) A.C. 24, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Shand, Davey, Brampton, Robertson and Lindley) have arffimed the decision of the Court of Appeal in *Rice* v. *Noakes* (1900) 2 Ch. 445 (noted ante vol. 37, p. 63). A mortgage of a leasehold public house contained a covenant by the lessees during the continuance of the term, and whether anything was due on the security or not, to buy beer exclusively from the mortgagees. The mortgagor claimed to redeem, on redemption a release of this covenant. The House of Lords agreed with the Courts below that the mortgagor was entitled to what he claimed. *Carritt* v. *Bradley* (1901) 2 K.B. 550 (noted ante vol. 37, p. 778), we see was cited in support of the case of the mortgagees, but it is not referred to in the judgments of their Lordships, but the principles they lay down seem to be altogether destructive of its authority.

BRITISH NORTH AMERICA ACT, S. 92, SUB-S. 16—MANITOBA LIQUOR ACT 1900 —POWERS OF LOCAL LEGISLATURE—PROHIBITION OF SALE OF LIQUOR.

In *Attorney-General of Manitoba* v. *Manitoba License Holders' Association* (1902) A.C. 73, the Judicial Committee of the Privy Council (Lords Hobhouse, Macnaghten, Davey, Robertson and Lindley) have decided that the recent Manitoba Liquor Act is intra vires of the local legislature under the B.N.A. Act, s. 92, sub-s. 16. This decision has been so much canvassed that it is not needful to say more concerning it here.

PRACTICE—CRIMINAL CONVICTION—SPECIAL LEAVE TO APPEAL.

Ex p. Aldred (1902) A.C. 81, was a special application for leave to appeal to the Judicial Committee of the Privy Council from a conviction of the defendant for being party to the issue of false balance sheets by a limited company. The conviction was founded on the verdict of a jury, and the Judicial Committee (the Lord Chancellor and Lords Hobhouse, Macnaghten, Davey, Robertson and Lindley) being of opinion that there was evidence on which the jury could properly find the verdict they had, and that there was no special matter sufficient to countervail it, refused the application.

COMPANY—POWERS OF COMPANY—FORMATION AND INVESTMENT OF RESERVE FUND — 27 & 28 VICT. C. 23 (D.) — PRACTICE — PARTIES — PURCHASE BY DIRECTOR AND RESALE TO COMPANY AT A PROFIT.

Burland v. *Earle* (1902) A.C. 83, was an appeal from the Ontario Court of Appeal in *Earle* v. *Burland*, 27 Ont. App. 540, in which the Judicial Committee of the Privy Council (Lords Hobhouse, Davey, Robertson and Sir R. Couch) made a material variation in the judgment appealed from. The action was by some of the shareholders of a company incorporated under the Dominion Act, 27 & 28 Vict., c. 23, to control the right of the directors to accumulate out of the profits of the company a reserve fund beyond what was reasonably necessary to provide for the vicissitudes of business. The Court of Appeal considered that the plaintiffs were entitled to relief, but the Judicial Committee have come to the conclusion that the Court has no jurisdiction to interfere with the internal management of a company acting within its powers. Their Lordships concede that while a company must prima facie bring an action to redress a wrong done to itself, yet if a majority of the shares are controlled by those against whom relief is sought,

who refuse to allow the name of the company to be used, then in that case the complaining shareholders may bring an action in their own names, but in such a case the plaintiffs can have no greater right than the company would itself have if plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders if such majority have approved of them; and the cases in which the minority can maintain such an action are confined to those in which the acts complained of are fraudulent or beyond the powers of the company. In the present case the Committee came to the conclusion that there was no principle of law binding the company to distribute the whole of the profits made, or in any way limiting or controlling its power to establish a reserve fund for any amount it might think fit, and that such reserve might properly be invested as the directors might bona fide determine, and the judgment below was accordingly varied. On another point the judgment of the Court below was also varied. It was objected by the plaintiff that one Burland, the managing director, had purchased property which he had subsequently sold to the company at a profit. The Court below had ordered him to account for this profit, but the Judicial Committee held that the company's right was to rescind the sale, but it could not affirm the sale and at the same time claim an account of the profit, their Lordships being of opinion that there was no evidence that Burland had purchased the property for, or as trustee for, the company. Their Lordships also held that under a resolution giving the members of the "staff" a percentage on the stock held by them by way of increase of their salaries, the secretary of the company was included in the term "staff," but not the managing director, and that on the secretary being subsequently appointed vice-president without any mention of salary, he was still entitled to continue to draw the same salary as he had whilst secretary.

COVENANT NOT TO ASSIGN WITHOUT CONSENT—REASSIGNMENT TO ORIGINAL LESSEE - INJUNCTION.

McEacharn v. *Colton* (1902) A.C. 104, was an appeal from South Australia in which the point is decided that where a lessee covenants not to assign without the consent of his lessor, and with consent he makes an assignment, the covenant runs with the land and the assignee is bound by it and cannot, without the lessor's assent, reassign the lease to the original lessee, and such reassignment may be restrained by injunction.

SPECIAL LEAVE TO APPEAL TO KING IN COUNCIL—MARTIAL LAW—CIVIL TRIBUNAL.

In *Marais* v. *General Officer Commanding* (1902) A.C. 109, an application to the Judicial Committee of the Privy Council was made by a person who had been arrested and detained in custody by the military authorities in South Africa for leave to appeal to the King in Council. It appeared that martial law had been proclaimed where the defendant was arrested, but that there were civil tribunals open in the proclaimed district competent to deal with the alleged offence with which the defendant was charged. Leave to appeal was refused, the Judicial Committee (the Lord Chancellor and Lords Macnaghten, Shand, Davey, Robertson, Lindley and Sir H. DeVilliers) being of opinion that the fact that civil courts were open did not displace or abridge the power of the military commandant. Their Lordships' judgment concludes with the observation: "The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." The soundness of this observation has been contested, but we notice that the editor has appended a note in which he says: "It is a matter of historical fact that there was not any state of war at the time and places of the acts complained of in the Petition of Right." From which it would therefore appear that the Lord Chancellor's judgment is well-founded, and that the framers of the Petition of Right had in their minds martial law exercised in a time of peace.

WATER—WATERWORKS COMPANY—"DOMESTIC PURPOSES."

Pidgeon v. *Great Yarmouth Waterworks Co.* (1902) 1 K.B. 310, was a case brought against a waterworks company incorporated under a special Act for not supplying water to the complainant pursuant to the terms of the Act. The facts as appeared by the case stated by the justices were as follows: The Act required that the defendants should at the request of occupiers of houses furnish them with a supply of water for domestic purposes "at specified rates," but provided that a supply for domestic purposes should not include a supply for any "trade, manufacture or business," and that the company should supply water for other than "domestic purposes" upon such terms and conditions as should be agreed upon between them. The complainant kept a boarding house, the house contained ten bedrooms, two water closets, but no fixed

bath, and water was only used in the house for cleansing, cooking, drinking and sanitary purposes. The question therefore for the Court was whether the water was required for "domestic purposes" or for a "business." The Divisional Court (Lord Alverstone, C.J. and Darling and Channell, JJ.,) came to the conclusion that the water was required for 'domestic purposes.'

PRACTICE—FOREIGN CORPORATION—SERVICE OF WRIT WITHIN JURISDICTION—FOREIGN COMPANY CARRYING ON BUSINESS IN ENGLAND—IRREGULARITY—AMENDMENT—RULES 55, 1039—(ONT. RULES 159, 362).

In *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft F. M. Co.* (1902) 1 K.B. 342, the defendants moved to set aside service of the writ of summons, the only point raised on the summons was that the defendants as a foreign corporation resident out of the jurisdiction could not be served within the jurisdiction at all under Rule 55, and on the return of the summons they asked leave to amend by setting up that if they could be served, the service had nevertheless not been made on the right person. Channell, J., refused to allow the amendment on the ground that if taken in the first place the defect might have been cured, but it could not be now. On the other point it appeared on the affidavits that the defendants, who were foreign manufacturers, had temporarily engaged a stand at the Crystal Palace near London at which they were exhibiting a motor car and other articles, and the stand was in charge of a person employed by the defendants as their representative whose duty it was to explain the articles exhibited, and to take orders and press the sale of the defendants' goods. The Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) agreed with Channell, J., that during the occupancy of the stand by the defendants they were carrying on business in England and might properly be served within the jurisdiction as provided by Rule 55 (Ont. Rule 159), and that the amendment of the summons for the purpose of setting up the other irregularity complained of was properly refused.

PROMISSORY NOTE—INCHOATE INSTRUMENT—FRAUD—NEGOTIATION—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61) S. 20—(BILLS OF EXCHANGE ACT (D.) 53 VICT., C. 33, S. 20).

In *Herdman* v. *Wheeler* (1902) 1 K.B. 361, the defendant had agreed to borrow £15 from one Anderson, and signed and handed to Anderson a blank stamped paper which he authorized him to fill up as a promissory note payable to Anderson for £15 only.

Anderson in breach of his authority, fraudulently filled up the paper as a note for £30, payable to the plaintiff, and handed it to the plaintiff who gave value for it, without notice that Anderson had been guilty of any breach of his authority. Anderson to complete his fraud misappropriated the proceeds. The Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.,) held that under these circumstances the plaintiff could not recover on the note because its delivery to him was not a negotiation of it within the meaning of the Bills of Exchange Act, s. 20, sub-s. 2. A doubt is expressed whether the payee of a note can ever be said to be a "holder in due course" within the meaning of that sub-section.

PRINCIPAL AND AGENT—AGREEMENT BY AGENT NOT TO INTERFERE WITH PRINCIPAL'S BUSINESS AFTER EMPLOYMENT CEASES—LIQUIDATED DAMAGES—INJUNCTION.

General Accident Ass. Corp. v. *Noel* (1902) 1 K.B. 377, was an action by the plaintiffs to restrain the defendant from committing a breach of an agreement not to interfere with the plaintiffs' business and for damages. The agreement was entered into by defendant on becoming an agent of the plaintiffs, and provided that he was not to interfere with the plaintiffs' business on ceasing to be their agent under a penalty of £100 as liquidated damages. Wright, J., who tried the action, decided that the plaintiffs must elect between an injunction and damages, but that they were not entitled to both remedies.

WITNESS—ACTION AGAINST FOR GIVING FALSE EVIDENCE ON CRIMINAL PROSECUTION—CONVICTION UNREVERSED.

Bynoe v. *Bank of England* (1902) 1 K.B. 467, was an action against a Bank and also against a person who had been a witness in a criminal prosecution of the plaintiff for forgery, and the statement of claim alleged that the Bank had furnished, and the witnsss had negligently sworn to evidence that was false. The action was dismissed by Jelf, J., on the ground that the statement of claim shewed no cause of action. The plaintiff gave notice of an application to the Court of Appeal for leave to appeal from the order of Jelf, J., but he did not appear in support of his motion The Court of Appeal (Collins, M.R., and Romer, and Mathew, L.JJ.,) having taken time to consider the matter, affirmed the order on the ground that as long as the conviction stands the action would not lie.

PRACTICE—AGREEMENT TO REFER—ACTION IN RESPECT OF MATTER AGREED TO BE REFERRED—STAY OF PROCEEDINGS—STEP IN PROCEEDINGS—ARBITRATION ACT 1889 (52 & 53 VICT., C. 49) S. 4—(R.S.O. c. 62, s. 6).

In *The County Theatres* v. *Knowles* (1902) 1 K.B. 480, the defendants applied to stay the proceedings under the Arbitration Act (see R.S.O. c. 62, s. 6) on the ground that the parties had agreed that the matters in question should be referred to arbitration. It appeared that the defendant had attended on a summons for directions in the action taken out by the plaintiffs on which an order had been made that the plaintiffs and defendant should respectively make discovery of documents, and it was held by Lawrance, J., and his opinion was confirmed by the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) that the defendant had taken a step in the proceedings and was consequently not entitled to a stay, as the defendant might have objected to any order being made on the ground of the agreement to refer.

CONTRACT—MEASURE OF DAMAGES—BROKER CONTRACTING TO CARRY OVER STOCKS—BREACH OF CONTRACT TO CARRY OVER STOCKS.

Michael v. *Hart* (1902) 1 K.B. 482, was an action against brokers for breach of a contract to carry over certain stocks purchased by them for the plaintiff's account until the settling day in May. Before May the stocks fell in price and the brokers without instructions from the plaintiff closed the account by selling the stocks. Subsequently the price rose and they were higher at the date of the May settlement, having been still higher during the interval. The question was whether the plaintiff was entitled to have his damages assessed with reference to the price of the stocks at the date of the sale, in which case they would be merely nominal, or whether he was entitled to damages measured by the difference between the price realized and the price at the date of the May settlement. The Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) decided that the damages should be ascertained by reference to the price at the May settlement. Wills, J., had held that as the plaintiffs were entitled to instruct the defendants to sell the stock at any time before the settlement day, they were therefore entitled to have the damages assessed with reference to the highest prices reached, but the parties having come to a compromise on this point, the Court of Appeal did not adjudicate upon it.

BAILEE—BAILMENT OF CHATTEL—LOSS OF CHATTEL BAILED BY NEGLIGENCE OF WRONG-DOER—POSSESSORY TITLE AS AGAINST WRONG-DOER—MEASURE OF DAMAGES.

The Winkfield (1902) P. 42, was an admiralty action, in which the Postmaster-General claimed to recover out of a fund in court as the damages resulting from the loss of a vessel by collision, a large sum by way of damages for the loss of certain mail bags and other contents in the vessel which had been sunk in the collision. Jeune, P.P.D, had dismissed the claim on the ground that the Postmaster-General was under no liability to the owners of the letters and parcels which had been lost, and was therefore under the case of *Claridge* v. *South Staffordshire Tramway Co.* (1892) 1 Q.B. 422, precluded from recovering their value. The argument in the Court of Appeal therefore turned principally on the question whether a bailee under no personal liability to the bailor could recover for the loss of the bailment occasioned by the negligence of a wrong-doer. The point was elaborately argued before the Court of Appeal Collins, M.R., and Stirling and Mathew, L.JJ., who came to the conclusion that the bailee could recover and that *Claridge's case* was erroneously decided. The Master of the Rolls, who delivered the judgment of the court, affirms that the root principle is that "as against a wrong-doer possession is title," and though the bailee may not be liable for the loss, yet, as in this case, if he recovers the value of the thing bailed, he must then account therefor to his bailor, and a recovery by the bailee would be an answer to any action by the bailor. The case is an important addition to the law of bailment.

PROBATE ACTION—ACTION TO REVOKE PROBATE GRANTED UPON PROOF IN SOLEMN FORM—RES JUDICATA—FRAUD CHARGED AGAINST PERSON NOT PARTY TO FORMER SUIT.

Birch v. *Birch* (1902) P. 62, was an action to revoke a probate granted upon proof of a will in solemn form in a former action. The plaintiff had been a party defendant in the former suit, but now claimed that the will in question had been obtained by the fraud of a beneficiary under the will who was not a party to the former proceedings. The defendants applied to stay the proceedings and dismiss the action on the ground that the matter was res judicata. Barnes, J., refused the motion, on the ground that a probate action differs from other actions, and that though no fraud

was charged against any of the parties to the former action, yet in a probate action a fraud by a beneficiary though not a party, in obtaining probate would render the grant impeachable in a subsequent action for revocation. See 112 L. T. Jour. 523.

PRACTICE—PROBATE—MISTAKE IN WILL—REVOCATION—REVIVAL.

In the goods of Reade (1902) P. 75, is an instance of the exercise of a jurisdiction by the Probate Court, which has not been often, if ever, invoked in our Probate Courts, viz., the correction of a mistake in a testamentary paper. The mistake in the present case was the reference contained in a codicil made in 1900 to a will made in 1895 which had been revoked by another will made in 1898, and which latter will was still unrevoked in 1900, though its existence was unknown to the solicitor who drew the codicil of 1900, he having drawn the will of 1895, which he supposed to be still in existence. The codicil purported to confirm the will of 1895, and made certain charitable bequests. After the testator's death the will of 1898 and two codicils (one of them that of 1900) were the only testamentary papers found among his papers. Upon motion of the executors of the will of 1898 (three of them were also executors of the will of 1895), Barnes, J., granted probate of the will of 1898 and codicils omitting from that of 1900 the words referring to the will of 1895.

PROBATE — PRACTICE — COSTS — EXECUTORS UNSUCCESSFULLY PROPOUNDING WILL.

Twist v. *Tye* (1902) P. 92, was a probate action in which the executors named in a will in which they were also named residuary legatees, propounded the will for probate after having ample opportunities of forming an opinion as to the testamentary capacity of the alleged testator. The will was pronounced against by the jury for want of testamentary capacity and want of knowledge and approval on the part of the alleged testator. Barnes, J., under these circumstances, considered the costs must follow the event, and that the executors must pay the costs of the defendant, but not of any of the parties cited whose interests were identical with those of the defendant; and that the executors were not entitled to costs out of the estate.

PRACTICE—ACTION FOR BREACH OF TRUST—THIRD PARTY NOTICE—CLAIM FOR CONTRIBUTION AGAINST THIRD PARTY OUT OF JURISDICTION—RULES 14, 170 (ONT. RULES 162, 209).

McCheane v. *Gyles* (1902) 1 Ch. 287, was an action brought by a cestui que trust against a surviving trustee for breach of trust in investing the trust fund and claiming payment of the entire fund with interest. The defendant applied for leave to serve with a third party notice the personal representative of one of the deceased trustees from whom he claimed contribution. The proposed third party was resident out of the jurisdiction. Leave was granted and the notice served. The third party then applied to Buckley, J., to rescind the order and set aside the service, and he refused the application. The Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.,) however held that the order should be set aside as not being authorized under the Rules as the service of a third party notice out of the jurisdiction can only be properly sanctioned when the subject matter of the claim of the defendant covered by the third party notice, is of such a character that if the claim had been the subject of an independent action commenced by writ, an order for service out of jurisdiction could be properly made under Rule 14 (Ont. Rule 162). If there had been any party within the jurisdiction upon whom the defendant had served a third party notice claiming contribution, then the case might be brought within Rule 14, clause (*g*). (Ont. Rule 162, (*g*)), and the service be allowed on the third party out of the jurisdiction, as "a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction." But the court holds that the fact that though the person out of the jurisdiction might have been a necessary or proper party to the plaintiff's action, yet that fact did not entitle the defendant to serve her with a third party notice. In short, the test whether a third party notice can be served out of the jurisdiction, is whether a writ in an action by the defendant, to enforce his claim against the proposed third party could be served out of the jurisdiction. If it could not, then the Rules do not authorize the service of a third party notice out of the jurisdiction.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Lount, J.] [April 10.

FRANKEL *v.* GRAND TRUNK R. W. Co.

Railways—Carriage of goods—Claim for non-delivery—Place of delivery—Consignees—Refusal to accept—Termination of transitus—Position of carriers—Bailees—Duty to have goods ready for delivery—Damages for breach.

Action for breach of contract to carry and deliver five car loads of scrap iron which the plaintiffs had sold to a rolling mill company. The contract of sale provided for delivery at the purchasers' mill at Sunnyside, Toronto, and in the shipping bills the property was addressed to the plaintiffs or the mill company, Sunnyside. The mill was situate near the defendants' main track. There was no station there, but there was a siding leading off the track into the mill. The station nearest to the mill was Swansea, and the cars containing the scrap iron arrived there, and notice of their arrival was sent to the plaintiffs and to the mill company. The station agent had previously been instructed by the plaintiffs to deliver all cars addressed to the plaintiffs at Swansea or Sunnyside to the mill company. The mill company, after inspection of the goods at Swansea, refused to accept them. The cars were not sent on to Sunnyside, but remained at Swansea, and, being in the way of traffic, had been, before the refusal to accept, run up a side line and left in a cutting. This was early in February, and while the cars were in the cutting the wheels became covered with clay by reason of a thaw, and then were frozen fast, and the cars were not got out until the end of April. The trial Judge (LOUNT, J.) found in favour of the plaintiffs, and assessed the damages at $1,000. The defendants appealed.

Held, OSLER, J.A., dissentiente, that the mill company were the consignees of the scrap iron, and had a right to put an end to the transitus at Swansea by refusing to receive it, and there was no necessity for the defendants to tender the goods at Sunnyside.

Held, however, MACLENNAN, J.A., dissenting, that the defendants were liable to the plaintiffs in damages for not keeping the cars, after the refusal, in such a position that the plaintiffs could unload them and remove their property.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A. MR. JUSTICE LISTER died while the case was under consideration. A majority of the remaining members of the Court agreed upon a judgment varying that of the trial Judge by limiting the plaintiffs' recovery to damages suffered by reason of the delay up to the time that the defendants had placed the cars in such a position that the plaintiffs could take their goods.

Wallace Nesbitt, K.C., and *H. E. Rose*, for the appellants. *G. F. Shepley*, K.C., and *J. Baird*, for the plaintiffs.

[April 11.

TOWN OF WHITBY *v.* GRAND TRUNK R. W. CO.

Railways—Statutory obligation—Enforcement by municipality—Prohibition against removal of "workshops"—Breach—Damages.

Upon a motion made by the plaintiffs, pursuant to leave given in the judgment reported in 1 O.L.R. 480, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition contained in s. 37 of 45 Vict., c. 67 (O.), providing that "the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company (the Midland Railway Company of Canada) without the consent of the council of the corporation of the said town."

Held, that this section imposed an obligation upon the Midland Railway Company of Canada for the benefit of the plaintiffs, who were entitled to maintain an action thereon in their own name: and by virtue of 56 Vict., c. 47 (D.), amalgamating the Midland Company with the defendants, and cl. 3 of the agreement in the schedule to that Act, the plaintiffs could maintain an action against the defendants for damages for any breach of the obligation committed by the Midland Company before the amalgamation, or by the defendants since the amalgamation; and the plaintiffs should be allowed to amend, and to have judgment for such damages as they were entitled to.

Held, also, that "the workshops now existing" meant the buildings used as workshops; and damages could not be assessed on the basis of the prohibition being against the shutting down of or reducing the extent of the work carried on in the workshops.

Aylesworth, K.C., and *Farewell*, K.C., for the plaintiffs. *Cassels*, K.C., for the defendants.

HIGH COURT OF JUSTICE.

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

FORD *v.* HODGSON.

Vendors' lien — Timber — Cutting of — Piled on land — Identification— Injunction.

St. G., the owner of land by an agreement in writing, sold all the timber on it to E., taking promissory notes in payment. E. assigned all his interest in the agreement to S., his principal, who made the notes and E. endorsed them to St. G. S. cut and removed considerable timber from the land and cut and piled on the land a lot of cordwood which he sold to the defendant but did not pay the notes. St. G. sold the land and all her interest in the timber and the notes to the plaintiff. Defendant sought to remove the wood, but the plaintiff obtained an injunction restraining him and claimed a vendors' lien.

Held, that the sale of timber to be removed in three years by the purchaser was of an interest in land, and in respect of which a vendors' lien arose by operation of law, which was not displaced by the cutting or sale of the timber as long as it could be indentified and remained on the land, and the remedy was by injunction and enforcement of the lien. *Summers v. Cook* (1880) 28 Gr. 179, followed.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

Riddell, K.C., for the appeal. *R. J. McLaughlin*, contra.

Falconbridge, C.J.K.B., Britton, J.] [March 13.

TORONTO GENERAL TRUSTS CORPORATION *v.* WHITE.

Arbitration and award — Valuation of buildings on leasehold land— Interest on amount fixed by award.

In a lease for twenty-one years, it was provided that the buildings should be valued at the end of the term by three valuators or arbitrators, whose award should be made within the six months next preceding November 1st, 1900, and the value paid by the lessor within six months from that date with interest from that date. Valuators or arbitrators were duly appointed and possession given by the lessees on October 31st, 1900, the last day of the term, but the award was not made until November 30th, 1901.

Held, that the lessees were entitled to interest on the value of the buildings, as ascertained by the award, from November 1st, 1900.

Judgment of MACMAHON, J., reversed.

Frank E. Hodgins, for the appeal. *Laidlaw*, K.C., contra.

Lount, J.] CITY OF KINGSTON *v.* KINGSTON L. H. & P. CO. [March 14.

Company—Franchise—"Works, plant, appliances and property"—Purchase by municipal corporation of gas works.

By agreement between the city of Kingston and the company the former was to have the option of purchasing and acquiring the "works, plant, appliances and property" of the company used for light, heat and power purposes, both gas and electric, upon giving to the company notice as therein provided, at a price to be fixed by arbitration under the Municipal Act. The majority of the three arbitrators in fixing the value of the "works, plant, appliances and property" included nothing for the earning power or franchise and rights of the company.

Held, that they were right in so doing, though the determination of the question was not to be decided by the meaning to be attached to the word "property," but by the fair interpretation and construction of the agreement. The word "property" as used in the agreement was on the fair construction of the instrument limited to the preceding words, and these words were not to be construed so as to include such an intangible right as the franchise or good-will of the company.

Walkem, K.C., and *Whiting*, K.C., for the company. *McIntyre*, for the city of Kingston.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [March 14.

HALL *v.* ALEXANDER.

Easement—Projecting eaves—Descending water and snow—Common owner—Conveyances by—Grant and reservation of rights.

Plaintiff's predecessor in title owning a lot of land built two houses thereon with a passage way between them and the eaves trough, and part of the eaves of the defendant's house projected over the passage way. He then conveyed to defendant's predecessor in title the westerly house "with the privilege and projection of the roof . . . . as at present constructed," and covenanted for the quiet and undisturbed enjoyment of the projection, and that on any sale or conveyance of the house to the east he would "save and reserve the right . . . . to such projection." Subsequently he conveyed the easterly house with the land between the two houses to the plaintiff "subject to the right . . . . to the use of the projection . . . . as at present constructed." In an action to compel the defendant to prevent the discharge of water, snow and ice from his roof into the plaintiff's passage way,

Held, that the defendant was not bound to prevent the snow and water discharged from the clouds upon his roof from falling from it upon the plaintiff's land, and that the easement of shedding snow and water, as had been done ever since the defendant's house was built, was necessary to the reasonable enjoyment of the property granted; that the grantor could not insist upon the grantee altering the construction of the roof so as to prevent

the snow and water coming down, and that the plaintiff stood in no higher position than the grantor; that the projection of the roof over the plaintiff's land carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below, and the action was dismissed with costs.

Judgment of the County Court of the County of York reversed.

Watson, K.C., for the appeal. *Du Vernet* and *Vickers*, contra.

Master in Chambers.] [March 24.

REX EX REL. ROSS *v.* TAYLOR.

Municipal elections—Quo warranto proceeding—Cross-examination on affidavits—Discretion as to permitting.

An application by the relator for an order allowing him to proceed and cross-examine the several persons who had made the affidavits filed by the respondent in answer to the affidavits filed by the relator in support of his motion in the nature of a quo warranto to void the election of respondent as reeve of the village of Port Dover. The application was heard by the Master in Chambers, March 21, 1902.

W. M. Douglas, K.C., for the relator.

S. C. Biggs, K.C., for the respondent, opposed the application on account of the great expense, which would exceed the amount of the relator's recognizance.

MASTER IN CHAMBERS—I have read all the affidavits filed, and, in my opinion, the application should not be granted. In *Reg. ex rel. Piddington v. Riddell*, 4 P.R. 80, the late Mr. Justice Morrison in delivering judgment said, at p. 85: "On the argument I was pressed by counsel for the relator to order further proceedings with a view to the oral examination of the parties, and the production of their books for the purpose of impeaching the facts sworn to by Clickinbroome and the defendant. I could only be warranted in doing so upon the ground that I consider the facts sworn to, to be untrue. I see no reason for my thinking so." In that case argument had taken place upon the affidavits filed; here no argument has been heard. I refer to the case to shew that it was a matter of discretion as to permitting the examination or not. In using this discretion I think that no examination would be helpful to me in considering the matter. The relator has the right to file affidavits in reply to those on behalf of the respondent. He will have an opportunity of doing so if he desires it, and the matter will stand adjourned for that purpose.

Meredith, C.J.] [April 10.

PENNINGTON *v.* MORLEY.

Mechanic's lien—Action begun by statement of claim—Service out of Ontario—Jurisdiction to allow.

There is no authority in the Courts of this Province to allow service out of Ontario of a statement of claim filed as the initial step in an action.

In *Re Busfield-Whaley* v. *Busfield*, 32 Ch. D. 123, followed.

Such service is not a matter of practice, but of jurisdiction, and Rule 3 does not enable the Court to apply the analogous procedure as to writs of summons.

Semble, that if there were power to allow service of such a statement out of Ontario, it could not be allowed nunc pro tunc after it had been effected without an order.

Service out of Ontario of a statement of claim, the initial proceeding in an action to enforce a mechanic's lien, under R.S.O. 1897, c. 153, upon foreigners resident in a foreign country, and all subsequent proceedings set aside.

History of the legislation in Ontario as to service out of the jurisdiction.

W. M. Douglas, K.C., for plaintiff. *J. H. Moss*, for defendants Crosby and Nordyke.

GENERAL SESSIONS ON THE PEACE—COUNTY OF YORK.

McDougall, Co. J.] REX *v.* CHILCOTT. [March 24.

Undertaking to tell fortunes—Contract to relieve operator from criminal liability.

The prisoners were indicted under Criminal Code s. 396, for having undertaken to tell fortunes.

It appeared in evidence that parties who desired the services of the fortune teller (afterwards called as witnesses), went to the defendants (who had assumed the name of "The Royal English Gypsies") and, on payment, in each case, of 25 cents, certain disclosures relating to their lives in the future were conveyed to them by the defendants, as the result of an inspection of their hands, or, as the method is generally called, palmistry.

Before anything was done, each individual was asked to sign, and thereupon did sign, the following:—

"Notice to Consultants. The Royal English Gypsies hereby warn all who desire to consult them that their delineations of character, circumstances, or past life, or their attempts (if any) to define, predict, or foreshadow the future, are made according to the rules laid down in the text books on Palmistry, Astrology, Psychometry, Clairvoyance or other arts and sciences studied by them as modified and supplemented by their own judgment, experience and personal gifts. They will act in good faith, and emphatically disavow any intention to deceive or impose upon those who consult them (which would constitute a legal offence), and their statements must be accepted as given on these conditions, and on this understanding; and persons who cannot accept such statements as made in good faith, and without any intention of deception or imposition, are requested not to consult them.

To the Royal English Gypsies: Having read the foregoing notice to Consultants, I hereby express my desire to consult you on the understanding and conditions therein stated, and to pay your usual fees.

Date..... Name.....

Time of day..... Address.....”

Held, that, by force of the above specified engagement, no undertaking to tell fortunes as contemplated by s. 396 of the Criminal Code had been given by the prisoners. An acquittal was, therefore, directed. See *R.* v. *Marcott*, 2 O.L.R. 105.

Dewart, K.C., for the Crown. *Du Vernet and Vickers*, for prisoners.

New Brunswick.

SUPREME COURT.

In Equity—Barker, J.] [March 18.

DE BURY *v.* DE BURY (No. 2).

Husband and wife—Purchase by husband of real estate in name of wife—Gift—Presumption—Surrender of leases of wife's freeholds—Merger—Purchase by husband—Lien—Title of wife.

Freehold property and leaseholds, the reversion in which was vested in the plaintiff's wife by demise under her father's will, were purchased by the plaintiff in 1893, while acting as manager of her landed estates, with his own money. The freehold property was conveyed by the vendor to the plaintiff's wife by his directions, and the surrender of leases was to the plaintiff and wife. Under the law at that date a husband was entitled to the rents and profits of his wife's real estate. By s. 4 (1) of The Married Women's Property Act, 1895, (N.B.) real estate belonging to a married woman, not acquired from her husband, is held and may be disposed of by her as a feme sole.

Held, 1. The presumption that a purchase by a husband in the name of his wife is intended to be a gift to her was not rebutted by the evidence in the case.

2. The wife could not alienate the freehold estate so acquired from her husband, at least during his life time.

3. On the purchase of the leases the estate under them merged in the freehold of the wife, and she could dispose of the whole estate without the husband's consent, and free of any equity in him for repayment of the purchase money or money expended by him in making repairs to the property.

Stockton, K.C., and *Mullin*, K.C., for plaintiff. *Earle*, K.C., for defendants.

British Columbia.

SUPREME COURT.

Hunter, C.J.] DIAMOND GLASS CO. *v.* OKELL MORRIS CO. [March 28.

Costs—Summons for judgment under Order XIV.—Practice.

Summons for judgment under Order XIV. The right to judgment was not disputed, but it was contended on behalf of defendant that plaintiff was not entitled to any more costs than he could have got by taking judgment in default of defence as the time for filling defence had expired before the summons was issued.

Held, that plaintiff was entitled to the costs of the summons.

W. A. Gilmour, for plaintiff. *A. J. Keppele*, for defendant.

Manitoba.

KING'S BENCH.

Dubuc, J.] ROBERTS *v.* HARTLEY. [March 20.

Fraudulent conveyance—Exemptions—Registered judgment—Judgments Act, R.S.M., c. 80, s. 12—Costs.

The plaintiff's claim in this action was to set aside a deed of the land in question from B. F. Hartley to his wife as fraudulent and void under the statute of 13 Elizabeth and R.S.M., c. 7., and for a declaration that his registered judgment against the husband formed a lien and charge upon the land and that the land should be sold to satisfy the judgment. The property was the actual residence and home of the defendants, and was worth only about $1,200, and they claimed that under section 12 of the Judgments Act, R.S.M., c. 80, it was exempt from the effect of the registered judgment and proceedings taken by the plaintiff. There was no doubt that B. F. Hartley was insolvent when he made the deed and the stated nominal consideration in the deed was only one dollar.

Held, that the debtor had not, by conveying away his property, lost his right to exemption, and following Story's Equity, s. 367, Taylor on Titles, s. 270, and Am. & Eng. Encyc. of Law, vol. 14, p. 255, that a convey ance of property which could not in the debtor's hands be made available for his creditors will not be declared fraudulent and void under the statutes.

Held, also, that, as the deed could not under the circumstances be set aside as fraudulent, and was good as between the parties to it, the plaintiff was not entitled to the declaration of a lien and charge on the land for his judgment, as it was against the husband alone. *Brinstone* v. *Smith*, 1 M.R. 302, and *Frost* v. *Drives*, 10 M.R. 319, distinguished. Action dismissed without costs.

Wilson and *Davis*, for plaintiff. *Haggart*, K.C., for defendants.