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A. INVENTIONS OF EMPLOYÉS.

1. Rights of employers, and employés considered without reference to the patent laws.—Abstracting the element of the effect of the patent laws, the respective rights of an employer and employé

with reference to the discoveries of the latter are determined by the application of principles similar to those which govern the general question of the extent of an employer's interest in things acquired or produced by the exercise of the mental or bodily powers of an employé;—that is to say, an employer is entitled to the benefit of all the discoveries of his employé, which have a direct and immediate connection with the work which the latter was engaged to perform, and were made during that part of the day, which he was bound to devote to the discharge of his contractual duties¹. The right of the employer in this regard is especially clear, where it is shown not only that the discovery in question was made during the working hours of the employé, but that the employer's materials and machinery were being used under the employer's direction for the avowed purpose of making such a discovery².

¹ That a calico printer was entitled, after having discharged his head colourman, to the book in which that servant had entered the processes for mixing colours during his service, although many of the processes were the invention of the servant himself, was held in *Makepeace v. Jackson* (1813) 4 Taunt. 770. This was an action of trover to recover possession of the book. But the following passage from the judgment of Chambre, J., seems to justify a citation of the case as an authority for the general principle formulated in the text. "The master has a right to something beside the mere manual labour of the servant in the mixing of the colours; and though the plaintiff invents them, yet they are to be used for his master's benefit, and he cannot carry on his trade without his book."

It has been held that secret processes and compounds invented by an employé of a firm in pursuance of an employment for that purpose became the property of the firm without an express assignment; and he may be compelled to account for profits derived from manufacture and sale thereof on his own account. *Baldwin v. Von Micheroux* (Sup. Ct. 1893) 5 Misc. 386, 25 N.Y. Supp. 857.

² In a case involving the obligation of an employé to disclose a secret process discovered by him under such circumstances, (see § 16, post), the court remarked: "Independently of any special contract to that effect, the resulting discovery was just as much the employing company's property, as if, instead of being the formula of a secret process, it had been a material product; so that the defendant in refusing disclosure was refusing to give up to the corporation what belonged to it." *Silver Spring & Co. v. Woolworth* (1890) 16 R. I. 729.

The effect of *Dempsey v. Dobson* (1896) 174 Pa. 122, 40 I.R.A. 550, 34 Atl. 459, is thus correctly stated in the reporter's headnote: If one employed by another experiments at the expense of his employer and for his use with a view to the immediate use of the results of such experiments in his employer's business, the recipes and formulae resulting from such experiments belong to the employer so far as to give him the right to use the same. In that case it was the duty of a colour mixer employed in a carpet factory to prepare the dyes or colours so as to reproduce in the car-

A custom which would give to an employé working under such conditions an exclusive title, as against his employer, to the results of his experiments, is unreasonable, and cannot be sustained³.

2. ——— considered with reference to the patent laws. Generally.—

(a) *Employé entitled to inventions independently made by him.* In a recent English case it was conceded to be a well settled principle, that "the mere existence of a contract of service does not, *per se*, disqualify a servant from taking out a patent for an invention made by him during the term of service, even though the invention may relate to subject matter germane to, and useful for his employers in their business, and even though the servant may have made use of his employer's time and servant's and materials in bringing his invention to completion, and may have allowed his employer to use the invention

pet all the shades indicated by the design. After his work was approved by the designer, it was his duty to enter in a book called a "Colour Book" the number of the carpet and the formula by which each shade of colour used in its manufacture was produced. He was also required to keep a book in which a piece of yarn coloured according to the formula for each shade in the carpet, was preserved with the number of the carpet to which the shades belonged. When the colours were prepared they were put into large pitchers, each labelled with the formula or recipe it contained. *Held*, (1) that the recipes prepared by the colour mixer for the use of his employers in the manufacture of their carpets belonged to them so far at least as to give them the right to continue the use of the various colours and shades produced by them; (2) that the mixer had a right if he chose so to do to preserve the recipes for his use in the future, but his right was not an exclusive one as against his employers; (3) that if the colour mixer did not keep the books which it was his duty to keep, but kept private books of his own in which he recorded the recipes, his employers had a right to a copy of their own recipes when he retired from their employment; (4) that in an action by the mixer to recover damages for the detention of his books, the value of the recipes in the books should not be considered in estimating his damages; (5) that the plaintiff's measure of damages was merely the detention of the books without regard to the recipes, and also proper compensation for any unnecessary violence in the manner of the detention of the books, or disregard for the sensibilities or the self respect of the plaintiff; (6) that in the instruction as to damages the jury should be told to consider the conduct of the plaintiff, his disregard of his duty in making no entries in his employers' colour books, his failure to disclose this fact to them, and his leaving them under the honest belief that he was removing from their mill their own colour books.

³ In *Dempsey v. Dobson* (see last note), evidence of such a custom with regard to the various combinations and shades of colour devised by him was held to have been properly rejected.

while in their employment"¹. The same doctrine is recognized by the American Courts². So far as regards its application,

¹ *Byrne J. in Worthington Pumping Engine Co. v. Moore* (1902) 19 Times L.R. 84.

The rule that if a servant, while in the employ of his master, makes an invention, that invention belongs to the servant, and not to the master, was recognized by Abbott, C.J., in the nisi prius case of *Blowam v. Elsee* (1824) 1 C. & P. 558; R. & M. 187.

"If an employer takes out a patent for an invention discovered and worked out by a workman in his employ, and the patentee has no more connection with the invention than that he is the employer of the workman, the patent will be void on the ground that the workman and not the patentee is the true and first inventor." Frost, Patents, (2nd Ed.) p. 14, citing *R. v. Arkwright* (1785) Dav. Pat. Cas. 61; *Barker v. Shaw* (1831) 1 Webst. Pat. Cas. 126, note.

The same author (p. 15) cites several rulings of the Patent Office as having established the principle, that, in the absence of special contract, the invention of a servant, even though made in the employer's time, and at the expense of the employer, does not become the property of the employer, so as to justify him in opposing the grant of a patent for the invention to the servant who is the proper patentee. Frost, Patents, (2nd Ed.) p. 15.

In a case where the evidence indicated that a manufacturer and his foreman were the joint inventors of the improvement in question, and the master sought letters-patent the granting of which was opposed by the foreman, Lord Cranworth was of opinion that they ought only to be granted on the terms of their being vested in trustees for the benefit both of the master and of the foreman. *Re Russell's Patent* (1857) 2 De G. & J. 130, per Lord Cranworth.

² "Persons employed as much as employers are entitled to their own independent inventions." *Agawam v. Jordan* (1868) 7 Wall. 583 (603); repeated in *Coljar Co. v. Van Dusen* (1874) 23 Wall. 530.

"If the employé makes an invention wholly independent of the employer, it is the law, that the invention belongs to him who actually makes it and that it does not inure to the benefit of the employer." *Muller v. Kelley* (1901) 18 App. D.C. 163.

"The mere fact, that the appellant was in the employment of appellee and received wages, and even used the material of appellee in the manufacture of his models, and even received assistance in making models, from the latter's employees, would not give it the property in the invention to the exclusion of the former." *Dice v. Joliet Mfg. Co.* (1882) 11 Ill. App. 109 (p. 114), Aff'd 105 Ill. 640.

A mechanic hired for the purpose of perfecting certain machinery, and bound to devote his skill and labour to the interest of those for whom the machinery is being worked, is not, by that fact, under any obligation to abstain from applying for a patent in his own name for such machinery, if otherwise entitled thereto. *Green v. Willard Barrel Co.*, (1876) 1 Mo. App. 202.

A man in the employ of the Fire Department of New York invented a heating apparatus, and attached it himself, to two of the engines, many other engines being also provided with it. The effect of the U. S. Gen. Stat. § 4899, under the circumstances was held to be, that the City had no right to the use of the invention, except in respect to those machines to which it had been applied before the employé had taken out a patent for it. *Brickill v. Mayor of New York* (1880) 7 Fed. 479.

there is no difference between the rights of persons working for the Government and for other employers³.

It has been laid down that any patentable device, which suggests itself with respect to an article, during the progress of experiments made by the employer with a view to its improvement, will be presumed to have been conceived by the employer, and that it is incumbent on the employee to overcome this presumption by satisfactory proof⁴. But it is difficult to admit that a simple presumption can ever furnish an adequate basis for an adjustment of the rights between two persons. A commissioner of patents would not issue a patent to any one who was unable to show by positive and specific evidence, that he was the inventor, or the assignee of the inventor, and there seems to be no valid reason why a court should, in a controversy between a master and his servant, proceed upon a different principle.

(b) *Employé subjected to duress.*—On general principles it is manifest that an employer cannot as against his employé, retain the benefit of letters patent which the latter has been prevented from applying for by coercive conduct of his superior, which amounts to actual duress. But duress will not be inferred from the mere fact that the employé feared he would lose his employment if he asserted his rights⁵.

(c) *Patent taken out by employé in violation of his fiduciary obligations.*—Two English decisions proceed upon the principle that an employé may be declared a trustee for his employer, in respect to any patent, which he could not, under the circumstances, take out in his own name without violating his

³ "The government has no more power to appropriate a man's property invested in a patent than it has to take his property invested in real estate; nor does the mere fact that an inventor is at the time of his invention in the employ of the government transfer to it any title to, or interest in it. An employé, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property." *Solomons v. United States* (1890) 137 U.S. 342.

⁴ *Miller v. Kelley* (1901) 18 App. D.C. 163.

⁵ *Barr Car Co. v. Chicago & N.W. Ry. Co.*, (1901) 110 Fed. 972, 49 C.C.A. 194, 97 O.G. 2534.

obligations as a fiduciary agent of his employer⁶. It is not altogether easy to define the boundary between the cases controlled by this conception, and those reviewed in *s b-d. (a), ante*. But the decisions and dicta there referred to show clearly that the doctrine of agency cannot be successfully by the employer invoked, unless something more is shown besides the facts of employment and use of the employer's time and appliances for the purpose of making the experiments which led to the discovery in question.

(d) *Acquiescence by employé in the taking out of a patent by his employer.*—Where a servant has surrendered to his master his rights as an inventor, by expressly or impliedly permitting him to incur the trouble and expense of obtaining a patent, it cannot be said that the master obtained the patent surreptitiously, or in fraud of the servant's discovery⁷.

(e) *Assignment of patent rights by employé.*—An inventor who is hired at a specified salary, without abatement for loss of time and without payment for extra time, and agrees that all the improvements made by him, while engaged in setting up,

⁶In a case where a chemist employed in a factory had discovered certain processes, Kekewich J. thus stated his reasons for a decision in favour of the employer: "For all purposes, except that of being the first and true inventor, he was the agent of his employers. His labours were theirs, he worked in their laboratory with their materials, as well as their assistance, and the benefits of his discovery, morally and equally belonged to them. *Kurtz v. Spence* (1888) 5 Rep. Pat. Cas. 181. Other rulings of the English Patent Office to the same effect are cited in *Frost, Patents*, (2nd Ed.) p. 14.

In *Worthington Pumping Engine Co. v. Moore* (1902) 19 Times, L.R. 84, the evidence showed that the relationship between the plaintiff and the defendant, as their general manager in England, was of the closest and most confidential character, and that it was part of his duty to communicate and consult with the head office about any modifications in the construction of the article manufactured, and to offer such suggestions as might seem to him advantageous to the corporation in respect to the business he controlled. The inventions which he had patented were, upon examination, found to be largely based upon information communicated to him as manager, and, having regard to the manner in which fresh details of construction were from time to time brought into existence, it was extremely difficult to determine to whom, among the various officers of the company, the merit of such details should be attributed. Upon this state of facts it was considered that the plaintiffs were entitled to a declaration that the defendant was trustee for them of the patent in question.

⁷*Dison v. Moyer*, (1821) 4 Wash. C.C. 68, (action by master for infringement of patent).

and operating certain machines shall be for the exclusive benefit of the employer, may be compelled to convey to the employer his interest in any improvement, which he may actually make in the course of his work. Such a stipulation is not an independent covenant, but merely one of the provisions of an indivisible contract, and it is therefore supported by the same consideration as the stipulation to render the specified services. Nor will such a stipulation be declared invalid on the ground that it is either against public policy, either in a general sense, or as being in restraint of trade⁸.

⁸ *Hulse v. Bonsack Mach. Co.* (1895) 70 Off. Gaz. 1498, 13 C.C.A. 180, 65 Fed. 864, Aff'g (1893) 57 Fed. 51. The court argued as follows: "Here we have the case of an ingenious man, without opportunity of developing his talent, and struggling under difficulties, enabled by this contract to secure employment in a large and prosperous corporation where he could give his inventive faculties full play. He in this way was afforded every opportunity of discovering and removing defects in cigarette machines. He secured this employment by signing this contract. He could not have obtained it if it had been understood that this contract had no validity. Then, in all human probability, the public would have lost the benefit of his discovery. In this point of view, a contract of this character cannot be said to be against public policy. This is not literally an agreement in restraint of trade. It is simply a contract, which, by analogy, can be likened to one, and the analogy should not be pushed beyond the reason for it. There is no presumption that such a contract is void. The presumption is in favour of the competency of the parties to make the contract and the burden is upon the party who alleges that it is unreasonable or against public policy. . . . The contract in this case has reference, not to all inventions which Hulse might discover, but only to improvements in cigarette machines; and the question is not whether a court of equity would compel specific performance if Hulse had conceived the invention after he had severed his relations with the company, and at a time when it did not result directly from opportunities of his employment, but whether the court should do so in this case where the invention was conceived while he was in the company's service, and perfected with its direct assistance, and in a case where Wright, the other party interested with him, was an agent and business manager of a department of the company's business. The case presents circumstances and elements calling for the exercise of this equitable remedy. We concur in the conclusion reached by the circuit judge in his opinion in this record: 'The public, in so far as questions relating to public policy are concerned, has no interest in this matter. Should the claim of the Bonsack Machine Company fail, the public would have no right to use the improvement. The device would then belong to Hulse, would be his secret, protected by patent, and guarded from the public use by provisions of law. The restraint provided for in the contract does not interfere with any interest of the public, and it only gives a fair protection to the party in whose favour it is given, for which proper compensation was stipulated for the party making it.' The company lets them, [its servants] into an intimate knowledge of its cigarette machines, affords them the opportunity of discovering any needed improvements in them gives them at hand the means of testing any improvements which may suggest themselves.

Where an employé contracts to assign to his employer all inventions made by him during his employment, he will not be enjoined from using such inventions to the injury of his employer, where the evidence fails to show any invention made by the employé during the term of his employment⁸.

A patentee who conveys his patent rights, in respect to a secret chemical preparation on condition of his being paid a certain royalty, and being employed by his grantee at specified salary, so long as his services are rendered solely in his employer's interests and are satisfactory, is justified in terminating the contract, if the employer fails to perform his obligations under the contract. A court of equity therefore will not restrain him from revealing the secret of his preparation to persons with whom he forms a partnership, after exercising his right of leaving the employment¹⁰.

In the United States the cognizance of actions at law or bills in equity which involve the question of the validity of a patent,

Naturally it seeks to protect itself from abuse of these results. The protection sought is a fair one for the interests of the company. Does this protection interfere with the interests of the public? Sales of secret processes are not within the principle or the mischief of restraints of trade at all. By the very transaction in such cases, the public gains on the one side what is lost on the other, and, unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture. Bowen L.J. in *Ammunition Co. v. Nordenfelt*, (1893) 1 Ch. 630."

An additional point expressly decided by the lower court and agreed to incidentally by the Court of Appeals was, that such a contract does not entitle the employer to the use of an improvement, made and perfected at a time when such employé is not in the employment, without making reasonable and just compensation.

For another case in which, a similar conclusion was arrived with regard to a contract of the same general type, see *Thibodeau v. Hildreth* (1902) 124 Fed. 892, 90 C.C.A. 78, 63 L.R.A. 48, Aff'g (1902) 117 Fed. 146. There it was held that an agreement by an employé, in consideration of his employment, that the employer should have the benefit of all inventions made by him while so employed, and that he would keep the same forever secret, if required by the employer, was not unconscionable, nor against public policy, and that the employé was not entitled to have it cancelled on that ground after he has left the employment.

For another instance of an express contract of service, providing that the patent of an employé should become the property of the employer, see *Mallory v. Mackaye* (1897) 86 Fed. 122.

⁸ *Universal Talking-Mach. Co. v. English* (1901) 34 Misc. 342, 69 N.Y. Supp. 813.

¹⁰ *New York Chemical Co. v. Halleck* (1891) 1 N.Y. Supp. 517.

is restricted to the Federal Courts¹¹. But a State court has jurisdiction to compel specific performance of an agreement by a servant to assign to his master the patents for any inventions which he may make while the contract of service continues. In such a suit there is no question raised as to the legality of the issue of the patent, or as to the propriety of the action of the commissioner of patents. Relief is asked for on the ground that the patents were rightfully obtained by the servant, and ought to be assigned to the plaintiff in accordance with the agreement¹².

(f) *Employer licensed by employé to use his inventions.*—

Where a servant allows his employer to use patented appliances, devised by him independently, and not in pursuance of any agreement contemplating the use of the employer's time, labour, or materials, in developing or perfecting them, a promise on the employer's part to pay compensation for the benefit received from the use of the inventions will be implied¹³.

Where an express license has been granted to an employer to use improvements patented by his employé the extent of the privilege is determined by the provisions of the contract¹⁴.

¹¹ *Stemmer's App.* (1868) 58 Pa. 155.

¹² *Binney v. Annan* (1871) 107 Mass. 94; 9 Am. Rep. 10.

¹³ *Ft. Wayne, C. & L.R. Co. v. Haberkorn*, (1896) 44 N.E. 322, 15 Ind. App. 479, distinguishing the class of cases referred to in § 3, *post*.

Where the owner of a patented invention was a director and officer of a corporation, and the latter appropriated and used such invention with his consent and acquiescence, it was held, that he was not necessarily precluded from recovering a reasonable compensation therefor by reason of his relationship to the company, but that such relationship, with other circumstances, was for the jury to consider in determining the question whether the license to use the patent should be implied to be for or without compensation. *Deane v. Hodge* (1886) 35 Minn. 146, 27 N.W. 917.

¹⁴ An employé who was the patentee of threshing machinery embodied in a threshing machine called the "New Peerless," manufactured by his employer under a license from him, granted to the employer an exclusive license to use such patents, and the exclusive right to use "all inventions and improvements in said machinery" thereafter made; also all "new designs of such machinery" made by him while in the employ of the licensee, and all inventions and improvements which should thereafter be made thereon. *Held*, that such license did not grant the right to use a patent issued to the licensor after he left the licensee's employ, for threshing machinery which was not an improvement on that of the New Peerless machines, nor an infringement of the patents under which such machines were made, but which embodied a different principle of operation, and devices which could not be used in the New Peerless machines, except by substitution; such patent being for a "new design," within the meaning of the contract. *Frick Co. v. Geiser Mfg. Co.* (1900) 100 Fed. 94.

3. *Engagement of employé for the purpose of making improvements in specific articles.*—The accepted doctrine in the United States is, that a contract by which a skilled workman merely agrees, for a stated compensation, to devote his time and services to devising and making improvements in articles manufactured by his employer does not operate so as to vest in the employer an inchoate legal title to the inventions of the workmen or to patents obtained by him for those inventions¹. The workman will not be compelled under such circumstances to assign to the employer the patents which he has taken out in his own name². A contract of this description, however, even if it contains no express provision on the subject³, subjects the employé to an obligation, the nature and extent of which has been thus stated by the Supreme Court of the United States:

“When one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practicable form his invention, and explicitly assents to the use by his employer of

¹ *Whiting v. Graves* (1878) 1 Holmes 222, 3 Bann. & Ard. Pat. Cas. 222, Fed. Cas. No. 17,577; *Clark v. Fernoline & Co.* (1889) 23 N.Y.S.R. 964; and cases cited in the next note.

In a case where the only question involved was one of priority, it was laid down that one who is the first discoverer of a process is entitled to a patent therefor, even against one in whose employ he was at the time of the discovery, and at whose request and expense he was making experiments which led to the discovery. *Damon v. Eastwick* (1882) 14 Fed. 40.

Compare the analogous rule, that “one partner acquires no right or interest, legal or equitable, in an invention made by his copartner during the existence of the partnership by reason merely of the copartnership relation, although the invention relates to an improvement in machinery to facilitate the business carried on by the firm, and although the partner making the invention, uses copartnership means in his experiments, and is also bound by the copartnership articles to devote his whole time and attention to the firm business. *Burr v. De La Vergne* (1886) 102 N.Y. 415, citing *Stemmer's Appeal* (1868) 58 Penn. St. 155, 164; *Belcher v. Whittemore*, (1863) 134 Mass. 330.

² *Haggood v. Hewitt* (1886) 119 U.S. 226; *Dalsell v. Dueser Watch Case Mfg. Co.* (1892) 149 U.S. 315, 37 L. ed. 749, 63 Off. Gaz. 1381, 13 Sup. Ct. Rep. 886; *Clark v. Fernoline Chemical Co.* (1889) 23 N.Y.S.R. 964.

³ For example of cases in which such a stipulation was involved, see *McAleer v. United States* (1893) 150 U.S. 424 (written agreement given in evidence); *Bensley v. Northwestern & Co.* (1886) 26 Fed. 250 (preponderance of evidence held to be in favour of the servant's consent having been given by parol).

such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the co-employés, of his employer, as to have given to such employer an irrevocable license to use such invention"⁴.

⁴ *Solomons v. United States* (1890) 137 U.S. 342 (346). There the facts upon which the court held that the license should be implied were as follows: The patentee was in the employ of the government when he invented an improved stamp. His experiments were wholly at the expense of the government. He was consulted as to the proper stamp to be used, and it was adopted on his recommendation. He notified the government that he would make no charge if it adopted his recommendation and used his stamp; and for the express reason that he was in the government employ, and had used the government machinery in perfecting his stamp. He never pretended, personally, to make any charge against the government. The court considered that the mere fact that the servant's wages were not increased in this case, while in the case next cited such an increase was granted, was not sufficient to create a distinction between the two cases.

An earlier decision which was relied in in the *Solomons Case*, as a precedent precisely in point, was *McClurg v. Kingsland* (1843) 1 How. 202. There it was held that a license to the employer to use the invention might justifiably be presumed from evidence to the effect, that the patentee, while working for wages in a factory, had, after making several unsuccessful experiments at the expense of his employer invented the improvements patented; that his wages had been increased in account of the useful result; that he remained for some months afterwards in the same employment, continuing during that period to manufacture the improved article for his employers; that he finally applied for and obtained a patent; that, while continued in the employment he proposed that his employers should take out a patent, and purchase his right, which they declined; that he made no demand on them for any compensation for using his improvement, and gave them no notice not to use it, till, on some misunderstanding on another subject, he gave them such notice, about the time of his leaving their establishment, and after making the agreement with the plaintiffs for an assignment to them of his right.

For other cases which illustrate the doctrine stated in the text, see *Lane & B. Co. v. Locke*, (1893) 150 U.S. 193, 37 L. ed. 1049, (engineer and draftsman, at a fixed salary, in the employ of the defendants, and using their tools and patterns, invented a stop valve, which the firm used with his knowledge in certain elevators constructed until its dissolution, and after that a corporation organized by the firm used it in the same way and with the like knowledge); *Keye v. Eureka Consol. Min. Co.* (1893) 158 U. S. 150, 39 L. ed. 929, (employé of smelting company who had invented a new method of withdrawing molten metal from a furnace took out a patent for it, and permitted his employer to use it without charge so long as he remained in its employ, which was about ten years); *Chabot v. American Button-Hole & O. Co.* (1872) 9 Phila. 378, 6 Fish. Pat. Cas. 71, (presumption of license held to be strengthened by the terms of an express contract, which had been made before the employé applied for a patent, and which provided that a large number of machines should be manufactured by the use of the defendant's factory, machinery, tools and materials, the employé supplying, at a specified price, merely the labour ex-

In a later case the same court carried the doctrine still further in the masters' favour by declaring that the presumption of a license will be entertained, irrespective of the consideration whether the property of the employer and the services of his other employer's were or were not used in the experiments necessary to develop the invention, or in the preparation of patterns

ended upon them, and his own services); *Continental Windmill Co. v. Empire Windmill Co.* (1871) 8 Blatch. 295, (suit for infringement held not to be maintainable by the assignee of the patent against a former employer of the patentee who had engaged him on a salary, with the understanding that he was to receive \$500 for any patentable improvements he might make); *Magoun v. New England Glass Co.* (1877), 3 Bann. & Ard. Pat. Cas. 114, Fed. Cas. 8,960 (articles constructed by or under the direction of the servant, and at their own expense placed by his employers in their factories with his knowledge and consent); *Davis v. United States* (1888) 23 Ct. of Cl. 329, (cost of experiments by foreman of a division of the Ordnance Department was paid by the United States: patents were taken out under the advice of the chief of the Ordnance Bureau: after they were issued the Navy Department paid employee a sum of money to reimburse him for the expense incurred in securing them, as a royalty for the right to their use); *Barry v. Crane Bros. Mfg. Co.* (1884) 22 Fed. 396; (complainant, by introducing into his employer's business certain improved tools which he had produced while working as a departmental foreman, was held to have licensed or consented to the use of those tools by the defendant company, not only for the time that he was in its employ, but so long as the tools shall last); *Bensley v. North-Western Horse-Nail Co.* (1866) 26 Fed. 250 (patented improvements developed and perfected at the sole expense of an employer, by employes who received extra pay on account of their known ability as inventors); *American Tube-Works v. Bridgewater Iron Co.* (1886) 26 Fed. 334 (inventor and patentee had supervised and directed the building of a machine for the defendant company, while he was in its employ); *Withington-Cooley Mfg. Co. v. Kinney* (1895) 68 Fed. 500, 15 C.C.A. 531, (right to continue constructing machines after patterns which an inventor had been employed upon a salary to devise, held not to have been terminated by the destruction of the original patterns in a fire); *Jencks v. Mills* (1896) 27 Fed. 622 (employe, while experimenting upon his invention, of which he had several, took the time which belonged to the defendants, used their tools, workmen, and materials, and tested the inventions in the machinery which was run by them); *Fuller eto. Co. v. Bartlett* (1887) 68 Wis. 73, 31 N.W. 747 (superintendent of a manufacturing company, knowing its intention to perfect and put upon the market a new machine, voluntarily disclosed his conception of a device to be used in connection therewith, and, under the direction of the company and with its material and at its expense, voluntarily went to work to perfect such device and construct the machines and to aid in putting them upon the market.

The rule adopted in the above cases is held to be equally applicable in cases where a machine is constructed with the inventor's knowledge and consent, before his application for a patent, by a partnership of which he is a member. The machine may be used by his copartners after the dissolution of the partnership, although the agreement of dissolution provides that nothing therein contained shall operate as an assent to such use, or shall lessen or impair any rights which they may have to such use. *Wade v. Metcalf* (1889) 129 U.S. 202.

and working drawings, and the construction of the completed machines. The principle was stated to be "really an application or outgrowth of the law of estoppel in pais, by which a person looking on and assenting to that which he has power to prevent is held to be precluded ever afterwards from maintaining an action for damages"⁵.

If the license which is thus implied from the general terms of the employment and the acquiescence of the employee in the use of his invention by the employer relates to an improvement in a process, the employer is ordinarily deemed to be authorized to continue to the improvement, during the whole period covered

⁵ *Gill v. United States* (1896) 180 U.S. 426 (p. 430). The court said: "This case raises the question, which has been several times presented to this court, whether an employe paid by salary or wages, who devises an improved method of doing his work, using the property or labour of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, may, by taking out a patent upon such invention, recover a royalty or other compensation for such use." After pointing out that the existence of any such right had been uniformly denied, the court proceeded thus: "It should be borne in mind that the fact upon which so much stress has been laid by both sides, that the patentee made use of the property and labour of the government in putting its conceptions into practical shape, is important only as furnishing an item of evidence tending to show that the patentee consented to and encouraged the government in making use of his devices. The ultimate fact to be proved is the estoppel, arising from the consent given by the patentee to the use of his inventions by the government without demand for compensation. . . . The servants consent may be shown by parol testimony, or by conduct on the part of the patentee proving acquiescence on his part in the use of his invention. The fact that he made use of the time and tools of his employer, put at his service for the purpose, raises either an inference that the work was done for the benefit of such employer, or an implication of bad faith on the patentee's part in claiming the fruits of labour which technically he had no right to enlist in his service." . . . The acquiescence of the claimant in this case in the use of his invention by the government is fully shown by the fact that he was in its employ; that the adoption of his inventions by the commanding officer was procured at his suggestion; that the patterns and working drawings were prepared at the cost of the government; that the machines embodying his inventions were also built at the expense of the government; that he never brought his inventions before any agent of the government as the subject of purchase and sale; that he raised no objection to the use of his inventions by the government; and that the commanding officer never undertook to incur a legal or pecuniary obligation on the part of the government for the use of the inventions or the right to manufacture thereunder."

This case was followed in one where it was held that a employe who, while earning weekly wages, constructs with his employer's tools and materials, and in his shop, machines which latter uses as part of his tools, without knowledge of any objection thereto, cannot, after obtaining a patent, enjoin his employer from further use of the particular machines. *Blauvelt v. Interior Conduit & I. Co.* (1897) 80 Fed. 906.

by the patent. If it relates to a certain description of machine, only the specific machine or machines which are set up during the term of the employment are protected⁶.

An implied license of this description is not transferable by the employer to a third person⁷.

The existence of a license is treated by the courts as a mixed question of law and fact, and a determination of this issue in one suit does not furnish a decisive precedent for another⁸.

4. **Engagement of employé for the purpose of perfecting an original conception of the employer.**—The rule applicable to cases in which a servant is employed to render assistance in perfecting the mechanical details and arrangements requisite for the complete elaboration of an invention of which the general idea has been conceived by the employer was thus formulated by Erie, J., during the trial of a patent case, in terms which were afterwards approved by all the other judges of the Court of Common Pleas:

“If a person has discovered an improved principle, and employs engineers, and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied.”

⁶Lowell J. in *Wade v. Metcalf* (1883) 16 Fed. 130. This point was not referred to by the Supreme Court (129 U.S. 202); but the doctrine enunciated in the text has received the approval of the Court of Appeals in *City of Boston v. Allen* (1898) 91 Fed. 248, where the scope of the doctrine was restricted by a ruling to the effect that, where an engineer employed by a city to build a ferry, makes and afterwards patents an improvement in the gangway used, no presumption, either of law or fact, arises in favour of an implied license to the city to use the patented device at another ferry built at another place several years afterwards. It was intimated, however, that, when the patented matter is a product, particularly if it is a minor product, or even if it is a minor machine, so that in either case it is used in quantities, its unlimited use during the time of employment may raise an implication of fact in favour of a license for a time likewise unlimited, as in the case of a process.

⁷*Hapgood v. Hewitt* (1886) 119 U.S. 228, relying upon an earlier case in which the general rule was laid down that “a mere license to a party without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal favour to the licensee.” *Tivy Etc. Factory v. Corning* (1852) 14 How. 193 (p. 216) citing *Curtis, Patents*, § 198.

⁸*City of Boston v. Allen*, (1898) 91 Fed. 248.

his patent; and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle"¹.

The principles which are controlling under such circumstances have been thus stated by the Supreme Court of the United States:

"Where the employer has conceived the plan of an invention and is engaged in experiments to perfect it, no suggestion from an employé, not amounting to a new method or arrangement, which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvements². But where the suggestions go to make up a com-

¹ *Allen v. Rawson* (1845) 1 C.B. 551 (p. 567). In the Court of Common Pleas, Tindal C. J. thus stated his views as to the facts in evidence: "It would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as inventions by him, so as to avoid a patent incorporating them taken out by his employer. Each case must depend upon its own merits. But, when we see that the principle and object of the invention are complete without it I think it is too much that a suggestion of a workman, employed in the course of the experiments, of something calculated more easily to carry into effect the conceptions of the inventor, should render the whole patent void. It seems to me that this was a matter much too trivial and too far removed from interference with the principle of the invention, to produce the effect which has been contended for."

That a mechanic employed for the purpose of enabling the employer to carry his original conception into effect is not an inventor was assumed by Alderson, B., in his direction to the jury in *Barker v. Shaw* (1831) 1 Webst. Pat. Cas. 126.

² In a latter judgment by the same court we find the passage: "Where a person has discovered a new and useful principle in a machine, manufacture, or composition of matter, he may employ other persons to assist in carrying out that principle, and if they, in the course of experiments arising from that employment, make discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original principle, and they may be embodied in his patent as part of his invention." *Collar Co. v. Van Dusen* (1874) 23 Wall. 530 (563, 564).

The general rule is that "one, who, by way of partnership or contract, or in any other, empowers another person to make experiments upon his own conception for the purpose of perfecting it in its details, is entitled to the ownership of such improvements in the conception as may be suggested by such other person." *Gedge v. Cromwell* (1902) 19 App. D.C. 192 (198).

"A person may be the real author of a plan of a complicated machine, or invention which requires for its perfection the skill and, to some extent, inventive faculties of workmen or engineers in adapting the best means to

plete and perfect machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belonged to another"³.

A person engaging the services of an inventor, under an agreement that he shall devote his ingenuity to the perfecting of a machine for their benefit, can lay no claim to improvements conceived by him after the expiration of such agreement⁴.

5. Employment of workman for the express purpose of making inventions for the employer's benefit.—The rule applicable to another

the successful application of the principle." Curt. Pat. (3rd Ed.) 121, quoted with approval in *Fraser v. Gage* (Ill. 1885) 1 N.E. 817, 8 West, 693, where it was held that the rights of an employer as an inventor are not impaired by his having obtained the assistance of skilled workmen.

"Invention is the work of the brain, and not of the hands. If the conception be practically complete, the artisan who gives it reflex and embodiment in a machine is no more the inventor than the tools with which he wrought. Both are instruments in the hands of him who sets them in motion and prescribes the work to be done. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought, and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law it always subsists. The mechanic may greatly aid the inventor, but he can not usurp his place. As long as the root of the original conception remains in its completeness, the outgrowth—whatever shape it may take—belongs to him with whom the conception originated." *Blandy v. Griffith* (1860) 3 Fish. Pat. Cas. 609 (suit for infringement, servant claiming to be inventor).

To the same general effect, see *King v. Gedney* (D.C. 1856) 1 McArthur Pat. Cas. 444, *Milton v. Kingsley* (1896) 7 App. D.C. 531.

Suggestions made by the mechanic to construct the machine, as to its form or proportions, are not sufficient to invalidate the patent; although they may be incorporated in the specification. *Pennock v. Dialogue* (1825) 4 Wash. C.C. 538.

But in *Berdan Fire-Arms Mfg. Co. v. Remington*, 3 Pat. Off. Gaz. 688, it was held, that an improvement which becomes necessary in the manufacture of a patent implement, in order to overcome a difficulty growing out of a departure from the form of the model, and which is introduced into it by the workmen without the knowledge of the patentee, cannot be appropriated by him as his invention.

Where one employs another to make a device, pointing out the distinct and dominating feature of his improvement, but does not make anything resembling a perfect drawing for the guidance of the other, or describe the proposed construction in detail, the maker of the device is not entitled to claim the invention, though by reason of his mechanical skill he may have made a neater and more perfect device than was in the mind of his employer. *Huebel v. Bernard* (1899) 15 App. D.C. 510.

³*Agawam Co. v. Jordan* (1868), 7 Wall. 583 (p. 603).

⁴*Appleton v. Bacon* (1862) 2 Black, 699 (case involving merely an examination of evidence bearing upon the date of the invention).

class of cases has been thus formulated by the Supreme Court of the United States:

"If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer"¹.

More briefly,—“If the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer since in making such improvements he is merely doing what he was hired to do”².

¹ *Solomons v. United States* (1890) 137 U.S. 342, (346).

From a remark made by Bayley J. during the agreement of counsel in *Blowam v. Elsee* (1825) 1 C. & P. 565, he appears to have been of the opinion that, in a case where a skilful person is employed for the express purpose of inventing, the inventions made by him will so far belong to the master, as to enable him to take out a patent for them. But no explicit ruling was made on this point.

² *Gill v. United States* (1896) 160 U.S. 426 (435).

Compare also the following statement: “Where one person agrees to invent for another, or to exercise his inventive ability for the benefit of another, the inventions made and patents procured during the term of service covered by the contract belong in equity to the employer, and not to the employé.” *Connelly Mfg. Co. v. Wattles* (1891) (N.J. Ch.) 23 Atl. 123. (Injunction restraining use of patents by employé was denied on the ground of the alleged contract's not having been satisfactorily proved.)

In an Illinois case it was conceded *arguendo*, that “where the employer hires a man of supposed inventive mind to invent for the employer an improvement in a given machine, under a special contract that the employer shall own the invention when made, and under such employment such improvement is invented by the person so employed, such invention may, in equity, become the property of the employer.” *Joliet Mfg. Co. v. Dice* (1883) 105 Ill. 649 (p. 652).

In *Pape v. Lathrop* (1897) 18 Ind. App. 633, where the employé stipulated to render services “as inventor,” and to assign any patents which he might apply for by the desire of his employer, the court stated the accepted doctrine as being to the following effect: “Where a servant, during his employment, and while using the time and material of his employer, invents new devices, compounds, or machinery, or any useful appliances in connection with the business of his employer, and which are used in the business of the employer, with the intention or understanding that they shall belong to the employer, the same become his absolute property, and such inventor has no interest therein.”

In *Wilkens v. Spafford* (1878) 3 Bann. & Ard. 274, a contract that the

The rationale of the cases governed by the rule thus stated is that there is a special employment for the limited and definite purpose of inventing. The employé is regarded as having hired out to his employer, the whole of his inventive powers, natural and acquired, so far as regards the particular improvements to the attainment of which his experiments are to be directed³. The ground upon which such cases are distinguished from those discussed in § 3, *ante*, is that in the latter there is merely a general employment⁴.

In Illinois it has been laid down that "the law inclines so strongly to the rule that the invention shall be the property of its inventor, that nothing short of a clear and specific contract to that effect will vest the property of the invention in the employer, to the exclusion of the inventor." Upon this ground the court held, in the case cited, that an agreement by an employé to give his employer the benefit of any improvements he might make in two specified kinds of machines should not be construed in such a sense as to entitle the employer to demand the assignment of his interest in an invention relating to a machine of another description, although the employer had

employer should have the exclusive benefit of the inventive faculties of the employé, and of such inventions in machinery as he should make, during the term of service, was held to entitle him, without any new agreement, to the exclusive use of the machines invented by the employé, during the prolongation of his service after the expiration of the term of his original engagement.

³ In a case in which the right of the servant to take out letters, patent in his own name was denied, the court observed: "The special service of inventing is the entire scope of the employment, . . . for the servant has no right to think or invent for himself on this particular subject matter in hand. He must get out of such a relation before he can claim the product of his work under such an employment. He cannot carry off both his salary and the only valuable product of his work under such an employment, leaving his master with his useless models, the results of his uselessly spent money on tools, machinery, time, labour of self and employés, with only a license or shop right which is not assignable or useful in any way save to himself. Such a result would necessarily defeat the whole purpose of the contract and the contracting parties. The cases resulting in mere license were those of general employment; at all events, they were not special employments for the limited service of inventing." *Annin v. Wren* (1887) 44 Hun. 355.

⁴ In one of those cases *Hapgood v. Hewitt* (1886) 119 U.S. 227, the doctrine laid down is explicitly declared not to be applicable, where there is a special employment to invent.

added the manufacture of that machine to his other business, and the employee had, with the consent of his employer, and with the assistance of his co-employees, spent a portion of his time in perfecting his invention⁶.

6. Refusal of employé to disclose the results of discoveries made by him, when deemed to be a breach of duty.—An employer's enjoyment of such specific benefits as he may be entitled, under the contract of hiring, to derive from the experiments of an employé is necessarily dependent upon his acquiring a knowledge of the results of those experiments. Accordingly an employé who refuses, when requested, to disclose to his employers the discoveries made in the course of his investigations is guilty of a breach of duty which will justify the employer rescinding the contract¹.

⁶ *Joliet Mfg. Co. v. Dice* (1883) 105 Ill. 649; Aff'g 11 Ill. App. 109. It was urged that a provision of the contract, to the effect that the employé "would work for the best interests of the company in every way that he can," and that such aid, in whatever way given, "should belong to the company,—that is, further improvements that he may cause to be made,—was broad enough to include the invention of the improvements in the third machine. But the court was of opinion that, taken in connection with the context these words clearly had reference only to improvements to be made in the specified machines, and had no reference to any other. With respect to the argument that when the employé consented to devote part of his time in superintending the manufacture of the third machine, and also to devote part of his time to the making of an improved machine of that kind, he thereby necessarily contracted that the invention, when perfected, should be the exclusive property of complainant, the court remarked that these circumstances might render the machine actually made the property of complainant and in equity might amount to a license to complainant to use the machine made, and possibly to a license to make and use other like machines. But this was the most the employer could claim.

¹ The discharge of the employé was held to be proper, where the employer, in consideration of giving permanent employment to the employé and increasing his salary from year to year, was to have the benefit of all experiments and discoveries of the employé, and the employé refused, without extra compensation, to disclose a process which he had discovered. *Silver Spring Bleaching & D. Co. v. Woolworth* (1890) 16 R.I. 729, 19 Atl. 528. Discussing the attempt of the employé to excuse himself by setting up that the corporation was the first to break the contract by previously refusing an increase of salary, the court said: "The answer of the corporation is, that it was only for valuable discoveries that the increase was to be given, and that the previous discoveries were without value, and the jury may have deemed this answer sufficient. The remedy for the defendant, if he was not satisfied with the compensation which he was receiving, was to decline to undertake the experiment until he was satisfied, not to make the experiment at the expense of the corporation, as its servant, and then refuse to disclose the result. The defendant refused disclosure unless the

B. LITERARY WORK OF EMPLOYÉS.

7. When an employer is entitled to the results of literary or artistic work performed by the employé. Generally.—One who employs another person to perform literary or artistic work is not deemed to be, within the meaning of the Copyright Acts, the "author" of what is produced by the labour of his employé,¹ unless the contract is one which provides that he shall participate in the work to an extent sufficient to entitle him to be regarded as a "joint author." In order to constitute such authorship it

corporation would agree beforehand, not to carry out the alleged contract, but to do something entirely different. He thus repudiated the contract which he now claims that he is entitled to the benefit of, and put himself in an attitude of hostility to his employer, indeed defying his employer, if he used the language attributed to him. And the jury, if this was so, might properly consider the dismissal justified."

The statement in the text is also sustained by the decision in *Clark v. Fernoline Chemical Co.* (1889) 23 N.Y.S.R. 964.

¹In *Nottage v. Jackson*, (1883) 11 Q.B.D. (C.A.) 627, A. and B. carried on business in copartnership as photographers under the firm of the L. Company. They did not take photographs themselves, but employed managers and a large staff of photographic artists and assistants. One of their managers, thinking that the photograph of the Australian Cricketers would sell well, arranged for the photographs to be taken without any payment being made for taking them and sent one of the artists in the employ of the firm to take the negative. From this negative the photograph was in the usual way produced and sold by the firm in the ordinary course of business; and A. and B. registered themselves under the Copyright Act, 1862, in their individual names as the "proprietors and authors" of the photograph. In an action by the firm to restrain the pirating of their copyright in the photograph; Held, that A. and B. were not the "authors" of the photograph, and that the registration was not a good one under the Act, 25 & 26 Vict. ch. 63, although the statement that the partners were "proprietors" was correct. Lord Esher said, "We understand that all the selling photographers have come to the conclusion that they are the authors of the photographs they sell—that is, the people who pay the servants—that they are the only persons who are interested in the photograph at the time it is done—they think that they are the authors of the photograph because the photograph is made and formed by the work of their mere servants. I cannot tell whether the person who drew this Act of Parliament had that idea or not; but I am not satisfied in my mind that he had, because it is full of difficulties." It was intimated, but not expressly decided, that the person who took the negative was the "author."

To the same effect, see *Kendrick v. Lawrence* (1890) 25 Q.B.D. 99, where a registration as "author" by a person who had employed an artist to make a drawing which he was himself incapable of making was held to be void.

See also the cases cited in the next three sections.

The American doctrine is the same. See *Pierpont v. Fowle* (1846) 2 Wood & M. 23 (p. 46); *Apwell v. Ferrett* (1846) 2 Blatch. 39; *Little v. Gould* (1852) 2 Blatch. 362.

must be the result of a preconcerted joint design. Mere alterations, additions, or improvements by the employer, whether with or without the sanction of the employé, will not entitle the former to claim to be "joint author" of the work².

Under some circumstances, however, the employer may acquire, by virtue of the contract, the rights of a prospective "proprietor" of the work to be produced, and become entitled in this capacity to the protection of the Acts. This situation is predicable, whenever it is a reasonable inference that the parties intended that the ownership of the work was to vest in the employer, as soon as it should come into existence. Their intention in this regard may be established either by express evidence bearing directly upon the point³, or implied from the contract⁴. Where the rights of the parties are to be determined on the latter footing the effect of the contract, is ascertained from a consideration not merely of its provisions, but also of the nature of the stipulated work. The question to be decided is one of fact, and each case must be dealt with on its own merits⁵.

Cases of the kind with which we are now concerned are not

² *Levy v. Rutley* (1871) L.R. 6 C.P. 523. There the plaintiff, the lessee of a theatre, employed one W. to write a play for him, suggesting the subject. W. having completed it, the plaintiff and some members of his company introduced various alterations in the incidents and in the dialogue, to make the play more attractive, and one of them wrote an additional scene. *Held*, that these circumstances did not make the plaintiff joint author of the play with W.

The play being finished, a sum of £4 15s. was paid to W. on account, and he signed a receipt, drawn up by the plaintiff's attorney, as follows: "Received of Mr. L. (the plaintiff) the sum of £4 15s. [on] account of 15 guineas for my share, title, and interest as co-author with him in the drama intituled, etc.; balance of 15 guineas to be paid on assigning my share to him." The balance was never paid, nor was any assignment executed by W. *Held*, no evidence that the plaintiff was either "joint author" or assignee of the author.

³ See, for example, *Trade Auxiliary Co. v. Middlesborough & Co. Assn.* (1889) 40 Ch. D. 425; *Lawrence v. Dana* (1869) 4 Cliff. 1; *Mallory v. Mackays* (1897) 86 Fed. 122.

⁴ For cases explicitly recognizing the principle that it is not necessary to show that the contract embraced express words, conferring the copyright upon the employer, see the following cases cited in § 12, *post*, *Sweet v. Benning* (1855) 10 C.B. 459; *Lawrence v. Aflalo* (1904) A.C. 17; *Lamb v. Evans* (1893) 1 Ch. 218. The same principle is taken for granted in most of the other cases cited in the following sections.

⁵ Lord Davey in *Lawrence v. Aflalo* (1904) A.C. 17.

controlled by any rule analogous to that applied in those which proceed upon the principle, that the produce of the labour of a servant hired to make improvements in mechanical devices becomes the property of his master at the moment of production (see § 5, *ante*). It is considered that literary productions stand upon different and higher ground from that occupied by mechanical inventions; that the intention of the legislature in the enactments relating to copyright, is, to elevate and protect literary men; that such an intention can only be effectuated by holding that the actual composer of the work was the author and proprietor of the copyright, and that no relation existing between him and an employer who takes no intellectual part in the production of the work, can without an assignment in writing vest the proprietorship of it in the latter.⁶

8. *Rights of parties in regard to books.*—It has been held that a tradesman who employs a person for remuneration to compile a book of designs must be taken to be the equitable assignee of the copyright, and therefore entitled to restrain the publication of designs copied from the book¹.

On the other hand a surrender of an author's copyright will not be inferred, where all the provisions of a contract by which he agrees to prepare a legal work at the expense of his employer, and to accept half the profits as his remuneration, have relation to the printing and publishing of the work, and to the mode of paying the expenses to be incurred. Under such circumstances the employé merely gives the sole right of printing and publishing to the employer².

9. ——— *dramatic pieces.*—One who employs another person to write a play for him does not, merely by reason of such em-

⁶ *Shepherd v. Conquest* (1856) 17 C.B. 427 (p. 444).

¹ *Grace v. Newman* (1874) L.R. 19 Eq. 623. This decision was distinguished in a later case in which it was held that the registration of a book under the Copyright Act of 1842 in the name of the author of the letter press does not confer any protection in respect of drawings made, for the purpose of illustrating the book, by an employé in whom the art copyright is vested. *Petty v. Taylor* (1897) 1 Ch. 465.

² *Stevens v. Benning*, (1854) 24 L.J. Ch. (C.A.) 153, (assignee of original publisher held not to be entitled to an injunction restraining a third publisher, from bringing out another edition of the book).

ployment, acquire an inchoate right of property in that play¹. This rule holds, even though the employer may have suggested the subject², or, though the employé may be an actor in the service of the employer, and the agreement provides that the play is to be acted at the theatre of the employer, and that the employé is to act in it himself as long as it will run, receiving a share of the profits as a compensation³.

¹ *Levy v. Rutley* (1871) L.R. 6 C.P. 523.

In *Shepherd v. Conquest*, (1856) 17 C.B. 427, the proprietors of a theatre employed an author to compose for them a dramatic piece, paying him a weekly salary and travelling expenses. There was no contract in writing, nor any assignment or registry of the copyright; but a mere verbal understanding that the plaintiffs were to have the sole right of representing the piece in London. *Held*, that the plaintiffs were not assignees of the copyright, nor had they such a right of interest therein as to entitle them to maintain an action for penalties under the 3 & 4 W. 4, c. 15, which gives the sole liberty of representing or causing to be represented at any place of dramatic entertainment, to the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece of entertainment (extended to musical compositions by 5 & 6 Vict. ch. 45, §§ 20, 21). It was held that, though the jury had found there was an agreement between the plaintiffs and the author by which the piece when composed was to be the property of the plaintiffs, who had agreed to pay for it, that finding was immaterial; because the effect of the Statute was that, if the composition was solely that of the person so employed to produce it, he was the sole proprietor of the copyright and right of representation, and, in the absence of any assignment in writing, those who employed him could not set up any right in respect of such composition. *Jervis C.J.* said: "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation, can become vested *ab initio* in an employer other than the person who had actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say, that, in such a case, the employer is the author of the work to which his mind has not contributed an idea; and it is upon the author in the first instance that the right is conferred by the statute which creates it."

² See cases cited in the last note.

³ *Boucicault v. Fox* (1862) 5 Blatch. 87 (employé held entitled to take out the copyright, even after the play had been acted). The Court said: "The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another. In the present case, no such contract is proved. The most that could possibly be said, in regard to the right of Stuart, or his trustee, in the play, is, that the arrangement entitled them to have it performed at the Winter Garden as long as it would run. There is not the slightest foundation upon which they, or either of them, can rest a claim to the literary property in the manuscript. That property was in the plaintiff, subject, at most, to a license or privilege, in

10. ——— musical compositions.—Where a musical piece which can properly be described as independent is composed in pursuance of a contract of employment, it will not be inferred from the mere fact of the employment, that it was the intention of the parties that the sole liberty of performing the piece should vest in the employer¹.

On the other hand, a person employed by the author and designer of an entire dramatic representation or entertainment to compose the incidental music for the play to be produced,

favor of Stuart and Fields, to have the play performed at the Winter Garden. . . . A man's intellectual productions are peculiarly his own, and, although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced."

A similar decision with respect to the same contract was rendered in *Roberts v. Myers* (1800) Brunn. Coll. Cas. 698, 23 Monthly L. Rep. 396.

¹ *Eaton v. Lake*, (1888) 20 Q.B.D. (C.A.) 378. There the plaintiff had been employed by the defendant, the proprietor of a music-hall, as the conductor of the orchestra, at a weekly salary, and had been in the habit of composing the music for ballets performed there, receiving payments of varying amounts from the defendant in respect of such compositions, composed the music for a Christmas ballet, to be performed at the decedent's music-hall; but while the piece was running he threw up his engagement as conductor, and took away the musical score and band-parts necessary for the performance of the music. It was subsequently arranged orally between the plaintiff and the defendant that the plaintiff should give up the score and band-parts to the defendant in consideration of a certain sum by the latter. The defendant afterwards continued to perform the piece with the plaintiff's music, and the plaintiff brought an action to recover penalties in respect of such subsequent performances. The jury found that the music composed for the ballet by the plaintiff was a substantial, independent, musical composition, and that the plaintiff had not sold his rights therein to the defendant. *Held*, that, in the absence of any assignment or consent to the representation of the composition in writing given by the plaintiff, the performances were contrary to the right of the author, and that the action was maintainable. The finding of the jury was declared to be inconsistent with the view urged by the defendant, that the nature of the agreement was such that he was from the very inception of its existence the owner of this composition in law. The decision in *Shepherd v. Conquest*, *supra*, was approved.

In *Storace v. Longman* (1788) an unreported case cited in *Clements v. Golding* (1809) 2 Camp. 25, where the plaintiff sued for the infringement of his copyright in a musical air, the defendant adduced evidence to prove that the song was composed to be sung at the Italian Opera, and that all compositions so performed were the property of the house, not of the composer. Lord Kenyon said, that this defence could not be supported; that the statute vests the property in the author, and that no such private regulation could interfere with the public right. It seems open to question, however, whether this evidence was not competent as bearing upon the intention of the parties.

upon the terms that the music shall become a part of the play, and that the employé shall have the sole liberty of performing that music, as accessory to the play, is not regarded as being within the language of the statute the owner or proprietor of the musical composition. The principle upon which the court proceeded in the case cited was essentially this—that, under any other doctrine, the labour, skill, and capital, bestowed by the employer upon the preparation of the entertainment, might all be thrown away, and the entire object of it frustrated, and the speculation defeated, as a result of one contributor's withdrawing his portion².

11. ——— abstracts from official records.—It has been held that, in the absence of evidence of a special agreement, it will not be implied that the copyright in abstracts made by an employé from registered documents in a record-office belongs to the employer¹.

12. ——— encyclopaedias and periodicals.—In England the rights of employers and employé in relation to these descriptions of literary productions are defined by § 18 of the Act, 5 & 6 Vict., ch. 45, which provides that a publisher or other person who projects and carries on an encyclopædia, magazine, periodical work, etc., and employs other persons to compose portions of such

² *Hatton v. Kean*, (1859) 7 C.B.N.S. 268: Crowder, J. said: "The music in question having been composed by the plaintiff under an express engagement with the defendant, and for the defendant, and having been paid for by the defendant, the plaintiff never had any separate property therein, and consequently he could have no right to prevent the representation of it by the defendant. With regard to this case Lord Esher, during the argument of counsel in *Eaton v. Lake*, note 1, supra, observed: "Assuming the facts alleged by the plea to be true, a jury could not have found on those facts that the composition was an independent composition."

Hatton v. Kean was followed in *Wallerstein v. Herbert* (1867) 16 L. T.N.S. 453. There the plaintiff was engaged for certain reward for the season as musical director, and he was to procure and pay all musical performers, to furnish all the musical instruments, to provide, lead, and perform overtures, entractes music, and all the music incidental to the dramatic performances, and they might be either original compositions of the plaintiff, or be selected from the works of other composers. Certain incidental music composed in pursuance of this engagement was held to have been part and parcel of the play to which it was accessory. In his work a Copyright (4th Ed.) p. 109, Mr. Copinger expresses the opinion that the decision was erroneous, in view of the facts.

¹ *Trade Auxiliary Co. v. Jackson* (1887) 4 Times L.R. 130.

works, "on the terms that the copyrights therein shall belong, to the employer," shall have the same rights in those compositions as if he were the author.

In cases controlled by this provision the onus of proving it to have been the intention of the parties, that the copyright is to be the property of the employer, lies on him¹. But the accepted doctrine is that, in the absence of special circumstances, or an express stipulation, indicating a contrary intention, a contract by which a person is employed and paid to execute work which is to constitute a portion of one of the publications which fall within the purview of the provision should be construed as vesting the copyright in the employer².

¹ *Lamb v. Evans* (1893) 1 Ch. 218, per Lindley L.J. (p. 225); *Trade Auxiliary Co. v. Jackson* (1887) 4 Times L.R. 130; *Walter v. Hows* (1881) 17 Ch. D. 708 (proprietor of a newspaper not entitled to sue in respect of a piracy of any article therein, where he merely proves that the author of the article has been paid for his services).

² In *Sweet v. Benning* (1855) 16 C.B. 459 (defendant sued for pirating the headnotes in the Jurist Reports), Jervis C.J. laid down the law as follows: "Where the proprietors of a periodical employs a gentleman to write a given article, or a series of articles or reports, expressly for the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical, and paid for the proprietors and publishers thereof, shall be the property of such proprietors and publishers; otherwise, it might be that the author might the day after his article has been published by the persons for whom he contracted to write it, re-publish it in a separate form, or in another serial, and there would be no correspondent benefit to the original publishers for the payment they had made" (p. 489). Maule J. was of opinion that, "where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer,—subject, of course, to the limitation pointed out in the 18th section of the Act."

In *Lamb v. Evans* (1893) 1 Ch. 218, Rev'g (1892) 3 Ch. 462, (proprietor of trades directory consisting of advertisements furnished by tradesmen and classified under headings denoting the different trades, which headings were composed by the plaintiff, the registered proprietor, or by persons paid by him to compose them,—held to have a copyright in all the headings, and, *semble*, in the mass of advertisements, as arranged), Lindley, L.J., said: "In drawing the inference regard must be had to the nature of the articles, which are here merely the headings to groups of advertisements with translations, and the view expressed by Mr. Justice Maule in *Sweet v. Benning*, 166 C.B. 484, may be very safely acted upon, viz., that *prima facie*, at all events, you will infer, in the absence of evidence to the contrary, from the fact of employment and payment that one of the terms was that the copyright should belong to the employer. That is not a neces-

The basis of the construction thus attached to such a contract in any given instance is an inference of fact, not a conclusion of law, and its rationale is simply, that as an employer cannot

draw any inference; but in a case of this sort, where any other inference would be unbusiness-like, I should not hesitate myself to draw that inference. Having regard to the employment and payment and the kind of work which one party was doing for the other, I draw the inference of fact that the work was done upon the terms that the copyright in these headings, which are of no use to anybody but the plaintiff, should be his." "What," said Kay, L.J., "is the fair inference from the facts of the case? Surely the inference is that the man who goes to the expense of printing and publishing this book will, as between him and the agents he may have employed to assist him in the compilation of it, have in himself whatever property the law will give him in that book. That is the inference I should certainly draw."

In *Lawrence v. Aflalo* (1904) A.C. 17, Rev'g. *Aflalo v. Lawrence* (1903) 1 Ch. (C.A.) 318, which aff'd (1902) 1 Ch. 264, (publisher of expensive encyclopædia of sport, held to be entitled to the copyright of articles written for it by the editor and by other persons employed by the editor), Lord Davey, after briefly stating the evidence, said: "Those are all the material facts of the case; and I have to ask myself what is the inference that I draw from those facts. That, I repeat, is a matter of fact, and not a matter of law. No doubt one may gain some assistance from the way in which a similar set of facts has been regarded in other cases; but after all, where it is a question of fact, each case must stand upon its own merits. My Lords, if I were to express my opinion as a juryma: upon the facts I have mentioned, I should say that it was one of the terms on which these gentlemen were employed to write articles for the encyclopædia that the copyright should belong to the proprietor; and I say so for this reason. The encyclopædia was to be his property, it was to be his book, he was to enjoy the benefit and receive the profit to be derived from its publication; and, therefore, I should assume that, in buying the articles written by these gentlemen, the inference is that both parties intended that the proprietor should have the right that was necessary for him adequately to protect the property which he had purchased, and the enterprise for the purpose of which these articles were intended to be used." Lord Halsbury observed: "I can entertain no doubt that this, like a great many other things in law, is one of those inferences which you are entitled to draw, but for which you can lay down no abstract rule." In this case the House of Lords declined to adopt the view of Romer and Stirling, L.J.J., to the effect that the mere circumstances that the writer of an article for an encyclopædia is employed and paid by the proprietor of the encyclopædia is not in itself sufficient to justify the inference, either in law or in fact, that the copyright in the article belongs to that proprietor under § 18 of the act.

It will be observed that the general principle applied in these cases is essentially similar to that which was propounded in the following terms by Sir John Leach in *Harfield v. Nicholson*, 2 L.J. 90 (p. 102), 2 Sim. & Stu. 1: "I am of opinion, that, under the statute (8 Anne, c. 19), the person who forms the plan, and who embarks on the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements,—that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally."

adequately protect his interests in the entire publication, unless he owns the copyright in the various parts, it is only reasonable to assume that the arrangement contemplated by him, as an ordinarily prudent business man, was one which would afford that protection³.

The proprietor of an encyclopædia who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form, or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes. This rule holds although no special agreement has been entered into with respect to the reservation of any right of publication by the plaintiff. The copyright being in the author except so far as he may have parted with it, no express reservation is necessary to constitute a right in him⁴.

In the United States there is no special statutory provision concerning the copyright in articles first published in encyclopædias, magazines, and other periodicals, and the special point discussed in the English cases reviewed in this section cannot arise⁵.

13. ——— notes to new editions of books previously copyrighted by the employer.—Title to the notes or other matter prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employé,

³ See the extract from the judgment of Lindley L.J. in *Lamb v. Evans*, as set out in the last note.

In the same case Bowen L.J. used the following words: "From what are you to collect the terms? You may collect them from what passed between the parties—that is to say, between the plaintiff and the persons whom he employed; but you may also collect them from the nature of the business itself, and it seems to me to be impossible, as a matter of business, to suppose that these headings were composed and furnished to the plaintiff upon other terms than that he was to have the copyright in them, because otherwise those who composed them, having furnished them to the plaintiff, might themselves have published them and defeated his object."

See also the remarks of Lord Davey and Lord Halsbury, as quoted in the preceding note.

Compare also the ratio decidendi in *Hatton v. Kean*, § 10, note 2, ante.

⁴ *Bishop of Hereford v. Griffin* (1848) 16 Sim. 190 (197).

⁵ See Drone, Copyright, p. 259.

by virtue of the contract of employment, without any written assignment; and, when so acquired, the tenure of the property depends upon the terms of the contract. The contract cannot be held to operate as a mere license, where it is to the effect that the proprietor of the book shall take the exclusive right to the contribution for the new edition, together with the right to register those contributions for the protection of the property. Under such an arrangement an inchoate right of registration passes to the proprietor of the book, and he is deemed to register it for the protection of his own property in the notes, and in trust for the author whenever that property shall be determined¹. The effect of such a contract however is restricted to the particular edition or editions to which it relates. It does not confer upon the proprietor of the copyright in the book, any title, legal or equitable, to use the notes in a later edition of the annotated work, without the consent of the author of the notes².

14. ——— literary work done in connection with official duties.—

There is authority for the doctrine that some at least of the productions which fall within the purview of the Copyright Acts cannot be registered by a person who gathered the materials at

¹ *Lawrence v. Dana* (1869) 4 Cliff. 1, (controversy regarding ownership of copyright between the representative of a court reporter and the editor of the reports). Clifford J. said: "Speaking of the first annotated edition, the agreement was distinct that the contributions were to be furnished without charge, and the edition of 1863 was prepared with the same explicit understanding between the parties. Although the services were gratuitous, the contributions of the complainant became the property of the proprietor of the book, as the work was done, just as effectually as they would if the complainant had been paid daily an agreed price for his labour. He gave the contributions to the proprietor for those two editions of the work, and the title to the same vested in the proprietor, as the work was done, to the extent of the gift, and the subject to the trust in favour of the donor, as necessarily implied by the terms of the arrangement. *Sweet v. Benning*, 16 C.B. 480; *Mayhew v. Maxwell*, 1 Johns. & H. 315. Delivery was made as the work was done; and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed. . . . Arrangements of the kind, it is believed, are frequently made between the proprietors of books and editors employed to prepare notes or other improvements to successive editions; and it is not perceived that there is any legal difficulty in upholding such a contract where, as in this case, it violates the rights of no one, and is entirely consistent with the public right."

² *Lawrence v. Dana*, *ubi supra*.

the cost of the Government while he was in the service of the State¹. This is certainly the case where the employé has expressly agreed that his productions are to be the exclusive property of the Government².

It has been held, however, that, in the absence of a special agreement to that effect, a college or similar institution is not entitled to the result of the literary labour of its professor, prepared by him for publication, although its preparation was incidental to his duty as professor, and was aided by the facilities available to him in his professional capacity³.

¹ On the ground that all the results of such labour belongs to the State, the publication of a map made by a draughtsman was enjoined in *Com. v. Desilver* (1858) 3 Phila. 31.

In *Little v. Gould* (1852) 2 Blatch. 302, a person engaged by the State to report the decisions of a court was held to be the "author" of the volumes containing the reports of such decisions, within the meaning of the copyright law, but that under the terms of the contract of employment, the copyright was vested in the Secretary of State, in trust for the State.

² Such an agreement was made by an artist with regard to such sketches and drawings as he may make while accompanying an Expedition fitted out by the United States Government, and receiving pay in the capacity of a master's mate. He was held not to be entitled to take out a copyright in certain sketches and drawings which were, on his return, incorporated, with his assent, in a report of the Expedition, the evidence showing that a large number of copies of the report, containing prints and engravings made from those sketches and drawings, had been, by the order of Congress, published for distribution. *Heine v. Appleton* (1857) 4 Blatch. 125.

³ In *Peters v. Borst* (1889) 24 Abb. N.C. 1, 9 N.Y. Supp. 789, a case involving a controversy between the director of an observatory and his assistant as to the ownership of a manuscript "Star Catalogue," upon which both had laboured, it was shown that the director conceived the plan, and selected the material, and that to him the correctness of the work was due; while the executive ability in working out the plan was that of the assistant. After the work had made much progress the assistant carried on the preparation of manuscript away from the observatory, and to an extent which he concealed from his principal, and finally claimed the whole as his property. Held, that those parts which were prepared by or under the supervision of the principal, or which were chiefly made up by copying from them, belonged to the principal, and he was entitled to recover possession of them from the assistant.

C. B. LABATT.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

COPYRIGHT—PHOTOGRAPH—PHOTOGRAPHS TAKEN “FOR A GOOD, OR VALUABLE CONSIDERATION”—OWNERSHIP OF COPYRIGHT—FINE ARTS COPYRIGHT ACT, 1862 (25 & 26 VICT. c. 68) s. 1.

Stackemann v. Paton (1906) 1 Ch. 774 was an action by photographers to restrain infringement of an alleged copyright in photographs taken by the plaintiffs. The photographs in question had been taken in the following circumstances. The plaintiffs had applied to the proprietors of two private schools for permission to take photographs “at their own risk” of the school premises. The permission was accorded and photographs taken of such parts of the premises as were suggested by the proprietors, without any charge to them but subject to their approval, and on their completion each of the proprietors bought some of the copies. Being desirous of advertising their respective schools, the proprietors took the photographs to the defendants and requested them to include the views in the advertisements of the schools published by them. The defendants accordingly made a block reducing the size of the photographs and published the impression thereof as an advertisement of the schools, which was the alleged infringement. Farwell, J., held that the permission granted by the school proprietors to the photographer to enter and take the photographs constituted “a good consideration” and, therefore, under the Fine Arts Copyright Act (25 & 25 Vict. c. 68), s. 1 (which would seem to be operative in Canada), the photographer, though the “author” of the copyright, was not entitled to copyright therein, but that the copyright belonged to the proprietors of the schools, and the action was therefore dismissed.

SETTLEMENT—POWER OF APPOINTMENT—EXERCISE OF POWER—APPOINTMENT BY WAY OF CONTINGENT REMAINDER—REMOTE-NESS—PERPETUITY.

Whitby v. Von Luedecke (1906) 1 Ch. 783 is a case involving one of those nice question of real property law in which the real property lawyer revels. By a marriage settlement made in 1844 real estate was settled to the use of Ann Gregory for life, and after her death to the use of such children of the marriage in such shares and manner as she should appoint. Only two children were born of the marriage, viz., Ann, in 1846, and

Lucie, in 1852. Ann Gregory died in 1897, and by her will purported to appoint the estate to the two daughters in equal shares for their respective lives, and, "in the event of the death of either, the survivor shall receive the whole income," and at the death of the survivor the estate was directed to be sold and the proceeds divided between the children of both daughters. The daughters were, on their mother's death, advised that the will was inoperative and an agreement was made for the division of the estate between the two daughters in fee simple as tenants in common which was carried out by conveyance executed in 1891. The daughter Ann died in 1903; and in 1905 the surviving daughter brought the present action, claiming that the deed of 1891 had been made under mistake as to her rights and claiming under the will to be entitled to the whole estate for her life. For the purpose of determining her rights it became necessary to decide what was the nature of the estate purported to be appointed by the will to the "survivor." If it were a vested interest as contended for by the plaintiff, it would be valid, but if a contingent remainder as contended for by the defendant, then it would be bad as offending against the rule against perpetuities. Buckley, J., decided that it was a contingent remainder, and as neither of the daughters were in esse at the date of the settlement, the remainder was void for remoteness, inasmuch as it could not, or might not, take effect in possession during a life or lives in being in 1844 and twenty-one years after. He therefore came to the conclusion that the daughters had been well advised that the will was inoperative and dismissed the action.

PRACTICE—SPECIFIC PERFORMANCE—DEFAULT BY PURCHASER—
FORFEITURE OF DEPOSIT—RE-SALE—PAYMENT OF DEFICIENCY.

Griffiths v. Vezev (1906) 1 Ch. 796 was an action for specific performance of a contract for the sale of land. The land had been sold subject to the usual condition that in case of default by the purchaser the deposit should be forfeited and the vendors might re-sell, and any deficiency in price on the re-sale should be paid by the purchaser. Judgment for specific performance had been granted and the defendant had made default and the plaintiff now moved for a supplementary order or judgment, declaring the deposit forfeited and authorizing the plaintiff to re-sell and providing for the payment of any deficiency by the defendant, which Eady, J., granted. The report gives the form of order made.

MORTGAGE—FORECLOSURE—PROVISO FOR REDEMPTION—PRINCIPAL NOT DUE—NON-PERFORMANCE OF COVENANT TO PAY INTEREST.

Williams v. Morgan (1906) 1 Ch. 804 was an action for foreclosure brought by a mortgagee for non-payment of an instalment of interest pursuant to a covenant. The mortgagor contended that the default did not authorize the plaintiff to foreclose. The mortgage contained, (1) a covenant to pay the principal on January 1, 1914, and the "interest which may be then due"; (2) a covenant to pay interim interest half-yearly on a specified date;; (3) a conveyance of the property "subject to the proviso for redemption hereinafter contained"; (4) a proviso that the mortgagee would not call in the principal before 1 Jan, 1914, if half-yearly interest were paid on the specified days or within twenty-one days thereafter; (5) a proviso that the mortgagor would not pay off the principal before 1 Jan., 1914; (6) a proviso that if the mortgagor should on 1 Jan., 1914, pay the principal "with interest for the same in the meantime at the rate aforesaid that may be due and unpaid" the mortgagee would reconvey. The mortgagor having paid an instalment of interest twenty-seven days after the specified date, the plaintiff claimed that this breach of the covenant had given him the right to sue for foreclosure. Eady, J., however, held that the proviso for redemption did not import a condition that the mortgagee's estate should become absolute for default in payment of the half-yearly interest on the specified days or within twenty-one days thereafter, and consequently that the right to foreclose had not arisen. He says, "The plaintiff asks me to import the covenant to pay the interest half-yearly into the proviso for redemption, so that on breach of that covenant, the condition of the proviso is broken, and the estate is absolute at law. I see no ground for doing this."

RAILWAY COMPANY — OMNIBUS BUSINESS — PASSENGERS — INCIDENTAL POWERS—ULTRA VIRES.

In *Attorney-General v. Mersey Railway Co.* (1906) 1 Ch. 811 Warrington, J., decides that a railway company incorporated to carry on the business of a railway, has not (unless specially authorized so to do) any power to carry on business as omnibus proprietors for the purpose of collecting and distributing their passengers, and that such a business cannot be considered as incidental to their undertaking.

COMPANY—RECONSTRUCTION—SALE OF ASSETS FOR SHARES IN NEW COMPANY—PARTLY PAID SHARES—DISTRIBUTION OF CONSIDERATION.

Fuller v. White (1906) 1 Ch. 823 is a somewhat similar case

to that of *Bisgood v. Nile Valley*, supra. The company in this case was by its articles of association empowered to sell and dispose of its property for such consideration as it thought fit, and in particular for shares fully or partly paid up, and to divide the consideration among the members of the company. The power of sale was exercisable either in view of a winding-up or not. The company agreed to sell its assets to another company. By the agreement the vendor company was to be wound up, part of the consideration was to consist of partly paid shares to be allotted to vendor company or its nominees. The vendor company was within two months to find people to take up these shares, and if any of them were not taken up, they were to be at the disposal of the purchasing company, and the vendor company was not to be liable to take them up itself. Resolutions were passed for the voluntary winding up of the vendor company and the liquidator was authorized to offer the shares in the new company to the shareholders at the rate of one new share for each share held by them in the old company, and to sell those not accepted and divide the net proceeds of sales among the members of the vendor company. The action was brought by a shareholder of the vendor company to restrain the carrying out of this arrangement, but Warrington, J., without going into the question of the fairness of the scheme held that it was within the powers of the company under its articles of association and dismissed the action. *Bisgood v. Nile Valley* was referred to, but held to be distinguishable.

COMPANY—WINDING-UP—“JUST AND EQUITABLE” ASSETS COVERED BY DEBENTURES—BUSINESS OF COMPANY CARRIED ON BY DEBENTURE HOLDERS—UNSECURED CREDITOR—COMPANIES ACT 1862 (25 & 26 VICT. c. 89) s. 79—(R.S.C. c. 129, s. 8)—(52 VICT. c. 32, s. 5 (D.)).

In re Melson (1906) 1 Ch. 841, an unsecured creditor of a limited company applied for a winding-up order. The application was resisted on the ground that the entire assets of the company were covered by debentures and that the business was being carried on by the debenture holders and there would be no assets available for the payment of the petitioners' claim. Buckley, J., nevertheless, held that it was “just and equitable” to make the order asked. *In re London H. E. Institute*, 76 L.T. 98, where a winding-up order was refused in similar circumstances and the decision affirmed by the Court of Appeal was not referred to.

 REPORTS AND NOTES OF CASES.

 Province of Ontario.

 COURT OF APPEAL.

Full Court.]

C. v. D.

[May 26.]

Husband and wife—Criminal conversation—Abandonment—Separation—Hearsay evidence—Damages.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of a Divisional Court reported 8 O.L.R. 308, dismissed—the appeal—on the ground that the evidence did not shew such abandonment by the plaintiff of his wife as deprived him of his right of action, and—the cross-appeal—on the ground of improper reception of evidence at the trial and excessive damages.

E. B. Ryckman, and J. S. MacInnes, for defendants' appeal.
Wm. R. Smyth, for plaintiffs' cross appeal.

Boyd, C., Magee, J., Mabee, J.]

[June 11.]

NEWELL v. CANADIAN PACIFIC RY. CO.

Railways—Unfenced premises—Trespasser—Evidence—Onus—Negligence.

A boy, over eight years of age, entered from the adjoining highway upon the unfenced premises (a freight yard) of the defendant company for the purpose of gathering up pieces of coal dropped from the cars and in doing so got under or alongside the wheels of a car which in being shunted ran over and killed him at a place over 400 feet from where he entered the yard.

Held, that he was wrongfully trespassing where he had no business or invitation to be.

Held, also, that the plaintiffs had not satisfied the onus cast upon them to establish by evidence circumstances from which it

might fairly be inferred that there was reasonable probability that the accident resulted from the absence of a fence at the place where the boy entered—and a nonsuit was upheld on the ground that no negligence was attributable to the defendant company which was the proximate cause of the accident. *Williams v. The Great Western R.W. Co.* (1874) L.R. 9 Exch. 157, followed. *Daniel v. The Metropolitan R.W. Co.* (1868) L.R. 3 C.P. 216; affirmed (1871) L.R. 5 H.L. 45, followed.

R. S. Robertson, for plaintiff. *MacMurphy*, for defendant company.

Meredith, C.J.C.P., Teetzel, J., Anglin, J.] [June 12.

STURGEON *v.* PORT BURWELL FISH CO., LIMITED.

Steamboat Inspection Act—Fishing tug—Dominion rules and regulations—Life saving apparatus.

The Steamboat Inspection Act, 1898, 61 Vict. c. 46 (D.), s. 3, enacts: "No steamboat used exclusively for fishing purposes and under 150 tons gross tonnage . . . shall be subject to the requirements of this Act . . . except as to the obligation to carry one life-buoy . . . and to carry a life-preserver for each person on board. Section 11 of Part VIII. of the Dominion Rules and Regulations respecting the inspection of boats, etc., purporting to have been passed under the said Act, under which the Governor-in-Council may make regulations, inter alia, respecting boats and life-preservers, fire-buckets, axes and lanterns and other life-saving appliances to be carried by steamboats or other vessels mentioned in the Act—provides that "every steamboat not employed in the carriage of passengers . . . shall at all times when the crew thereon is on board, be provided with and have on board . . . a good, suitable and sufficient boat or boats in good condition," and another regulation provides, "Every steamboat not employed in the carriage of passengers . . . shall . . . have on board . . . a number in due proportion to that of the crew of . . . fire-buckets . . . and of axes and lanterns, to the satisfaction of the inspector."

Held, that the above Act did not apply to a fishing tug of the defendants' company of some 12½ tons, and that if the intention of the Governor-in-Council was to carry the provisions beyond the terms of the Statute, there was no authority so to do; but that it was preferable to read them as not intended to be applied to steamboats excepted from the operation of s. 3 of the

Act; and that, therefore, the plaintiff could not succeed in an action brought under Lord Campbell's Act against defendants to recover damages for a death alleged to have been caused by the negligence of the defendants in failing to comply with the provisions of the above Act and regulations as to life-saving apparatus.

Proudfoot, K.C., for plaintiff. *Arnoldi*, K.C., for defendants.

Full Court.]

REX v. DAUN.

[June 29.]

Evidence—Seduction under promise of marriage of previously chaste unmarried female under 21 years of age—Corroboration—Criminal Code ss. 182 and 684, sub-s. (c.).

Where a statute requires that evidence shall be corroborated in some material particular, the corroboration required is what, in some material respect, will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon; so where a prisoner was charged with having seduced and had illicit connection with an unmarried female contrary to s. 182 of the Crim. Code, and it was shewn that he had told her brother that "he always thought enough of A. to marry her," and told her parents that "he always intended to marry A.," and he and she had their photographs taken together.

Held (Osler, J.A., dissenting), sufficient corroboration of the girl's evidence that he had illicit connection with her under promise of marriage.

Per OSLER, J.A., there was no corroboration as to the illicit connection on the occasion in question: the admissions and conversations sworn to had reference to a later occasion. Even the girl's evidence did not shew seduction and illicit connection or that the seduction, if any, was under promise of marriage.

Delamere, K.C., for the prisoner. No one for the Atty.-Gen'l.

Full Court.]

[June 29.]

OTTAWA ELECTRIC CO. v. CORPORATION OF THE CITY OF OTTAWA.

Municipal corporations—Light and power—Electricity—Special Act—Power to "produce, manufacture, use and supply."

Appeal from the judgment of BOYD, C., after trial without a jury dismissing the action with costs.

A special Act, 57 Vict. c. 75 (O.), enacts that the defendants shall, in addition to the powers conferred by the Municipal Light and Heat Act, which is thereby incorporated, have power to manufacture and use and supply to others to be used, electricity for motive power and for any other purpose to which the same can be applied . . . and to acquire and hold lands, water powers and all other property . . . necessary therefor, and shall for and with respect to such powers and purposes have all and every the powers which are by the said Act conferred on municipal corporations with respect to light and heat. In reliance on this Act the defendants passed a by-law providing for the execution of an agreement with a power and manufacturing company for the acquisition from it of electrical power for the purpose of using and to supply it to others to be used by means of a certain property and plant which they had acquired from another company.

Held, that the by-law was ultra vires because the Special Act did not authorize the defendants to acquire, that is, to purchase the supply of electricity to be used and supplied to others to be used in the manner contemplated, but only themselves to enter upon the process of production and manufacture of electricity so produced and manufactured and to supply to others.

W. Nesbitt, K.C., and *G. F. Henderson*, for plaintiffs.
Shepley, K.C., and *McVeity*, for defendants.

HIGH COURT OF JUSTICE.

Mabee, J.]

RE WEBB.

[April 5.

Lunatic—Petition for declaration of lunacy—Service out of the jurisdiction—Dispensing with personal service—Jurisdiction of Master in Chambers.

A petition for a declaration of lunacy may be served out of Ontario under 3 Edw. VII. c. 8, s. 13(O).

And where the supposed lunatic was confined in an asylum outside of Ontario, and an order was made by the Master in Chambers authorizing service there upon the supposed lunatic and the medical superintendent of the asylum, and the latter alone was served, because he was of opinion that service might dangerously excite the former, an order was made dispensing with personal service and confirming the service made.

Quære, as to the jurisdiction of the Master in Chambers, under Rule 42, to make an order for service out of the jurisdiction of such a petition.

Joseph Montgomery, for the petitioners.

Mabee, J.]

[April 6,

RE RUTTAN AND DREIFUS AND CANADIAN NORTHERN R.W. Co.

Railway—Expropriation of land—Valuation by arbitrators—Improvements—Fixtures placed on land by company before filing plan—Compensation for—Irregular entry—Railway Act.

A railway company in 1900 entered upon lands and made valuable improvements intending to take and use the lands for the purpose of their railway. In 1905 they obtained authority to take the lands, and filed their plan under the Railway Act on the 23rd March, 1905. Arbitrators, in awarding compensation to be paid by the company for the lands, allowed to the claimants a sum for the improvements actually made by the company.

Held, that the company did not stand in the same position as an ordinary trespasser going upon lands; they had a statutory right to acquire a title, and entered after negotiation with the true owners, and with the permission of one who claimed to be but turned out not to be the true owner; although, the improvements were fixtures, dedication to the land owners was not to be presumed, but the contrary; and the amount of the award should be reduced by the sum allowed for the improvements.

Section 153 of the Railway Act, which provides that the date of the deposit of the plan shall be the date with reference to which the compensation or damages shall be ascertained, does not mean that all the company's improvements made before depositing the plan go to the land owner; the lands dealt with in this section are the lands as the company obtained them, in the condition they were at the time they entered, valued as of the date of filing the plan; the claimants' right to compensation accrued at the date the lands were taken, and stood "in the stead of the lands" by virtue of s. 173; and so the improvements were not put upon the lands of the claimants at all.

W. H. Blake, K.C., for railway company. *Ritchie*, K.C., for claimants.

Meredith, C.J.C.P., Britton, J., Magee, J.]

[April 30.

MONTGOMERY v. SAGINAW LUMBER CO.

Third party procedure—Service of notice on third party out of jurisdiction “proceeding”—3 Edw. VII. c. 8, s. 13(O).—Con. Rule 162(e)—Breach of contract within Ontario—Indemnity.

A third party notice is a “proceeding” within the meaning of 3 Edw. VII. c. 8, s. 13(O.), providing that in Con. Rule 162 the word “writ” shall be deemed to include any document by which a matter or proceeding is commenced; but, when applying Con. Rule 162 (e) to service out of Ontario of a third party notice, the word “action” must be read as if it were “third party proceeding”—the effect being that service can be allowed only where the third party proceeding is founded on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario; and in this case there was no breach within Ontario, because the contract under which indemnity was sought by the defendants against the third parties was one under which the obligation to indemnify did not arise until judgment had been recovered and the amount paid by the defendants, and the defendants were in the same action opposing the recovery of judgment.

Order of ANGLIN, J., reversed.

C. A. Moss, for third parties. W. E. Middleton, for defendants.

Meredith, C.J.C.P., Britton, J., Magee, J.]

[April 30.

WAY v. CITY OF ST. THOMAS.

Statutes—Special Act—Repeal by implication—Repugnancy to subsequent general Act—Rule of construction—Assessment and taxes—Exemptions—Railway—By-law of municipality—Commutation—School rates.

A city council in 1897 passed a by-law providing that a certain annual sum should be accepted from a railway company for 15 years “by way of commutation and in lieu of all and every municipal rate or rates and assessment,” in respect of certain lands owned by the railway company. This by-law was passed

under the authority of a special Act respecting the railway company, 48 Vict. c. 65 (O.), s. 3, of which provided that it should be lawful for the corporation of any municipality through which any line of the railway had been constructed to exempt the company and its property within such municipality, in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum or otherwise in gross or by way of commutation or composition for payment of all municipal rates. By a subsequent general enactment, 55 Vict. c. 60, s. 4 (O.), it was declared that no municipal by-law thereafter passed for exempting any portion of the ratable property of a municipality from taxation, in whole or in part, should be held or construed to exempt such property from school rates. The general Act did not by express words repeal the special Act.

Held, that it did not effect a repeal by necessary implication—*generalia specialibus non derogant*.

Held, also, that there was nothing to shew that the sum which the railway company were to pay was not more than the school taxes which they would be liable to pay if they were not entitled to any exemption.

J. M. Glenn, K.C., and *A. Grant*, for plaintiff. *W. B. Doherty*, for defendants, the city corporation. *D. W. Saunders*, for defendants, the railway companies.

Boyd, C., Magee, J., Mabee, J.]

[May 1.

METALLIC ROOFING CO. OF CANADA v. JOSE.

Labour union—Strike—Combined action—Intention to inflict damage actionable—Indorsement and aid of other association—Injunction.

The members of a labour union in order to compel the plaintiffs (employers of both union and non-union men) to enter into an agreement whereby they would agree amongst other things to employ none but union men so long as the union was able to supply workmen, called the plaintiffs' workmen out on strike in the middle of a day's work, and thereafter sent letters to the plaintiffs' customers and others (most of whom employed union members) informing them that their men would refuse to handle any product of the plaintiffs as they were an unfair firm to organized labour, and published of the plaintiffs' goods that they

were unfair and by other means endeavoured to prevent the plaintiffs carrying on their business.

Held, that this combined action on the part of the members of the union with the intention of inflicting damage on the plaintiffs was not justified by any countervailing prospect of pecuniary advantage to the union or the men and was therefore actionable and the members of an International Association of which the local union was a part having indorsed the action of the local members and rendered them financial assistance to carry on the strike were along with such local members liable in damages.

Held, also that an injunction should be granted restraining acts in furtherance of the conspiracy to injure except as to picketing, of which there was not sufficient evidence that such practice had been resorted to.

Judgment of MACMAHON, J., after trial with a special jury affirmed with modification.

Riddell, K.C., and J. G. O'Donoghue, for appellants. *Tilley and Strachan Johnston*, contra.

Boyd, C.]

HODGINS v. BANTING.

[May 1.

Medical practitioner—Action against, for malpractice—Trial without jury—Negligence—Evidence—Costs.

It is now the general rule, as recognized in *Town v. Archer* (1902) 4 O.L.R. 383, that actions against physicians or surgeons for malpractice, where the facts are not so much in dispute as the deductions of skilled witnesses upon the method of treatment disclosed, shall be tried without a jury.

The negligence complained of in this case was in setting and treating a fracture of the plaintiff's leg, the result being a shortened leg and a slightly everted foot.

Held, that this result could not be invoked as sufficient evidence of negligence, on the doctrine of *res ipsa loquitur*; and that the defendant's treatment was not to be condemned because somebody else of perhaps equal skill would have pursued another course; and there being no lack of care and attention on the defendant's part, and the evidence not disclosing any piece of negligence or ignorance which could be classed under the head of malpractice, the action was dismissed.

Upon consideration of a number of circumstances, one of them

being that the action was defended by a medical protection society, the plaintiff was relieved from payment of the costs of the defence upon condition of the proper fees of the defendant for the treatment being paid.

T. G. Meredith, K.C., for plaintiff. *J. M. McEvoy*, for defendant.

Meredith, C.J.C.P., Britton, J., Magee, J.] [May 1.

BACON v. GRAND TRUNK R.W. CO.

Railway—Animal killed on track—Railway Act, 1903, s. 237—Negligence—Burden of proof—Jury.

In an action for damages for the loss of a horse killed by a train upon the defendants' track, the jury found that the horse was killed upon the property of the defendants, and that the defendants were responsible for that.

Held, that upon the proper construction of s. 237, sub-s. 4, of the Dominion Railway Act, 1903, a finding that the horse was killed upon the property of the defendants was sufficient to entitle the plaintiff to recover, unless it was shewn by the defendants that the animal got at large through the negligence of the owner or custodian, and such negligence was sufficiently negatived, in view of the judge's charge, by the finding of the jury that the defendants were responsible.

Judgment of the County Court of Simcoe, reversed.

R. D. Gunn, K.C., for plaintiff. *W. A. Boys*, for defendants.

Meredith, C.J.C.P.] [May 2.

RE ARMSTRONG AND JAMES BAY R.W. CO.

Railway—Expropriation of land—Compensation—Award—Increase on appeal—Damages from severance of farm—Access of cattle to springs—Farm crossing—Offer to provide—Statutory right—Railway Act, 1903, s. 198—Costs of arbitration.

The railway company took for the purposes of their railway 3.09 acres of a grain and dairy farm of about 195 acres. The railway crossed the farm severing from the front part of it about 24 acres, including a field of 18 acres, which contained springs affording a supply of water for the cattle and horses

on the farm. Upon an arbitration to ascertain the compensation to be paid for the land taken and the damages sustained by reason of the exercise of the railway company's powers of appropriation, the owner of the farm claimed damages *inter alia* for the loss or serious impairment of the convenient use for the purpose of the farm of the springs in the field mentioned. The company contended that the loss would be minimized by the construction of a farm crossing across the railway, and offered to appear before the Board of Railway Commissioners and consent to an order directing that such a crossing be constructed and maintained by them:—

Held, applying *Vézina v. The Queen* (1889) 17 S.C.R. 1, that the owner of the farm had no statutory right under sec. 198 of the Railway Act, 1903, to a farm crossing sufficient to provide a satisfactory means of access for his cattle to and from the springs, and was entitled to damages in respect of this claim.

Construction of subs-ss. 1 and 2 of that section of the Railway Act.

Held, upon the evidence, that the sum of \$1,170, awarded by the majority of the arbitrators, was not adequate compensation for the land taken and the injury done, and the amount was increased upon appeal to \$2,250.

Remarks upon the large costs and expenses incurred in arbitrations under the Railway Act and the harshness of the rule which throws them upon the land owner if the amount awarded is less than that offered by the company.

DuVernet and Kyles, for land owner. *R. B. Henderson*, for company.

Anglin, J.]

LUDLOW v. IRWIN.

[May 3.

Costs—Taxation—Witness fees—Briefing evidence—Witnesses not called—Con. Rule 1176.

In an action for libel the plaintiff, not having pleaded justification, before the trial gave a notice, under Rule 488, of his intention to adduce, in mitigation of damages, evidence of the circumstances under which the libel was published. To meet such evidence the plaintiff had brought a number of witnesses to the trial, but the evidence was not admitted, and the witnesses were not called in reply.

Held, that by implication from Con. Rule 1176, or by analogy to the practice therein prescribed, the cost of procuring

the attendance of these witnesses and the briefing of their evidence, etc., should be allowed on taxation of the plaintiff's costs against the defendant.

W. E. Middleton, for the plaintiff. *C. B. Jackes*, for the defendant.

Anglin, J.]

[May 11.]

RE PHILLIPS AND THE CANADIAN ORDER OF CHOSEN FRIENDS.

Insurance—Co-morientes—Survivorship—Onus of Proof—R.S.O. 1897, c. 203, s. 159, sub-ss. 1 and 8, 4 Edw. VII. c. 15, s. 7, (O).

The Ontario Insurance Act, R.S.O. 1897, c. 203, s. 159, sub-s. 8, as amended by 4 Edw. VII. c. 15, s. 7 (O), applies only where the beneficiary "dies during the life time of the assured" and the onus is upon anyone claiming under that section to establish that fact. Where the assured and one of the beneficiaries perished in a common disaster and there was no evidence of survivorship.

Held, that the surviving beneficiaries were not entitled by virtue of that section to the insurance money.

Held, also, that the interest of a beneficiary is, apart from the section, contingent upon the beneficiary surviving the assured, and as the onus is upon any beneficiary seeking to share in the fund to establish such survivorship, the representatives of the deceased beneficiary took no share.

Seemle, that beneficiaries under the statute take as tenants in common and not joint tenants.

Seemle, also, that apart from sub-s. 8, the effect of s. 159, sub-s. 1, is, upon the death of one of several beneficiaries, to create a resulting trust in favour of the survivors.

W. E. Middleton, for the application. *Harcourt*, Official Guardian for the infants. *Lyman Lee*, for the Chosen Friends.

Anglin, J.]

RE TOLHURST.

[May 12.]

Dower—Order dispensing with release of—Husband and wife living apart—R.S.O. 1897, c. 164, s. 12.

A right which is barred by contract is not usually spoken of as a right to which a person is disentitled by law.

And in a case where a wife had been living apart from her husband for over two years and had disentitled herself to alimony by releasing it for valuable consideration.

Held, that she had not been living apart from him under such circumstances as by law disentitled her to alimony, and an order dispensing with her concurrence to bar dower under s. 12 of R.S.O. 1897, c. 164, in a conveyance by the husband, was refused.

G. H. Cleaver, for the applicant. *C. A. Moss*, for the respondent.

Meredith, C.J.C.P., Teetzel, J., Anglin, J.]

[June 4.

IN RE MUD LAKE BRIDGE.

Municipal Act—Bridges—Bridge over 300 feet in length.

The words "a bridge over 300 feet in length" in s. 617(a) of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19, must be construed to include necessary embankments.

Held, therefore, that a bridge of 643 feet, comprising an embankment of 140 feet on one side, and 260 feet on the other, and a wooden section of 243 feet, spanning the waters of the lake at low water, and connecting with the embankments, was a bridge "over 300 feet in length" within the meaning of the above section.

Seemle, s. 617(a) is not to be read as applying only to bridges crossing the rivers, streams, ponds or lakes, so as to exclude bridges crossing ravines.

Watson, K.C., and *F. D. Moore*, for County of Victoria. *M. Laughlin*, K.C., for Township of Carden.

Province of Manitoba.

KING'S BENCH.

Perdue, J.]

WILLIAMS v. HAMMOND.

[July 13.

Master and servant—Wrongful dismissal—Insolvency as ground for dismissal.

Action for wrongful dismissal. Defendant claimed that he was justified in dismissing plaintiff as incompetent to perform properly the duties that he had undertaken, viz., those of

manager of the manufacturing department of a large fur business. The trial judge, however, found that this defence had not been proved. Defendant also set up another ground of dismissal, viz., the alleged insolence and insubordination of plaintiff. About a week after the engagement began, plaintiff asked defendant for \$25 which had been promised him on account of transportation from Toronto. When directing payment of the \$25, defendant said it was "another case of paying a man who was not worth it." To this plaintiff replied that defendant would have to prove him incompetent before a judge and jury, or words to that effect. Defendant then dismissed the plaintiff from his employment.

Held, that, even if the expression complained of, considering the circumstances, and that it was provoked by defendant's own remark, could be regarded as insolent, it was only a single isolated instance, there being no complaint of any unbecoming conduct on the plaintiff's part on any other occasion, and would not justify a dismissal. A single disrespectful retort by an employee, which has been provoked or called forth by an unbecoming remark on the part of the employer, is not a good ground for dismissal. *Edwards v. Levy*, 2 F. & F. 94, followed.

Judgment for plaintiff for \$650 and costs.

Haggart, K.C., and *Whitla*, for plaintiff. *Pitblado* and *Hoskin*, for defendant.

Full Court.

HAVERSON *v.* SMITH.

[July 14.]

Sale of goods—Delivery—Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, s. 3—Agreement that purchaser should bear any loss by fire, effect of.

John Burnett agreed to deliver to defendant, free on board cars at Carman, 195 cords of wood, in exchange for four mules. The wood was at another station on the same railway, and was to be taken from two piles containing 200 cords. It was agreed that, if the wood should be burned, defendant should bear the loss, and that if the mules died the loss would fall on Burnett. The mules were delivered to Burnett; but, before anything was done towards delivery of the wood or separating the 195 cords from the rest of the wood in the piles, Burnett assigned to plaintiff for the benefit of his creditors.

Defendant then took some of the wood from the two piles when the plaintiff replevied it.

Held, that there was no change of title to the wood because nothing had been done to identify the particular 195 cords that defendant was to get out of the piles. All that defendant got by the agreement was a right to have delivered to him 195 cords out of a larger quantity of wood. He could not have replevied it or brought trover for it, if Burnett had taken it away. His only remedy for non-delivery would have been an action for damages. As the undisputed evidence shewed affirmatively that there was no change of title or possession of the 195 cords, the agreement of defendant to bear any loss by fire was, for the purposes of such an action as this, an unimportant term of the bargain, and merely meant that, in case the wood should be destroyed by fire, Burnett was to be relieved from his liability to deliver it.

Appeal from verdict in favour of plaintiff dismissed with costs.

Hudson, for plaintiff. *Hoskin*, for defendant.

Law Associations.

In July last at the Conference of the American Library Association, there was formed the "American Association of Law Libraries."

The purpose of this new organization is to develop and increase the usefulness and efficiency of the law libraries of the United States and Canada. Those interested are invited to send their names and addresses to the Secretary-Treasurer.

The officers are: President, A. J. Small, Iowa State Law Library, Des Moines, Ia.; Vice-President, Andrew H. Mettee, Library Company of the Baltimore Bar; Secretary-Treasurer, Franklin O. Poole, Association of the Bar, 42 West 44th St., N.Y. City; Executive Committee: President, Vice-President, Secretary-Treasurer, Frank B. Gilbert, G. E. Wire, Frederick W. Schenk.