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With great regret we record the death of Hon. William Lount, one of the Puisne Justices of the Common Pleas Division of the Supreme Court of Judicature for Ontario. He had been suffering from a severe illness for some time, and this was aggravated by a severe accident which happened to him some months ago. The end came on Saturday, the 25th ult. As we ventured to prophesy when he was appointed to the Bench in 1901 (ante vol. 37, p. 89) he made an excellent judge, and his courtesy and consideration made him a favourite with the profession. Having already referred to his career at the Bar it needs now but to regret that so useful a life has been cut off after such a short period of judicial service.

It is not in this part only of His Majesty's Empire that frequent exception is taken to judicial appointments. The *Calcutta Weekly Notes* thus speaks:—"We are at a loss to find out on what principle judicial appointments are often made in India. Lord Curzon is ever ready to avail himself of experts, even to cope with the Calcutta smoke. It seems, therefore, strange that he does not consider the administration of justice in the metropolis of sufficient importance to require the services of even fairly competent men. Some of the recent appointments to responsible judicial offices would seem to shew that neither the Government of India nor the Local Government seem to enquire into the qualifications, claims, or competence of men who are nominated to them for such appointments. If the Government do not take care our law Courts will soon lose the little reputation that they still possess." This is very plain language, but the efficiency and standing of the Bench is a subject so important that no apology is necessary if the facts warrant the statement, and presumably they do. As to the remarks of our contemporary, above quoted, we notice that, per contra, the writer highly commends the appointment of Babu Saroda Churn Mitter to officiate for Mr. Justice Hill.

EMPLOYERS' LIABILITY ACT.

(*Concluding Article.*)

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In the present article, which concludes the series of those relating to the English Employers' Liability Act of 1880 and the Colonial and American statutes on which that Act has been copied more or less closely, it is proposed to collect the cases which determine the extent of the servants' right of action under the remaining provisions of those statutes and also to note some miscellaneous points of pleading and practice which have been incidentally decided by the courts in actions brought under the statutes.

X. WHAT PERSONS ARE ENTITLED TO SUE UNDER THE ACTS.

1. **General remarks.**—The cases which turn upon the question whether the injured person is entitled to maintain an action under these statutes against the party whom he seeks to hold responsible fall into three categories: (1) Those in which the right of action is made to depend upon principles determined to be equally applicable to statutory as well as to common law actions; (2) Those in which the right depends entirely upon the specific terms of the Acts themselves; and (3) Those in which the right depends upon the answer to the question, how far common law principles are affected by these or other Acts which modify the relations between masters and servants.

2. **Servants temporarily under the control of the defendant.**—Whether the plaintiff, although regularly working for another person, was, at the time of the accident, under the control of the defendant in such a sense as to be an employé ad hanc vicem, and therefore entitled to hold the defendant accountable under the statute, is determined by tests similar to those which are applied in actions at common law (*a*).

(*a*) One sent by a firm of contractors to assist their workman in constructing an elevator which they have contracted to erect in a building, whose wages the owners have promised to pay, may properly be found to be a servant of such owners. *Wyld* v. *Waygood* [1892] 1 Q.B. 783, 61 L.J.Q.B.N.S. 391, 66 L.T.N.S. 309, 40 Week. Rep. 501, 56 J.P. 389. Lord Herschell, commenting on the conten-

For an extensive collection of cases on which this question is discussed, see a note by the present writer in 37 L.R.A. at pp. 33, et seq.

3. Volunteers.—A mere volunteer as regards the service under performance is not entitled to the benefits of those Acts (*a*).

4. Persons who have temporarily or permanently ceased to be in the employment of the defendant.—If the plaintiff, though he may at some previous time have worked for the defendant, was not actually in his service at the time when the injury was received, it is clear that he cannot sue under these statutes (*a*).

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tion that the plaintiff was not working under any contract with the defendants, and therefore was not a workman within the meaning of the Act, and capable of suing under it, said: "The only effect of that objection, if it prevailed, would be this, that there would be no question as to the defendant's liability, but the action should have been one brought at common law, and not brought under the Employers' Liability Act. But I think that in this case there is evidence that the plaintiff was a workman employed by the defendants. Duplea had requested Horton's foreman that he should have furnished to him a man for the purpose of doing the work in connection with the lift. It was not work which Horton had to do, but work which the defendants had to do. There is evidence that Duplea needed and obtained assistance for the work he had to do, and his employers recognized it as being rendered on their behalf and asked to have an account sent in for the work the man had done, so that they might pay his wages during the time he was so engaged. It is enough to say that there was evidence which it was impossible to withdraw from the jury that the plaintiff was in the service of the defendants within the meaning of this Act."

(*a*) *McCloherty* v. *Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117, where the court refused to say that this doctrine barred recovery in the case of a female employe whose hair was caught in an uncovered revolving shaft, while she was on a bench endeavoring to open a window for ventilation purposes.

A brakeman who is travelling as a passenger on a train, and is not under the control of the conductor for the purpose of the performance of the duties characteristic of his position, cannot recover for injuries received in coupling a car in compliance with the directions of the conductor. Such a direction is entirely unauthorized, and fastens no liability on the company. *Georgia Pac. R. Co.* v. *Propst* (1887) 83 Ala. 518. There the court held demurrable a count which began thus: "When on a trip down defendant's said road, plaintiff, being aboard defendant's train was there ordered by the conductor, employed to manage or superintend the business affairs of said company on the aforesaid train, and whilst in the exercise of his superintendence, to couple a freight car to others attached." It was declared that there was nothing in this count which showed that the plaintiff was acting as brakeman, or had been requested to do so. But probably the rule of pleading here applied will in many jurisdictions be considered too strict.

(*a*) By the rules of a mine workmen, upon their discharge, were not entitled to receive their wages until they had returned their tools. A miner who was discharged on a Saturday, but had no opportunity to go down for his tools on that day, went down on Monday and was injured by an explosion of gas due to inadequate ventilation. *Held*, that at the time of the injury he was acting in the employment of the mine owner. *Cowler* v. *Moresby Coal Co.* (Q.B.D. 1885) 1 Times L.R. 575. In *Lovell* v. *Charrington*, reported in the Law Times Newspaper, March 1882, (see also Rob. & Wall. on Empl. 3rd Ed., p. 230), the plaintiff had been occasionally employed by the defendant as a trolleyman, but on the day in question, he arrived too late, and was told that he was out of employment for that day. While leaving the premises he was injured owing to a defect herein. Held that he was not a "workman" within the statutory definition.

5. **Independent contractors.**—(See also sec. 8 (i), post.) These Acts have no application to a man who is conducting his own business; and the fault, if any, is imputable to himself (*a*).

6. **Servants of independent contractors.**—(See also sec. 8 (i), post.) Under the English, Colonial, and Alabama statutes, which contain no special provision modifying the general rule of law on the subject, it is clear that the servants hired by a contractor or subcontractor cannot sue the principal employer, unless there is evidence to shew that the control which he exercised over them was the same in kind and degree as that exercised by a master (*a*) Similarily the servant of a subcontractor cannot recover in a suit against the principal contractor (*b*).

Under the Acts of Massachusetts, Ontario, British Columbia and Massachusetts, the principal employer is made liable to servants of contractors or subcontractors for defects in the condition of the ways furnished by him for the purpose of executing the work contracted for. Whether the instrumentality which caused the injury was one of those to which this provision applies is a question of fact in each instance (*c*).

(*a*) *Bruce* v. *Barclay* (1890) 17 Sc. Sess. Cas. (4th Ser.) 811.

(*a*) The miners who take service under the middlemen known in England as "butty" men are liable to dismissal by the principal employer, and are therefore regarded as his servants in such a sense as to be entitled to the benefits of the Employers' Liability Act of 1880. *Brown* v. *Butterly Coal Co.* (1885) 53 L.T.N.S. 964, 50 J.P. 230. The relationship of a mine-owner to the men hired by an independent contractor to assist him in sinking a shaft is not changed to that of a master by the fact that under the Coal Mines Regulation Act of 1887, and the rules of the mine in question, the manager exercised such control over all persons in the mines as might be requisite for the purpose of enforcing the prescribed regulations for carrying on without danger the mining operations. *Marrow* v. *Flimby & B. Moor Coal & Fire Brick Co.* [1898] 2 Q.B. 588, 67 L.J.Q.B.N.S. 976. Nor does a workman employed by a person who has contracted with a colliery owner to sink a shaft become the servant of such owner merely by reason of the fact that he enters into a collateral agreement with the owner to conform to certain "Conditions of employment," the general effect of which is to provide for the safety of the persons working in the mine. *Fitzpatrick* v. *Evans* (1901) 17 Times L.R. 253, following case last cited. See also *Milligan* v. *Muir* (1891) 19 Sc. Sess. Cas. (4th Ser.) 870, where the general rule in the text was applied. Whether the immediate employer of the plaintiff was an independent contractor or in the service of the defendant is a question for the jury, where the evidence is that such employer took work from the defendant; that he hired the plaintiff as well as other boys, and paid them their wages; that the plaintiff went to work when the company wanted him; and that the company repaired the machinery used, whenever it went out of order. *Masters* v. *Jones* (1894) 10 Times L.R. 403.

(*b*) *Nicholson Macandrew* (1888) 15 Sc. Sess. Cas. (4th Ser.) 854.

(*c*) A workman employed by a sub-contractor to do work outside the mill cannot recover from the owner of the mill, where he passes through the mill to get a drink of water, and in returning goes out of his way to assist a millhand

7. Railway servant.—It has been suggested that this term which is employed in the English Act for the purpose of designating one of the specific classes of persons to which their provisions are applicable should be understood as referring only to servants engaged in the conduct and management of railways, and not as embracing servants hired to do work in connection with a collateral undertaking carried on by a railway company as an adjunct to their proper business of carriage by land—e.g., the keeping of a hotel, or the operation of a line of steamboats (*a*). Such a doctrine would limit the benefit of the acts in a manner analogous to the decisions under the Acts of Iowa, Kansas, and Minnesota, which, it is held, abolish the defence of co-service only in cases where the injuries were received in the actual operation of a railway. But, so far as the writer knows, there has not been any judicial expression of opinion as to the point just raised.

In an English case referred to in sec. 8 (h), post, it was held that a driver of a tram-car could not sue under the Act, as being engaged in "manual labour" (*b*). The possibility of his recovering as a "railway-servant" was not discussed, and it seems to have been assumed both by the court and counsel that this description was not applicable to an employé of a street railway company.

In the Ontario and British Columbia Acts it is expressly declared that the term "railway servant" includes "tramway and street railway servant."

In Canada it has been held that an employé working on a railway controlled by the Dominion Government may recover

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and falls through an unguarded hole in the floor. *Finlay* v. *Miscampbell* (1890) 20 Ont. Rep. 29. In *Toomey* v. *Donovan* (1893) 158 Mass. 232, 33 N.E. 396, the case was held to be for the jury, where the evidence was that the defendant had given to another person charge of a certain room in his factory under an agreement by which the defendant was to furnish the machinery and materials, and the contractor was to hire and pay the men; that the defendant was to pay for the repairs; that the contractor had the right to order the repairs to be made; that the defendant had the right to inspect the machines, and was often in the room; and that the injury was received owing to a defect in one of the machines by one of the men in the employ of the contractor. In this case the contractor was also the person entrusted by the defendant with the duty of seeing that the machine was in proper condition, under sec. 1, sub-sec. 1 of the statute. It was held that the relation which he occupied as contractor would not relieve the defendant from liability for his negligence in the discharge of this duty.

(*a*) Rob. and Wal. on Employers, 3rd ed., p. 231.

(*b*) *Cook* v. *North Metropolitan T. Co.* (1887) 18 Q.B.D. 683.

under the provisions of an Employers' Liability Act passed by the legislature of the Province in which the injury was received (*c*).

All persons in the employment of railway companies, whatever may be their rank, are within the purview of the Act (*d*).

8. **"Workmen," meaning of, as used in the English and Colonial Acts.**—By sec. 8 of the English Act it is declared that the expression "workman" means "any person to whom the Employers and Workmen Act of 1875 applies." The words of the Act thus referred to, so far as they are material in this connection, are as follows:

"The expression 'workman' does not include a domestic or menial servant, but save as aforesaid, means any person who, being a laborer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labor."

This section has been incorporated, with some important changes, in the Colonial Acts.

The meaning of the words by which the various kinds of workmen are designated, and of the more general phrases with which the provision concludes, is to be ascertained not only from the decisions upon the Employers' Liability Act itself, but from those in which the Employers and Workmen Act and the other statutes in pari materia which make use of a similar terminology, have been construed (*a*). Some common law cases are also serviceable for purposes of definition.

(*a*) *Domestic or menial servant.*—(See also sub-s. (*b*) note (*i*) post.) According to a text-book of repute, domestic or menial servants are "those persons whose main duty is to do actual bodily work as servants for the personal comfort, convenience, or luxury of the master, his family, or his guests, and who, for this

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(*c*) *Canada S. R. Co.* v *Jackson* (1890) 17 S.C.R. 316.

(*d*) A superintendent drowned while engaged in investigating the condition of a well was held entitled to recover in *Pearson* v. *Canadian Pac. R. Co.* (1898) 12 Man. 112.

(*a*) In this connection, however, it is not amiss to recall the remark of Earle, J., that "it is a matter of common knowledge that words in one Act of Parliament may have a meaning which they would not have in another." *Wilson* v. *Zulueta*, 14 Q B. 405, (p. 415.)

purpose, become part of the master's residential or quasi-residential establishment." (*a*)

Whether or not a servant is a domestic or menial servant is primarily a question of fact for the jury (*b*).

(*b*) *Labourer.*—(See also sub-sec. (*i*) post.) The generic word "labourer" denotes "a man who digs and does other work of that kind with his hands" (*c*). In one sense every man who works or labours may be called a "labourer"; but the word as used in the statute, has a more restricted meaning, being applicable only to a person whose work is essentially manual. It does not embrace an omnibus conductor (*d*); nor the caretaker of goods seized under a fi fa (*e*), nor a carpenter, nor a bailiff, nor the clerk of a parish (*g*).

In one case it was remarked that artificers, handicraftsmen, miners, etc., do not necessarily or properly fall under the denomination of "labourers" (*h*). But this distinction is not material in the present connection.

(*a*) Roberts & Wallace on Employers (3rd ed. p. 214). This definition was recently mentioned with marked approval by Collins J. in *Pearce* v. *Lansdowne* (1893) 62 L.J.Q.B. 44, where a potman in a public house was held to discharge duties which were substantially of a menial nature. In actions where the question involved was, whether the rule was applicable, that domestic servants are month's warning when the contract of hiring is terminated, it only entitled to a has been held that the phrase, "menial servants," includes a huntsman hired to take charge of a pack of foxhounds. *Nicoll* v. *Greaves* (1865) 33 L.J.C.P. 259; and a head gardener, living in a cottage situated on his master's property. *Mowlan* v. *Ablett* (1835) 2 Gr. M. & R. 54; but not a governess. *Todd* v. *Kerrich* (1852) 8 Exch. 151; nor the housekeeper of a large hotel. *Lawler* v. *Linden* (1876) 16 Ir. Rep. C.L. 188; nor an employe who combines the functions of a steward and gardener. *Fagan* v. *Burke* (1861) 12 Ir. C.L.R. 495. The statement of Blackstone that the word "menial" is derived from mœnia, this class of servants being conceived of as infra mœnia, dates from the antedeluvian period of philology, and is one of the many absurdities of that sort which are still allowed to disfigure legal treatises. The word is really derived, according to the best modern authorities, from the Saxon meine, mesnie, that is, a household, or family. See Collins, J. in *Pearce* v. *Lancaster*, supra, and Skeat's Etymological Dict., sub voc.

(*b*) *Pearce* v. *Lansdowne* (1893) 62 L.J.Q.B.N.S. 441, 443, 69 L.T.N.S. 316, 57 J.P. 760, per Williams, J.

(*c*) Brett M.R. in *Morgan* v. *London &c. Co.* (1882) 53 L.J.Q.B. 352.

(*d*) Day J. in *Morgan* v. *London General Omnibus Co.* (1883) 12 Q.B. Div. 201 (p. 206).

(*f*) *Bramwell* v. *Renneck* (1827) 7 B. & C. 536.

(*g*) Brett M.R. in *Morgan* v. *London &c. Co.* (1884) 13 Q.B.D. 832 (p. 833).

(*h*) Lord Ellenborough in *Lowther* v. *Radnor* (1806) 8 East 113 (p. 124).

The word "labourer" in the special provision of the Stamp Act by which agreements for the hire of a "labourer" are admissible in evidence, even if they are unstamped, is not confined to a mere hedger and ditcher (*i*).

(*c*) *Servant in husbandry.*—This description applies to a dairy-maid who, by her contract, is to assist in harvesting, if so required (*j*); to a servant engaged by a farmer to act as "kitchen-woman and byre-woman" (*k*); to a waggoner (*l*); and to a "man employed to dig the ground" (*m*); but not to a person engaged by a farmer to weigh out the food for the cattle, to set the men to work, and in all things to carry out the orders given to him (*n*).

"Servants in husbandry" are expressly excluded from the benefits of the Ontario, Manitoba, and British Columbia Acts. See sec. 2, sub-sec. 3 (*o*). The Massachusetts Act also excludes "farm labourers."

(*d*) *Journeyman.*—In a treatise of authority the following definition of the word "journeyman" is suggested: "One who, being neither a foreman nor an apprentice, and working not on his own account for the public, but under a master, works with his hands in an occupation of a constructive kind, requiring skilled knowledge, which skilled knowledge he possesses" (*p*). Etymologically considered, a journeyman is one who is employed by the day, but that is not the sense in which the term is ordinarily used, for, in most of the trades in which journeymen are employed—as, for

(*i*) *Queen* v. *Wortley* (1851) 21 L.J.N.C. 44 holding that a man engaged to take charge of glebe land at a fixed salary and a third of the net profits was not a "menial servant," but a "labourer."

(*j*) *Ex parte Hughes* (1854) 23 L.J.M.C. 138.

(*k*) *Clarke* v. *M'Naught*, Arkley (Sc.) 33.

(*l*) *Lilley* v. *Elwin* (1848) 11 Q.B. 742, 17 L.J.Q.B.N.S. 132, 12 Jur. 623.

(*m*) Brett, M.R., in *Morgan* v. *London &c. Co.* (1884) 13 Q.B.D. 832, p. 833.

(*n*) *Davis* v. *Lord Berwick* (1861) 3 E. & E. 5490. Crompton J. pointed out that his chief duty was to keep the general accounts belonging to the farm, and this fact indicated that his position was rather that of a steward than that of a "servant."

(*o*) Under this provision it is for the jury to say whether the plaintiff was a servant in husbandry and was engaged in the usual course of his work, when the evidence is that a farmer had not engaged him to do any particular kind of work, but that he was first put at mason work, and then at digging the drain which caved in and thus caused the injury complained of. *Reed* v. *Barnes* (1894) 25 Ont. R. 223.

(*p*) Rob. & Wall. on Employers (3rd ed.) p. 221.

an instance, in the business of butchers, bakers, and tailors—they are hired and paid by the week (*q*).

(*e*) *Artificer.*—(See also sub.-sec. (*i*), notes (*vv*), (*zz*), (*aaa*), and (*b b b*) post.) An "artificer," according to Brett, M.R., is a "skilled workman" (*s*). The word has been held applicable to a framework knitter who manufactured stockings (*t*); and to the stoker of a steamer (*u*). It is not confined to occupations of which the essence is "manual labour," but embraces such workmen as a calico pattern-designer, engaged to serve for a term of years (*v*); or the overseer of a printing office (*w*); or the superintendent of looms in a factory whose time is divided between supervision and manual labour (*x*).

(*f*) *Handicraftsman.*—(See also sub.-sec. (i), notes (v v) and (z z) post.) The meaning of the word "handicraftsman" is essentially the same as that of the word "artificer," that is to say, he is a "skilled workman" (*y*).

(*g*) *Miner.*—By sec. 7, sub-sec. 2 of the recent English Workmen's Compensation Act of 1897 the word "mine," as used therein, means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, applies. In the absence of any express declaration in the Employers and Work-

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(*q*) *Morgan* v. *London &c. Co.* (1883) 12 Q.B.D. 201, per Day J., who remarked that the term would not be applied in common parlance to an omnibus conductor. In the same case in the Court of Appeal, as reported in 53 L.J.Q.B. 352, Brett M.R. said (p. 353): "A 'journeyman' is a man who is working for a master, such as a "carpenter.'" This passage is not in the Law Reports.

(*s*) *Morgan* v. *London &c. Co.* (1884), as reported in 53 L.J.Q.B. 352 (p. 353).

(*t*) *Morehouse* v. *Lee* (1864) 4 F. & F. 354. [Truck Act.]

(*u*) *Wilson* v. *Zulueta* (1849) 14 Q.B. 405. [Stamp Act.]

(*v*) *Ex parte Ormrod* (1844) 1 D. & L. 825. [Decision on 4 Geo. 4. ch. 34, sec. 3.]

(*w*) *Bishop* v. *Letts* (1858) 1 F. & F. 401. [Stamp Act.]

(*x*) *Leech* v. *Gartside* (1885) 1 Times L.R. 391. [Held entitled to recover for an injury caused by defective machinery, though he was engaged in supervision when the accident occurred.]

(*y*) Brett M.R. in *Morgan* v. *London, &c. Co.* (1884), as reported in 53 L.J.Q.B. 352 (p. 353). A hairdresser is not a "handicraftsman." *Queen* v. *Justices of Louth* (1900) 2 Ir. R. 714. See sub-sec. (h), *post.* By sec. 4 of the Workshop Regulation Act, 1867, 30 Vict. ch. 146, since repealed by 41 Vict. ch. 16 sch. 6, it was declared that "handicraft" means 'any manual labor exercised by way of trade or for purposes of gain in or incidental to the making any article, or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article." This definition has been held to include an employé engaged in making straw-plait. *Beadon* v. *Parrott* (1871) L.R. 6 Q.B. 718. [Breach of Act in employing a child under eight years of age.]

men Act of 1875, it is reasonable to suppose that the rule of construction thus indicated would be followed in determining whether a workman was a "miner" for the purposes of the Employers Liability Act (*z*).

With respect to the distinction between "mines" and "quarries" it has been held that workers in underground quarries of slate are entitled to the protection provided for miners under the Metalliferous Mines Act (*aa*). For some purposes it is clear that a surface quarry is not a "mine" (*bb*). But the question whether a workman is employed in such a quarry is or is not a "miner" is not material in the present connection. Quarrymen of all descriptions are at all evenns within the purview of the general clause, "otherwise engaged in manual labor" (*cc*).

(*h*) *Persons "otherwise engaged in manual labour."*—Conformably to a familiar principle of statutory construction, this general phrase is held to refer to labour ejusdem generis with the specific kinds previously mentioned (*dd*).

There is some difficulty in defining the line beyond which a person will fail to come within the definition of a "workman" as defined by this clause. In some cases the true conclusion will be indicated by the fact that the legislature has used the word "labour" not "work" Various occupations may be said to involve "manual work," and not manual labour (*ee*). In other

(*z*) The word "workman" in the Employers' Liability Act of Victoria is, by an express provision, not applicable to any person coming under Div. 1, Part III, of the Mines Act of 1890.

(*aa*) *Sims* v. *Evans* (1875) 23 W.R. 730; *Jones* v. *Cwmmorthen Slate Co.* (1880) 41 L.T.N.S. 576.

(*bb*) In a case where a lease was under construction it was held that the expression "mines" did not comprise "quarries," and it was said that a quarry is distinguished from a mine as being "a place upon or above or not under ground." Turner L.J. in *Bell* v. *Wilson* (1866) L.R. 1 Ch. 303.

(*cc*) See *Devonshire* v. *Rawlinson* (1864) 38 J.P. 72. [A case under Stat. 4 Geo. 4, ch. 34, sec. 3, in which a servant's wages were forfeited for absence from work.]

(*dd*) Day, J., in *Morgan* v. *London General Omnibus Co.* (1883) L.R. 12 Q.B. Div. 201, 50 L.T.N.S. 687, 32 Week. Rep. 416. In the Court of Appeal (1884) 53 L.J.Q.B.N.S. 352, L.R. 13 Q.B. Div. 832, 51 L.T.N.S. 213, 32 Week. Rep. 759, 48 J.P. 503, Brett, M.R. said that this phrase meant "any person engaged in the same way as all the others are engaged, although they do not go by the same names." To the same effect see remarks of Smith, J., in *Cook* v. *North Metropolitan Tramways Co.* (1887) L.R. 18 Q.B. Div. 683, 56 L.J.Q.B.N.S. 309, 56 L.T.N.S. 448, 57 L.T.N.S. 476, 35 Week. Rep. 577, 51 J.P. 630.

(*ee*) *Cook* v. *North Metropolitan Tramways Co.* (1887) L.R. 18 Q.B. Div. 683, 56 L.J.Q.B.N.S. 309, 56 L.T.N.S. 448, 57 L.T.N.S. 476, 35 Week. Rep. 577, 51 J.P. 630, per Smith, J., who illustrates the distinction by referring to the case of

cases a "satisfactory distinction may be drawn between those whose labour is continuous and requires no application of thought and those whose labour requires the application of a certain amount of thought and skill" (*ff*). But the most generally serviceable test is furnished by the doctrine that the essential question to be answered in each instance is whether the duties performed by the servant were mainly mental or mainly physical, and that the Act applies only where his duties belong to the latter category (*gg*). This doctrine involves the corollary that the mere user of the hands in matters incidental to a man's employment does not constitute him a manual labourer within the meaning of the Act (*hh*). Following out this conception the courts have held that an action can not be maintained under the Act of 1880 by a person employed by a firm of manufacturers "to assist the firm, as a practical working mechanic, in developing ideas the firm might wish to carry out, and to originate and carry out ideas and inventions suitable to the business of such firm" (*ii*); nor by an

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a person engaged in telegraphing or in writing. A "hairdresser" has been held not to be a "workman" on the ground that, although he is a "handicraftsman," he is not engaged in "manual labor," *Queen* v. *Justices of South* (1900) 2 Ir. Rep. 714.

(*ff*) Grantham, J., in *Cook* v. *North Metropolitan Tramways Co.* (1887) L.R. 18 Q.B. Div. 683, 56 L.J.Q.B.N.S. 309, 56 L.T.N.S. 448, 57 L.T.N.S. 476, 35 Week. Rep. 759, 51 J.P. 630.

(*gg*) Pollock, B., in *Hunt* v. *Great Northern R. Co.* [1891] 1 Q.B. 601, 60 L.J.Q.B.N.S. 216, 64 L.T.N.S. 418, 55 J.P. 470.

(*hh*) *Pound* v. *Lawrence* (1891) 1 Q.B. (C.A.) 226, (rev'g decision of Q.B.D.) "It is difficult," said Brett M.R., "to imagine any work done by man so purely intellectual as to require no kind of work with the hands; and the converse is equally true, that there can hardly be work with the hands that requires no intellectal effort. If, then, the words 'manual labour' are to have the full significance which could be put on them, they would be extended to every kind of employment. That cannot be the true meaning of the statute, but some more confined interpretation must be arrived at. I agree that this must be done by looking to the nature of the substantial employment, and not to matters that are incidental and accessory."

(*ii*) *Jackson* v. *Hill* (1884) 13 Q.B D. 618.

(*jj*) *Morgan* v. *London General Omnibus Co.* (1884) 13 L.R.Q.B. (C.A.) 832; 53 L.J.Q.B.D. 352, 51 L.T.N.S. 213, 32 W.R. 759, 48 J.P. 503, aff'g (1883) 12 L.R. Q.B.D. 201, 50 L.T.N.S. 687, 32 W.R. 416, (disapproving *Wilson* v. *Glasgow Tramways Co.* (1878) 5 Sc. Sess. Cas. (4th Ser.) 981, where it was held by Lords Moncrieff and Gifford, with some expression of doubt that a tramway conductor was within the Act). A conductor, said Brett, M.R., "does not lift the passengers into or out of the omnibus. It is true that he may help to change the horses; but his real and substantial business is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the passengers as their fares; in fact, he earns the wages becoming due to him through the confidence reposed in his honesty."

omnibus conductor (*jj*); nor by a driver of a tram car (*kk*); nor by a grocer's assistant (*ll*); nor by a waiter at a restaurant (*mm*); nor by a skilled engineer in charge of the machinery of a ferry-boat (*oo*). In line with these decisions is one to the effect that a guard of a goods train, whose main duty is to guard and conduct the train and marshal the cars, but is also required to assist at times in coupling and uncoupling the cars and unloading, is not entitled to the benefits of the Truck Acts (*pp*).

On the other hand the phrase has been held to embrace a man in the service of a wharfinger whose duties were to drive a horse and trolley and load and unload the trolley (*qq*); a man engaged as "potter's printer, overlooker, and mixer" (*rr*); a stevedore working on a ship attached to a wharf (*ss*).

The mere fact that the employé, for the sake of speed and convenience, hired a certain number of assistants, whom he paid

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(*kk*) *Cook* v. *North Metropolitan Tramways Co.* (1887) 18 Q.B.D. 683, 1 Times L.R. 523. "I cannot see," said Smith J., "the distinction between driving and other occupations which involve no manual labor though they do involve manual work. Had the legislature intended to include coachmen they would have included them among the specific instances."

(*ll*) *Bound* v. *Lawrence* (1892) 1 Q.B. (C.A.) 226 (228). Fry, L.J., said "It appears that the appellant was employed as a grocer's assistant in a shop, and his business was to take orders from the customers and to carry them out. In doing this he may have to shew goods, and if the customers take away the goods he has to make up the parcels. In doing this he has to use his hands, and the question is whether that makes him a manual labourer. There can be no manual labour without the use of the hands: but it does not at all follow that every user of the hands is manual labour, so as to make the person who does it a manual labourer. Now, the principal part of the appellant's employment is selling to the customers across the counter. That is his substantial employment, and if he has to do other things which involve physical exertion, we must see whether that is not incidental to his real employment. In this case I cannot doubt that that is so. The findings of the fact to me to negative the idea that the work described was any part of his real and substantial employment." Brett, M.R., also laid stress upon the fact that, in the occupation of the appellant, the knowledge and skill required in selling the goods to customers was more important than the manual work that he did, and that the latter was an incident of his employment.

(*mm*) *Smithwhite* v. *Moore* (1898) 14 Times L.R. 467.

(*oo*) *Frory* v. *Balwain Steam Ferry Co.* (1886) 7 New So. Wales L.R. (L) 147. [Injured by the starting of the machinery while he was making some repairs.]

(*pp*) *Hunt* v. *Great Northern R. Co.* (1891) 1 Q.B. (C.A.) 601.

(*qq*) *Yarmouth* v *France* (1887) 19 Q.B.D. 647. Lord Esher said (p. 651) "He is a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He had to load and unload the trolley. That is manual labour. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and trolley and the navigating the lighter form the easiest part of the work; his real labour, that which tests his muscles and his sinews, is the loading and unloading of the trolley or the lighter."

(*rr*) *Granger* v. *Aynsley* (1880) 6 Q.B.D. 182.

(*ss*) *Hallen* v. *King* (1896) 17 New So. Wales L.R. (L) 13.

himself, will not take him out of the class of persons "engaged in manual labour" (*tt*).

A person whose occupation is one of which the essence is manual labour is entitled to recover under the Act if he is injured while performing a duty or work incidental to that occupation, even though the duty does not directly involve manual labor (*uu*).

(*i*) "*Working under a contract with an employer.*"—The contract of employment to which this phrase points is, as the subject-matter of the Act indicates, one of service as distinquished from one which is entered into with an "independent contractor." Accordingly, although the work in which the employé whose rights or liabilities are in question may have been of such a character as to bring him prima facie within one of the descriptive terms used for the purpose of defining the word "workman," yet he cannot sue under the Act, if it appears that his agreement merely bound him to produce certain specified results, and did not place him under his employer's control with respect to the means by which, or the manner in which, those results were to be attained (*vv*). If his agreement is essentially one of this nature, he is not converted into a servant by participating in the manual labor by which the agreement is performed (*ww*). One of the ordinary characteristics of such an agreement is that the contractor is free to perform his contract either in person or by deputy. In several cases, therefore, the existence or absence of an obligation on the part of the employé in question to do the stipulated work himself has been

(*tt*) *Granger* v. *Aynsley* (1880) 6 Q.B.D. 182.

(*uu*) *Holland* v. *Stockton Coal Co.* (1898) 19 New So. Wales (L.R.) L 109, where it was held error to nonsuit a plaintiff whose husband, a man ordinarily working as coal-hewer in a mine, was suffocated by gas, while engaged, as one of an exploring party, in locating the origin of the gas.

(*vv*) *Sleeman* v. *Barrett* (1864) 2 Hurlst. & C. 934, 33 L.J. Exch. N.S. 153, 10 Jur. N.S. 476, 9 L T.N.S. 834, 12 Week. Rep. 411, where it was held that the word did not include "butty colliers," i.e., men working in partnership who contract for digging coal by the day, the ton, or the piece, according to the nature of the work, and employing others to assist them, for whose wages they are responsible. See however *Bowers* v. *Lovekin* (1856) 25 L.J.Q.B.N.S. 371, 6 El. & Bl. 584, 2 Jur. N.S. 1187, cited in note (*aaa*), infra. A person who contracts to weave certain pieces of silk goods for another at certain prices is not an "artificer or handicraftsman" or "other person" within Geo. IV, chap. 34, § 3. *Hardy* v *Ryle* (1829) 9 Barn. & C. 603, 4 Mann. & R. 295, 7 L.J.M.C. 118.

(*ww*) *Riley* v. *Warden* (1848) 2 Exch. 59, 18 L.J. Exch. N.S. 120; *Ingram* v. *Barnes* (1857) 7 El. & Bl. 115, 26 L.J.Q.B.N.S. 82, 3 Jur. N.S. 156. (In both these cases the plaintiff was denied to be a "labourer" within the meaning of the Truck Acts.)

treated as the appropriate criterion for determining whether he was entitled to the benefits or subject to the burdens of statutes regulating the contract of employment (*yy*).

If the agreement is essentially one for personal services, the employé is not removed into the category of "independent contractors" by the fact that he was left free to employ assistants, and did employ them (*zz*); nor by the fact that he was to be paid by the piece (*aaa*), or with reference to the amount of the sales of

(*yy*) In *Riley* v. *Warden* (1848) 2 Exch. 59, 18 L.J. Exch. N.S. 120, Parke, B. laid it down that a "labourer," within the meaning of the Truck Acts, is one who has entered into a contract to give his personal services and to receive payment in wages. See also to the same effect *Weaver* v. *Floyd* (1852) 21 L.J.Q.B.N.S. 151, 16 Jur. 289; *Sharman* v. *Sanders* (1853) 13 C.B. 166, 22 L.J.C.P.N.S. 86, 3 Car. & K. 298, 17 Jur. N.S. 765. Under these Acts a labouring man who enters into a contract to make as many bricks as the contractee required, such contractee supplying the materials and paying so much a thousand for the finished bricks, is not a workman, since there is no contract binding him to do the work personally. *Stuart* v. *Evans* (1883) 49 L.T.N.S. 13, 31 Week. Rep. 706. In the Employer's Liability Act of New South Wales, the intention of the legislature is indicated with more precision than in the English and Canadian Statutes, as its provisions are expressly declared to be applicable to those who enter into a "contract of service or a contract personally to execute any work or labour." It has been held that a contract, to fall within this description, must be a contract to serve personally or to serve for some period, or to do some particular work, and that no action can be maintained by a man who, being the owner of two carts, went, when it suited him, to the brick-kiln of the defendant and conveyed bricks to different places on the defendant's premises, not being bound to do the work, but being entitled to receive a specified sum of money if he thought fit to do it. *Loob* v. *Amos* (1886) 7 New South Wales L.R. (L) 92. See also *McElroy* v. *Australian Forge & Engineering Co.* (1899) 24 Vict. L. Rep. 953, where it was laid down, that the Employers and Employés Act of Victoria is not applicable to persons entering into a contract which can be performed by deputy.

(*zz*) *Weaver* v. *Floyd* (1852) 21 L.J.Q.B.N.S. 151. 16 Jur. 289. (Workman held to be "artificer"); *Bowers* v. *Lovekin* (1856) 25 L.J.Q.B.N.S. 371, 6 El. & B.L. 584, 2 Jur. N.S. 1187 (see next note); *Lowther* v. *Radnor* (1806) 8 East, 113 (see next note); *Whiteley* v. *Armitgage* (1864) 13 Week. Rep. 144; *Pillar* v. *Llynvi Coal & I. Co.* (1869) 38 L.J.C.P.N.S. 294, L.R. 4 C.P. 752, 20 L.T.N.S. 923, 17 Week. Rep. 1123. Iron rivetters paid at a fixed price per ton with liberty to employ other workmen of inferior skill to themselves have been held to be "handicraftsmen" within the Stat. 4 Geo. IV, chap. 34, sec. 3. *Lawrence* v. *Todd* (1863) 32 L.J.M.C.N.S. 238, 14 C.B.N.S. 554, 10 Jur. N.S. 178, 8 L.T.N.S. 505, 11 Week. Rep. 835. (Convicted for absence from work.)

(*aaa*) In *Bowers* v. *Lovekin* (1856) 25 L.J.Q.B.N.S. 371, 6 El. & Bl. 584, 2 Jur. N.S. 1187, "butty-men" held to be entitled to the benefits of the Truck Acts. The evidence was that they had bound themselves to do the work personally. Contrast *Sleeman* v. *Barrett* (1864) 2 Hurlst. & C. 934, 33 L.J. Exch. N.S. 153, 10 Jur. N.S. 476, 9 L.T.N.S. 834, 12 Week. Rep. 411, cited in note (*vv*), supra. So also a working tailor engaged to make clothes, each garment to be paid for according to a price list has been held to be an artificer within the Masters & Servants Act, 4 Geo. IV, chap. 34, sec. 3. *Ex parte Gordon* (1855) 25 L.J.M.C.N.S. 12, 1 Jur. N.S. 683. (Convicted for failure to finish a piece of work which he had begun.) One who digs a well at so much a foot has been held to be a "labourer" within the meaning of 2 Geo. II, chap. 19. *Lowther* v. *Radnor* (1806) 8 East, 113. See also *Lawrence* v. *Todd* (1863) 32 L.J.M.C.N.S. 238, 14 C.B.N.S. 554, 10 Jur. N.S. 178, 8 L.T.N.S. 505, 11 Week. Rep. 835, cited in last note.

the article which he was manufacturing (*bbb*).

The phrase in the Employers and Workmen Act which is now under discussion cannot be construed as giving the servants of an independent contractor a right of action for personal injuries against the principal employer (*ccc*).

9. Seamen.—Seamen were expressly excepted from the scope of the Employers and Workmen Act of 1875. This provision, though repealed for other purposes by the Merchant Seamen Act of 1880, was for the purpose of definition kept alive by sec. 11 of that Act. Seamen are therefore still excluded in England from the advantages of the Employers' Liability Act. (*a*)

If a plaintiff relies upon the theory that his functions were partly those of a seaman and partly what may be called non-maritime, he cannot recover unless he proves expressly and distinctly that he actually had an employment separate from that of a seaman. (*b*)

The word "seaman" applies only to the crews of sea-going ships. An action will therefore lie for the death of the fireman of a canal-boat who was drowned by its capsizing (*c*). This rule has been altered to some extent by express enactment in some of the Colonies.

10. Servants working in Government Departments.—According to Mr. Beven (1 Negl. 873), the definition of "workman" in the Employers and Workmen Act does not include Crown servants for these two reasons.

(*bbb*) A stuff presser or stuff finisher of Italian goods, working at weekly wages and a commission, besides superintending other servants was held liable, as an "artificer", for an unlawful breach of contract under Stat. Geo. 4, ch. 34, sec. 3. *Whitely* v. *Armitage* (1864) 13 W.R. 144.

(*ccc*) *Marrow* v. *Flimby* (C.A. 1898) 2 Q.B. 588, where it was held that a colliery owner could not be sued under the Act of 1880 by a miner in the service of a person who had entered into a contract to sink a shaft for a certain price per fathom sunk, and who employed and payed the sinkers and superintended them himself.

(*a*) A bill introduced in 1893 to repeal the Act of 1880, and, inter alia, to give seamen the benefit of the substituted enactment, failed to pass into law. See Kay's Shipmasters & Seamen (2nd Ed.) sec. 466. In New South Wales it has been held that the phrase "otherwise engaged in manual labour" must be construed as being applicable only to persons ejusdem generis with those specifically mentioned, and only embraces persons working on land. *Hanson* v. *Australasian S. N. Co.* (1883) 5 New So. Wales L.R. (1) 447. But by the Act of 56 Vict. No. 6, seamen are now entitled to sue under the statute.

(*b*) *Hanrahan* v. *Limerick S. Co.* (1886) 18 L.R. Ir. 135. [Holding, on the ground that there was no such proof furnished, that a mate of a steamer could not recover for injuries received while he was superintending the loading of a cargo.]

(*c*) *Oakes* v. *Monkland I. Co.* (1884) 11 Sc. Sess. Cas. (4th Ser.) 579.

First, the rights of the Crown are not affected by any Act in which the Crown is not specially named (*a*).

Secondly, the Crown is not liable for torts committed by its servants (*b*.) This rule, as it would seem, still prevails in most of the British Colonies; but it has been abrogated wholly or partially in some of them (*c*.)

XI. DAMAGES RECOVERABLE.

England, Newfoundland, and Australian Colonies: Secs. 3, 5. British Columbia: 1891, ch. 10, sec. 6. Manitoba: Ch. 39, sec. 6. Ontario: Secs. 7, 12. Massachusetts: Secs. 1, 3. New York: Sec 4. Colorado: Sec. 2. Indiana: Rev. Stat. 1894, sec. 7085.

11. Damages recoverable where the injured servant survives.—The provisions specifying the amount recoverable by an injured servant do not give a measure of damages, but merely fix a limit beyond which the jury cannot award compensation (*a*.) Within that limit the measure of damages is left to be determined upon the ordinary principles which regulate the assessment of the indemnity in actions for personal injuries.

Under the English and some of the Colonial Acts the maximum amount which can be awarded is a variable quantity, dependent upon the earning capacity of the supposed injured person (*b*).

(*a*) Bacons Abr. Prerog. (E) 5.

(*b*) *Johnstone* v. *Sutton*, 1 T.R. 493; *Huron* v. *Denman*, 2 Exch. 167.

(*c*) The New Zealand Employers' Liability Act is made expressly applicable to Crown servants. In Canada by virtue of the Dominion Act, 50 & 51 Vict. ch. 16, employes engaged on any "public work" can recover for the negligence of any officer or servant of the Crown if the circumstances were such that he could have recovered in an action against a private employer. *Queen* v. *Filin* (1895) 24 Can. S.C. 482, following *Quebec* v. *Queen* (1895) 24 Can. S.C. 420, where it was laid down that the effect of the Dominion statute, 50 & 51 Vict. ch. 16, sec. 16, par. (c.), was to confer upon the Exchequer Court, in all cases of claim against the Government, arising out of the death of or injury to any person through the negligence of its servants on any railway or other public work of the Dominion, the same jurisdiction as is exercised in like cases by the ordinary courts over public companies. Apparently this statute operates so as to give a Government servant a right to take advantage of any Employers' Liability Act which may be in force in the Province where the injury was received, if he was engaged on a railway or other public work.

(*a*) *Borlick* v. *Head* (1885) 34 Week. Rep. 102.

(*b*) The plaintiff is entitled to prove as damages loss of wages in respect both of his employment with the defendants and also in respect of certain overtime labor under another employer, where the total amount which he can thus recover is less than the amount he might have been awarded in respect of his estimated earnings for three years in the defendant's service. *Borlick* v. *Head* (1885) 34 W.R. 102, 2 Times L.R. 103. An apprentice cannot, under this section,

The American Acts simply declare that the damages shall not exceed a certain sum.

A mixture of these two methods is adopted in the Ontario and British Columbia Acts, the servant having the privilege of recovering either a fixed sum or one computed on the basis of earnings, whichever may be the larger. The precise amount recoverable within the limit thus fixed is determined, (except in so far as it may be affected by the special provisions in some of the Acts respecting deductions), with reference to the principles which regulate the measure of damages in all actions for personal injuries. An extended discussion of the subject would therefore be out of place in this article.

Where the plaintiff is entitled to damages at common law as well as under the statute, the amount of the indemnity recoverable is not restricted to the sum fixed by that Act (*c*).

12. Damages recoverable by the representatives of an injured servant.—The various clauses in these statutes by which a right of action is given to the representatives of a deceased servant have been treated as an expression of the intention of the legislatures that the provisions of the Damage Acts and the decisions in which they have been construed are to be regarded as controlling upon the questions of the assessment of damages in cases where death results from the accident in suit.

In England the right of action given to relatives of a deceased person by the earlier Act is not a right given to them quâ relatives to recover damages as a solatium for the distress which may be occasioned to them by the death; nor is it a right transmitted to them by the deceased, to recover damages for the loss or for the personal pain and suffering which he endured. It is a right given to the parties named in the statute, to recover damages for the death of their relative, when, and only when, the death has caused such parties a pecuniary loss, and to the extent only of such pecuniary loss (*a*).

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be awarded more than the sum to which his wages at the time of the accident would amount in three years. The damages cannot be augmented by construing the word "earnings" as including the computed value of the tuition he was receiving. That word means money or things capable of being turned into money by accurate estimation. *Noel* v. *Redruth Foundry Co.* (1896) 1 Q.B. 453, 65 L.J.Q.B.N.S. 330, 74 Law T. Rep. 106, 12 Times L.R. 248.

(*c*) *O'Connor* v. *Hamilton Bridge Co.* (1894) 25 Ont. R. 12.

(*a*) Ruegg on Empl. Liab., pp. 131, et seq., citing *Gillard* v. *Lancashire &c. R. Co.* (1848) 12 L.T. 356; *Ryan* v. *Great Northern R. Co.*, 4 B. & S. 396, and other cases.

The Colonial Acts are expressed in the same terms and, therefore, construed in the same manner as that of England (*b*).

In Alabama, Colorada and Indiana, the measure of damages is limited to the pecuniary injury sustained by the persons to whose benefit the recovery enures. Exemplary or vindictive damages cannot be recovered, nor can anything be allowed on account of the pain and suffering of the deceased, the grief and distress of his family, or the loss of his society (*c*).

In Massachusetts the representatives of the deceased servant may recover damages for all the damage accruing to him before death, including his mental and physical sufferings (*d*).

XII. TRIAL PRACTICE.

(In the article published March 1st, sec. 3, notes (a) and (c), some additional cases dealing with points of pleading are cited.)

13. Scope of subtitle.—In this subtitle, as already intimated at the commencement of the article, it is proposed merely to collect, under appropriate headings, the cases in which various points of pleading and procedure have been determined in actions brought under the statutes. It would be out of place to attempt, in the present connection to develop fully the general rules which these cases illustrate. For a more complete discussion of the subjects touched upon, the reader is referred to the various treatises on trial practice (*a*).

14. Institution of distinct suits at common law and under the statute.—By the express terms of the English Act (sec. 6), a statutory action must, in the first instance, be commenced in a County Court. But, as the common law rights of a servant are not affected by the Act, the institution of such an action will not debar him from bringing another action at common law, either in the County Court or the High Court. If actions are brought in

(*b*) *Rombaugh* v. *Balch* (1900) 27 Ont. App. 32.

(*c*) *Louisville & N.R. Co.* v. *Orr*, 91 Ala. 548, 8 So. 360; *James* v. *Richmond &c. R. Co.*, 92 Ala. 231 [both cases under the Employers' Liability Act]; *Denver &c. R. Co.* v. *Wilson*, 12 Colo. 20, 20 Pac. 340; *Ohio &c. R. Co.* v. *Tindall*, 13 Ind. 366. See generally Sutherland on Dam., secs. 1263, et seq.; Shearn & Redf. Negl., secs. 137, 466.

(*d*) See Shearn & Redf., sec. 767a.

(*a*) So far as the English procedure is concerned the works of Mr. Beven, Mr. Ruegg, and Messrs. Roberts and Wallace on Employers' Liability will supply lawyers in other jurisdictions with all the information that they are likely to require.

different courts one will be stayed. If both are brought in a County Court, they will be consolidated and tried together (*a*).

15. Joinder of causes of action under the statutes and at common law in the same suit.—In England it has been customary to join common law and statutory causes of action in the same suit, and in spite of one judicial intimation adverse to this rule of procedure, its propriety may perhaps be regarded as being now no longer open to controversy (*a*).

In Scotland also this joinder is permitted (*b*).

In Massachusetts the propriety of such a joinder has, so far as the writer knows, never been questioned, and a large number of cases might be cited in which the complaint has included counts setting forth claims both under the statute and at common law (*c*). A similar remark is applicable to the Alabama course of practice (*d*).

16. Joinder of causes of action under the Employers' Liability Acts and the Damage Acts.—It has been held by the English Court of Appeal that the causes of action for the death of several employés in favour of their respective relatives, under Lord Campbell's act and the Employers' Liability Act, are several, and cannot be joined in one action (*a*). But such a joinder is now permitted

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(*a*) See Beven on Empl. L. (2nd Ed.) p. 198.

(*a*) In *Munday* v. *Thames Ironworks Co.* (1882) 10 Q. B. D. 59, Manisty, J., expressed a doubt whether a statutory action instituted in a County Court and removed to a Superior Court could be consolidated with one instituted prior to the removal in the Superior Court. But this dictum is inconsistent with the case of *Larbey* v. *Greenwood* (reported only in the Times newspaper, July 23, 1885), where the action in the County Court was removed in order that a common law claim might be added to it. Mr. Ruegg who refers to this decision (Empl. L. p. 141, note), states that the same course has been followed in other cases. See also *Marrow* v. *Flimby &c. Co.* (1898) 2 Q.B. 588, where there was both a common law and a statutory claim, and no objection to this joinder was raised For the general rule as to the joinder of alternative causes of action under the Judicature Act, see *Bagot* v. *Eastin*, 7 Ch. D. 1.

(*b*) *Morrison* v. *Baird*, 10 Sc. Sess. Cas. (4th Ser.) 271; *Goudie* v. *Paul*, 22 Sc. Sess. Cas. (4th Ser.) 1; *Duthie* v. *Caledonia R. Co.*, 35 Sc. L. Rep. 726; *Murray* v. *Cunningham* (1890) 17 Sc. Sess. Cas. (4th Ser.) 815; *McColl* v. *Eadie* (1891) 18 Sc. Sess. Cas. (4th Ser.) 507.

(*c*) It will be sufficient to mention, as examples, the following: *Demers* v. *Marshall* (1899) 172 Mass. 548, 52 N.E 1066; *Ford* v. *Mt. Tom. Sulphite Pulp Co.* (1899) 172 Mass. 544, 52 N.E. 1065; *Hall* v *Wakefield &c. R. Co.* (Mass. 1901) 59 N.E. 668; *Hughes* v. *Malden &c. Co.* (1897) 168 Mass. 395, 47 N.E. 125.

(*d*) For examples of the joinder of common law and statutory counts, see *Clements* v. *Alabama &c. R. Co.* (Ala. 1900) 28 So. 643; *Louisville &c.* v. *R. Co.* v. *York* (Ala. 1901) 30 So. 676.

(*a*) *Carter* v. *Rigby* (C.A.) [1896] 2 Q.B. 113, 65 L.J.Q.B.N.S. 537, 74 Law T. Rep. 744, a decision under the English County Court Rules, Order 44, Rule 18, in which the court followed *Smithwaite* v. *Hannay* (1894) A.C. 494, a decision with regard to Order 16, rule 1, of the Supreme Court Rules.

under Order III, r. 1a, of the County Court Rules, which was added in consequence of this decision.

17. Removal of actions to higher courts.—To induce the High Court in England to grant a writ of certiorari to remove an action from the County Court something more is necessary than an affidavit, which merely alleges in substance that the sufficiency of the notice, and other questions upon which the liability of the defendant depended are of considerable complexity and legal difficulty. Special circumstances such as are not likely to arise in cases of this type, but which may arise in exceptional instances must be averred in order to justify a removal. Under any other doctrine the intention of the legislature that the County Court should be the regular tribunal for the trial of these actions might be frustrated in the great majority of cases (*a*).

As to the power of removal generally under the Judicature Acts and its amendments, and the County Court Acts (see Ruegg on Empl. L., p. 138, et seq.).

18. Joinder of employer and negligent co-employé as parties defendant.—In an action brought under these statutes for an injury caused by the culpable act of any of the employés for whose negligence the employer is declared liable, that act obviously constitutes a breach both of a duty owed by the employer and of a duty owed by the employé himself. The injured person, therefore, may maintain an action against the employer and the delinquent employé jointly (*a*).

19. Within what period the action must be brought.—In all the Acts reviewed in this series of articles, except those of Alabama and Indiana, there are express provisions of which the effect is that the injured servant's right to maintain the statutory suit is conditional upon its being instituted within a specified period.

(*a*) *Munday* v. *Thames Iron-works & Shipping Co.* (1882) 47 L.T.N.S. 351, 10 Q.B.D. 59. See also *McEvoy* v. *Waterford S. Co.* (1885) 16 Ir. R.L.R. (Exch. D.) 291. In *Reg.* v. *City of London Court, (Judge of)* or *Claxton* v. *Lucas*, 14 L.R. Q.B.D. (C.A.) 905, 53 L.J.Q.B. Div. 330, 52 L.T.N.S. 537, 33 W.R. 700, aff'g 14 L.R.Q.B. Div. 818, 54 L.J.Q.B. Div. 301, 33 W.R. 521, 49 J.P. 407, it was held that sec. 39 of the County Courts Act, 1856, providing for a stay of the proceedings on certain conditions was intended to apply to actions which could be brought either in one of the superior courts or a county court, and was therefore not applicable to an action brought under the Employers' Liability Act, since by sec. 6 of that Act the action must be brought in the county court.

(*a*) *Charman* v. *Lake Erie &c. R. Co.* (1900) 105 Fed. 449. [Removal of cause from the State to the Federal Court was denied on this ground.]

It has been held that the time limit thus fixed is absolute, and that a servant's action is barred even where his excuse for not taking proceedings is that, between the time of giving notice of the injury and the expiration of the period within which the statute prescribes that the action must be brought, he was in a lunatic asylum, in consequence of the impairment of his faculties by the accident (*a*). If this decision is good law it discloses a very shameful defect in the statute.

20. Service of summons, waiver of irregularity.—An employé waives an irregularity in the service of the summons—(in the case cited it was served several days too late)—by appearing and cross-examining the plaintiff (*a*).

21. Sufficiency of the complaint.—In this section it is proposed to consider merely the formal requisities of the complaint. Its sufficiency, in so far as that depends upon the correctness of the rule of substantive law which it embodies, has necessarily been determined as an incident of the discussion of the various doctrinal points investigated in the articles already published in this Journal.

Some of the decisions to be cited possibly apply a stricter standard of technical correctness than would be deemed necessary in the various jurisdictions in which the more liberal of the modern systems of pleading have been adopted. But even to practitioners who have to draw complaints with reference to those systems those decisions will afford some instruction and guidance

The relation of employer must exist, and must be set forth in the complaint, to enable the injured person to sue under these statutes (*a*).

A complaint is demurrable, if in one of the courts it sets forth two separate causes of action, one under each of two distinct provisions (*b*).

A complaint is demurrable unless the allegations shew that the misconduct which is the basis of the claim was that of one of the

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(*a*) *Johnston* v. *Shaw* (1883) 21 Sc. L.R. 246.

(*a*) *Dunn* v. *Butler* (Q.B.D. 1885) 1 Times L.R. 476.

(*a*) *Nicolson* v. *McAndrew*, 15 Sc. Sess. Cas. (4th Ser.) 854; *Sweeney* v. *Duncan*, 19 Sc. Sess. Cas. (4th Ser.) 870.

(*b*) *Clement's* v. *Alabama &c. R. Co.* (Ala. 1900) 28 So. 643.

particular persons for whose fault the employer is made responsible by the statutes (*c*).

As regards the sufficiency of the complaint in respect to its statement of the breach of duty relied upon as a cause of action, the general rule is that it is good against a demurrer, when, and only when, it follows, either literally or substantially, the words of the particular provision with reference to which the allegations were framed (*d*).

(*c*) A complaint by a section hand for injuries caused by being struck by a hand car, "being operated recklessly, wantonly, and with gross negligence by defendant or its agent at that time," is bad, as being merely equivalent to a complaint that the injury was caused by a fellow-servant of the plaintiff. *Central of Georgia R. Co.* v. *Lamb* (Ala. 1899) 26 So. 969. See also next note.

(*d*) A complaint in an action to recover for an injury caused by defects in the ways, works, machinery, or plant of the defendant is demurrable, where it does not indicate by name or identify in some other way the appliance or appliances on the defective quality of which the plaintiff relies. *Louisville &c. R. Co.* v. *Jones* (1901) Ala. 30 So. 586; or where the defect to which the alleged injury was due is not specified. *Whatley* v. *Zenida Coal Co.* (1899) 122 Ala. 118, 26 So. 124.

A complaint which alleges that the injury was caused by "defects &c.," and concludes with "viz., the said hand car was out of plumb," and "was so improperly adjusted that it was likely to jump or be thrown from the track," has been held sufficiently specific, as against a demurrer, in its description of the defects. *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231, 25 So. 54.

A complaint is sufficient to take the case to the jury, when it alleges in substance that the injury was caused by the negligence of the defendants, or of their foreman, specially averred to be a person to whose orders the injured servant was bound to conform, in causing such servant to work in a drain from seven to ten feet in depth without sufficiently propping the sides, the result being that the sides collapsed and fell upon him. *McColl* v. *Eadie* (1891) 18 Sc. Sess. Cas (4th Ser.) 507.

An allegation that the injury occurred on the defendant's road on which it was at the time operating hand cars, and on one of defendant's hand cars, on which intestate, as an employé of defendant, was at the time engaged in the duties of his employment, and that one H. was the foreman in charge of said car, are sufficient to shew that H. was at the time the foreman of the defendant *Highland Ave. & B. R. R. Co.* v. *Dusenberry* (1891) 98 Ala. 240.

A complaint is not demurrable which shews that the negligent servant managed the defendant's estates while he was absent, although it does not aver in terms that he was not ordinarily engaged in manual labour. *McLeod* v. *Pirie* (1893) 20 Sc. Sess. Cas. (4th Ser.) 381.

It is error to sustain a demurrer to a complaint the averments of which substantially follow the language of the statute, but it is error without injury, if an amendment which specifies the particular facts relied upon as indicative of negligence, but which imposes no additional burden on the plaintiff, is filed and a demurrer to it overruled. *Loughran* v. *Brewer* (1896) 113 Ala. 509.

Averments that a person named was in the employment of the defendant, that he had superintendence entrusted to him, that he was negligent while in the exercise of such superintendence, and that he was the defendant's superintendent, clearly shew that the superintendence which he had was entrusted to him by the defendant. *Bessemer &c. Co.* v. *Campbell* (1898) 121 Ala. 50, 25 So. 793.

A count in an action for injuries caused by "defects" is bad, unless it contains an allegation of negligence either in the employer or someone entrusted, &c. *Davies* v. *Dyer* (1897) 11 New So. Wales L.R. (L.) 431.

The complaint in an action for injuries caused by the negligence of an employé exercising superintendence must contain a distinct averment shewing

A general averment of the negligence of the person entrusted with superintendence is enough. An averment of specific negligence is not requisite (*e*).

A complaint alleging injuries from a defective system is sufficiently specific without a distinct averment to shew how and in what manner this system was directly authorized by the defendant (*f*).

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the duties discharged by the superior servant, and that he was not ordinarily engaged in manual labour. *Moore* v. *Koss* (1890) 17 Sc. Sess. Cas. (4th Ser.) 706.

A count framed under the provision as to injuries caused by obedience to rules, is bad unless it contains an allegation that the injury resulted from some impropriety or defect in the rules, &c. *Davies* v. *Dyer* (1890) 11 New So. Wales L.R. (L.) 431.

An averment in a count of a complaint in an action by a brakemen against a railroad company that he was shaken or jolted from the car and his injuries were caused by the negligence of the engineer in allowing his car and engine to be suddenly and violently shocked,—is a sufficient allegation of negligence. *Highland Ave. & B.R. Co.* v. *Miller* (1898) 120 Ala. 535, 24 So. 955. In the same case it was held that the complaint in such an action need not aver that the shock or jerk which caused him to fall from the car was of more than usual violence or greater than was ordinarily incident to the starting and movement of cars, where in the first count it is charged to have been caused by reason of a defect in the engine, and in the third count by the negligence of the engineer.

In an action to recover for the negligence of a person "in charge of an engine," it has been held sufficient to aver that the injuries were inflicted "by reason of the defendants' negligence," the position being taken that for the purpose of pleading, there is no distinction between the "negligence of a railway company" and the negligence of an "engineer." *Indianapolis Union Ry. Co.* v. *Houlihan* (Ind. 1901) 60 N.E. 943.

A complaint in an action to recover for an injury alleged to be due to an employé in "charge of a car, . . . upon a railway," is bad, if it fails to aver that such employé was in charge of the car in question, and that it was on a railway. *Central, &c., R. Co.* v. *Lamb* (Ala. 1899) 26 So. 969. In *Mobile & O.R. Co.* v. *George* (1891) 94 Ala. 199, it was held that an averment that "defendant negligently used in its business a steam engine or locomotive which was out of order, so that it could not be stopped promptly," could not be regarded as the equivalent of the statutory language. The court said: "The engine may have been negligently used in the business, and yet the defect complained of not having arisen from, or been discovered and remedied owing to the negligence of defendant, or of some person intrusted with the duty of seeing that the works and machinery were in proper condition. The adverb 'negligently,' as employed in the count, qualifies the manner in which the engine was used, and, fairly construed, does not relate to the origin of the defect, or to the failure to discover and remedy it; and even when taken in connection with the subsequent averment, that plaintiff was injured on account of 'the negligently defective condition of the engine,' is not the equivalent of an averment that the defect arose from, or was not discovered and remedied, owing to the negligence of defendant, or of any person in its employment."

To the same effect, see *Central of Georgia R. Co.* v. *Lamb* (Ala. 1899) 26 So. 969, where a complaint for injuries caused by being struck by a hand-car which was not "properly fixed so as to control it," was held demurrable for the omission of the same allegation.

(*e*) *Bessemer &c. Co.* v. *Campbell* (1898) 121 Ala. 50, 25 So. 793, overruling a demurrer to a complaint which averred that the death of plaintiff's intestate was caused by the negligence of a "bank-boss" in failing to take proper precautions to prevent a fire which broke out in a mine from suffocating him.

(*f*) *Henderson* v. *Watson* (1892) 19 Sc. Sess. Cas. (4th Ser.) 954.

In a treatise of high authority it is said to be necessary, under the English rules of practice, that, in every case, except where the negligence relied on is the employer's personal negligence alone, the particulars of the claim should give both the name and the description of the persons in the employer's service who are alleged to have been negligent (*g*). And, although the authorities are somewhat conflicting, this seems to be the accepted doctrine of the American courts also (*h*).

22. **Sufficiency of the plea.**—A plea stating that, if there was any fault, it was that of a fellow-servant has been held sufficiently specific to go to trial upon (*a*).

23. **Burden of proof.**—(*a*) *Generally.*—The authorities cited in the earlier articles of this series all proceed upon the assumption that the plaintiff has the onus of proving (1) that there was a breach of duty in the premises as regards himself; (2) that such breach of duty was committed by some person for whose acts and omissions the master is made responsible by the statutes, and (3) that such breach of duty was the efficient cause of his injury. A few cases are cited in the subjoined note in which there has been an explicit affirmation of one or other of these propositions; but

(*g*) Ruegg on Empl. Liab. p. 122. In the appendix of this work, the learned author gives a number of Forms of Particulars of Demand which have been actually used in statutory suits.

(*h*) In one Alabama case it was held that a complaint was not demurrable for the reason that it does not designate the name or position of the person so intrusted. *McNamara* v. *Logan* (1893) 100 Ala. 187, 14 So. 175. Defendant's counsel cited *Mobile &c.* v. *George* (1891) 94 Ala. 199, where it was suggested, *arguendo*, but not expressly determined that good pleading required the name of the person to whose orders the employé is bound to conform, to be stated, so as to give the defendant notice thereof, and present an issuable fact whether such person was in the service or employment of defendant, or whether plaintiff was bound to conform to his orders. This case was distinguished by the court on the ground that, even supposing that the suggestion embodied the proper rule as to pleading under the subsection dealt with, viz. that relating to conformity to orders, it did not follow that the same strictness should be required in a declaration alleging an injury from defects.

But in a later case, it was laid down, on the authority of the very decision so distinguished, that the name of the person "intrusted with the duty, &c." must be averred, or the plaintiff must allege that he was ignorant thereof. *Louisville &c. R. Co.* v. *Bouldin* (1895) 110 Ala. 185. To the same effect is *Central of Georgia &c. R. Co.* v. *Lamb* (Ala. 1899), 26 So. 969.

The ruling in *McNamara* v. *Logan*, supra, was, strangely enough, not referred to in either of these later cases.

A railroad employé cannot recover from the company, under a count of the complaint alleging that the name of the person guilty of the alleged negligence was unknown to him, where such allegation is disproved by the undisputed evidence. *Alabama G.S.R. Co.* v. *Davis* (1898) 24 So. 862, 119 Ala. 572.

(*a*) *McNeil* v. *Kinneil, &c. Co.* (1898) 25 Sc. Sess. Cas. (4th Ser.) 962.

no useful purpose would be served by accumulating authorities to demonstrate what is really beyond controversy (*a*).

(*b*) *Res ipsa loquitur.*—Whether the onus is shifted in any particular case by the operation of the doctrine of "res ipsa loquitur" is determined by the same considerations as those which are controlling in actions at common law (*b*).

24. Instructions.—To ask a jury in general words whether there was any defect by reason of which the accident happened, or any negligence on the part of an employé having superintendence is not a proper way of submitting the case to them (*a*).

(*a*) As to (1), see *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231; *Louisville &c. R. Co.* v. *Bunson* (1892) 98 Ala. 570, 14 So. 619; *Garland* v. *Toronto* (1896) 23 Ont. App. 238.

As to (2), see *Gibbs* v. *Great Western R. Co.* (1884) 12 Q.B.D. (C.A.) 208; *Garland* v. *Toronto* (1896) 23 Ont. App. 238; *Louisville &c. R. Co.* v. *Davis* (1890) 91 Ala. 487.

Mary Lee Coal & R. Co. v. *Chambliss* (1892) 97 Ala. 171, 53 Am. & Eng. Cas. 254, 11 So. 897. [Verdict set aside on the ground that there was no evidence that the failure to discover or remedy the defect was due to the negligence of the employer or his representative.]

As to (3), see *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231; *Louisville, &c. R. Co.* v. *Binion* (1892) 98 Ala. 570, 14 So. 619; *Farmer* v. *Grand Trunk R. Co.* (1891) 21 Ont. Rep. 299. [No recovery, where the evidence is equally consistent with the theory of contributory negligence on the plaintiff's part.]

(*b*) A verdict for the plaintiff will not be disturbed where the evidence is that the unsafe adjustment of a plank in a temporary staging across which he and his fellow workmen were carrying materials was the cause of the injury. The mere fact that such evidence is quite consistent with the hypothesis that some person for whose acts the master was not responsible might have moved the plank does not throw on the plaintiff the onus of proving that the defect had existed so long that it ought to have been discovered by an agent of the defendants. *Giles* v. *Thames, &c., Co.* (Q.B.D. 1885) 1 Times L.R. 469.

A finding that the defendant was not in fault as regards the adjustment of a scaffold used by workmen engaged in painting a ship is not warranted where the plaintiff's witnesses declare that the chains which supported the poles on which the scaffold rested were slung at such a distance from the ship's side that there was a likelihood of the poles tipping under the weight of the workmen, while the defendant produces evidence that the chains were slung at such a distance that no tipping was possible, but does not explain how the accident occurred. The fact that the catastrophe happened throws the weight of probability on the side of the witnesses who account for the accident, and furnishes a strong reason for accepting their testimony as correct. *Davison* v. *Henderson* (1895) 22 Sc. Sess. Cas. (4th Ser.) 448.

The mere fact that a shaft supported by brackets falls is sufficient evidence to warrant a jury in finding that its fall was due to a defect in the supports. *Copithorne* v. *Hardy* (1899) 173 Mass. 400, 53 N.E. 915.

On the other hand the mere fact that the upper compressing plate of a brick-making machine falls unexpectedly on the hand of a workman who has just arrested its movement with a scraper will not justify a finding that there was a defect in the machine. *Kay* v. *Briggs* (Q.B.D. 1889) 5 Times L.R. 233.

See, generally, on this doctrine, 1 Bev. Negl. pp. 129-148; Shearm. & Redf. Negl. sec. 59.

(*a*) *Pritchard* v. *Lang* (1809) 5 Times L.R. 639.

If a charge is given at the request of the plaintiff, and afterwards a charge is given at the request of the defendant, eliminating from the case the count of the complaint on which the first charge is based, the most that can be said of the first charge is that it was abstract—an infirmity not demanding a reversal (*b*).

25. Province of court and jury.—Whether the acts of omission or commission covered by the various sections of these statutes shew an absence of due care is a question for the jury, whenever the evidence is such that reasonable men may differ as to the proper inference to be drawn from it (*a*). A verdict for the plaintiff, therefore, should not be set aside where there was any evidence to support the cause of action alleged (*b*). But an examination of the facts in the cases decided under the statutes shews that they have exercised with considerable freedom their power of controlling the action of juries.

The question whether the material substances constituting the instrumentality which was the immediate cause of the injury were among those covered by the statutes is also one for the jury, wherever the proper inference from the facts is a matter of doubt, or the facts themselves are a subject of controversy (*c*). But a court is almost always warranted in reviewing a verdict for the plaintiff which involves the determination of this question, for the elements of uncertainty which render the finding of a jury conclusive are seldom present. See cases cited ante, vol. 38, pp. 276-288, 327-329, and vol. 39, pp. 131-142.

It is also for the jury in the first instance to say whether the negligent employé was a superintendent (ante vol. 38, pp. 619-625), or a person to whose orders the plaintiff was bound to conform (ante vol. 39, pp. 8-11), or a person delegated with the authority of the employer to make rules or to give particular instructions (ante vol. 39, pp. 8-12), or a person in charge of one of the various appliances specified in the provision relating to negligence in the operation of railways (ante vol. 39, pp. 131-

(*b*) *Bessemer, &c. Co.* v. *Campbell* (1898) 121 Ala. 50.

(*a*) *McCord* v. *Cammell* (H.L.E. 1896) A.C. 57, per Lord Watson (p. 65.)

(*b*) *Reynolds* v. *Holloway* (C.A. 1898) 14 Times L.R. 551.
As to the grounds upon which a new trial will be granted under the English Judicature Act, see generally, Ruegg on Empl. L. pp. 142: et seq.

(*c*) *Prendible* v. *Connecticut Riv. Mfg. Co.* (1893) 160 Mass. 131, 35 N.E. 675.

142). But in this connection again the control of the jury over the result is often merely nominal.

As to the functions of court and jury in determining whether inaccuracies in the notice were prejudicial to the defendent, see ante, vol. 39, pp. 147-150.

26. Appointment of assessors.—Notwithstanding that the English Act merely provides that assessors may be appointed "for the purpose of ascertaining the amount of compensation," Mr. Ruegg (Empl. L. p. 127) thinks that it was really intended that the assessors should serve the same purpose as assessors in County Court actions generally; that is to say, they are to give such advice and assistance as persons of skill and experience in the matter to which the action or matter relates" are qualified to give. If this conjecture is well-founded the same construction would be placed on the similar language of the Canadian and Australian Acts. But so far as judicial authority goes, the point is apparently still an open one.

27. Questions which may be reviewed on appeal.—In England an appeal from a County Court to the High Court is only allowed on questions of law. See Ruegg on Empl. L. p. 147. It is a condition precedent to the right of appeal that the question on which it is desired to appeal should have been raised before the County Court judge (*a*); and that it should have been raised at or immediately after the appeal (*b*).

As the American statutes contain no specific provisions affecting the procedure on appeal, the actions under them are in this respect governed by the same rules as actions at common law.

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(*a*) *Rhodes* v. *Liverpool Investment Co.* 4 C.P.D. 425; *Clarkson* v. *Musgrave*, 9 Q.B.D. 386: *Cook* v. *Gordon*, 61 L.J.Q.B. 445; *Allmarch* v. *Walker* (Q.B.D. 1885) 78 L.T. Journ. 39.

(*b*) A request made to the judge an hour and a half after the trial was concluded has been held to have been too late. *Pierpont* v. *Cartwright*, 5 C.P.D. 139.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

B.N.A. ACT S. 91—LANDS IN ONTARIO SURRENDERED BY INDIANS—PROPRIETARY RIGHTS—POWER OF DISPOSITION.

In *Ontario Mining Co.* v. *Seybold* (1903) A.C. 73, the Judicial Committee of the Privy Council (The Lord Chancellor and Lords Macnaghten, Davey, Robertson and Lindley) have affirmed the judgment of the Supreme Court, 32 S.C.R. 1. The case was in reference to mining rights in Indian lands in Ontario. The appellant claiming to be entitled thereto under grants from the Dominion Government, and the respondents claiming title under grants from the Ontario Government. The majority of the Supreme Court held that the proprietary rights in the minerals vested in the province under the B.N.A. Act under the decision of the Judicial Committee in *St. Catharines Milling Co.* v. *The Queen*, 14 A.C. 46, and therefore the grantees of the Provincial Government had the best right, and with this conclusion the Judicial Committee agreed, and dismissed the appeal. We notice that some strong observations are made on the fact that on the application for leave to appeal certain material facts were not disclosed. Their Lordships remarks on this point ought to be borne in mind by practitioners from whom is expected the utmost candour.

INFANT—CONTRACT FOR PURCHASE OF LAND BY INFANT—MORTGAGE BY INFANT TO SECURE ADVANCE—LIEN FOR MONEYS ADVANCED TO INFANT FOR PURCHASE OF LAND.

In *Nottingham Permanent Building Society* v. *Thurstan* (1903) A.C. 6, the House of Lords (Lord Halsbury, L.C., and Lords Shand, Davey and Robertson) have also affirmed the judgment of the Court of Appeal (1902) 1 Ch. 1, (noted ante, vol. 38, 191). An infant had made a contract to purchase land and arranged with a building society to advance the purchase money and executed a mortgage in the society's favour to secure the advance. Their Lordships agreed with the court below, that the mortgage was void notwithstanding that the Building Societies Act enables

infants to become members of building societies and "give all necessary acquittances." The lien declared in favour of the mortgagees by the Court of Appeal is not disturbed.

MONEY PAID UNDER MISTAKE OF FACT—CERTIFIED CHEQUE FRAUDULENTLY ALTERED—NEGLIGENCE—NOTICE OF DISHONOUR.

Imperial Bank v. *Bank of Hamilton* (1903) A.C. 49. This is the last of a much litigated case, and the Judicial Committee of the Privy Council (Lords Macnaghton, Robertson, Lindley and Sir Arthur Wilson) have affirmed the judgments of the Ontario Court of Appeal, 27 A.R. 590, and the Supreme Court of Canada, 31 S.C.R. 144. The facts of the case were simple. One Bauer was a customer of the Bank of Hamilton and drew a cheque on that Bank for $5. The word "five" was written and a considerable space was left between that word and the "dollars" word printed on the cheque. He procured the cheque to be certified by the clerk of the Bank of Hamilton, and then fraudulently altered it by filling in the word "hundred," thereby making it to appear to be a cheque for $500. He then took the cheque as altered and deposited it with the Imperial Bank and received credit for $500. The cheque was passed through the clearing house next day and paid by the Bank of Hamilton, the fraud not having then been discovered. On its discovery the action was brought by the Bank of Hamilton to recover $495 and for this sum judgment was awarded. The points relied on by the Imperial Bank were chiefly two: (1) That the Bank of Hamilton was negligent in not turning up Bauer's account before paying the cheque, and (2) That notice of the forgery ought to have been given on the day they paid the cheque, whereas it was not in fact given till the day after, but their Lordships held that on neither ground were the appellants entitled to succeed: as to the first point because, even if the Bank of Hamilton were negligent in not examining Bauer's account before paying the cheque, it did not thereby induce the Imperial Bank to treat the cheque as good; and as to the second point, notice of forgery was unnecessary, and the cheque for $5 was not dishonoured and the rule as to the necessity of notice of the dishonour of a bill of exchange did not apply. The litigation has probably cost a good deal more than the amount at stake, but at all events it has settled the law.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court]. LUDLOW *v.* BATSON. [Jan. 1.

Defamation—Special case—What constitutes.

The special damage required in an action of defamation must be such as would be the reasonable and natural result of the words used. Where, therefore, the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece from her father's estate, had put in an account for trifling matters, such as for candies, oranges, etc., the special damage alleged being that in consequence thereof the niece and his wife had left him and refused to live with him.

Held, that such damage was not such as was recognizable at law, not being the natural and reasonable consequence of the words used.

Brewster, K.C., for plaintiff. *Harley*, K.C., for defendant.

Meredith, C.J.C.P.] [Jan. 16.

LONDON LIFE INSURANCE CO. *v.* MOLSONS BANK.

Insurance—Life insurance—Fraud of agent—Payment by bank—Right of company to recover amounts paid.

N. was the assistant superintendent of a life insurance company as well as its local agent at one of its branches, having sole control of the business there. A number of applications sent in by him to the head office were, with the exception of some five in number, on the lives of fictitious persons, and, as to these five the insurance had subsequently lapsed, but of which the company were kept in ignorance. Afterwards N., representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the fictitious claimants and forging their alleged signatures thereto, when cheques for the respective amounts made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank, were sent to N. whose duty it was, on receipt thereof, to see the payees and procure discharges from them. On receipt of these cheques the endorsements of the fictitious payees' names were forged and the cheques presented to the bank and paid in good faith, the amounts thereof being charged to the company's account.

Held, that the company was affected by what had been done by N. so as to preclude it from disputing the right of the bank to pay the cheques and charge the plaintiffs with amounts thereof.

Aylesworth, K.C., and *Jeffery*, for plaintiffs. *Hellmuth*, K.C., and *Ivy*, for defendants.

Meredith, J.] IN RE BROWN *v.* SLATER. [Feb. 3.

Will — Construction — Life estate — Survivorship — Disentailing deed — Condition of devise — Bearing testator's name — Vendor and purchaser.

A testator devised the lands "whereon I now reside" to his son "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever, and in default of a second male heir to their eldest surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life." The testator's son had by the wife mentioned in the will four children, one son and three daughters, of whom one son and one daughter survived the testator's son and his wife. One of the daughters who predeceased the testator's son had previously joined with him in a disentailing deed in which it was recited that she was the tenant in tail in remainder expectant upon the decease of her father.

Held, that the testator's son took a life estate only, and the surviving daughter an estate tail male; and that the disentailing deed did not stand in the way of that daughter making a conveyance of the lands in fee.

Held, also, that the condition as to continuing to bear the testator's name did not prevent the daughter, being unmarried, from conveying in fee.

A. W. Brown, for vendor. *W. T. Evans*, for purchaser.

Falconbridge, C.J., Meredith, C.J.] [Feb. 6.

NEELY *v.* PETER.

Water and watercourses — Injury to land by flooding — Claim for damages — Summary procedure — Costs of action — Erection and maintenance of dam — Liability of owners — Tolls — Liability of lumbermen using dam — Injunction.

The judgment of STREET, J., 4 O.L.R. 293, was affirmed for the reasons given by him; and, in addition to the damages awarded to the plaintiff against the added defendants, an injunction was granted restraining these defendants from penning back the waters of the river in question, but the operation of the injunction was suspended for a year to enable those defendants to acquire the right to overflow the plaintiff's land, under the provisions of R.S.O. 1897, c. 194, or otherwise.

Arnold, for plaintiff. *Haight*, for defendants.

Divisional Court.] [Feb. 16.

ONTARIO ELECTRIC LIGHT CO. *v.* BAXTER & GALLAWAY.

Agreement—Supply of electric power—Continued existence of property—Condition precedent.

Where under the terms of an agreement the plaintiffs were to supply the defendants with electric current to a specified amount of horse power, to be used by them for operating their machinery and for use in their business and for no other purpose, the limitation was for the purpose of confining the use of the power to the defendants' premises, and not to any existing mill thereon, so that the fact of such mill being afterwards destroyed by fire did not dispense with the defendants' obligation to receive and pay for the power. *Taylor* v. *Caldwell* (1863) 3 B. & S. 826, distinguished.

Lynch Staunton, K.C., for plaintiffs. *Teetzel*, K.C., for defendants.

Meredith, C. J., MacMahon, J.] [Feb. 27.

RUSSELL *v.* EDDY.

Costs—Third party—Discretion—Appeal.

Rule 214 gives power to the court or a judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the defendant. Such an order is in the discretion of the court or judge, and there is no appeal from it unless by leave, as provided by the Judicature Act, R.S.O. 1897, c. 51, s. 72.

W. H. Blake, K.C., for plaintiff. *Godson*, for defendant.

Divisional Court.] [March 3.

METALLIC ROOFING CO. *v.* AMALGAMATED SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

Parties—Who may be sued—Status of defendants—Local union.

The right to maintain an action or the liability to be sued can only be by or against persons as individuals, or as a corporation or a partnership, or where individuals are carrying on business in a name other than their own, or where they have been given the capacity to own property and to act by agents.

A local union of workmen, a purely voluntary association, occupying none of such capacities, are not liable to be sued; and a writ served upon them was therefore set aside;

Taff Vale R. W. Co. v. *Amalgamated Society of Railway Servants* (1901) A.C. 426, distinguished.

Where it clearly appears that the association sued is not an entity, which may be sued by the name it bears, it is more convenient to set aside

the service of the writ on a motion made therefor than to allow the case to proceed at the trial with a certainty of its ultimate dismissal.

O'Donoghue, for appellants. *Tilley*, for respondents.

Street, J., Britton, J.] MATTHEWS *v.* MARSH. [March 21.

Promissory note—Accommodation maker—Renewal note obtained by fraud of principal maker—Right to sue on original note—Division Court—Power to amend.

On April 4, 1899, the above joined with one McDonald in a promissory note for $130 in favour of the plaintiffs for the accommodation of the latter. When it became due McDonald brought a renewal note, purporting to be signed by the defendant, which the plaintiffs accepted and gave up the original note stamped "paid." McDonald becoming insolvent and the plaintiffs failing to get payment of the renewal note out of his estate, sued the defendant upon it before a Division Court judge and a jury, when the defendant swore he never signed the renewal note, but nevertheless there was a verdict for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the judge at the trial allowed the plaintiffs to claim in the alternative upon the original note, as well as claiming upon the renewal note, and to amend their claim accordingly. The jury then returned a verdict for the plaintiffs on the original note. The defendant applied for a new trial which was refused, and he then appealed to this Court.

Held, 1. The Division Court judge had jurisdiction to amend the plaintiff's claim as he had done under Rule 4 of the Division Courts.

2. The renewal note being a forgery so far as the defendant's signature was concerned, and the plaintiffs, therefore, having been induced by McDonald's fraud to give him up the original note, the plaintiffs retained a right to recover in equity on the original note.

Hewson, K.C., for plaintiffs. *Gunn*, K.C., for defendant.

Boyd, C.] BURKHOLDER *v.* GRAND TRUNK R.W. Co. [March 25.

Damages—Death by accident—Apportionment between widow and children.

An action brought against a railway company by a widow on behalf of herself and four infant children, aged respectively seven, five, three and one year, to recover damages for the death of her husband through the company's alleged negligence, was settled by the company paying $4,800. On application to a judge the amount was apportioned by giving the widow $1,200 and each of the children $900, the widow also to be paid for the children's maintenance, $200 a year half yearly for three years, the fact of

the widow having already received $1,000 for insurance on the husband's life being taken in consideration.

Osborne, for widow. *D. L. McCarthy*, for railway company. *Harcourt*, for infants.

Meredith, C.J., Maclaren, J.A.] [March 30.

BEDELL *v.* RYCKMAN.

Practice—Discovery—Postponement of till prior questions disposed of—Con. R. 472.

Appeal from an order of BRITTON, J., affirming an order of the Master in Chambers requiring the defendant to file a further and better affidavit on production, and to attend at his own expense to be further examined for discovery. The statement of claim displayed a single cause of action based upon the proposition that the defendant Cox and his associates as to the transactions detailed in it and the circumstances under which those transactions took place, stood in a fiduciary relation to the defendant company, which prevented them from making any profit for themselves out of the purchase of certain businesses acquired by them and afterwards transferred for a large sum of money to the defendant company, and the relief claimed was an account and payment by the individual defendants of the difference between the aggregate of the prices paid by them and what was paid by the company to them. It was admitted that the individual defendants received from the defendant company a sum in cash and stock far in excess of what they paid for the businesses, and the only matters really in controversy were the liability of the defendants other than the defendant company, to account for the profit made by them on the transfer to the company of the properties and if liability be established the amount for which they were answerable.

Held, that discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account asserted by the plaintiff had been established. The practice of the Court, as a general rule, is to postpone consequential discovery until liability has been established. The English rule from which our Consolidated Rule 472 is taken was adopted for the purpose of making uniform the practice in the cases with which it deals, and to enable the Court in any case to postpone the consequential discovery until the right of the plaintiff should be established.

W. H. Blake, K.C., for appellant. *Riddell*, K.C., and *Lamport*, for respondents.

Meredith, J.] [April 2.

KRUG FURNITURE CO. *v.* BERLIN UNION OF AMALGAMATED WOOD-WORKERS.

Trade union—Inducing breach of contract—Interference with business—Pleading.

Damages are recoverable against a trade union and the members thereof in an action by employers of workmen when by means of threats, abusive language, and a system of espionage the workmen are induced to break their contracts of employment with the employers and other workmen are prevented from entering into the employment in their stead.

It is too late at the trial after a trade union has appeared and pleaded in an apparently corporate capacity to raise the objection that it is not in fact incorporated or liable to be sued. Such an objection must be specially pleaded.

Du Vernet, and *Scellen*, for plaintiffs. *Macee*, K.C., and *Clement*, for defendants.

Winchester, M.C.] [April 4.

CHANDLER AND MASSEY *v.* GRAND TRUNK R.W. CO.

Parties—Joinder of defendants—Alternative claims—Con. Rule 186.

A machine sold by the plaintiffs was burnt while in the premises of the defendant railway company at the place for its delivery to the purchaser. The plaintiffs brought this action against the railway company as carriers for the value of the machine and in the alternative against the purchaser for the price:

Held, that this could not be done, the relief claimed against the railway company being based on the assumption that the title to the machine was in the plaintiffs, and that against the purchaser on the assumption that title had passed to him.

Quigley v. *Waterloo Manufacturing Co.* (1901) 1 O.L.R. 606, and *Evans* v. *Jaffray* (1901) 1 O.L.R. 614, applied.

D. L. McCarthy, for defendant company. *W. A. Sadler*, for plaintiffs. *C. A. Moss*, for defendant Kerr.

Boyd, C.] GRIFFITH *v.* HOWES. [April 4.

Insurance—Life insurance—Benevolent society—Certificate—"Legal heirs designated by will"—Election.

A certificate issued by a benevolent society to a married woman on the 25th October, 1892, provided that the benefit was to be payable to her "legal heirs as designated by her will." She died on the 14th of November, 1892, leaving her husband and three children her surviving. By her will,

dated Sept. 30, 1892, she gave specific properties and legacies to her husband and each of her three children by name, the insurance to her executors "for the purpose of paying thereout all debts due by me," and the residue to her children:

Held, that the bequest of the insurance money to the executors was inoperative: that it was payable to the three children as "legal heirs designated by will," and that the children were not bound to elect between the benefits specificially given to them and the insurance money.

G. M. Macdonnell, K.C., for plaintiffs. *W. H. Sullivan*, for defendants.

Street, J.] SMART *v.* DANA. [April 4.

Sheriff—Bond—Predecessor in office—Annuity out of revenues.

Pursuant to the terms of his appointment a sheriff and two sureties gave a bond to his predecessor in office to pay to him an annuity "out of the revenues of the said office."

Held, that fees received by the sheriff as returning officer at elections of members of Parliament, and commission earned by him as assignee for the benefit of creditors, formed part of the revenues of the office, and that as far as the revenues of each year so ascertained extended, after deducting necessary disbursements connected with the office during that year, the annuity for that year was payable.

Ritchie, K.C., for plaintiff. *Aylesworth*, K.C., and *M. M. Brown*, for defendants.

Divisional Court.] VOIGHT BREWING CO. *v.* ORTH. [April 7.

Judgment—Default judgment — Statement of defence — County Court—Appeal—Interlocutory order.

An order made in an action in a county court for service of notice of a writ out of the jurisdiction provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." Within the twelve days an appearance in the usual form was entered, the following words being added: "The defendant admits only $103, but otherwise disputes plaintiffs' claim in this action:"

Held, that this was in effect a statement of defence; that filing was, under the order, all that was necessary, and that a judgment entered for default of defence was void.

A motion by the defendant to set aside the judgment as irregular and void was dismissed by the County Court judge, who gave the defendant leave on payment of $5, to move on the merits for leave to defend:

Held, that this was a final order and that an appeal lay therefrom.

O'Donnell v. *Guinane* (1897) 28 O.R. 389, distinguished.

F. E. Hodgins, K.C., for defendant. *Wigle*, for plaintiffs.

Province of Manitoba.

KING'S BENCH.

Full Court.] COCKRILL *v.* HARRISON. [March 7.

Evidence—Corroboration—Breach of promise of marriage.

This was an action for breach of promise of marriage. The judge charged the jury that it was necessary that the plaintiff's evidence should be corroborated by some other material evidence in support of the alleged promise, holding that the Imperial Statute, 32 & 33 Vict., c. 68, s. 2, has not been expressly or by implication repealed by the Manitoba Evidence Act, R.S.M. 1902, c. 57. Defendant had a verdict and plaintiff appealed.

Held, that the charge to the jury was correct, as the Manitoba Evidence Act does not assume to codify the whole of the law of evidence and does not deal with the subject of the corroboration of evidence and in no way repeals the Imperial Act referred to. Appeal dismissed with costs.

Howell, K.C., for plaintiff. *Aikins*, K.C., for defendant.

Full Court.] NORTH CYPRESS *v.* C.P.R. Co.
ARGYLE *v.* C.P.R. Co. [March 14.
SPRINGDALE *v.* C.P.R. Co.

Canadian Pacific Railway lands—Exemption from taxation—Meaning of words "grant from the Crown"—"Meaning of words "taxation by the Dominion."

These were actions brought by arrangement to obtain a judicial decision as to when the twenty years' exemption from taxation of the lands of the Canadian Pacific Railway Co. in the North-West Territories, provided for in the contract with the Government, for the construction of that railway, set out in the Schedule to 44 Vict., c. 1, was to cease, and as to whether any such lands can be taxed for school purposes as soon as letters patent are issued for them. The first and second actions were on behalf of rural municipalities in that portion of Manitoba, which was added to it in 1881, after the contract with the Railway Company had been ratified by Parliament; and the third action, in which the company submitted to the jurisdiction of this Court, was on behalf of the School Trustees of a school district in the North-West Territories seeking to recover school taxes against lands patented to the company. The questions to be decided turned on the proper construction of clause 16 of the contract, which reads as follows:—"16. The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other pro-

perty, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be forever free from taxation by the Dominion, or by any Province thereafter to be established, or by any municipal corporation therein; and the lands of the company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown." By 44 Vict., c. 14, extending the boundaries of the Province of Manitoba, it was specially provided that the territory thereby added to that Province should be "subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof."

Held, 1. Following *C.P.R.* v. *Cornwallis*, 7 M.R. 1, 19 S.C.R. 702, and *C.P.R.* v. *Burnett*, 5 M.R. 395, that the exemption clause referred to applies to lands in that portion of the North-West Territories added to the Province of Manitoba in 1881.

2. The words "grant from the Crown" in said clause mean the letters patent conveying the lands, and that the twenty years of exemption in respect of any particular parcel do not begin to run until the date of the letters patent.

3. Under the company's contract, charter of incorporation and ratifying Act, it was not intended that it should take any vested interest in any specific lands until actual formal conveyance by letters patent in the usual course.

In the case of *Springdale* v. *C.P.R. Co.*—At the time of the incorporation of the company, and the making of the contract referred to, the Lieutenant-Governor of the North-West Territories in Council had certain powers of legislation, conferred upon him by previous Acts of Parliament, which included the creation of school corporations having the right to impose taxation for the support of schools, and in this case a separate and distinct question was raised as to whether the contract provided for exemption of the company's land grant from taxation imposed under such powers or under powers subsequently conferred by Act of Parliament upon the Lieutenant-Governor, acting by and with the advice and consent of the Legislative Assembly of the North-West Territories, since created.

Held, DUBUC, J., dissenting, that such taxation for school purposes in the Territories was not "taxation by the Dominion," or taxation "by any Province hereafter to be established, or by any municipal corporation therein," and that, as it is only from "such taxations" that, under clause 16 of the contract, the company's lands in the North-West Territories were to be exempt, it follows that the school corporation was entitled to recover the taxes regularly imposed by it, though it would cease to be so entitled, whenever its territory should be included in a new Province to be established, until twenty years from the issue of letters patent for each particular parcel of land.

Howell, K.C., and *Mathers*, for plaintiff. *Ewart*, K.C., *Tupper*, K.C., and *Phippen*, for defendants.

Book Reviews.

A Treatise on the Investigation of Titles to Real Estate in Ontario; by EDWARD DOUGLAS ARMOUR, K.C., D.C.L. Third edition; Canada Law Book Company, Toronto, 1903.

The earlier editions of this excellent work are already so well-known to the members of the profession that a third edition should need no introduction. Ten years, however, have elapsed since the last edition was published and since that time many and important changes have taken place in the law relating to titles of real estate in Ontario. Besides a host of judicial decisions appertaining to the law on this subject there has been a revision of the Ontario statutes and incessant and irritating amendments to those already on the statute books. Among the many changes in this respect will be found amendments to The Devolution of Estates Act, The Mortgage Act, The Trustee Act, The Trustee Investment Act, The Real Property Limitation Act, The Registry Act, The Land Titles Act, The Mechanics' and Wage Earners' Lien Act, The Married Women's Real Estate Act, The Landlord and Tenants' Act, The Execution Act, and many others.

These changes in the law are all embodied in this work, and carefully considered. The additions and alterations to the text found throughout the volume are very considerable, so that this edition has been thoroughly revised, in some parts recast and in others entirely rewritten, adding some fifty odd pages to the size of the book.

The index is complete and exhaustive and designed to facilitate the use of the book to the every-day practice of title searching.

A Treatise on the law of Street Surface Railways, by Andrew J. Nellis, of the New York State Bar, Albany, N.Y., Matthew Bender, Law Publisher, 1902. 682 pp. $6.00.

This book discusses the law of street surface railroads from and including the organization of such corporation to the acquisition of its franchise and property, the construction, equipment, management, operation and municipal regulation of its road and branches, the rights and liabilities of the company as to third persons, employees and passengers.

Street railway cases are becoming very numerous, as is to be expected considering the immense extension of business developed in that line. The book before us contains a survey of the entire field. The writer has gathered together, classified and arranged the decisions of the courts and the statute law up to date. He seems to have done his work with much care and certainly with great research. It is a pioneer book and will be found very useful to the profession in this country as well as in the United States, the conditions being very much the same in both countries.