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THE

ONTHLY LAW DIGEST

AND

REPORTER

CONTAINING A COMPLETE DIGEST OF A'L THE DECISIONS OF THE MONTH

RELATIN . TO

MERCANTILE LAW, THE LAW OF CORPORATIONS, EVIDENCE, TORTS, AND PATENT, COPYRIGHT, CONSTITUTIONAL, CRIMINAL AND OTHER BRANCHES OF LAW OF GENERAL INTEREST, GATHERED FROM EACH PROVINCE OF THE DOMINION, THE UNITED STATES, ENGLAND, FRANCE, IRELAND AND SCOTLAND,

EDITED BY

F. LONGUEVILLE SNOW,

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SALUTATORY.

In introducing a new law periodical to the legal profession of Canada, it is needless to say, that we have entered upon the undertaking in the firm belief that there is room for such a publication. Having its headquarters in the commercial metropolis of Canada, we hope—and for this we solicit the concurrence of commercial counsel in this and other cities of the Dominion—to render the MONTHLY LAW DIGEST AND REPORTER particularly interesting to commercial lawyers. But the large number of cases arising under the law of Torts, as well as Criminal, Constitutional and other cases of a generally interesting character, will, we hope, recommend the journal to the profession at large. A special feature of this periodical, will be the introduction of the Civil law wherever it harmonizes with, or would enlighten the jurisprudence of the Common law in mercantile matters. If favoured from the outset, with the hearty co-operation of the profession, we will not fail in our promise, to spare no efforts in making the MONTHLY LAW DIGEST AND REPORTER a law journal worthy of our times and of the requirements of the profession.

F. L. SNOW.

January 20, 1892.

MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. JANUARY, 1892. No. 1.

ACCEPTANCE OF NOTE—See Payment.

ACCESSORY OF THING SOLD — See Sale 8.

ACCOUNT—ACTION FOR ACCOUNT OF MONEY PAID—RECEIPT—ERROR—PAROL EVIDENCE—Art. 1234—Art. 14 C. C. (Quebec.) Findings of Fact.

S. brought an action to compel V. to render an account of the sum of $2,500 which S. alleged had been paid on the 6th Oct., 1885, to be applied to S.'s first promissory note maturing, and in acknowledgment of which V.'s book-keeper gave the following receipt:

"Montreal, October 6th, 1885. Received from Mr. D. S. the sum of two thousand five hundred dollars, to be applied to his first notes maturing, Mr. V., Fred"; and which V. failed and neglected to apply. V. pleaded that he never got the $2,500, and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, dismissed S.'s action.

On appeal, to the Supreme Court of Canada *Held*, (1) that the finding of the two courts on the question of fact as to whether the receipt had been given through error should not be interfered with.

(2) That the prohibition of Art. 1234 C. C. against the admission of parol evidence to contradict or vary a written instrument is not *d'ordre public;* and that if such evidence is admitted without objection at the trial, it cannot subsequently be set aside in a court of appeal.

(3) That parole evidence in commercial matters is admissible against a written document to prove error. ÆTNA INS. CO. *v.* BRODIE, 5 Can. S. C. R. 1, followed. Appeal dismissed with costs. *Schwersenski* v. *Vineberg.* Supreme Court of Canada, June 22, 1891.

ACCOUNTING—See Partnership 2.

ACTION FOR DAMAGES—See Damages.

ACTION AGAINST STOCKHOLDERS—See Corporations 4.

ATTAINDER—See Confiscation.

ADMIRALTY—SALVAGE.

D, a tug undertook to tow a ship I. out of the harbour of Quebec to the foot of the Traverse for $70. When they had proceeded part of the way the weather became bad, and the ship anchored and D. returned to the harbor. During the night the ship dragged her anchors and went ashore. B. another tug, went to the ship in the morning, and shortly afterwards D. returned to her, and after some bargaining the ship agreed to pay each of them $600 to pull the ship off and tow it back to Quebec. On a claim being made by D. and B. for the above amount, it was resisted on the ground that it was obtained from the master of the ship when he was alarmed for her safety, and that the claim was an exorbitant one, and the tugs should be paid only what the service was reasonably worth.

Held:—That D.'s claim was a claim for salvage and not towage, but that

D. should have stood by the ship and was bound to do so, and render all necessary assistance subject to the proper value of her services being afterwards paid.

That although B. was under no obligation to stand by the ship as was D, yet the master of the ship was misled by the urgency of the pilot in insisting upon his securing the services of the tugs, and that the charge was an exorbitant one.

That in the circumstances the offer of $150 each made by the ship for the services was sufficient, and would be maintained. *The Dauntless* v. *The Ship Ismir.* Vice-Admiralty Court, Nov. 1888, 35 L. C. J. 46.

AGENT—See Banks 5—Evidence 2—Principal & Agent 1.

ARBITRATION—See Criminal Law 8—Railways 4.

ASSAULT—See Criminal Law 5.

ASSAULT AND BATTERY—See Evidence 9.

ASSIGNMENT—See Partnership 1.

ASYLUM FOR THE INSANE—See Nuisance 1.

AWARD—See Arbitration.

BAD FAITH—See Guaranty.

BAIL—See Criminal Procedure 4—Sheriff.

BANKRUPTCY — (SEE ALSO PRINCIPAL and SURETY 2).

ACT OF—NOTICE OF INTENTION TO SUSPEND PAYMENT.

A debtor sent to his creditors this letter;—"Being unable to meet my engagements as they fall due I invite your attendance at" (a specified place and time) "when I will submit a statement of my position for your consideration and decision :"

Held :—Affirming the decision of the Court of Appeal (24 Q. B. D. 320) that the letter would naturally induce the creditors to believe that the debtor intended to suspend payment of his debts and therefore amounted to a notice that he was "about to suspend payment of his debts" within the meaning of the Bankruptcy Act 1883, sect. 4, sub-sect. 1 and was therefore an act of Bankruptcy. *Crook* v. *Morley*, 1891, App. Cas. 316.

(*Note.* English Bankruptcy Act 1883, 46 and 47 Vict., c. 52. "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts :" "he commits an act of Bankruptcy."

Dominion Insolvent Act 1875, 38 Vic., c. 16, sec. 3 (*a*). A debtor shall be deemed insolvent—"if he has called a meeting of his creditors for the purpose of compounding with them, or if he has exhibited a statement showing his inability to meet his liabilities, or if he has otherwise acknowledged his insolvency.")

BANKS and BANKING.—(SEE ALSO TAXATION 3—PARTNERSHIP 3.

1. STOCK GIVEN TO ANOTHER BANK AS COLLATERAL SECURITY—BANKING ACT—QUEBEC, arts. 1970, 1973, 1975 C. C.

The Exchange Bank, in advancing money to F. on the security of Merchants Bank shares, caused the shares to be assigned to their managing director and an entry to be made in their books that the managing director held the shares in question on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Later on, the managing director pledged these shares to another bank and absconded.

Held :—Affirming the judgment of the court below, that upon repayment by F. of the loan made to him, the Exchange Bank was bound to return the shares or repay their value. Appeal dismissed with costs. *The Exchange Bank* v. *Fletcher*. Supreme Court of Canada.

2. MEASURE OF DAMAGES FOR MISTAKE IN NOT PAYING CHECK.

(1) Where a banker refuses to pay the check of a depositor engaged in trade, who has sufficient funds on hand for that purpose, in the absence of evidence of malice or special injury to the depositor, more than mere nominal

damages are, even in such case recoverable although the refusal to pay the check was occasioned by the mistake of the bank in bookkeeping. Without proving special damages in such a case the jury may allow the Plaintiff temperate or substantial damages.

(2) *Check Marked, "Refused for want of funds"—Damages.*

To return a check marked "refused for want of funds" to the holder, especially through a clearing house, certainly tends to bring the drawer of that check into disrepute as a person engaged in mercantile business; and a single refusal of that kind may, and frequently does, bring ruin upon a business man, and it is often impossible to prove special or actual damages.

(3) *Malice—Intention.*

Malice in a legal sense means a wrongful act done intentionally without just cause or excuse, so here the bank wrongfully refused to pay the checks of the appellee; that refusal was intentional and without just excuse. There were, therefore, all the elements of legal malice, although there might have been no intention to injure the appellee. *Schaffnr* v. *Erhman*, Supreme Court of Illinois, Oct. 31, 1891, 24 Chicago, L. N. 84.

3. DISCOUNTS.

Defendants drew a draft at 30 days, payable to themselves, and, having endorsed it to the plaintiff bank "for collection," sent it to plaintiff in a letter, offering it the paper if it wished to discount it, and send them a check for the amount, which offer was accepted and complied with by plaintiff; *Held*, that plaintiff became the holder and owner of the draft for value, and, on its being dishonored by the acceptor, could sue defendants thereon. *Payne* v. *Albany City Nat. Bank*, Ind, 28 N. E. Rep. 432.

4. DIRECTORS—LIABILITY FOR REPRESENTATIONS.

Defendants, as directors, during a run on their bank, posted conspicuously in the bank a notice, signed by them, and addressed to the general public, representing the bank to be solvent. Plaintiff saw the notice, and, after consultation with the directors, loaned the bank money, which was lost.

Held:—That the notice, not being addressed to the plaintiff, could not entitle him to recover from the directors, under R. L. Vt. s. 983, which provides that no action shall be brought to charge any person upon a representation concerning the credit of another, unless such representation is in writing, and signed by the party to be charged; and the fact that the notice was signed by defendants as directors would prevent a recovery from them individually, even if the notice were a sufficient representation in writing. Such representation in writing cannot be aided by evidence of additional verbal representations. *First National Bank of Plattsburg* v. *Sowles et al.* Vermont Circuit Curt.

5. AGENT OF—EXCESS OF AUTHORITY. (Nova Scotia).

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank, which he discounted as such agent, and without indorsing the drafts used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property, by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor, and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full, a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty; the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment

Held, affirming the judgment of court below, Gwynne, J., dissenting, that the drafts were "debts due and

owing" from the insolvents to the bank and within the first preference created by the deed.

Per Ritchie C. J. : K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm, and when the firm received that money they became debtors to the bank for the amount.

Per Strong and Patterson, JJ., that the agent being bound to account to the bank for the funds placed at his disposal, became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he failed to account. The right the bank had to elect to treat the act of the agent as a tort was not important, as in any case there was a debt due.

Per Gwynne, J.: The evidence does not establish that these drafts were anything else than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper, and were not obliged to look to any other for payment.

Appeal dismissed with costs. *Merchants Bank of Halifax* v. *Whidden*, Supreme Court of Canada, May 12th, 1891.

BENEFICIARY—See Insurance, 2.

BILLS OF EXCHANGE AND NOTES—(SEE ALSO PRINCIPAL & AGENT 2—PARTNERSHIP 4—PAYMENT —PRINCIPAL & SURETY 1).

1. DEMAND NOTE—On a demand note providing for a reasonable attorney's fee in case of suit thereon, the maker is entitled to demand of payment before suit can be brought, and it is error in an action on such note, to render judgment for plaintiff on the pleadings, if the answer alleges that payment was not demanded. *Prescott* v. *Grady*, Cal., 27 Pac. Rep. 755.

2. REISSUE.

One of two joint makers of a note cannot, after taking it up, reissue it. Stevens vs. Hannon, Mich., 49 N. W. Rep. 874.

3 INDORSER WITHOUT RECOURSE.

An indorser of a promissory note "without recourse" for value, contracts and engages that the signatures borne by said note as makers or prior indorsers are the genuine signatures of the persons thereby represented, and that such note is their valid obligation. *Palmer* v. *Courtney*, Neb., 49 N. W. Rep. 754.

4. SILENCE AS ESTOPPEL.

In a suit upon a promissory note by the payee against one whose name was signed thereto as maker, where the only defence pleaded was the non-execution of the note: *Held*, that the silence of defendant under the circumstances of the case was legitimate evidence in behalf of plaintiff tending to prove the execution of the note by defendant, or by his authority. *Lothrop* v. *Union Bank*, Colo. 27 Pac. Rep. 696.

5. CONFLICT OF LAWS.

A promissory note was dated and executed at Cheyenne, Wyoming, and by its terms was payable there. The maker was a Wyoming corporation having most of its property and transacting the greatest part of its business in Nebraska. The payee was a resident of Wyoming. The note provided for interest at 15 per cent per annum, which was lawful in Wyoming where the note was made. The note was given for a loan of money, and was secured by mortgages executed in Wyoming on certain property of the corporation, situated in this State. The payee and mortgagee refused to pay the money until he examined the records in this State to see if the property was clear from incumbrances. On making examination and finding no liens, the money was paid over in this State, and the note and mortgages delivered here. There was evidence tending to show that the agreement for the loan was made in good faith in Wyoming, and not as a device for securing interest in excess of that allowed by the laws of this State. The finding of the District Court that the note is a Wyoming contract, and its validity is not governed

by the laws of Nebraska, upheld. *Coad v. Home Cattle Co. et al.*, Supreme Court, Nebraska, Sept. 15, 1891, 24 Chicago L. News, 59.

BOARDS OF HEALTH — See also Mun. Corporations No. 8.

County boards of health are corporate bodies, invested by statute with functions of a public nature, to be exercised for the public benefit, and in the absence of such remedy conferred by statute are not liable in an action of tort for damages in the performance of an official duty. *Forbes v. Board of Health of Escambia County*, Florida S. Court, Aug. 15, 1891.

BOND — Condition — Breach—Damages.

The defendant in response to an advertisement by the Plaintiff, sent in a tender for the construction by him of certain works. His tender was defective in that it was not executed by any sureties as directed by the advertisement and was not accompanied by a deposit. The tender was not accepted, but negotiations took place between the plaintiffs and the defendant in connection with it and the defendant signed a bond conditioned to, within four days, furnish the sureties and make the deposit and execute all proper and necessary agreements for the doing of the work in question. The terms of the contract had not been settled between the parties. The defendant did not within four days furnish sureties or make a deposit or sign any agreement, and no agreements were within that time tendered to him for execution.

Held, that it was the duty of the plaintiffs to prepare the agreements and tender them to the defendant for execution, and that as they had not done this there was no default on the part of the Defendant of which they could complain and no liability for damages. *Brantford, Waterleo & Lake Erie Railway v. Huffman.*

Breach—See Bond—Contracts 6—Damages 2.

Bribery—See Criminal Law 4.

Burden of Proof—See Criminal Procedure 3—Insurance 9.

Burglary—See Criminal Procedure 7.

Capital Punishment—See Confiscation.

Capital Stock—See Corporations 3.

Careless Driving—See Negligence 13.

CARRIERS—(See also Negligence 6).

1. Ejection of Passenger.

Under compiled Laws of Utah, §2354, which provides that " any passenger who refuses to prepay his fare or toll on demand may be put off the cars at any stopping place the conductor or employee of the company may elect," the company has no right to eject a passenger for non-payment of fare except at a stopping place. *Nichols v. Union Pac. Ry. Co.* Utah, 27 Pac. Rep. 693.

2. Benefit of Insurance.

An insurance policy on cotton consigned from Texas to Liverpool stipulated that it was not to cover the common law liability of the common carrier, but that, if the cotton were lost while in the care of any common carrier, the underwriter should advance to the assured an amount equivalent to the insured value of the cotton so lost, and if the carrier proved liable, the assured should return to the underwriter the amount received from the carrier ; *Held*, that a railroad company to whom the cotton was consigned was liable for loss resulting from its negligence, though the bill of lading stipulated that the company should have full benefit of any insurance that had been effected on the cotton. *Gulf, etc., Ry. Co. v. Zimmerman*, Tex., 17 S. W. Rep. 239.

3. Contract — Liability for Injury—Limitation.

(1) In pursuance of an inquiry from a shipper, a railroad company informed him of the through rates of transportation for certain goods to a point

beyond its own line. The goods were subsequently delivered to the company, and received by it addressed to such point, which the company could reach by means of connecting railroads. *Held*, in an action for the non-delivery of some of the goods and delay in delivering others, that these facts were sufficient to sustain a finding that the company had agreed to transport the goods beyond its own line to the place to which they were consigned. (2) Where the bills of lading or receipts given to the shipper when he delivered the goods to the carrier for transportation were surrendered by him on receiving the goods at their destination, the fact that he did not produce the bills or prove their contents at the trial does not give rise to a presumption prejudicial to him as to the terms of the contract of shipment contained therein. (3) The carrier, which had entered into a contract with the shipper for the transportation of the goods to the place of destination, had no right to make inconsistent stipulations with the persons who delivered the goods for the shipper; and provisions and conditions in the shipping bills, signed by such persons without the knowledge of the shipper, limiting the liability of the carrier to points on its own road, cannot be considered as applicable to the shipment in question. (4) A provision in shipping bills that the carrier should not be responsible for delay in the transit of the property does not relieve it from liability for delay occasioned by its own negligence. (5) A provision in shipping bills exempting the carrier from liability for damages, unless a written notice of the particulars of the claim is given to the freight agent at or nearest the place of delivery, within thirty-six hours after the goods have been delivered, is applicable to shipments beyond the carrier's line as well as to shipments to points on its line. (6) Such provision, which limits to thirty-six hours from the delivery of the goods the time within which notice of the particulars of the claim can be given, is void in so far as it applies to a shipment of a carload of potatoes, since the time allowed for making the examination and preferring the claim is unreasonably short. *Jennings* v. *Grand Trunk Ry. Co. of Canada*, New York Court of Appeals, Second Division, Oct. 6, 1891.

CARS—COUPLING—See Master and Servant 4.

CHARITABLE INSTITUTION—See Taxation.

CHARTER—See City Charter.

CHARTER-PARTY—CONSTRUCTION—DEMURRAGE—CUSTOM OF THE PORT.

A charter-party stipulated that a vessel should proceed to "Portugalete, or any other usual ore loading-place in the river Nervion, not above Luchana, as ordered by merchant's agents on arrival, or so near thereunto as she may safely get and there load in the customary manner from the factor of the said merchant a full and complete cargo of iron ore......... Steamer to be loaded at the rate of not less than 400 tons per working day as customary, after being berthed in turn, and ten days on demurrage over and above the said lay-days at 16s. 8d. per hour." The rules of the port provided that the turn for loading vessels was to be taken from an official list of arrivals. The vessel arrived at Portugalete on 17th June, and received her official number. She was ordered by the shipper's factor to load from a particular station or deposit. On the 21st June, the vessel was ready to receive cargo, but as other previous arrivals had to be loaded from this particular station, she could not be berthed until June 27th, when her loading began, which was completed on the evening of the 28th June. In the meantime vessels which had arrived later were able sooner to load their cargoes from other and less crowded stations.

In an action for demurrage by the shipowners, *Held* (diss. Lord Young) that as the charter-party did not stipulate that the vessel should berth in turn at a particular place, she should have been berthed in turn with other ships according to the order of their arrival at any berth where iron ore was loaded at Portugalete; that her time

for loading in turn arrived on 21st June, and that the defenders were liable for the detention of the vessel before the loading commenced. *Stephens, Mawson & Goss* v. *Macleod & Company*, 29 Scottish Law Reporter, 30.

CHILDREN, LOSS OF SERVICE OF—See Negligence 13.

CHINESE—EXCLUSION ACT—DEPORTATION.

Where a Chinese person has been convicted of being unlawfully in the United States, and the evidence shows he entered the United States from Canada, after having been in that country for a time, he must be returned to Canada, under the act which provides that such person shall be removed to "the country whence he came." *In re Mah Wong Gee*, U. S. D. C. (Vt.), 47 Fed. Rep. 433.

CITY—CHARTER — LIMITATION OF POWER TO MAKE PURCHASES — LIABILITY OF CITY.

Held, that there being no provision in a city's charter limiting its powers to make purchases for fitting up rooms for the use of city officers, or prescribing any particular manner for making contracts therefor, the Council can confer the power on a committee, and, the city having enjoyed the benefit of work performed and the goods purchased, it is liable therefor on *quantum meruit*, even though the order was given by a single member of the committee, or by the janitor of the building, *Kramrath* v. *City of Albany*, N. Y. Court of App. Oct., 6 1891.

COKE OVENS—See Damages 3.

COLLECTOR OF TAXES—See Taxation 2.

COLLISION—See Insurance 10.

COMMERCE—See Constitutional Law 2.

COMMISSION—See Sale 5.

COMMON EMPLOYMENT—See Master & Servant 8.

COMPANIES — See Electricity 2 — Winding up Acts.

CONDITIONS OF POLICY—See Insurance 4. 8.

CONFISCATION — PEINE CAPITALE—CONFISCATION — POUVOIRS LÉGISLATIFS.

Jugé :—Que le statut Impérial 33-34 Vict., chap. 23, n'est pas applicable au Canada.

Que la confiscation des biens d'un condamné n'est que la conséquence de l'incapacité de transmettre ses biens que la loi civile prononce contre celui qui a encouru une peine capitale ; que cette incapacité est exclusivement du droit civil, qui régit tout ce qui concerne l'état des personnes, le droit de propriété et celui de succession.

Que par "l'Acte de l'Amérique Britannique du Nord 1867," S. 92, n. 13, la propriété et les droits civils sont exclusivement du ressort des législatures provinciales, et qu'en conséquence, en adoptant la disposition contenue dans les sections 55 et 56 du statut 32-33 Vict., chap. 29 reproduite dans les sections 36 et 37 du chap. 181 des Statuts Refondus du Canada, en autant que cette disposition s'applique à la confiscation des biens d'un condamné à une peine capitale, le Parlement Fédéral a outrepassé ses pouvoirs, et que la loi ainsi votée est inconstitutionnelle, et ne saurait être appliquée en cette province.

Que les articles 35 et 36 du Code Civile décrètent la confiscation, en faveur du Souverain, des biens d'un condamné à une peine capitale, que cette loi n'a pas été affectée par les dits statuts et que le père n'hérite pas de son fils condamné à une telle peine.

Qu'en principe, d'après les dispositions du droit de la province sur cette matière, les biens sont d'abord affectés au paiement des dettes du condamné et que la confiscation ne peut s'appliquer qu'au surplus d'iceux, les dettes déduites.

Dumphy v. *Kehoe*, Cour Supérieure, Montréal 25 juin 1891, 21 Rev. Lég. 119.

CONFLICT OF LAWS—See Bills of Exchange and Notes 5.

CONSPIRACY—See Criminal Law, 3.

CONSTITUTIONAL LAW — SEE ALSO CONFISCATION.

1. POWERS OF PROVINCIAL LEGISLATURE—SALE OF LIQUOR.

Held, that the Provincial Legislature has the right to confer on Municipalities power to prohibit the sale of intoxicating liquors by wholesale as well as by retail, and that 53 Vict. (2) ch. 79, sec. 39, by which the town of Magog is authorized to restrain, regulate, or prohibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors by retail or wholesale within the limits of the town, is *intra vires*. *Lépine* v. *Laurent*, 14 Legal News, 369.

2. COMMERCE—TAXATION.

The Act of the Kentucky legislature providing that Express Companies within the State shall pay a license tax of $500 or $1,000 per annum, according as the lines over which they operate are less or more than 100 miles in length, is void as a regulation of interstate commerce, within the inhibition of Const. U. S., art. 1, s. 8, subd. 3, in that it seeks to lay a burden upon the business of such companies rather than upon their property.

The Act of the Kentucky legislature providing that telegraph companies within the State shall pay a yearly tax of one dollar per mile for the line of poles and first wire, and fifty cents for each additional wire, is also void, for the same reason. *Commonwealth* v. *Smith*, *same* v. *U. S. Express Co.* Ky. Ct. App., Sept. 1891, 10 Rail. & Corp. L. J. 362.

CONSTRUCTION—See Charter Party—Contracts 6—Guaranty—Insurance 9, 10—Principal & Agent 3—Sale of Goods 2—Trusts—Wills.

CONSTRUCTIVE SERVICE—See Service.

CONTINUING TRESPASS — See Railways 1.

CONTRACTS — (SEE ALSO CARRIERS 3—DAMAGES 2—SALE OF GOODS —INSURANCE 9.

1. SUBSCRIPTION TO AID MANUFACTORY.—Subscribers of money to induce a person to erect a mill, who have not paid up their subscriptions, are not in a position to sue to enjoin him from selling, and removing the machinery therefrom, after operating it for two years, and finding it a losing investment. *Ayres* v. *Dutton*, Mich., 49 N. W. Rep. 897.

2. PERFORMANCE.

Under an oral contract, evidenced by an unsigned written contract, whereby defendant agrees to sell plaintiffs five carloads of wood at a fixed price, "and as much more as might be ordered" by plaintiffs, defendant is not liable in damages for failure to carry out the contract after he has delivered eight carloads. *Bryant* v. *Smith*, Mich., 49. N. W. Rep. 889.

3. FRAUD.

The contract under which plaintiff performed work for defendant construction company in building a railroad, provided that monthly advances were to be made him on the basis of measurement and classification of the work by defendant's engineer, and that all disputes as to amount and classification of work were to be referred to the divisional engineer, whose decision thereon should be final: *Held*, that plaintiff could maintain an action for the fraud of defendant's engineer in underestimating and classifying his work, without alleging that reference had been duly made to the divisional engineer or that he was privy to the fraud, so that the reference would be useless. *Meyers* v. *Pacific Const. Co.*, Oreg., 27 Pac. Rep. 584.

4. COVENANTS FOR THIRD PERSONS—RESTRAINT OF TRADE.

(1) Defendant, who owned a factory for the manufacture of a certain kind of cheese, designated by a certain name, sold it, together with the secret of the manufacture, to plaintiffs, and covenanted that neither she nor her husband, her father, nor her brother-in-law, who had all assisted her in running the factory, would impart the secret to any other person than plaintiffs, nor engage in the business of manufacturing or selling such cheeses.

The covenant further provided that for any violation of the agreement by defendant, without mentioning the others, a certain sum should be paid by her as damages. *Held*, such covenant is not void as in restraint of trade. *Tode* v. *Gross*, New York Court of Appeals, Oct. 6, 1891.

5. INTERPRETATION.

A contract for the sale of a stock of hardware provided on what terms certain specified articles were sold, and then stipulated: "All other stock to be invoiced at cost price, with eight per cent on net cost price added for freight." It further stipulated that the purchaser was to take all the binding twine in stock, and that the price of the same should be fixed by the price at which twine manufacturers should sell twine to dealers during the following season.—*Held*, that the purchaser was not bound to pay 8 per cent, on the cost of the twine, as that clause only applied to stock sold at cost, and not to twine the price of which was to be fixed by its cost the next season. *Lund* v. *McCutchen*, Iowa, 49 N. W. Rep., 998.

6. CONSTRUCTION - IMPLIED PROMISE—BREACH THEREOF.

The suppliant had a contract to carry Her Majesty's mails along a certain route. In the construction of a government railway the Crown obstructed a highway used by the suppliant in the carriage of such mails, and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed by both parties the suppliant sought to maintain an action by petition of right for breach thereof on the ground that there was an implied undertaking on the part of the Crown in making such contract that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been.

Held, that such an undertaking could not be read into the contract by implication. *Archibald* v. *The Queen*, Exchequer Court of Canada, Sept. 21, 1891.

7. NOTICE OF TERMINATION — DEFAULT.

A contract which provides that, "if default shall at any time be made by the parties of the second part in the performance of the covenants and conditions hereof, and if said defaults hall continue for the space of sixty days after written notice from the parties of the first part to proceed with the performance and conditions, then the said party of the first part may, at its option, terminate the contract," cannot be terminated at will by giving the parties notice that they are in default, and that, unless they proceed to carry out the contract, after sixty days the same will be terminated, but there must be a fault existing at the time of the notice, which default must continue for sixty days after notice to proceed under the contract and strictly perform its conditions. *Hand Stitch Broom Sewing Machine Co.* v. *Blood*, U. S. C. C. (N. Y.), 47 Fed. Rep., 361.

8. IMPLEMENT—NO SPECIFIC TIME FOR DELIVERY—UNAVOIDABLE DELAY—REASONABLE TIME.

A firm of iron merchants in May 1887, contracted to supply the malleable ironwork of certain proposed buildings. The estimate provided: "The prices for the above to include all charges for carriage to and delivery at the job at such times as may be required by the mason, who will take delivery of joists and beams and lay same." Following a usual course the iron merchants exported iron to Belgium, to be manufactured into girders and joists and returned to them, but owing to strikes, and excessive heat in that country, certain girders which were ordered between 6th and 15th June were not delivered till the end of September and beginning of October, from a month to six weeks beyond what was admitted to be the usual and ordinary time.

In an action against the iron merchants for damages for breach of contract, *Held*, that as the defendants had taken a common course, of ordering

the ironwork from abroad, the causes of delay incident to its foreign manufacture must be considered, and were sufficient to exculpate the defendants from the charge of unreasonable delay in fulfilling their contract. *Taylors* v. *MacLellans, et contra*, 29 Scottish Law Reporter 23.

CONTRACTOR — See Master & Servant 7, 8—Negligence 14.

CONTRADICTION—See Evidence 1.

CONTRIBUTORIES—See Winding Up Acts 1, 2.

CONTRIBUTORY NEGLIGENCE — See Master & Servant 2—Negligence 9, 12, 16.

COPYRIGHT — INFRINGEMENT — PUBLIC.

Complainants published the enlarged edition of Webster's Dictionary of 1864. Defendants published the "Famous Reprint" of the edition of 1847, but omitted a part of the preface, so that it was uncertain of which edition it was a reprint. Defendants by their advertisements, represented also that their edition, which sold for $1.45, was a copy of a book that had sold at from $12 to $15 for 20 years, whereas the fact was that the edition of 1847 had been out of print during that time, and the edition of 1864 was the only one that had been on the market; *Held*, that the bill disclosed adequate cause for complaint, in view of the allegations that the public had been deceived, and the complainants had sustained damage. *Merriam* v. *Famous Shoe and Clothing Co.* U. S. C. C. (Mo.) 47 Fed. Rep. 411.

CORPORATIONS MUNICIPAL—See Municipal Corporations.

CORPORATIONS—PRIVATE.

1. STOCK—ISSUE TO OFFICER.

A co-partnership was formed to buy certain property, thereafter to be conveyed to a corporation to be formed, and stock issued to each partner at $70 per share, of the value of $100 per share, according to the capital contributed. One partner who became president of the corporation, was to contribute $490,000. He issued stock to himself accordingly, but in fact only contributed $133,000 and gave notes for the balance, which he afterward paid with the corporation's funds; Held, that the issue of stock by the president to himself over the amount actually paid for with his own money was fraudulent. *Huiskamp* v. *West*, U. S. C. C. Ill., 47 Fed. Rep. 236.

2. FALSE REPRESENTATIONS— CAPITAL STOCK—STATEMENT OF CORPORATION.

An action for damages for fraudulently inducing plaintiff to take the note of a corporation by the false representations of its officers as to the amount of its paid up capital stock, cannot be maintained against them by evidence of the falsity of their statement of the amount of its paid up capital stock filed with the State commissioners as required by the statutes of Massachusetts, 1884 ch. 330, § 3, since such statement is not addressed to nor intended for the public. *Hunnewell* v. *Duxbury*, S. C. Mass. 33 Cent. L. J. 357.

3. ACTION AGAINST STOCKHOLDERS— EXECUTION—RES JUDICATA.

A judgment creditor who has had an execution returned unsatisfied against a street railway corporation may maintain an action against its stockholders to recover for the benefit of all creditors who may desire to be made parties, the amount due upon unpaid subscriptions for stock. The liability of the stockholders is several, and it is not necessary to make them all defendants. (*Hatch* v. *Dana*, 101 U. S., 205 followed.)

Proof that a creditor has exhausted his legal remedy against the corporation is shown by a judgment and execution thereon returned unsatisfied.

Evidence that the company owns a large amount of personal property besides its road and franchise is inadmissible. The judgment is conclusive against the company and its stockholders, and they cannot show that the indebtedness for which the judgment was recovered arose upon a contract which was *ultra vires*.

One to whom stock is issued, and in whose name it appears on the book of the corporation, is liable to the creditors of the corporation for the unpaid subscription although he is not the owner of such stock. *Baines* v. *Babcock*, S. C. Cal., Sept. 1891, 10 Ry. & Corp., L. J. 375.

4. Who Liable as Stockholders—Record not Conclusive—Unauthorized Transfer of Customer's Stock to Broker's Name — Disaffirmance—Estoppel.

No person can be made a stockholder without his knowledge or consent, and in an action to charge a person as a stockholder the transfer to him upon the books of the corporation is not conclusive of his ownership, but the actual fact may always be inquired into, and if it be shown that the transferee on the books never consented to accept the shares, the transfer to him is null and void.

Hence, where it appeared in a creditor's action to charge defendants, as the record owners of stock, with an unpaid assessment thereon, that the defendants were brokers who had agreed to carry the stock on margin for a customer, and that upon its purchase by other brokers upon orders of such customer, the brokers, instead of delivering certificates to the defendants with a blank assignment and power of attorney, as usual in such cases, had the shares transferred to the name of defendants and sent them the certificates naming defendants as owners of the stock, and the defendants, as soon as they saw the certificates in their name, repudiated the transfer by notifying the customer to take up the stock and had it transferred from their name and by returning the certificates to the other brokers indorsed in blank with instructions to sell and have the stock transferred from defendants' name, *Held*, that the defendants had done all that was possible or required as a disaffirmance of the unauthorized transfer of the stock and were not liable as stockholders notwithstanding the fact that before the resale of the shares the books ef the corporation were closed and a retransfer could not be made.

The defendants connot be held liable within the rule that a person who permits his name to appear and remain in a company's outstanding certificates of stock and on its register as a stockholder is estopped, as between himself and the creditors of the Corporation, to deny that he is a stockholder, as that doctrine applies only to one who is actually a stockholder in fact, as well as upon the books of the Company. Under such circumstances defendants cannot be deemed stockholders either in law or in fact. *Glen* v. *Garth*, Supreme Court of New-York, June 1891, 10 Ry. & Corp. L. J. 396.

Coupling Cars—See Master & Servant 4.

Covenants for Third Persons — See Contract 4.

Creditor's Deed—See Trusts.

CRIMINAL LAW—

1. Profanity.

A complaint for profane swearing charged that defendant "did profanely curse" without setting forth the language used. No objection was made at the trial to the sufficiency of the complaint. The words usel were shown by the evidence, and defendant's counsel told the jury they were the judges of the law, and that the words used were not profane. The Court charged what constituted profane cursing and the charge was not excepted to. *Held*, that the verdict cured the defect in the complaint. *State* v. *Freeman*, Vermont Supreme Court, July 27, 1891.

2. Larceny—Embezzlement.

The evidence showed that defendant, pretending to illustrate the manner of drawings, at the Louisiana Lottery, placed upon a table a paper covered with squares and figures, and induced witness to place his money upon the table with the understanding that it would be returned as soon as defendant had completed the illustration; that as soon as the money was placed upon

the table Defendant took the same, and refused to return it; *Held*, that the evidence established larceny, and would not support a conviction for embezzlement. People vs. Johnson Cal., 27, Jac. Rep. 663.

3. Homicide—Conspiracy.

Where two persons are jointly indicted for murder, a conspiracy to do the act may be proved on the trial of one to show the intent with which he acted, and the jury may be instructed on the law relative thereto, though no conspiracy was charged, as principal and abettor are equally guilty, and the act of one is that of both. Dorsey vs. Commonwealth, Ky. 17, S. W. Rep., 183.

4. Bribery.

Const. Pa. art. 3, § 32, provides that persons may be compelled to testify in any lawful proceeding against one charged with bribery, but that such testimony shall not be afterwards used against the witness, except for perjury in giving such testimony:

Held, that the words "offence of bribery" include bribery of delegates to a convention for the nomination of a candidate for Congress. Commonwealth vs. Bell, Penn. 22, Atl. Rep., 641.

5. Felonious Assault.

Where an indictment charges that defendant purposely and wilfully assaulted the prosecuting witness with a pistol, with intent to kill him, evidence that they had had a difficulty a few days before the alleged assault, in which defendant put his hand into his pocket, as if to draw a weapon, is competent, as tending to show the wilfulness of the act, and intent with which defendant used his pistol. *State* v. *Mounts*, Mo. 17, S. W. Rep. 226.

6. Homicide—Manslaughter.

One who goes to another's house, where the inmates are quiet and inoffensive, and, with pistol in hand, originates a difficulty, and undertakes to intimidate them, and by his conduct causes a person to shoot him, is guilty of voluntary manslaughter, if after being shot, he pursues and kills such person. *Main* v. *Commonwealth*, Ky., 17 S. W. Rep. 206.

7. Disturbing Public Worship.

Where two are charged in one count of the same indictment with a misdemeanor committed by disturbing a congregation of persons assembled for divine service, in order to convict both, the evidence of guilt must apply to one and the same transaction. Two separate and independent transactions on the same day, at the same church, will not support the indictment; one of the accused having disturbed the congregation at 12 o'clock and the other at 1 o'clock, and there being no concert or connection between the two offenders. *Jackson* v. *State*, Ga., 13 S. E. Rep. 689.

8. Evidence — Manufacture of False Evidence, Attempt to Pervert Due Course of Justice—Judicial Tribunal—Arbitrators—Tampering with Arbitration Samples.

It is not necessary in order to complete the offence of attempting to pervert the course of justice by the manufacture of false evidence, that such evidence should be made use of.

To tamper with evidence to be laid before arbitrators, appointed by the parties to a contract for the determination of differences arising under such contract, is to attempt to pervert the court of justice by misleading a tribunal of a judicial nature.

The prisoner was indicted for having unlawfully, knowingly, and designedly altered the character of the contents of certain sample bags of wheat which had become, and were, evidence to be used before arbitrators appointed in accordance with the terms of a contract to decide any question that might be in dispute between the buyers and sellers of a cargo of wheat, with intent thereby to pass the same off as true and genuine samples of the bulk of such cargo, and thereby to injure and prejudice the buyers of the cargo and to pervert the due course of law and justice. By a contract for the sale of a cargo of wheat, certain stipulations were made for the settling of any disputes that might arise by arbitration,

and, for the purpose of being used as evidence, in any such arbitration, samples were taken from the bulk by the prisoner on behalf of the seller, and by another person on behalf of the purchaser. Such samples were sealed and taken to the prisoner's house, and while they were in his possession the prisoner tampered with them by extracting the contents of the bags, which he cleaned and replaced in the bags without breaking the seals, thereby producing very much better samples.

The samples so altered were forwarded by the prisoner to the London Com. Trade Association, who by the terms of the contract were to appoint arbitrators in default of arbitrators being appointed by the parties should any question be in dispute, and who were also to select a committee of appeal if necessary for the purpose of hearing and finally deciding any appeal against the award of the arbitrator. No arbitration in fact ever took place.

Held :—That the indictment was good and alleged an offence, although it did not allege that an arbitration took place, or that the samples were used as evidence; that the offence committed by the prisoner was not a mere private cheat, but was an attempt to mislead a tribunal of a judicial nature by the manufacture of false evidence; and that it was therefore not necessary that the evidence should have been in fact used in order to constitute the offence charged.

Held :—Also, that, inasmuch as the prisoner had forwarded the samples when altered to the Association in London, and had thereby put it out of his power to retract what he had done, he had done all that he could do to pervert the due course of law and justice, and was therefore rightly convicted upon the evidence of the offence with which he was charged. *Reg.* v. *Vercones*, 17 Cox's Crim. Law Cases 267.

CRIMINAL PROCEDURE.

TRIAL.

1. Reasonable Doubt.

Instructions to the jury that "a reasonable doubt is an actual, substantial doubt, arising from the evidence or want of evidence in the case." *Held*, not error. *Langford* v. *State*, Neb. 49 N. W. Rep. 766.

2. Sufficiency of Verdict.

A verdict of guilty, inadvertently written on a quashed indictment, instead of being so on the real indictment on which the prosecution is based and carried on is not on that account a nullity. It is not sacramental that it be written, or, when written, that it be signed or put on the indictment. It is surely of equal, if not superior, dignity to a verdict rendered *ore tenus* or unsigned in open court by the jury. *State* v. *Jenkins*, La., 9 South. Rep. 905.

3. Homicide—Burden of Proof.

In a prosecution for murder the Court instructed that the burden of proof was on defendant to show the absence of malice, unless the prosecution "shows that the crime only amounted to manslaughter, or that defendant was justifiable or excusable:" *Held*, that while standing alone, the instruction ignored the question of mitigating circumstances which may have been proved, yet, as the charge as a whole stated the law correctly, and the evidence of the prosecution "tends to show" manslaughter, it was not erroneous. *People* v. *Ah Jake*, Cal. 27 Pac. Rep. 595.

PRACTICE.

4. Admission to Bail.

Where petitioner's conviction of murder was reversed, with orders for a new trial, and he was admitted to bail, a writ of *mandamus* will be denied, to admit him to bail during the

progress of the second trial. *Hull* v. *Reilly*, Mich. 49 N. W. Rep. 869.

5. NOLLE PROSEQUI.

In case a party is charged with burglary and larceny in one count and is tried and found guilty as charged, and thereafter files a motion for a new trial on the sole ground that the proof adduced was insufficient to sustain the indictment for burglary, *Held*, that, at this stage of the proceedings, it was competent and admissible for the district attorney to enter a *nolle prosequi* as to the charge of burglary, and prevent a new trial being granted. *State* v. *Washington*, La, 9 South. Rep. 927.

6. GRAND JURY—REMOVAL OF DISQUALIFIED MEMBER.

The drawing and placing of a disqualified person on a grand jury, as a member thereof, and the subsequent removal of such person from it, by the court, after impanelment, on objection of defendant, for proper disqualification, do not so vitiate or infect that body as to paralyze it, and blot it out of existence. An indictment presented with a true bill by the body, as it remained constituted, is valid, and should not be quashed, although the motion be made before conviction. *State* v. *Cansey*, La. 9, South. Rep., 900.

7. BURGLARY—CHARGING LARCENY.

A count of an indictment alleging a breaking and entering into a dwelling with intent to steal goods therein, and actual larceny therein is not bad as a count for burglary because that part charging larceny is not drawn with sufficient precision to support a conviction of larceny, as the breaking and entering are charged to have been done with intent to commit larceny, a charge of actual larceny is not necessary, and may be rejected as surplusage. *State* v. *McClung*, W. Va. 13, S. E. Rep., 654.

CUSTOM OF THE PORT—See Charter Party.

DAMAGES (MEASURE OF)—See Banks 2—Damages 5

DAMAGES — See also BOND — MASTER & SERVANT—NEGLIGENCE—NUISANCE 2 — RAILWAY 2 — SALE OF GOODS 7, 8.

1. ICE—DESTRUCTION.

In an action for the loss of ice destroyed by defendants by draining the waters of a pond, the measure of damages is the value of plaintiff's right to harvest the ice upon the pond, and so to make it his property at the time it was destroyed. *Handforth* v. *Maynard*, Mass., 28 N. E. Rep. 348.

2. BREACH OF BUILDING CONTRACT.

Plaintiff agreed to build an extension to defendant's water tower, and defendant undertook to maintain the water level in the tower at such a height as to enable plaintiff's workmen to stand on a raft in performing the work.

Held:—That for defendant's default in not maintaining the water at the agreed level, whereby p.aintiff was compelled to construct a scaffold on the outside of the tower, plaintiff could recover only the increased expense incurred by him in erecting the scaffold over what it would have cost him to perform the work as contemplated in the contract, and was recovery for the entire cost of the scaffold was error. *Nason Manufacturing Co.* v. *Stephens*, N. Y. Court of Appeals, Oct. 6, 1891.

3. COKE OVENS—INJURY TO ADJOINING LAND.

When a company establishes an oven for the manufacture of the coke of other companies, and its location is due entirely to the convenient proximity of the mines of such other companies, and not to the development of any mines of its own, an injury to adjoining land from smoke and sterilizing gases is not irremediable, as the necessary consequence of the company's legal right to develop its property, but is the consequence of devoting its land to manufacturing; and therefore, while the person who sustains injury is not entitled to an injunction, if the oven has been well located and is as remote from dwellings as any that can be found in that region, he is nevertheless

entitled to damages in an action at law. *Robb* v. *Carnegie Bros. & Co.* Penn. 22 Atl. Rep.649.

4. PROPERTY — INJURIOUS AFFECTION OF BY CONSTRUCTION OF PUBLIC WORK—OBSTRUCTION OF ACCESS.

The defendant was the owner of a dwelling house and property fronting on a public highway. In the construction of a Government railway the Crown erected a bridge or over-head crossing on a portion of the highway in such manner as to obstruct access from such highway to the defendant's property which he had theretofore freely enjoyed. *Held*, that the defendant was entitled to compensation under the Government Railways Act and the Expropriation Acts. *The Queen* v. *Malcolm*, Exchequer Court of Canada, Sept. 17, 1891.

5. LAND—INJURIOUS AFFECTION OF —CONSTRUCTION OF A RAILWAY SIDING ON A SIDE-WALK CONTIGUOUS THERETO—MEASURE OF DAMAGES.

Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under the Government Railways Act, 1881, unless the injury (1) is occasioned by an act made lawful by the statutory powers exercised, (2) is such an injury as would have sustained an action but for such statutory powers, and (3) is an injury to lands or some right or interest therein, and not a personal injury, or an injury to trade. The construction of a railway siding along the side walk contiguous to lands whereby access to such lands is interfered with, and the frontage of the property destroyed for the uses for which it is held (in this case for sale in building lots), is such an injury thereto as will entitle the owner to compensation.

Quaere: Whether the rule that compensation in cases of injurious affection only must be confined to such damages as arise from the construction of the authorized works, and must not be extended to those resulting from the user of such works, is applicable to cases arising under the Government Railways Act 1881. *The Queen* v. *Barry et al.* Exchequer Court of Canada, Sept. 17, 1891.

DANGEROUS PREMISES — See Negligence 11.

DECEIT—EVIDENCE.

A party cannot sustain an action for deceit where no harm has come to him. Deceit and injury must concur. *Alden* v. *Wright*, Minn. 49 N. W. Rep. 767.

DEFAULT—See Contract 7.

DEFECTIVE APPLIANCES—See Master & Servant 5.

DEFECTIVE SEWERS—See Municipal Corporation 3.

DEFECT IN SYSTEM—See Master & Servant 11.

DELAY—See Contract 8.

DELIVERY AND ACCEPTANCE — See Sale 10—Contract 8.

DEMAND NOTES—See Bills & Notes 1.

DEMURRAGE—See Charter-Party.

DEPORTATION—See Chinese.

DIRECTORS — LIABILITY OF — See Banks & Banking 4.

DISCOUNTS—See Banks & Banking 3.

DISMISSAL, ARBITRARY RIGHT OF—See Master & Servant 9.

DISQUALIFICATION —See Municipal Corp. 7.

DISSOLUTION OF PARTNERSHIP—See Partnership 5.

DISTRIBUTION OF INTESTATE ESTATE —See Statutes 2.

DISTURBING PUBLIC WORSHIP—See Criminal Law 7.

DIVIDENDS—See P[illegible]ipal & Surety 2.

DOUBT—See Criminal Procedure 1.

DYKE—See Municipal Corporations 7.

EASEMENT—See Evidence 5.

ELECTIONS, MUNICIPAL—See Municipal Elections.

ELECTION PETITION—See Practice 2.

ELECTRICITY—SEE ALSO TAXATION 4.

1. ELECTRIC RAILWAYS—TELEPHONE—INJUNCTION.

A grant by the legislative and municipal authorities to a street railway company to use electricity as a motive power, though it does not designate the particular system by which the power is to be supplied, does not give the company a right to use a system by the use of which the electricity will pass from the street and interfere with the current of a telephone company which has previously lawfully erected its poles and wires on private property, where there are other systems which might be used by the railway company at a greater expense, but at less additional expense than would be required for the telephone company to change its system.

When a street railway company is about to use electricity as a motive power, to be supplied by a system which will allow the current to escape to the wires of a telephone company erected on private property, and to continuously interfere with and injure the business of the telephone company, an injunction will lie, there being no adequate remedy at law. (But compare *Cincinnati. Inclined Plane Ry. Co.* v. *City and Suburbun Tell. Ass'n.*, 10 Ry. & Corp. L. J. 82, holding that the remedy of the telephone company was to readjust its methods to meet the condition created by the introduction of electro-motive power upon the street Railway).

Where, in an action for an injunction an appeal was taken to the court of appeal from an order granting a temporary injunction, and the court of appeal dismissed the appeal on the ground that the granting of an injunction "pendente lite" was a discretionary order, and not reviewable, *Held*, that there had been no determination of the case on its merits, notwithstanding the views expressed in the opinion thereon. *Hudson River Telephone Co.* v. *Watervliet Turnpike & R. R. Co.*, N. Y. Supreme Court, Sept. 1891, 10 Ry. & Corp. L. J. 364.

2. ELECTRIC COMPANIES—RIGHTS OF IN SUBWAYS.

The plaintiff, an electrical illuminating company, applied for and was granted space for its wires in an electric subway constructed by defendant, a corporation having a *quasi*-public character and specially authorized to build and maintain general subways for electric wire under contract with the board of commissioners of electrical subways. At the time of plaintiff's application it was chargeable with knowledge of general rates fixed by the defendant for the use of allotted ducts although no special agreement to pay such rates was proved.

Held, that by plaintiff's acceptance of a duct under such circumstances, an implied contract to pay such regular rates arose.

Held, further, that if, as plaintiff claims, it took possession without a binding contract, such possession was that of a bare licensee and, after due notice to remove, it became a trespasser, and defendant might summarily remove an apparatus thus trespassing on the subway; that if a contract exists plaintiff must abide by its terms or seek its modification in the manner prescribed by law, but that such contract does not create the ordinary relation of landlord and tenant so as to limit the defendant's remedy to a suit to recover rent, and that the defendant may lawfully remove the wires unless the agreed sum is paid; so that upon no theory would plaintiff, without having paid for the use of the duct at the rate fixed by defendant up to the date of the application, be entitled to an injunction against the removal of the wires. *The Brush Electric Illuminating Company*, Appellant v. *The Consolidated Telegraph and Electrical Subway Company*, Respondent. N. Y. Supreme Ct. Oct., 1891 24 Chicago L. News 73.

ELEVATED RAILWAY—See Railways 1.

ELEVATED TRAMWAY—See Eminent Domain.

EMBEZZLEMENT—See Criminal Law 2.

EMINENT DOMAIN.

PUBLIC USE — ELEVATED TRAMWAYS.

In condemnation proceedings by an elevated tramway corporation organized under Laws of 1888, chap. 462, it appeared that the southerly terminus of petitioner was accessible only by a private road, and that up to the date of the petition the road had been used solely for transporting stone for a private corporation in which the incorporators of petitioner were interested. It was claimed that it was the intention to carry freight for any person offering the same to the extent of its surplus capacity after supplying the private corporation.

Held:—That in view of the object of its corporate existence, and the manner in which it had been and was to be operated, the evidence failed to establish that the taking sought was for public use. *In re Split Rock Cable Road Co.* N. Y. Court of Appeals, Oct. 6, 1891.

EMPLOYER AND WORKMAN — See Master & Servant 11.

ERROR—See Account.

ESTOPPEL—See Bills of Exch. and Notes 4—Corporations 5 — Municipal Corporations 7.

EVIDENCE—See also CRIMINAL LAW 8—DECEIT—INJUNCTION 2—LIBEL & SLANDER 1—PARTNERSHIP 4—SALE OF GOODS 9—WILLS 6.

IN CIVIL CASES.

1. CONTRADICTION—SLANDER.

Where, in an action for slander, a witness testified that the words were spoken of plaintiff's business, in consequence of which an employee left the service, but that he could not fix the time the words were uttered, it was competent to show, for the purpose of contradiction, that on a former trial he had testified that the words were spoken before the employee left. *Elmer* v. *Fessenden*, Mass. 28 N. E. Rep. 299.

2. ADMISSIONS OF AGENT.

Where the proof fails to show that the wife of the person in possession of a farm had authority to control the business in the absence of her husband, the admissions of such wife in regard to the business of the farm cannot be received, and an instruction submitting them to the jury is erroneous. *Norfolk Nat. Bank* v. *Wood*, Neb., 49 N. W. Rep. 958.

3. PAROL.

Where a written contract stipulates that one party is to deliver to another $800, "in wall-paper at wholesale price," parol evidence is admissible, in a suit for non-delivery of the paper, to show that the parties agreed at the time of making the contract that the wholesale price should be the price then fixed by a printed card of prices which was delivered to the purchaser. *Fawkner* v. *Lew Smith Wall Paper Co.*, Iowa, 49 N. W. Rep. 1003.

4. PERSONAL INJURIES.

Where it is alleged, in a suit for injuries causing the death of a locomotive engineer, that the engine was derailed by striking some ice that had been washed on the track by the overflowing of a creek, the testimony of a witness who visited the scene of the wreck shortly after the accident, as to whether the ice appeared to have been struck by the engine, is not objectionable, as calling for the opinion of the witness on a material question. *Scagel* v. *Chicago, etc. Ry. Co.*, Iowa 49 N. W. Rep. 990.

5. INJUNCTION — EASEMENT — DAMAGES.

In an action against an elevated railway company for damages and an injunction, it is error to exclude evidence of the general effect of the road upon the easements of light, air and access of other property in the vicinity of and on the same avenue with the premises in suit.

In such an action it is also error to exclude evidence as to the effect of the operation of the road upon business, and as to the course of business since its erection in said avenue and vicinity.

Anna Maria Doyle, Respondent v. *The Manhattan Railway Company and the Metropolitan Elevated Railway Company*, Appellants. New York Court of Appeals, Oct. 1891. 24 Chicago L. N. 79.

IN CRIMINAL CASES.

6. FALSE SWEARING.

On an indictment for false swearing evidence that the judge who administered the oath was in the exercise of the duties of his office is sufficient on this point, in the absence of counter evidence. *Dowdy* v. *Commonwealth*, Ky., 17 S. W. Rep. 186.

7. HOMICIDE—DECEASED'S CHARACTER.

Defendant's personal knowledge of the violent and dangerous disposition of deceased would not entitle him to evidence of the knowledge of others in that regard as corroborating his knowledge, unless he first testified to such personal knowledge. *Tribune* v. *Commonwealth*, Ky. 17 S. W. Rep. 186.

8. INSANITY.

To justify the Court permitting a non-expert witness, in a criminal case to express any opinion at all as to the sanity of defendant, the witness must have had adequate opportunity of observation and judging of defendant's capacity. *State* v. *Williamson*, Mo., 17 S. W. Rep. 172.

9. ASSAULT AND BATTERY.

In an action for assault and battery, where it is shown that defendant assaulted plaintiff, a boy of 13, on the street, it is not competent for plaintiff to show that at the time of the assault the by-standers asked a policeman to arrest defendant, and threatened personal violence to him, (defendant); nor is it competent for the by standers to testify as to what they thought of the assault, and what they said or did in consequence of it. *Kuhn* v. *Freund*, Mich. 49, N.W. Rep., 867.

EXECUTION—See Corporations 4.

EXEMPTION FROM TAXATION — See Statute 1.

EXPROPRIATION—See Railway 3.

FALSE EVIDENCE—See Criminal Law 8.

FALSE REPRESENTATIONS—See Corporations 3.

FALSE SWEARING—See Evidence 6.

FAMILY.

In *Estate of Shedd* 60 *Hun* 367, it was held that a man may have a "family" although he does not live with them, 44 Alb. L. J. 367.

FELONIOUS ASSAULT—See Criminal Law 5.

FIRES—See Negligence 1, 2.

FIRE LIMITS — Municipal Corporations 1.

FORFEITURE OF PROPERTY — See Master and Servant 9.—Confiscation.

FRAUD—See Contract 3.

GOVERNMENT RAILWAY — See Negligence 7.

GRAND JURY — See Criminal Procedure 6.

GUARANTEE — See Principal and Surety 2.

GUARANTY — CONSTRUCTION — BAD FAITH.

A third person had applied to plaintiff for the purchase of ten cases of paper, the price of which could not be ascertained until a partial delivery was made, and the last parcel weighed. plaintiff wrote defendant, asking if he would guarantee the payment of the bill by the purchaser to the extent of $1,000, adding that it was not likely that it would amount to as much as that. Defendant answered that he did not care to make himself liable for so large an amount, but that he was perfectly willing "to guarantee the amount of the bills thus far purchased, which I understand amount to about $600." The price of the paper was subsequently ascertained to be over $900.

Held : — That plaintiff's failure to inform defendant that the price would exceed his approximate estimate of $600 was not such an evidence of bad

faith as would release defendant from his guaranty, even if it had been procured by the misrepresentation of the purchaser. *Powers* v. *Clarke*, N. Y. C. A., Oct. 6, 1891.

HOMICIDE—See Criminal Law 3, 6—Evidence 7—Criminal Procedure 3.

HORSES—See Negligence 4, 10.

HOUSE OF ILL-FAME — See Nuisance 2.

ICE—See Damages 1.

ILLEGAL SALES—See Liquor 2, 3.

IMPEACHMENT—See Witness.

IMPLEMENT (Scotch Law)—See Contract 8.

IMPLIED MALICE — See Libel and Slander 2.

IMPLIED PROMISE—See Contracts 6.

INJUNCTION — See also ELECTRICITY 1 — EVIDENCE 5 — MUNICIPAL CORPORATIONS 1—NAVIGATION—RAILWAYS 1, 3.

1. MUNICIPAL ACTS.

Where a city holds, for the purpose of erecting wharves thereon, real property which was acquired under a legislative act, and paid for by taxation, citizen tax-payers whose private interests are subserved by the maintenance of wharves may sue to restrain by injunction the passage of an ordinance by the city council, authorizing the mayor to convey the property to the commissioners of the sinking fund. *Roberts* v. *City of Louisville*, Ky. 17 S. W. Rep. 216.

2. EVIDENCE.

A petition, asking that the erection of a stairway be enjoined, alleged that it would occupy 8 feet on the north side of an alley 20 feet wide, on the south side of which petitioner owned a lot and home. Defendant alleged that the alley was only 12 feet wide, and that the stairway was wholly on his own lot. His deed called for a lot 127 feet deep, to an alley 12 feet wide; *Held*; that the evidence being conflicting, there was no abuse of discretion in denying the injunction, on the ground that it had not been shown that the ground on which the stairway was being erected had ever been dedicated to the public use as a public alley. *Bank of State of Georgia* v. *Porter*, Ga. 13 S. E. Rep. 650.

3. PLEADING.

Where a petition by the manufacturer of a certain medecine to enjoin a person who owned a large quantity thereof, which had been in a burned building, alleged that the medecine had a large sale; and that it was composed of vegetable substances, and that, by reason of the great heat to which it had been subjected, its medecinal properties were dissipated, and that the sale thereof under petitioner's trademark would cause great damage to petitioner's business; but failed to allege that defendant was insolvent, or to show wherein petitioner would suffer irreparable injury, or wherein the medecine had lost its virtue, there was no abuse of discretion in denying the injunction. *Swift Specific Co.* v. *Jacobs*, Ga., 13 S. E. Rep. 642.

4. MANDATORY—LACHES OF PLAINTIFF.

A Chancellor does not and ought not, to interfere by way of mandatory injunction, even though the injury be clearly established, where there has been long continued delay in asserting the right, and a remedy exists at law.

In this case a certain building restriction had been laid by a grantor upon the adjoining land at the time of a conveyance by him to the defendant's predecessor in title. The neighbourhood was then wholly devoted to private residences. More than fifty years later, when the property in question, as well as that surrounding it, had been altered or rebuilt for business purposes, the owner of the dominant tenement, filed a bill to restrain the maintenance of certain buildings erected by the defendant more than twenty-one years before, and alleged to be in violation of the covenant. *Held*, that the application came too late to be entertained by a chancellor, and that the plaintiff had no remedy except in an action at law.

Friedenberg's Appeal. Supreme Court of Pennsylvania, Oct. 5, 1891. 24 Chicago L. News 57.

INJURY TO LAND—See Damages 3, 5.

INJURIES (PERSONAL)—See Evidence 4—Master and Servant 1, 2, 5, 7, 8—Negligence.

INNKEEPERS — LIABILITY FOR LOSS OF GUEST'S PROPERTY.

An innkeeper is *prima facie* liable for any loss or injury to the goods of his guest, though he may exculpate himself by proof that the loss or injury happened without any fault or negligence on his part, or on the part of his servants, so that, in an action by a guest for such loss, the complaint need not allege that plaintiff was free from fault or negligence. *Bowell* v. *De Wald*, Ind. 28, N. E. Rep., 430.

INSANITY—See Evidence 8.

INSOLVENCY — See Bankruptcy — Principal and Surety 2—Winding-up.

INSURANCE — SEE ALSO CARRIERS 2.

LIFE.

1. POLICY IN FAVOUR OF WIFE—DEATH OF INSURED CAUSED BY FELONIOUS ACT OF WIFE—INSURANCE VOID.

James Maybrick insured his life with the defendants in favour of his wife. The insured died and his wife was subsequently tried and convicted for murdering him. Prior to her trial she assigned her interest under the policy to one of the plaintiffs. The assignee of the policy and the executors of the deceased sued the defendants to recover the amount due upon the policy. *Held*, that the plaintiffs were not entitled to recover. *Cleaver* v. *Mutual Reserve Fund Life Ass'n.* 65, L. T. Rep. 230, Q. B. D. July 20, 1891, 44 Albany, L. J. 382.

2. MUTUAL BENEFIT SOCIETY—BENEFICIARY—INSURABLE INTEREST.

Where the constitution of a mutual benefit insurance association and its policy provide that the beneficiary may be changed at the will of assured, the fact that the beneficiary has no pecuniary interest in the life insured does not render the contract void as against public policy. *Ingersoll* v. *Knights of Golden Rule.* U. S. C. C., Ga., 47 Fed. Rep. 272.

3. MUTUAL BENEFIT INSURANCE — REJECTION OF CLAIM.

A mutual benefit society's laws provided that the society had power to pass on any claim for a death loss, and that its decision on any such claim should be final, and that no suit at law or in equity, should be brought on such claim. Plaintiff's husband became a member of the society and held an endowment certificate, which, upon his death while a member in good standing, would entitle plaintiff to receive a certain amount. After her husband's death, plaintiff presented her claim to the society, which, after a hearing, was rejected: *Held*, in an action by her on the certificate, where no charge was made that the society acted fraudulently, or contrary to its rules, that its decision was final. *Canfield* v. *Great Camp of Knights of the Maccabees*, Mich, 49 N. W. Rep. 875.

FIRE.

4. CONDITIONS OF POLICY.

In an action by J. S. G. against an insurance company upon a policy issued to him for $400 upon a house worth $600, which policy contained a clause in the following words; "when property insured by this policy, or any part thereof, shall be alienated or incumbered, or in case of any transfer or change of title to the property insured, or any part thereof, shall be alienated or incumbered, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, without the consent of the company indorsed hereon, this policy shall at once cease to be binding upon this company."

Before the loss the assured contracted to sell the house and lot for the consideration of $85[illegible], $100, of which was paid down, the balance to be paid in fifteen equal instalments, each three

months thereafter, with interest; the purchaser going into possession. None of the instalments had become due when the house was totally destroyed by fire; *Held*, that plaintiff could recover. *Grable* v. *German Ins. Co.* Neb., 49 N. W. Rep. 713.

5. WAIVER OF CONDITION.

Where, under a policy conditioned to be void if the assured places any additional incumbrances on the property, the assured places a second mortgage thereon, and a week or two later requests the agent to insert the name of the second mortgage in the policy so as to secure him, the answer of the agent that he could not do so, as the loss was made payable to the first mortgagee, but that he thought "it would be all right anyway," does not constitute a waiver of the condition. *Bosworth* v. *Cleary*, Wis. 49 N. W. Rep. 750.

6. REMOVAL OF INSURED PROPERTY.

The fact that a tank containing oil insured against fire was carried four or five hundred feet from its original location, as described in the policy, but not off the premises occupied by the insured, does not relieve the underwriter from liability for a subsequent loss by fire; since the location of the tank, as given in the policy, can be regarded only as descriptive, and not as a warranty. *Western & Atl. Pipe-Lines* v. *Home Ins. Co.*, Penn., 22 Atl. Rep. 654.

7. POLICY—WAIVER OF CONDITION.

Held: That in the absence of a positive stipulation in a policy of insurance that such policy shall terminate at noon of the last day such policy has to run, or proof of an established invariable custom, such policy will be held to cover the whole of the last day for which it is drawn.

That where a claim for a loss under a policy of insurance is made by the insured, which claim is refused from the outset by the insurer, who denies all liability, such refusal is a waiver of any condition of the policy requiring proof of loss. *The Montreal Herald Company* v. *The Northern Insurance Company*. Superior Court, Montreal, Dec. 15th, 1888, 35 L. C. J. 51.

8. CONDITIONS OF POLICY—SALE OR TRANSFER OF PROPERTY—LEASE WITH OPTION OF PURCHASE.

Putting a lessee in possession of insured property under a contract that he shall buy the property on the expiration of his lease, or, at his option, at any time during its continuance, does not violate a condition of the policy that shall become void if any change takes place in the title or possession, when, on application for the insurance, the building was in process of erection, untenanted, and the company had notice of the contemplated lease and change of possession, though not of the agreement to convey contained in the lease. *Smith* v. *Phœnix Ins. Co.*, Supreme Court of California, Sept. 21, 1891, 33, Cent. L. J. 397.

MARINE.

9. CONTRACT OF — OPEN POLICY — CONSTRUCTION — DECLARATION OF GOODS BY INSURED—ONUS PROBANDI.

When payment of a risk is resisted by insurers on the ground of misrepresentation, the onus is on them to prove very clearly that such misrepresentation has been made.

Where an open policy was granted on goods shipped from Melbourne to London per one set of specified steamers to Sydney and thence to London per another set, covering risk while in a specified factory at Sydney, "declarations to be made within forty-eight hours after departure of steamer from Sydney": *Held*, that according to the true construction of this contract two declarations must be made by the insured, one as incident to every contract of an open policy, for the purpose of identifying the shipments at Melbourne to which the policy was to attach and necessary by law to make the policy operative; the other, under the express terms of the above contract, giving particulars relating to such goods as had been already brought within the policy by a previous declaration apt for that purpose, and had since been actually shipped for London.

Semble: Though there is no positive law in New South Wales requiring contracts of marine insurance to be in writing, yet the general authority given to the agent of an insurance company must be to make contracts in the ordinary way, and that is by writing. *Davies* v. *National Fire and Marine Insurance Company of New Zealand*, 1891, App. Cas. 485.

10. Collision Clause—Construction of Policy.

By a policy of marine insurance the underwriter insured the ship *Niobe* from the Clyde (in tow) to Cardiff *and or* Penarth while there and thence to Singapore, and while in port for thirty days after arrival; and agreed "if the ship hereby insured shall come into collision with any other ship or vessel and the insured shall in consequence thereof become liable to pay, and shall pay to the persons interested in such other ship or vessel, any sum or sums of money," etc., to pay the assured a certain proportion of the sum so paid.

While the *Niobe* was being towed to Cardiff her tug came into collision with and sank another vessel, whose owners recovered damages both from the *Niobe* and the tug.

In an action by the owners of the *Niobe* upon the policy against one of the underwriters for payment of his proportion of the sum paid by such owners on account of the collision, the underwriter pleaded that under the policy, he was only liable for damages arising from collision with the *Niobe*.

Held:—Affirming the decision of the Court of Session (17 Court Sess. Cas., 4th Series (Rettie) 1016 Lord Bramwell dissenting), that the collision of the tug with the damaged vessel must be taken to have been a collision of the *Niobe* with another vessel within the meaning of the policy, and that the underwriters were liable. *McCowan* v. *Baine & Johnson et al. The "Niobe"* 1891, App. Cas. 401.

Intent—See Weapon.

Interpretation of Contracts—See Contracts 5.

Intoxicating Liquor—See Liquor.

JUDGMENT DEBTOR.

Refusal to Answer Questions—Application to Commit.

Application to commit the defendant, who had been examined as a judgment debtor, "for refusing to disclose his transactions respecting his property, and for not making satisfactory answers respecting the same, and for refusing to answer" certain questions set forth, or for an order requiring him to attend at his own expense "and answer the said questions and such other questions arising out of the same as may be necessary, and to fully declare his transactions respecting his property, and the disposition thereof made by him." The refusal was not contumacious, but solely on the advice of the attorney who attended the examination on behalf of the defendant.

An objection was taken, and the reason given for the refusal was that the questions were asked to get evidence upon which to attack a judgment recovered against the defendant, or to discover what evidence the defendant would give in an action which the present plaintiffs had brought, or threatened to bring against the sheriff.

Held, that it could not be any ground for refusing to answer that the information gained by the examination would be of use, or was intended to be used, for the purpose of a suit against some third person. The question put related to the debtor's property or his transactions respecting the same.

Order made that the debtor attend at his own expense and answer the questions set out in the summons, and such other questions as might necessarily arise out of the answers given. The order to be with costs of the application and any increased costs of the examination occasioned by the refusal to answer. *Ross* v. *Van Etten*, Manitoba Queen's Bench. 17 Oct. 1891.

Jurisdiction—See Navigation.

Jury (Grand)—See Criminal Procedure 6.

Laches—See Injunction 4.

Land, Injury to—See Damages 3, 5.—Sale 8.

LARCENY — See Criminal Law 2—Criminal Procedure 7.

LATENT DEFECT—See Sale of Goods 9.

LEGISLATURE, POWERS OF — See Confiscation—Constitutional Law 1.

LIABILITY — See Corporations 5 — Innkeeper—Municipal Corporation 3—Negligence 14—Sheriff—Telegraph Co. 1, 2.

LICENSES—See Peddler—Liquor 1.

LIEN FOR STREET IMPROVEMENT—See Practice 1.

LIBEL AND SLANDER.

1. LIBEL IN PLEADING — EVIDENCE OF FACT POSTERIOR TO DATE OF ACTION.

T, the plaintiffs, a firm of advocates, brought an action under No, 578 against M. to recover $372.80 due for professional services. M. pleaded ignorance of law and want of skill on the part of plaintiffs, and also charged them with acting contrary to the instructions and against the interests of M., to whom, by reason of their incapacity, plaintiffs caused great loss and damage. While the cause 578 was still pending, T brought an action under No. 1816, against M. for libel, as contained in the allegations of said plea. Before the hearing of the cause 1816, judgment was rendered in 578, dismissing the said plea. At the trial of cause 1816, proof was offered by T. of the judgment in 578, and objected to by M. as "being proof of facts posterior to the action in this case."

The Court reserved the objections, and at judgment and on merits

Held, Overruling the objection and admitting the evidence objected to, that the allegations contained in said plea, which had been pronounced unfounded and dismissed, constituted a written defamatory libel against plaintiffs.

That malice was properly and legally inferable from the nature and falsity of the charges and the manner in which they were made by M. against plaintiffs.

That plaintiffs were entitled to recover damages from M, which the court assessed at $300 with *contrainte par corps* for the payment of same against the male defendants: *Trenholme et al* v. *Mitchell et al.* Superior Court, Montreal, April, 27 1890. 35 L. C. Jurist 4.

2. SLANDER—IMPLIED MALICE.

A statement made in a public place, in the presence and hearing of persons there congregated, that a certain individual named, who resides in the vicinity, is a damned rascal, or a rogue, and that he had stolen all the property he possessed, is, if untrue, a slander *per se.* In the absence of proof of malice, the use of such an opprobrious epithet implies malice, and it suffices to maintain an action for the recovery of damages, without special injury being proved. *Savoie* v. *Scanlan*, La., 9 South Rep. 916.

LIGHTING STREET — See Municipal Corporations 6.

LIMITATION OF POWERS — See City Charter.

LIQUOR (INTOXICATING) — SEE ALSO CONSTITUTIONAL LAW, 17.

1. LIQUOR LICENCE ACT.—LOCAL OPTION—SALE BY WHOLESALE—SALE BY RETAIL.

Section 18 of 53 Vic., c. 56 (O), allowing under certain conditions, municipalities to pass by-laws for prohibiting, the sale of spirituous liquors, is *intra vires* the Ontario legislature, as is also s. 1 of 54 Vic. c. 46 which explains it, but the prohibition can only extend to sale by retail.

A by-law omitting to provide a penalty for its violation is not necessarily bad. *In re* Local Option Act, Ontario C. A.

2. ILLEGAL SALES.

On an indictment charging the sale of whisky to two named persons, proof of a sale to either of them will warrant a conviction. *Hall* v. *State*, Ga., 13 S. C. Rep. 634.

3. ILLEGAL SALES.

Some intoxicating liquors are not comprehended in the descriptive term

"spirituous liquors." Consequently a statute enacting that it shall be unlawful for any person to sell intoxicating liquors contains matter different from what is expressed in the title thereof, the title being "an act to prohibit the sale of spirituous liquors." *McDuffie* v. *State*, Ga., 13 S. E. Rep. 596.

LOCAL OPTION—See Liquor 1.

LOSS OF SERVICE—See Negligence 13.

MALICE (IMPLIED)—See Libel and Slander 2.

MALICIOUS ARREST.

An officer will not be held responsible personally in damages unless it be proven that he has acted arbitrarily, in violation of law, and without regard to the functions with he is entrusted. *Boutte* v. *Emmer*, La, 9 South. Rep. 921.

MANDATORY INJUNCTION —See Injunction 4.

MANSLAUGHTER—See Criminal Law 6.

MANUFACTORY—See Contracts 1.

MASTER & SERVANT.

1. INJURIES TO RAILROAD EMPLOYEE.

Where a car is derailed by the accumulation of snow, ice, and dirt on the flanges on the rails, the railroad company is liable to an employee on the car, who sustained injuries by reason of the derailment, since the duty of keeping its track in proper repair rests on the master. *McClarney* v. *Chicago etc. Ry. Co.*, Wis. 49 N. W. Rep., 963.

2. INJURY—CONTRIBUTORY NEGLIGENCE.

Where plaintiff had been engaged by defendant for several years in attending to switch-lamps in its yard, and while so employed and standing upon one of its tracks, was struck by a car which he knew to be switching close to him, his negligence will defeat a recovery, although defendant's custom was to switch the car on to a track other than the one plaintiff was on, and he, relying upon such custom, was paying no attention to the moving car. *Collins* v. *Burlington etc. Ry. Co.*, Iowa, 49, N. W. Rep., 848.

3. TORTS—RATIFICATION.

Plaintiff ordered coal of defendant, which a third person, without defendant's knowledge or authority, undertook to deliver, and in so doing negligently injured plaintiff's building. Afterwards, and with knowledge of the accident, defendant demanded payment for the coal. It was *held*, that defendant was liable for the injury, since such demand was a ratification of the acts of the person delivering the coal. *Dempsey* v. *Chambers*, S. C. Mass. 33, Cent. L. J. 335.

4. COUPLING CARS—NEGLIGENCE.

Where a railroad company by rule forbids its brakemen going between freight cars to couple them, and provides that coupling must be done by means of a stick, the company is not liable for the death of a brakeman who, in consideration of employment by the company, signed a written recognition of such rule, waiving all liability of the company to him for any results of disobedience thereof, when it appears that he understood what he was signing, that the company had provided coupling-sticks for the train, and that the death was the result of disobedience of the rule. *Russell v. Richmond & D. R. Co.*, U. S. C. C. (S. Car.) 47 Fed. Rep. 204.

5. DEFECTIVE APPLIANCES — INJURY.

Where the pin holding the singletree to the draw-head of a street-car came out, releasing the horse, and the driver was dragged over the dash board, it was error, in an action for the resulting injury, to charge that it is the duty of a master to furnishe such appliances "as combine the greatest safety with practical use", since a master need only furnish appliances reasonably safe, though better ones exist; and a subsequent charge, given at the master's request, which correctly states the law, does not cure the error. *Sappenfield* v. *Main St. etc. R. Co.*, Cal., 27 Pac. Rep. 590.

6. NEGLIGENCE—SAW-MILL.

While plaintiff was engaged in changing a saw in defendant's mill upon the order of the foreman, a log carriage, which had been left at rest, with the steam shut off, and the lever locked with which it was moved, suddenly started, and run over and injured plaintiff. It was undisputed that a machine which would do that was improperly constructed or adjusted, and unsafe, and that it appeared that the foreman knew, several days before the accident, that the machine had started when no one was near it.

Held:—That defendant was negligent in not originally adjusting the carriage so as to be safe, or in not discovering the defect, and making it safe before the accident. *Mooney* v. *Connecticut River Lumber Co.*, Mass., N. E. Rep. 352.

7. NEGLIGENCE—COMMON EMPLOYMENT — CONTRACTOR AND SUB-CONTRACTOR.

In an action to recover damages for injury caused by the negligence of the defendant's servant, the defence of common employment is not applicable unless the injured person and the servant whose negligence caused the injury were not only engaged in a common employment but were in the service of a common master.

Builders contracted to build a block of houses, under a specification prepared by the owner's architect, certain fireproof portions of the houses to be executed by the Respondents, who were iron founders. The Respondents contracted with the architect to do their portion of the work, and had no contract with the builders and were not under their directions or control. While the respondents were carrying out their contract workmen employed by them in raising concrete to the upper storey of the building, negligently let a bucket fall on the appellant, who was working in the lower story in the employment of the builders. In respect of the injury thus caused the appellant brought an action against the Respondents.

Held, reversing the decision of the Court of Appeal (23 Q. B. D. 508), that since the relation of master and servant did not exist between the respondents and the appellant, the doctrine of collaborateur did not apply and the action was maintainable.

Wiggett & Fox 11 Ex. 832, commented on.

Woodhead vs. Gartness Mineral Company 4 Sc. Sess. Cas, 4th Series, 469 and Maguire vs. Russell 12 Sc. Sess. Cas., 4th Series 1071, disapproved.

Lord Cairns' observations in Wilson v. *Merry*, (Law Rep. 1 H. L. Sc. 331. 332), explained. *Johnson* v. *Lindsay & Co.* 1891 App. Cas. 371.

8. AGREEMENT FOR SERVICE—ARBITRARY RIGHT OF DISMISSAL—FORFEITURE OF PROPERTY—(Ontario).

By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who, in consideration thereof, agreed to employ M. for two years, to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation.

By one clause of the agreement the employer was to be the absolute judge of the manner in which the employee performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal, but to have no claim whatever against his employer.

M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders.

Held, reversing the judgment of the Court of Appeal and of the Divisional Court, that the agreement gave the employer the right at any time to dis-

miss M. for incapacity or breach of duty without notice, such right being absolute and not required to be exercised judicially, but only in good faith.

Held, per Ritchie, C. J. Fournier, Taschereau, and Patterson, JJ., that such right of dismissal did not deprive M. of his claim for a share of the profits of the business.

Per Strong and Gwynne JJ., that the share of M. in the profits was only a part of his remuneration for his services which he lost by being dismissed equally as he did his fixed salary. *McRae* v. *Marshall*, Supreme Court of Canada, June 22, 1891.

9. RAILWAYS — DAMAGES — NEGLIGENCE.

In a civil action triable by jury as a matter of right, if there be evidence tending to establish the plaintiff's cause of action in substance as alleged, the verdict will not be disturbed merely on the ground that there is evidence of an opposite tendency.

Questions of negligence, as well as of contributory negligence are generally within the province of the jury, which should not be invaded by the courts except in the clearest of cases.

A person engaging to work in and about the construction of a railroad assumes the ordinary risk of such employment, including the risk of being transported to and from his work on a construction train over a newly constructed road, and cannot expect the road-bed to be in as perfect and safe condition before it is finished as if the same had been completed and opened for public travel.

A laborer unskilled in railroad building, even if he has aided in repairing defects in a newly constructed road, is not necessarily chargeable with notice of the defective condition of the road-bed.

A servant cannot voluntarily and knowingly incur unusual and extraordinary danger at the risk of his master. But if the unusual danger is not apparent to a mind like his, and he does not know nor have the means of knowing it, he may incur such danger, under the order of his master or his representative, without being guilty of contributory negligence.

Where in the absence of the superintendent of construction, the workmen employed in constructing a railroad are performing their labor under the supervision and direction of a general foreman, who has full power and authority to employ and discharge them, such foreman is, in relation to such workmen, the representative of the railroad company, and not their fellow-servant.

It is the duty of a company constructing a railroad to employ a competent skilled person to see to it that its road is reasonably safe for the transportation of its workmen—not necessarily as safe as a road fully completed and equipped for the carriage of passengers, but as safe as the circumstances of the case will reasonably allow.

The safety of human life requires that a very high degree of skill and diligence shall be exercised in the construction of railroads to be operated by the dangerous agency of steam. The question whether a railroad has or has not been properly constructed at a certain place for the purposes for which it is being used may be proper for the opinion of an expert witness.

In an action for personal injuries by loss of limb, the assessment of damages must, within reasonable bounds, be confided to the judgment of the jury. *Colorado Midland Ry. Co.* v. *O'Brien.* S. C. Colorado June, 1891. 10 Ry and Corp. L. J. 351.

10. NEGLIGENCE — EMPLOYER AND WORKMAN — DEFECT IN SYSTEM —MAXIM "*Volenti non fit injuria.*"

Where a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control—the danger being created or enhanced by the negligence of the employer — the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to shew that he has undertaken the risk so as to make the maxim "*volenti non fit injuria*" applicable in case of injury. The question

whether he has so undertaken the risk is one of fact and not of law. And this is so both at common law and in cases arising under the Employers' Liability Act 1880.

The plaintiff was employed by railway contractors to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones and at times swung them over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. A stone having fallen from the crane and injured the plaintiff, he sues his employers in the county court under the Employers Liability Act 1880. The jury found (1) that the machinery for lifting the stone, taken as a whole, was not reasonably fit for the purpose for which it was applied; (2) that the omission to supply special means of warning was a defect in the ways, works, machinery and plant; (3) that the employers (or some person engaged by them to look after the condition of the work, etc.) were guilty of negligence in not remedying the defect; (4) that the plaintiff was not guilty of contributory negligence; (5) that he did not voluntarily undertake a risky employment with a knowledge of its risks; and returned a verdict for the plaintiff for damages. Application having been made to enter judgment for the defendants on the ground that the case ought not to have gone to the jury, the plaintiff having admitted that he knew of the risk and voluntarily incurred it:

Held, reversing the decision of the court of appeal (Lord Bramwell dissenting), that the mere fact that the plaintiff undertook and continued in the employment with knowledge and understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering; that the evidence would justify a finding that the plaintiff did not voluntarily undertake the risk of injury; that the maxim "*Volenti not fit injuria*" did not apply; and that the action was maintainable.

Held, contra by Lord Bramwell, that there was no evidence to justify the 5th finding of the jury; that the plaintiff having volontarily undertaken the the work with knowledge of the risk the maxim "*Volenti non fit injuria*" applied; and that the action was not maintainable. *Sword* v. *Cameron*, (1 Sc. Sess. Cas. 2nd Series, 493) approved. *Thomas* v. *Quatermaine* (18 Q. B. D. 685) commented on. *Smith* v. *Baker & Sons* 1891 App. Cas. 325.

MAXIM—(*Volenti Non Fit Injuria*)—See Master and Servant 11.

MEASURE OF DAMAGES—See Banks 2—Damages 5.

MISTAKE—See Banks 2.

MUNICIPAL ACT—See Injunction 1.

MUNICIPAL CORPORATION

— See also BOARDS OF HEALTH — PRACTICE 1.

1. SEWERS.

A parol license permitting a city to discharge the sewage from a particular district on private property does not authorize the discharge of the sewage from a much larger territory; and the licensor is entitled to an injunction against such increased discharge, and is not confined to a legal action for damages. *New-York, etc Ry. Co.* v. *City of Rochester*, N. Y. 28 N. E. Rep., 416.

2. FIRE LIMITS—INJUNCTION.

Where a city ordinance prohibits the erection of wooden buildings within its fire limits, individuals who show a threatened violation of the ordinance, and that if unrestrained it will work irreparable injury to them and their property, are entitled to an injunction, though the building if erected would not be a nuisance *per se*. *First Nat. Bank* v. *Sarlls*, Ind. 28, N. E. Rep., 432.

3. DEFECTIVE SEWERS.

A municipal corporation that has power to construct sewers in its streets is liable for so improperly locating and constructing the outlet to a sewer, which is principally located along the streets, as to discharge the sewage on plaintiff's premises, though the lower

portion of the sewer, including the outlet, is located on private grounds, and though the municipality had no authority to construct a sewer there and had no control over such portion. *Stoddard* v. *Village of Saratoga Springs*, New-York Ct. of App. 1891, 27 N. E. Rep., 1030.

4. LIABILITY FOR NEGLIGENCE OF OFFICERS.

A distinction exists as to their liability for the negligence of their officers between municipal corporations proper, such as chartered towns and cities, which voluntarily assume a part of the sovereignty of the State for purposes of local government, and counties, which are arbitrary political divisions of the State established by general laws for general governmental purposes; and the former can be held liable for the negligence of its officers in keeping a filthy and unhealthy prison, whereby injury results to a person confined therein. *Edwards* v. *Town of Pocahontas*, U. S. C. C. (Va.), 47, Fed. Rep. 268.

5. ORDINANCES—STORAGE OF OILS.

A city ordinance prohibiting the storage by any person within the city limits of inflammable oils, except upon permission from the common council, leaving it to the common council to say whether a particular place is suitable for the purpose, or a particular person is a proper one to whom to grant permission, and allowing the permission to be revoked at the will of the council, is invalid, because of the power of arbitrary discrimination it rests in the council. *City of Richmond* v. *Dudley*. Supreme Court of Indiana. Sept. 1891 10 Ry. & Corp. L. J. 387.

6. STREET LIGHTING.

A contract by which a city agreed to pay an electric light company $2,050 per year for eight years, in quarterly instalments, for the lighting of its streets and its city hall, will not be presumed to violate its city charter, which prohibits the city from levying a tax for general city purposes in any one year in excess of 2 per cent of the assessed valuation of the property in the city, and which declares that the city shall have no power to borrow money or contract any debt which cannot be paid out of the revenues of the current fiscal year; and, therefore, in an action by the electric light company against the city, a complaint which alleges the contract, and its breach by the city in refusing to pay two quarter-yearly instalments, is not demurrable on the ground that the city had no power to enter into the contract. *Merrill Railway & Lighting Co.* v. *City of Merrill*, Wis. 49 N. W. Rep. 965.

7. DYKE RATE—MOTION TO QUASH—DISQUALIFICATION—ESTOPPEL.

An application was made to quash a rate imposed upon the proprietors of Wallace Bay Dyked Marsh, on the ground that the commissioners selected to execute the works were themselves proprietors in the marsh, and therefore incompetent to discharge the duties imposed upon commissioners appointed under the R. S. c. 52. The rate was also attacked on the ground that certain expenses incurred by the commissioners for travel, legal services, etc., were improperly included in the amount assessed. It appeared that the expenses were incurred in connection with obtaining a grant from the provincial government in aid of the work: that the expenses were deducted from this grant, and the balance expended, one of the proprietors also complained that he was assessed for a larger acreage than he actually possessed.

Held, that if the functions of the commissioners were of a judicial character, they were authorized to impose the rate under the R. S., 5th Series, c. 109, which provides that no person empowered by law to exercise judicial function shall be incapable of acting in any cause, matter or proceeding, "by reason of his being or having been interested as one of several rate payers, or as one of any other class of persons liable in common with others," etc. If the functions were non-judicial there was no disqualification.

That the expenses charged by the commissioners were reasonable and

incurred in the interest of the work, and were not within the case of *re Bishop's Dyke*, 20 N. S. Repts. 263.

That the owner who complained of excessive assessment having been called upon to go with the surveyor and point out the boundaries of his lot or lots, and having refused, was precluded by the terms of R. S., c. 42, s. 26, from disputing the correctness of the assessment.

Per Weatherbee, J., that assuming the charges by the commissioners not to be within their authority or jurisdiction, the rate could not be quashed on that ground, as the money received by the commissioners from the government must be expended under the terms of the grant, and the amount could not be ascertained until after the final completion of the work. *In re Wallace Bay Aboiteau* Supreme Court of Nova Scotia.

8. Appointment of Board of Health—(Nova Scotia).

S. 67 of the act by which municipal corporations were established in Nova Scotia (42 Vict., c. 1) giving them "the appointment of health officers.... and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S. 4th Ser., providing for the appointment of boards of health by the Lieutenant-Governor in Council. Ritchie, C. J,, *dubitante* as to appointment by the executive in incorporated counties.

A board of health appointed by the executive council, by resolution, employed M., a physician, to attend upon small-pox patients in the district "for the season," at a fixed rate of remuneration per day. Complaint having been made of the manner in which his duties were performed, he was notified that another medical man had been employed as a consulting physician, but refusing to consult with him he was dismissed from his employment. He brought an action against the municipality setting forth in his statement of claim the facts of his engagement and dismissal, and claiming payment for his services up to the date at which the last small pox patient was cured, and special damages for loss of reputation by the dismissal. The Act allows the board of health to incur reasonable expenses, which are defined to be services performed and bestowed and medicine supplied by physicians in carrying out its provisions and makes such expenses a district, city, or county rate, to be assessed by the justice and levied as ordinary county rates.

Held: Per Fournier, Taschereau, and Gwynne, JJ., that the employment of M. "for the season" meant for the period in which there should be small-pox patients requiring his professional services.

(2) Per Fournier, Taschereau, Gwynne, and Patterson, JJ., that notwithstanding no provision was made for supplying the municipality with funds in advance to meet the reasonable expenses that might be incurred under the Act, a claim for such expenses could be enforced against a municipality by action.

(3) Per Ritchie C. J. and Strong J., that the only mode of enforcing such a claim is by a writ of mandamus to oblige the municipality to levy an assessment.

(4) Per Fournier, Taschereau & Gwinne JJ., affirming the judgment of the court below, that M. was entitled to payment at the rate fixed by the resolution of the board up to the time in which there ceased to be any small-pox patients to attend.

(5) Per Ritchie C. J., Strong and Patterson, JJ., that the claim of M. was really one for damages for wrongful dismissal, which is not within the provision in the act for reasonable expenses. *Municipality of Cape Breton* v. *McKay*, Supreme Court of Canada. May 12, 1891.

MUNICIPAL ELECTIONS.

Misconduct of Presiding Officer in Opening Ballots.

During the conduct of a municipal election, the presiding officer, for the ostensible purpose of seeing that no more than one ballot was deposited by each elector, opened three ballot

papers in such a way that, if he had been so disposed, he might have ascertained for whom the parties depositing the paper voted. On an application to a county court judge to set aside the election on the ground of misconduct on the part of the presiding officer, the latter swore that he simply opened the ballots for the purpose stated, that he did not read them, and that he did not know for whom the parties voted; also, as regarded a tally of the votes which he kept during the election, that it was merely kept for his own amusement and from conjecture, though others might have seen it.

Held, by Weatherbee and Ritchie JJ., and Graham L. J., on appeal from the decision of the County Court Judge dismissing the petition, that the evidence of the presiding officer that he did not see or know for whom the parties voted was irrelevant; that the manner in which the papers were opened by him was a violation of the spirit and intention of the Act, R. S., 5th Series, c. 57; and that the appeal should be allowed with costs.

McDonald C. J. and Townshend, J. dissented on the ground that no corrupt act on the part of the presiding officer was shown by the evidence. *Hiltz* v. *Skerry*, Supreme Court, Nova Scotia.

MUTUAL BENEFIT SOCIETIES — See Insurance 2. 3.

NAVIGATION.

INTERFERENCE WITH PUBLIC RIGHT OF—INJUNCTION—JURISDICTION.

An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbor is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vict. c. 16, s. 17 (d).

(2). A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament.

(3) The Provincial Legislatures since the union of the provinces, cannot authorize such an interference.

(4) Wherever by act of the Provincial Legislature passed before the Union, authority is given to the Crown, to permit an interference with the public right of navigation, such authority is exercisable by the Governor-General and not by the Lieutenant-Governor of the province. *The Queen* v. *Fisher*, Exchequer Court of Canada, Sept. 21, 1891.

NEGLIGENCE (CONTRIBUTORY—SEE MASTER & SERVANT 2—NEGLIGENCE 9, 12, 16.

NEGLIGENCE—SEE ALSO MASTER & SERVANT.

1. FIRES.

A fire started by defendant on its own right of way spread to plaintiff's premises, and plaintiff's cattle wandered into the fire; *Held*, that the injury to the cattle was a proximate result of the escape of the fire. *Chicago etc R. Co.* v. *Barnes*, Ind., 28 N. E. Rep., 328.

2. FIRE—FALL OF WALL AFTER FIRE—DAMAGES. (Quebec).

Held, Affirming the judgments of the courts below, that the owner of a wall of a house who allows it to remain standing after a fire in a dangerous condition, and takes no precautions to prevent an accident, is liable for the damage caused by the falling of the wall, even if the falling takes place seven days after the fire during a high wind.

Appeal dismissed with costs. *Nordheimer* v. *Alexander*, Supreme Court of Canada.

3. RESPONSABILITÉ — CHEMINS DE FER.

Jugé, qu'une compagnie de chemins de fer est responsable d'un accident survenu à un animal qui serait entré sur sa voie par sa clôture qui était en mauvais ordre. *La Compagnie du Chemin de Fer Atlantique Canadien* v. *Joseph Sauvé*, Cour du Banc de la Reine (en appel) 23 mai 1891, 21 Rev. Leg. 142.

4. Railroad Companies—Frightening Horse.

Plaintiff was lawfully upon defendant's depot grounds, unloading corn in a crib which was near two highway crossings, when defendant's engine passed without signal, and frightened plaintiff's team, causing them to run away and injure plaintiff. Act 20th Gen. Assem. Iowa, ch. 104, provides that no railroad engine shall approach a highway crossing without giving a signal, and makes the neglect to give such signal a misdemeanor: *Held*, that defendant was liable, although plaintiff was not attempting to use such crossing. *Lonergren* v. *Illinois Cent. Ry. Co.*, 49 N. W. Rep., 852.

5. Railroad Company — Turn-Table.

A railroad company owning a turntable situated on the company's land, about six hundred feet from two highways, and having upright guy-bars, is not bound to keep it locked on the ground that it is an attractive object to children, and a child injured while playing thereon cannot recover. *Daniels* v. *New York & N. E. R. Co.*, Massachusetts Supreme Judicial Court, Sept. 1891, 44 Alb. L. J. 398. (See *Barrett* v. *South Pac. Ry. Co* Supreme Court of California 1891).

6. Carriers of Passengers — Street Car.

Plaintiff, a boy 14 years old, was a passenger on one of defendants street cars. The car was crowded, and he was standing on the front platform, leaning against the dasher. He either fell off, or, as he claimed was pushed off by passengers getting off, and was run over; *Held*, that there was no error in charging that defendant was not liable for the conduct of the passengers unless it was unusual and disorderly and could have been prevented by the persons who had charge of the car at the time. *Randall* v. *Frankford & S. P. E. P. R. Co.*, Penn., 22 Atl. Rep. 639.

7. Injury Received on Government Railway—Order for Particulars—Practice.

Where in his petition the suppliant alleged in general terms that the injuries he received in an accident on a government railway in the province of Quebec, resulted from the negligence of the servants of the Crown in charge of the track, and from defects in the construction of the railway, an order was made for the delivery to the respondent of particulars of such negligence and defects. *Tancrède Dubé*, Suppliant, and *Her Majesty the Queen*, Respondent. Exchequer Court of Canada, Oct. 14, 1891.

8. Railroad Company — Turn-Table.

A railroad company is liable for injuries received by a child while playing upon a turn-table upon its premises near a public street which was not protected by an inclosure nor guarded by its employees, though it was provided with the customary fastenings to keep it from revolving, and the child was invited to play thereon by other children. (Directly opposed to *Daniels* v. *N. Y. & N. E. Ry. Co.*, alluded to above). *Barrett* v. *South Pacific Ry. Co.*, S. C. California, 33 Cent. L. J. 335.

9. Contributory—Railway Crossing.

A person travelling in a public street, and finding it obstructed by a freight train at full stop, to which a locomotive is attached, who, relying upon the assurance of a brakeman that he can safety climb over the bumpers and pass between the cars, as the train will remain stationary for some time, attempts to do so, and while in the act suffers an injury by the train being started suddenly, without warning by ringing the bell or sounding the whistle, in guilty of such contributory negligence as will prevent his recovery for the injury. *Renner* v. *Northern Pacific Ry. Co.* C. C. of U. S. Dist. Wash E. D. April 1891. 10 Ry. & Corp. L. J. 354.

10. Railways — Horses Killed — Property on Adjoining Premises.

Three horses got upon the defendant's line of railway from adjoining

premises, where they had no right to be, and were killed. In an action for damages for their loss

Held, following *Davis* v. *Canadian Pacific Railway*, 12 A. R. 724 that the words "under the circumstances it might properly be" in 53 Vic. c. 28, s. 2 (D), mean "it might lawfully be" and that as the horses were not on the adjoining premises with the consent of the owner or occupant they were not "lawfully" there.

Held, also, that although the owner did not object to their being there, still as there was no by-law of the municipality permitting them to run at large, they could not be held to have been properly there, and the action was dismissed with costs. *Duncan* v. *Canadian Pacific Railway*, Ontario, Chancery, Div. H. C. J.

11. DANGEROUS PREMISES—PLEADING.

A complaint for personal injuries through defendant's negligence alleged that defendants invited the public to visit the house where the accident occurred for the purpose of trade, and that it was a place of public resort for such purpose; that a hatchway was located in the building, where customers would and did naturally go; and that plaintiff, "while properly and necessarily in said building, without fault on her part, fell through said hatchway etc: *Held*, that the complaint did not show that plaintiff was one of the class invited to visit the premises, and therefore did not show failure to perform any duty owed plaintiff. *Thiele* v. *McManus*, Ind., 28 N. E. Rep. 327.

12. RAILWAYS, CONTRIBUTORY, NEGLIGENCE— COLLISION WITH STREET CAR.

In an action against a railroad company to recover damages for the alleged negligent killing of plaintiff's intestate, it appeared that decedent was a street-car driver, and that in coming towards defendant's track he slowed his car to a walk when he was within about 25 or 30 feet of the railroad crossing, and that he could have seen the approaching train 75 feet down the track when 25 feet away from the crossing, or could have seen the train 160 feet down the track when within 16 feet of the crossing; that the deceased did not stop his car; but seemed to be looking at his horse with his hand on the brake that there was a flagman regularly stationed at the crossing, but that he was in the flag house, and gave no warning of danger.

Held, that it was a question for the jury to determine whether the absence of the flagman from his post of duty warranted deceased in presuming that it was safe to cross defendant's track at the time, and a finding that the deceased was not guilty of contributory negligence would not be disturbed. *Richmond* v. *Chicago & W. M. Ry. Co.*, S. C. Michigan July 1891, 10 Ry. & Corp. L. J. 344.

13. CARELESS DRIVING — ALLEGATION OF LOSS OF SERVICES RENDERED BY CHILDREN.

Two of the plaintiff's children, aged respectively six and four years, were crossing a street in the town of Truro, when the defendant's carriage, driven by his servant, came suddenly around an adjacent corner. The children were knocked down, trampled by the horses, and severely injured. In an action claiming damages for the injuries received by the children by reason of the negligent driving of the defendant's servant, the following words in the statement of claim were relied upon as a sufficient allegation of loss of services to the plaintiff: "By the blows, falls, and tramplings the children were bruised and injured about their bodies and heads, as well as internally, and in consequence thereof they were for months, and one is still ill, and is suffering, and is unable to move about and perform the acts and duties that children of their age are in the habit of doing and are expected to do, etc."

The court was equally divided.

Held, per Weatherbee, J., and Graham, E. J., that the words used were sufficient.

Per Ritchie and Townshend, JJ., that, in the absence of an allegation that the children were residing with or

in the service of their father, no inference of loss of services by the plaintiff could be drawn from the words used.

The issues in law having been heard by the judge before the trial :

Per Weatherbee, J., where objections in law are to be heard before the trial, the proper practice is to enter the cause for argument before the full court. *Cox* v. *McKenzie*, Supreme Court of Nova Scotia.

14. NEGLIGENCE OF INDEPENDENT CONTRACTOR — LIABILITY OF PRINCIPAL.

In the construction of one of defendant's telegraph lines, a hole dug for one of the posts in a public street was left unguarded at night, and plaintiff sustained injuries by falling therein. The line was building under a contract with a railroad company, which was to furnish all labour accept a foreman, and defendant did not expressly agree to furnish the foreman. The foreman on the contract was employed by the railroad company, and from it received his instructions and his pay, and had full charge of digging holes and setting posts. *Held*, that under the rule exempting a person from liability for injuries caused by the sole negligence of an independent contractor or his servants, defendant was not liable.

The contract for the construction of the line not requiring any holes to be dug in the street, the defendant was not liable, under the rule rendering employer subject to the same liability as the contractor, when the performance of the contract, in the ordinary mode of doing the work, necessarily or naturally results in producing the defect or nuisance which causes the injury.

Where no foundation is laid for the admission in evidence of a copy of a contract, defendant's exception in the record is available in support of the judgment in its favour. *Hackett* v. *Western Union Tel. Co.*, Supreme Court of Wisconsin, 10 Ry. & Corp. L. J. 390.

15. PROXIMATE CAUSE.

Plaintiff brought suit against a sewing-machine company for personal injuries inflicted by the carelessness of its agent in attempting to remove from her house a machine, which it had agreed to take in part payment for another. Plaintiff showed the agent when he came, that the machine was unusually heavy, and told him that he could not remove it alone, without taking off the top, embracing the machinery ; but the agent insisted that he could if he could get it on his shoulders. She told him also that it had always taken two men to move it theretofore, and called his attention to the fact that she had taken off the belt, and that, if he undertook to shoulder the machine without replacing it, the top would be likely to fall. No attention was paid this however, and the consequence was, that when he raised the machine, the top did fall, striking the wall, and rebounding to the floor, where it broke into pieces. A fragment struck the plaintiff as it broke, and entirely destroyed one of her eyes. *Held*, that defendant was liable. The court said " appellant's counsel insist that the fact that the top of the machine first struck the wall, and then fell to the floor, destroyed the chain of causation, in the view of the law, between the act and the injury, on the theory that the wall was an intervening agency. We know of no instance where the law has been applied upon that theory under such circumstances, and we have been referred to none." *White Sewing Machine Co.* v. *Ritcher*, Appellate Court of Indiana, 44 Alb. L. J. 391.

16. RAILWAYS—CONTRIBUTORY NEGLIGENCE—PLEADING.

Where a railway train stops near a station, where it is impossible for a female passenger to alight safely, and she is directed by the Company's servants to alight, but when upon the platform she is told to remain there until she reaches the station, the violent starting of the train whereby the door is suddenly closed injuring her fingers while holding to the door-frame for support, is negligence.

An averment of facts showing negligence on the part of defendants, with a general averment that the plaintiff

is without fault, constitutes a sufficient complaint, where the facts specially pleaded do not clearly show contributory negligence on the part of plaintiff.

The fact that the plaintiff placed her hand where it was liable to injury if the door was closed is not negligence, where it does not appear that she did so voluntarily and independently of the sudden motion of the train.

Where the servants directed the plaintiff to remain on the platform, her failure to attempt to return to her seat was not negligence, since she had a right to rely on their judgment, and act upon their direction, in the absence of danger in so doing, so obvious that a reasonably prudent person would not have done so.

An injury to a passenger while on a R. R. train is "prima facie" negligence, whether caused by defects in the machinery or by the acts of the servants operating the machinery.

Evidence showing that the train had reached the passenger's destination before the plaintiff went on the platform; that the train had so far slowed up that the conductor and brakeman were both off the train, and that the express purpose of its stopping was to let the plaintiff off, and that the brakeman told her to remain on the platform, and that she was not attempting to get off when injured. *Held*, sufficient to support a finding for the plaintiff on the issue of contributory negligence. *Kentucky & Indian Bridge Co.* v. *Quinkert*, Appt Ct. of Ind., Sept. 1891, 10 Ry & Corp. L. J. 372.

Negotiable Instruments — See Bills and Notes—Principal and Agent 2.

New Brunswick—See Statute 2.

Nolle Prosequi — See Criminal Procedure 5.

Notes—See Bills and Notes.

Notice—See Contract 7.

Nova Scotia—See Banks 5—Municipal Corporation 8—Negligence 13—Wills 5.

NUISANCE.

1. Asylum for the Insane—Action to Compel Discontinuance of Erection.

Held, where buildings are being erected for a legal and proper object, such as a hospital for the insane, and there is no proof that they are causing or likely to cause any injuries to the properties of the neighbours or any diminution of their value, owing to causes for which the proprietors of the asylum would be liable, adjoining proprietors have no right to ask by injunction that the erection of the buildings be discontinued. *Crawford et al*, v. *Protestant Hospital for the Insane* M. L. R. 7. Q. B. 57.

2. House of Ill-Fame—Damages.

Held, that where complainant's house is rendered unfit and uncomfortable for respectable occupation by reason of the proximity of a house of ill-fame, whose inmates are boisterous and indecent, he may maintain an action to restrain the nuisance, and to recover damages occasioned thereby. *Crawford* v. *Tyrrell* N. Y. Court of Appeals Oct. 6, 1891.

Obstruction—See Damages 4.

Officers, Liability of Municipal—See Municipal Corporation 4.

Officers, Misconduct of Municipal—See Municipal Elections.

Officer, Obstructing Town — See Taxation 2.

Oils—Storage of—See Municipal Corporation 5.

Onus Probandi—See Insurance 9.

Open Policy—See Insurance 9.

Ordinance (Municipal)—See Municipal Corporation 5.

Parol Evidence — See Account — Evidence 3.

PARTNERSHIP.

1. Assignment for Benefit of Creditors.

The assignees for the benefit of creditors of a deceased partner, under an assignment which did not purport to

convey any firm property, have no right to the firm assets as against an officer who seizes the same under attachment in an action against the surviving partner as such by creditors of the firm. *Van Kleck* v. *McCabe*, Mich. 49 N. W. Rep., 872.

2. Accounting.

Where one of two partners was employed by a third person on a salary, which he did not put into the partnership business, the other, who devoted his whole service to the joint business is entitled to pay for such services without any agreement therefore. *Morris* v. *Griffin*, Iowa 49 N. W. Rep., 846.

3. Banking Business.

W. and O. having dissolved partnership in the banking business under the name of "W. and O." the business was continued under the firm name "of W. & Co.," it being generally understood that A., a brother of W., and an employee in the bank, became a partner. A. not only did not deny that he was not a partner but on several occasions stated that he was. He was present, and made no objection when W. ordered the fact of their partnership to be published in a newspaper, which was done; and he did other acts in carrying on the business to cause the belief that he was a partner: *Held*, that not only was A. estopped to deny the partnership but the jury were warranted in finding its existence as a fact. *Wright* v. *Weimeister*, Mich. 49 N. W. Rep., 870.

4. Authority to Give Note—Presumption—Evidence.

One member of a partnership formed for the purpose of conducting a theatre *prima facie* has no authority to give a firm note.

Where one buys the note of such a firm knowing the nature of the partnership business, knowing that it was written and signed by the irresponsible member of the firm, and with knowledge of a course of dealing which pointed to the other partner alone as the financial representative, he takes the note at his peril, though there was no actual bad faith on his part. *Pease* v. *Cole*, Connecticut Supreme Court of Errors Aug. 25, 1885.

5. Dissolution.

Where co-partners who have had differences arising out of their joint business, voluntarily and at arms length enter into a written contract dissolving their partnership relations, and by its terms make pure and detailed arrangements for a separation and division of their joint property, and provide fully for the payment of the firm debts,

Held, that in the absence of allegation and proof to the contrary, all of such differences will be presumed to have been merged and adjusted by the contract of dissolution. *Little* v. *Little*, N. Dak. 49 N. W. Rep. 736.

Passengers — Ejection of — See Carriers, 1.

PATENT.

1. Prolongation of—Non-user of Invention — Presumption of non-Utility Rebutted.

Where an invention has not been brought into use during the term of the letters patent, but such non-user is satisfactorily accounted for, and the invention is one of great merit, an extension may be granted. *Southby's Patent*, 1891, App. Cas. 432.

2. Prolongation of — Practice — Time for Filing Petition.

Where a petition for prolongation has not been presented within six months before the patent, which had been granted in 1877, had expired;

Held, that it is excluded both by 5 and 6, Wm. 4, c. 83, and also by 2 and 3 Vict., c. 67.

Brandon's Patent (9 App. Cas. 589) and Jablochkoff's Patent (ante p. 293), distinguished.

Marshall's Patent, 1891, App. Cas. 430.

PAYMENT.

Acceptance of Note.

The acceptance of a note "for," or "on account of" or "in payment of"

an existing debt, in the absence of an express agreement or understanding that it is taken in satisfaction or discharge of the debt, is to be understood and be interpreted as a conditional payment only. The mere recital in a receipt or other writing of the fact of payment by note is not, by itself, sufficient evidence of absolute payment, and that the creditor assumes the risk of its being paid, but is upon the implied understanding that the note will be paid, and only shows that when paid it shall be a discharge of the original debt. *Combination Steel & Iron Co.* v. *St. Paul City Ry. Co.*, Minn. 49 N. W. Rep. 744.

PEDDLERS.

LICENSES—SALE BY SAMPLES.

Where manufacturers of household goods of West Virginia sent their agent into North Carolina to sell goods by sample on the instalment plan, the goods to be delivered to cash purchaser by the agent afterwards, the fact that the goods were to be delivered by the agent does not make him iable to pay tax as a peddler, as prescribed by Laws N. C. 1889, ch. 216, § 24. *In re Spain*, U. S. C. C., (N. Car.), 47 Fed. Rep. 208.

PEINE CAPITALE—See Confiscation.

PERFORMANCE OF CONTRACT — See Contract 2.

PERSONAL INJURIES—See Evidence 4.

PHYSICAL EXAMINATION OF PARTY —See Trial.

PISTOL—See Weapon.

PLEADING—See Negligence 11, 16—Injunction 3.

POLICY—OPEN—See Insurance 9.

POWER OF ATTORNEY—See Principal and Agent 3.

PRACTICE — SEE ALSO NEGLIGENCE 7—QUO WARRANTO—INJUNCTION—PLEADING.

1. MUNICIPAL CORPORATION—LIEN FOR STREET IMPROVEMENTS.

In a suit by a contractor to enforce a lien for street improvement on the abutting lots, the complaint is sufficient if it pleads all the acts done by the municipal officers, and all acts essential to show their authority, and need not set forth their proceedings, nor incorporate by reference or otherwise, the contract under which the work was done, nor any other instrument, except the final estimate or assessment. *Van Sickle* v. *Belknap*, Ind. 28 N. E. Rep., 305.

2. ELECTION PETITION—SOLAR TIME —TIME FOR FILING.

Motion by the petitioner to disallow the preliminary objection to the petition filed by the respondent. The objection was that the petition was filed after office hours on the last day for filing it.

Maclennan, J. A. The preliminary objection must be disallowed. The rule as to the keeping the offices of the court open from ten to three, or from ten to four, as the case may be, is merely directory and for the guidance of the officials, and does not forbid them to keep their offices open to a later hour, if they think fit or if the business requires it. See *Rolker* v. *Fuller*. 10, U. C. Q. B. 477. This petition. therefore, was in time, the office being still open, and the petition having been received by the officer, although it was after three o'clock. I am, moreover, of opinion that the petition was in time in any view of the Act and the rule. It was received by the officer as of that day. and Mr. Cameron, who filed it, swears that it was then not as much as a quarter past three by the public clocks. The officer's act in receiving and filing the petition on that day, and granting a certificate of the fact must be upheld. unless displaced by clear and satisfactory evidence. It is common knowledge that the time kept by the public clocks in Toronto is standard time, and that standard time is seventeen and one half minutes faster than solar time. That being so, the petition was in reality filed before three o'clock, and was in time according to the strictest construction of the rule. There can be no doubt that upon a question like this a party has the right to insist, in the

absence of legislation or a rule of court, that solar time should govern. *Curtis* v. *Marsh*, 3 H. & N. 866). The objection will be disallowed with costs. *Re North Bruce Dominion Election Petition. Muir* v. *McNeil*, Ontario, Practice Court.

PRESUMPTION—See Partnership 4.

PRINCIPAL — LIABILITY OF — See Negligence 14.

PRINCIPAL AND AGENT.

1. RATIFICATION OF AGENT'S ACTS.

A principal, if he receives and retains notes which were obtained by his agent under certain stipulations, is bound by the stipulations, though they were unauthorized. *Wheeler and Wilson Manufacturing Co.* v. *Aughey*, Penn. 22 Atl. Rep. 668.

2. NEGOTIABAE INSTRUMENT—*Bona Fide* HOLDER FOR VALUE.

Held, Abuse of power or betrayal of trust by an agent, who endosers a bill of exchange for his principal, does not affect the recourse against the latter of a *bona fide* holder for value who had no knowledge of such abuse or betrayal. *The Quebec Bank* v. *Bryant Powis & Bryant et al*, Superior Court Quebec Feb. 6, 1891. 17 Q. L. R. 98.

3. POWER OF ATTORNEY — CONSTRUCTION.

Held, 1st. A power of attorney whether bestowed by a written instrument, or inferred from a train of circumstances and acts, must be construed strictly.

2nd. The power of attorney recited at full length in *Quebec Bank* v. *Bryant, Powis and Bryant* (*Limited*), at pages 83-85 *supra*, does not give the agent the power to borrow money for the principal.

3rd. No action will be in favour of the pledgee, against the indorsers of notes pledged as security for a loan declared invalid. *La Banque du Peuple* v. *Bryant, Powis and Bryant et al*, Superior Court Quebec. Feb. 6, 1891. 17 Q. L. R. 103.

PRINCIPAL AND SURETY.

1. JOINT PROMISSORY NOTE.

In an action at law upon a joint promissory note, all the makers except one being sureties, a verdict against some of the sureties for the whole amount of the note, and against one of them for half that amount, is contrary to law. The plaintiff may, however, enter judgment against all the sureties for the lesser sum, and direction is given accordingly. *Jones* v. *Lewis*, Ga. 13 S. E. Rep. 578.

2. GUARANTEE—BANKRUPTCY AND INSOLVENCY—DIVIDENDS.

The plaintiff's testator gave a guarantee in the following form: " In consideration of the goods sold by you on credit to M., and of any further goods you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than $2,500.

Held, that this was a guarantee to secure an ultimate balance and that, M. having made an assignment for the benefit of creditors, the plaintiff could not rank on his estate in respect of the $2,500 paid under the guarantee. *Martin* v. *McMullen*, Ontario C. A.

PROCEDURE—See Practice—Criminal Procedure.

PROFANITY—See Criminal Law 1.

PROPERTY—INJURY TO—See Damages 4.

PROXIMATE CAUSE—See Negligence 15.

PUBLIC MONEY—See Statute 1.

PUBLIC USE—See Eminent Domain.

PUBLIC WORKS—See Damages 4.

PUBLIC WORSHIP — See Criminal Law 7.

PURCHASER—RIGHTS OF — See Sale of Goods 1.

QUO WARRANTO—PROCEDURE.

In proceedings in *quo warranto* the respondent must answer precisely by

what statutory authority he exercises the functions of an office. *State* v. *Tillma*, Neb., 49 N. W. Rep. 806.

RAILWAYS—See also Master & Servant—Negligence--Electric Railways.

1. Continuing Trespass by Elevated Railroad—Injunction.

After the erection of an elevated railroad structure, and while the road was in full operation, an owner of abutting land which had been depreciated in value by the presence of the road, conveyed the same: *Held*, that the continued operation of the road was a continuing trespass; that all the vendor's original rights in the easements appurtenant to the land passed to the vendee, regardless of the price paid for the title, and that the vendee became entitled to all the remedies, legal and equitable, against the trespasser which the vendor might have exercised if such conveyance had not been made. *Lena Papenheim* v. *The Metropolitan Elevated Ry. Co. and the Manhattan Railway Co.*, New York Court of Appeals, October 1891, 24 Chicago L. News 57.

2. Construction of Road — Damages for Using Street.

Neither by express grant nor by necessary implication has the E. T., V. & G. Ry. Co. any authority to construct and operate its railway longitudinally upon the public streets of the city of Macon.

In an action by the owner of abutting property against the company for damage to the freehold and for diminishing the annual value of the premises for use there can be no recovery as to the freehold where the market value has been increased, but for loss of rents and profits there may be a recovery, notwithstanding such increase in the market value. A wrong done cannot set off increase of market value, caused by his wrongful act, against loss of rents and profits occasioned thereby. *Davis* v. *East Tennessee V. & G. Ry. Co.*, Supreme Court of Georgia, July 1891, 10 Ry. & Corp. L. J. 393.

3. Expropriation of Land — Injunction.

On a motion for an interim injunction to restrain a railway company from taking possession, under a warrant obtained from a county judge, of certain land different from what was shown on the company's plan deposited under S. 10, S-S. 2, of R. S. O. c. 170:

Held, following *Murphy* v. *Kingston and Pembroke Railway Co.*, 17 S. C. R 582, that the land could not be taken as it was not shown on any plan so deposited.

Held, also, that, as the notice given under S. 20 S. S. 1, of R. S. O. c. 170 offered certain privileges in addition to cash as compensation, and as the land-owners were entitled to have their compensation all in cash, there was no proper notice and no proper surveyor's certificate, and, as these were at the very foundation of the county judge's authority, he had acted without jurisdiction.

Held, also, that in the case of a limited jurisdiction such as that of the judge in this case, the facts which give jurisdiction and without which the powers given by the act never arise must not be absolutely presumed to exist because the judge has acted as if they did; and if disputable then the warrant based upon them must stand or fall with them. *Brooke* v. *Toronto Belt Line Railway Co.* Ontario, High Court of Justice Ch. D. Aug. 25, 1891.

4. Railway Act of Canada, 42 Vic. ch. 9 — Award of Arbitrators — Prolongation of Delay for Making Award.

Held :—(1) Under the Railway Act of 1879, 42 Vic. ch. 9 that where the arbitrators appointed to fix the compensation for a property, adjourned to a day subsequently fixed for making the award, without stating in their minutes that such adjournment was for the purpose of making an award, and at their subsequent meeting the three arbitrators and counsel for the parties were present, and no objection was made to the regularity of the meeting, such absence of objection

constituted a tacit ratification of the proceedings up to that time.

(2) That an adjournment to enable one of the arbitrators to visit the property, without any date being fixed for the next meeting, did not terminate the arbitration; and that an award made on a subsequent day, the three arbitrators being presents, was a valid award.

(3) That a notorial award is not necessary in the case of an arbitration under the Railway Act of 1879; that the entering of the amount awarded in the minutes constituted the actual awatd; and the fact that on a subsequent day the award was made out in notarial from and signed by two of the arbitrators the other arbitrator not being present, did not invalidate the award as previously made and entered in the minutes. *Ontario and Quebec Railway Co.* and *Les Curé et Marguilliers de l'Œuvre et Fabrique de Ste Anne du Bout de l'Isle*, M. L. R. 7 Q. B. 110.

RAILWAY ACT OF CANADA — See Railways 4.

RAILWAY CROSSING—See Negligence 9.

RATIFICATION—See Master and Servant 3—Principal and Agent 1—Sale of Goods 3.

REASONABLE DOUBT—See Criminal Procedure 1.

REFUSAL TO ANSWER—See Judgment Debtor.

RELATIVES—See Wills 8.

REMOVAL OF INSURED PROPERTY—See Insurance 6.

RES JUDICATE—See Corporations 4.

RESPONSABILITÉ—See Negligence 2.

RESTRAINT OF TRADE—See Contracts 4—Trade Union.

RESULTING TRUST—See Trust.

RETAIL, SALE OF LIQUOR BY—See Liquor 1.

SALE OF GOODS.

1. RIGHTS OF PURCHASER.

In the absence of a breach of warranty or fraud, the mere fact that goods sold are worth less than the contract price will not authorize the recovery by the purchaser of the excess of the price so paid over the actual value of the goods. *Weller* v. *Becktell*, Ind. 28 N. E. Rep., 333.

2. CONSTRUCTION.

B. made a written contract with defendants, agreeing to sell them a certain number of staves, of his "first manufacture," to be delivered f. o. b. cars at a certain point: *Held*, that title to the first staves manufactured did not on their manufacture pass at once to defendants without delivery, or some act designating them as the staves intended to be delivered. *Fordice* v. *Gibson*, Ind. 28 N. E. Rep., 303.

3. SUNDAY CONTRACT — RATIFICATION.

A contract of sale made on Sunday, with no delivery of the property then or afterwards, is void although the parties intended to waive delivery. Ratification by the vendee alone, made by allowing a credit on the vendor's account, it not appearing that the vendor ever took or claimed the benefit of such credit, will not suffice to validate the sale. *Calhoun* v. *Phillips*, *Ga.*, 13 S. E. Rep. 593.

4. RIGHTS OF VENDOR.

A written contract for the sale of certain lumber provided that the title and right of possession of the lumber should remain in the vendor until full payment should be made. The contract was signed by the parties, and duly recorded, but before payment in full the vendees made an assignment, and the assignee took possession thereof as assets of the vendees. *Held*, in replevin by the vendor against the assignee, that the contract was one of conditional sale and that plaintiff was entitled to possession of the lumber, although the contract provided that it was at the sole risk of the vendees, who were to have it insured, and to assign the policy to the vendor as collateral security. *Wadleigh* v. *Buckingham*, Wis., 49 N. W. Rep. 745.

5. CONTRACT—COMMISSION.

A finance company agreed to nego-

tiate the sale of $800,000 of railroad bonds for a commission of 10 per cent. payable in the bonds. Afterwards the parties to this agreement entered into an agreement with a third person, in which the latter agreed to make a loan to be secured by pledge of part of these bonds, and it was provided that $80,000 of the bonds should be appropriated to the finance company in payment of its claims for commission. *Held*, that the second agreement passed title to the $80.000 of bonds to the finance company, although it had not then negotiated a sale of the $800,000 of bonds. *American Loan and Trust Co.*, v. *Toledo, C. & S. Rq. Co.*, U. S. C. C. (Ohio), 47 Fd, Rep. 343.

6. Sale of Goods by Weight—Contract where perfect, art. 1474 C. C., etc. (Quebec).

Held (1) Per Ritchie C. J., Strong, Fournier, and Patterson, JJ., affirming the judgment of the court below, that where goods and merchandize are sold by weight, the contract of sale is not perfect and the property of the goods remains in the vendor, and they are not at his risk until they are weighed, or until the buyer is in default to have them weighed; and this is so even where the buyer has made an examination of the goods and rejected such as were not to his satisfaction.

Held, also, per Ritchie C. J., Fournier and Taschereau, JJ., that where goods are sold by weight and the property remains in the possession of the vendor, the vendor becomes in law a depositary; and if the goods while in his possession are damaged through his default and negligence, he cannot being an action for their value. *Ross* v. *Hannan*, Supreme Court of Canada, June 22, 1891.

7. Contract—Damages.

On March 22nd, 1889, defendants by telegraph offered plaintiff $5.00 per barrel for 1000 barrels flour, to be delivered on 15th April following, which offer plaintiff accepted. By error plaintiff shipped the flour on March 30th and drew on defendants for the price. Defendants notified plaintiff that shipment was to be made on 15th of April only, and plaintiff admitted the mistake, offered to pay all extra charges, and by the same telegram asked defendants, "will you accept this, or shall we take the flour and complete contract as made?" Defendants answered, "consider this tender cancels contract altogether." On the 18th April, plaintiff tendered the flour and draft to defendants, and on 8th June sold the flour for $4.25 per barrel and instituted an action to recover $875.42.

Held, that there was no recision of contract, and judgment rendered in favour of plaintiff for amount of difference between contract price and amount sold for. *Kehlor* v. *Mayor et al*, Superior Court, Montreal, March 19, 1890, 35 L. C. J. 25.

8. Of Land—Error as to Accessory of thing Sold—Damages.

The appellant purchased from respondents at public auction two lots of land on a certain street, and signed a memorandum of sale in which reference was made to the official plan, on which the street was marked as being 51 feet wide at that place. On the surveyor's plan prepared for the sale, the street was also traced as 51 feet in width, but by inadvertence, on the lithographed copies distributed at the auction sale, the part of the street where the lots were situated was represented as of uniform width with the upper part of the street, which was 60 feet wide. In the advertisements, and in the auctioneer's announcement at the sale, the street was also described generally as 60 feet wide. When the error was discovered the respondents (vendors) offered to cancel the sale if the appellant (purchaser) had been misled by the error on the lithographed copies, but the appellant refused, and brought an action of damages.

Held, affirming the judgment of Davidson, J., M. L. R., 3 S. C. 403, in an action of damages by the appellant (purchaser), that he having received the full number of square feet bargained for, having refused to relinquish the bargain, having signed the me-

morandum of sale in which reference was made to the homologated plan showing a street 51 feet wide, and moreover no specific damage being proved, an action of damages could not be maintained. *Inglis* v. *Phillips*, M. L. R., 7 Q. B. 36.

9. Of Goods—Latent Defect—Art. 1523 C. C.—Reasonable Delay for Complaint as to Quality—Evidence.

Held : — (1) That sourness and unsoundness in salted salmon—defects which were discoverable by smell when the goods were opened and inspected—are not latent defects against which the seller is obliged by law to warrant the buyer.

(2) Where goods are sold without warranty and subject to inspection, the buyer is bound to make an inspection of the goods within a reasonable time after delivery and an action brought five months afterwards, complaining of the quality of the goods received by him, is not exercising due diligence.

(3) Where the buyer pretended that the sale was made with warranty, and the agent of the seller immediately wrote that before the sale he had read his principal's letter to the buyer, stating that there would be no warranty, this fact, in the absence of any immediate and positive denial by the buyer, furnishes a strong presumption of the truth of the agent's statement. *Vipond et al.* v. *Findlay et al.*, Superior Court. Montreal May 29, 1891. 7 M. L. R. (S. C.) 242.

(*Note.* Civil Code art. 1523. "The seller is not bound for defects which are apparent and which the buyer might have known of himself."

Mr. Justice Tait stated in the course of judgment that "although it is hardly necessary to go into the English law, as this case must be decided according to ours, yet it seems to me there is no substantial difference, and if anything, the English law is less favourable to the purchaser," citing Benjamin on Sales (3rd Eng. Ed.) p. 633, 649, 650. Campbell on sales p. 304.)

10. Statute of Frauds—Delivery and Acceptance.

Action to recover the price of a separator and drawing belt.

Defence, no agreement in writing, no part payment, no delivery and acceptance, and no receipt of the goods as required by the 17th section of the Statute of Frauds.

The only ground attempted to be proved by the plaintiff to establish his right of action was that there was a sufficient delivery and acceptance to take the case out of the provisions of the statute.

After some negotiations the plaintiff shipped the machine, taking his chance that it would suit the defendant; he showed that the defendant examined the separator on the car in his, the plaintiff's, presence and that of his agent, Ross ; that a couple of days afterwards the defendant assisted Ross and one Himan to move the separator from the car, in order that an engine standing on the same car and purchased by Himan might be removed therefrom ; he did nothing more afterwards with the machine.

The plaintiff claimed that when the defendant had worked with Ross and Himan to move the machine from the car, he had done so for the purpose of taking possession of it for himself. The defendant denied this and stated that Himan, who had to unload his engine, had passed by his place and had asked him to come with him to see the machine and that he had assisted him as a friendly act.

The articles were to be paid for by three promissory notes, which contained a condition that the title and possession of the property was to remain vested in the plaintiff until the notes were paid : The notes were never signed.

Held, that delivery and acceptance had not been proved. Verdict entered for the defendant. *Livingston* v. *Robertson*, Manitoba Queen's Bench, 19 Oct. 1891.

Samples — See Criminal Law 8—Peddler.

Salvage—See Admiralty.

Saw-Mill—See Master & Servant 6.

Service — Agreement for — See Master & Servant 9.

SERVICE.

OF WRIT OF SUMMONS — CONSTRUCTIVE SERVICE — JUDGMENT BY DEFAULT—SETTING ASIDE.

An order for constructive service of a writ of summons on the defendant was granted on affidavit of the sheriff of the county of Victoria that he had sent his deputies at least three times to the defendant's house, but the defendant could not be found, and, from diligent inquiry, he believed that he was avoiding service. Judgment by default having been entered, on the constructive service effected under this order, the defendant applied to open up the judgment, making affidavit (1) that he had no knowledge or intimation of the issue of the writ; (2) that he never evaded service; (3) that during the time referred to in the sheriff's affidavit he was working on the railway about nine miles from his home; (4) that he had a good defence to the action, particulars of which were set out.

An appeal from the judgment of Tremaine C. C. J., refusing to open up the judgment, was allowed with costs. *McCurdy* v. *McLeod*, Supreme Court of Nova Scotia.

SEWERS — See Municipal Corporations 1. 3.

SHERIFF.

LIABILITY FOR DEPOSIT.

A sheriff who had in his charge a prisoner arrested by him on a warrant on which bail was indorsed, is liable to the State for money received by him on deposit from such prisoner in lieu of bail, though there is no statute permitting the sheriff to receive such deposit, since the transaction if illegal, can never be questioned by the prisoner, who participated therein, and the sheriff is estopped to deny the legality of the transaction, as against the State, by the fact that he received the money. *State* v. *Scanlon*, Ind, 28 N. E. Rep. 426.

SLANDER—See Libel and Slander, 2 —Evidence, 1.

SOLAR TIME—See Practice, 2.

STATUTE.

1. APPROPRIATION OF PUBLIC MONEY.

Whether or not money appropriated by the legislature was intended for a public or a private purpose must be determined from the statute itself, and from such considerations as the court can judicially notice, and it is not competent to take proof and determine the question as a matter of fact. *Waterloo Woolen Manufacturing Co.* v. *Shannahan*, N. Y., 28 N. E. Rep. 358.

2. REPEAL OF—DISTRIBUTION OF INTESTATE ESTATE—(New-Brunswick).

The legislature of New-Brunswick, by 26 Geo. 3, c. 11, s. s. 14 and 17, re-enacted the Imperial Act, 22 and 23 Car 2, c. 10 (Statute of Distribution), as explained by s. 25 of 29 Car. 2, c. 3, (Statute of Frauds), which provided that nothing in the former act should be construed to extend to estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal estates as heretofore.

When the statutes of New-Brunswick were revised in 1854, the act. 26 Geo. 3, c. 11, was re-enacted, but, s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme coverte* her next of kin claimed the personality on the ground that the husband's rights were swept away by this omission.

Held, per Ritchie, C. J., Fournier and Patterson, JJ., that the right of a husband to the personal property of his deceased wife does not depend on the statute of distribution but he takes it *jure mariti*.

Per Strong, J., that the repeal by the revised statutes of 26 Geo. 3, c. 11, which was passed in the affirmance of the Imperial Acts, operated to restore s. 25 of the Statute of Frauds as part of the common law.

Per Gwynne, J., when a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial courts, and *a fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. 3, c. 11 (N. B.), it was not necessary to enact the interpreting sec-

tion of the Statute of Frauds, and its omission in the revised statutes did not affect the construction to be put upon the whole act.

Held, per Ritchie, C. J. Fournier, Gwynne, and Patterson, JJ., that the married woman's Property Act of New Brunswick (C. S. N. B., c. 72), which exempts the separate property of a married woman from liability for her husband's debts and prohibits any dealing with it without her consent, only suspend's the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the act had never been passed.

The Supreme Court of New-Brunswick, while deciding against the next of kin on his claim to the residue of a *feme coverte*, directed that his costs should be paid out of the estate. On appeal, the decree was varied by striking out such direction. Appeal dismissed with costs. *Lamb* v. *Cleveland*, Supreme Court of Canada, May 12, 1891.

STATUTE OF DISTRIBUTION — See Statute 2.

STATUTE OF FRAUDS—See Sale of Goods 10.

STOCK—See Corporations 2.

STOCKHOLDERS — See Corporations 1. 4.

STORAGE OF OIL — See Municipal Corporation 5.

STREET—See Railways 2.

STREET CAR — See Negligence 6. 12.

STREET, LIGHTING—See Municipal Corporation 6.

SUBSCRIPTION—See Contract 1.

SUBWAYS—See Electricity 2.

SUNDAY CONTRACT — See Sale of Goods 3.

SURETY—See Principal and Surety.

SWEARING (False)—See Evidence 6.

TAXATION—SEE ALSO CONSTITUTIONAL LAW 2.

1. EXEMPTION — CHARITABLE INSTITUTIONS.

The word "taxation" in Acts Ky. 1869-70, Vol. I, p. 181, which provides that the property of a certain charitable institution "shall be exempt from all taxation by State or local laws for any purpose whatever", does not embrace an assessment for street improvement. *Zabel* v. *Louisville Baptist Orphans' Home*, Ky., 17 S. W. Rep. 212.

2. OBSTRUCTING COLLECTION.

Pen. Code, Cal. §. 428, which provides that every person who obstructs or hinders any public officer from collecting taxes "in which the people of this state are interested" is guilty of a misdemeanor, does not apply to the act of obstructing a town officer in the collection of a town tax. *Ex parte Sam Wah*, Cal., 27 Pac. Rep. 766.

3. BANKS — NATIONAL — DEDUCTION OF INDEBTEDNESS.

The owner of National Bank stock, in listing his shares for taxation is not entitled to deduct his *bona fide* indebtedness from the value of such shares of stock.

The decision on the former hearing of the case, reported in 25 Nebraska, 468, overruled. *Bressler* v. *Wayne County*, Nebraska Supreme Court, Sept. 16, 1891, 44 Alb. L. J. 400.

4. ELECTRIC LIGHTING COMPANIES —MANUFACTURE— EXEMPTION — PENALTIES.

An electric lighting corporation was incorporated in 1880, under chapter 37, Laws of 1848, relative to the formation of gas-light companies, which companies were, by chapter 512, laws of 1879, authorized to "use electricity instead of gas." The corporation in question never produced anything but electricity.

Held, that it was not a manufacturing corporation, and as such exempt from taxation.

Section 3, chapter 361, laws of 1881, imposed the tax in question upon "every corporation; * * * except manufacturing corporations;" further providing that such "exception shall not be taken to include gas companies." Chapter 353, laws of 1889, amended said section 3 by excluding from the exemption "electric or steam-heating, lighting and power companies."

Held, that the said amendment of 1889 was not a legislative declaration that electric companies were previously within the exemption.

Although a part of the relator's capital stock was invested in patent rights, no deduction should for that reason be made from the tax.

Sec. 2, chapter 361 of law of 1881 provides that if a company is in default in making a proper report to the comptroller, and in paying the tax, the comptroller shall add ten per cent for each and every year for which such report was not furnished, or for which said tax was not paid,

Held, that this provision did not mean that ten per cent should be added to every's year tax that was in default. *People Ex Rel. Edison Electric Illuminating Company of New York* v. *Wemple*; *People Ex Rel. Brush Electric Illuminating Company of New York* v. *same*. New York Supreme Court. 1891, 44 Alb. L. J. 393.

TELEGRAPH COMPANIES.

1. Failure to Deliver Message.

A transient visitor to a town or city, who furnishes to the company no definite address, is not a person residing in the same or within one mile of the station, in contemplation of the act of 1887, subjecting telegraph companies to a forfeiture for failing to deliver despatches to residents. *Moore* v. *Western Union Tel. Co.*, Ga. 13 S. E. Rep. 640.

2. Limiting Liability.

Under the provision of section 12 ch. 89*a*, Comp. St., a printed stipulation on a message blank, to the effect that a telegraph company should not be liable for a failure to deliver an unrepeated message in a sum greater than that paid for the service, is no defence to an action for damages for delay in delivering an unrepeated message. *Western Union Tel. Co.* v. *Lowrey*, Neb., 49 N. W. Rep., 707.

Telephone—See Electricity 1.

Torts—See Master & Servant 3.

Trade—Restraint of—See Contracts 4—Trade Union.

TRADE UNION.

Unlawful Combination — Restraint of Trade.

Held, that where the main objects of a trade union are in restraint of trade it is an unlawful combination, and that an action by one of its members for enforcing an obligation to pay him sick money is therefore incompetent. *Wood* v. *Engineers' Society*, Sheriff Court of Ayrshire. 7 Scot. Law Rev. 321.

Tramway (Elevated) — See Eminent Domain.

Transmissible Interest — See Wills 8.

Trespass (Continuing)—See Railroad 1.

TRIAL.

Physical Examination of Party.

Under the common law, the courts of the U. S. have no power, in an action for personal injuries, to order before the trial an examination of the body of the injured person. *Union Pac. Ry. Co.* v. *Botsford*, U. S. Supreme Court May 25, 1891, 33 Cent. L. J. 362.

(*Note*. To the latter report an extensive note is attached reviewing cases on this point and citing authorities which appear to be in conflict, though the majority of them concede the right to compel physical examination.)

TRUSTS—See also Wills.

Creditors' Deed — Construction of—Resulting Trust.

The partners in a business, by a deed reciting the inability of the firm to pay their creditors, assigned the business and property of the firm to trustees upon certain trusts for the benefit of the creditors of the firm. The deed contained no provision in the event of there being a surplus.

Held, reversing the decision of the court of appeal and restoring the decision of Kekewich, J. 45 ch. D. 38, that upon the natural and true construction of the deed there was an absolute disposal of all the proceeds

to be realized for the benefit of the creditors, and that no resulting trust for the benefit of the assignors could be implied. *Smith* v. *Cooke*, *Story* v. *Cooke*, 1891 App. Cas. 297.

TURN TABLE—See Negligence 5. 8.

UNVOIDABLE DELAY—See Contract 8.

VENDOR—RIGHTS OF— See Sale of Goods 4.

VERDICT—See Criminal Procedure 2.

Votenti non fit Injuria—See Master and Servant 11.

WAIVER OF CONDITION—See Insurance 5. 7.

WEAPONS.

CARRYING CONCEALID WEAPONS— INTENT IMMATERIAL.

One who repaired a sheriff's pistol, and carried it back in his pocket, was guilty of carrying a concealed weapon, since the statute makes the fact and not the intent criminal. *Strahan* v. *State*, Supreme Court of Mississipi, March 2, 1891. 24 Chicago L. N. 84.

WHOLESALE, SALE OF LIQUOR BY— See Liquor 1.

WIFE—POLICY IN FAVOUR OF—See Insurance 1.

WILLS.

1. JOINT WILL—VALIDITY.

A joint will executd by two brothers, revocable at the will of either, is valid. *Hill* v. *Harding*, *Ky.*, 17 S. W. Rep. 199.

2. CONTEST OF

In the contest of a will by some of testator's children, who had been disinherited by him, where the sole issues were testator's mental incapacity and undue influence on the part of the favored children, the testimony of a witness, who would have taken by inheritance had no will been made, that one of proponents, the favored children, stated to her (witness) that testator had requested him to give something to witness and her sister, was immaterial. *Chaddic* v. *Haley*, Tex., 17 S. W. Rep. 233.

3. CONSTRUCTION — SHARES — DEBENTURE STOCK.

A bequest of all a testator's "shares" in a public company will not pass debenture stock.

Dictum of *James*, L. J., in *Attree* v. *Hawe*, (9 Ch. D. 349), that debenture stock " is of the same nature as other stock of the company " and is " nothing but preference stock with a special preference " discussed and explained. *In re Bodman*, *Bodman* v. *Bodman*, 1891, 3 Ch. 135.

4. CONSTRUCTION.

A will which made no disposition of the personal estate, and had no residuary clause, contained the following provision : " I authorize my executor to sell and convey " certain land " for the purpose of discharging all my debts." *Held*, that the direction did not indicate an intention that the personalty should be relieved from its primary liability for the payment of the debts, and therefore the executor could not sell it to the widow when they both knew that there was more than enough personalty to pay the debts. *Sweeney* v. *Warren*, N. Y. 28 N. E. Rep., 413.

5. CODICILS—REVOCATION—REVIVAL —NOVA-SCOTIA LAW.

Where by a codicil dated the 21st of July, 1882, expressed to be a codicil to his will of the 17th of July, 1880, the testator confirmed the said will, and it appeared that the said will consisted not merely of the document of the 17th of July, 1880, but also of an intermediate codicil revoking a particular bequest therein.

Held, that though a reference simply to the date of the earlier document was not sufficient in itself to restrict the confirmation to that particular document, yet other words and surrounding circumstances could and did convey such an intention with reasonable certainty, and accordingly the will of the 17th of July after confirmation was no longer affected by the partial revocation made by the intermediate codicil. *McLeod* v. *McNab*, 1891, App. Cas. 471.

6. Revocation—Evidence.

Express revocation of a will can only be shown by evidence of some of the Acts designated by the Statute, and unless revoked by another instrument, as thereby prescribed, the will itself must be destroyed, or bear some marks of defacement or spoliation, manifesting the intent to revoke. The provisions of the Statute must be complied with, and it is not enough that the failure to do so is attributable to the fraud of an interested party. Revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator, and hence a valid sale of an estate devised will effect a revocation *pro tanto*. An inoperative conveyance may so operate if there be an intention to convey. But a contract or conveyance executed by one who is mentally incapacitated, or adjudged void for fraud or undue influence, is ineffectual as a revocation. *Graham* v. *Birch*, S. C. Minnesota, 33 Cent. L. J. 336.

7. Trust.

The testator by his will, gave the residue of his estate to his executor and trustees in trust, to obtain an act of incorporation of an institution to be known as the "Tilden Trust," "with capacity to establish and maintain a free library and reading-room in the city of New-York, and to promote such scientific and educational objects as said executors and trustees may more particularly designate," and provided that in case such institution should be incorporated satisfactorily to them within the life of the survivor of two specified lives in being, the executors and trustees were authorized to organize the corporation, and convey or apply to its use the residue of his estate, or sc much as they should deem expedient. The will further provided that in case said institution should not be so incorporated, or if for any reasons the executors or trustees should deem it inexpedient so to convey or apply such fund, or any part thereof, then they were authorized to apply the same "to such charitable, educational, and scientific purposes" as in their judgment will render the same "most widely and substantially beneficial to the interests of mankind." The trustees obtained the charter as thus required, and conveyed it to the residuary estate. *Held*, that the trust was void for want of a certain designated beneficiary, for uncertainty and indefiniteness in the objects thereof, and for excess of discretion in the trustees. *Tilden* v. *Green*, N. T. Ct. App., Oct. 1891, 44 Alb. L. J. 368.

8. Construction — "Relatives Named" "Transmissible Interest."

A testator gave his general estate to his executors and directed them to set apart the sums specified for the benefit of certain persons by name, some of whom he described as his cousins and others as his nieces, during their respective lives, and after their deaths for their children; and he gave his residuary estate to be equally divided among such of "his relatives thereinbefore named" as by virtue of the provisions of his will should become entitled to a vested transmissible interest in any part of his property. The persons described as the testator's nieces were his wife's nieces, not his own; and some of the persons described as his cousins were illegitimate relatives;

Held, by Stirling, J., that the words "a transmissible interest" meant an interest transmissible after death, and that those legatees who took only a life estate were excluded from participation in the residue;

Held, by the Court of Appeal (reversing the decision of Stirling, J., upon these points), that upon the true construction of the will, the words "relatives named" included relatives by affinity as well as consanguinity, and illegitimate as well as legitimate, relatives; and also persons described as children of legatees named in the will, although not themselves specially named. Observations as to the province of authorities on questions of construction. *In re Jodrell. Jodrell* v. *Seale*, 44 ch. D. 590. C. A.

The decision of the Court of Appeal (44 ch. D. 590,) upon the construction

of a will and codicils, affirmed, 1891 App. Cas. 304.

WINDING—UP ACTS.

1. Company—Contributories.

A dry dock company, having issued stock to the extent of $15,000 and having assets to cover $30,000 above their other liabilities, passed a by-law accepting from each of the shareholders $3,000 as payment in full of $3,750 stock. Subsequently the company got into difficulties, and was put into liquidation under the Winding-up Acts.

On an appeal from a Master's ruling placing these shareholders upon the list of contributories to the extent of $750 each:

Held, that, as the company was not only solvent at the time, but had a surplus of sufficient dimensions to warrant them in so doing they had the right to accept $3,000 in payment of $3,750 stock; and the appeal was dismissed. *In re Owen Sound Dry Dock Shipbuilding & Nav. Co.*, Ont., High Court of Justice, Ch. D. 17 Sept. 1891.

2. Contributories.

McC. manager of a company, purchased certain shares from C. for the purpose of cancellation and paid for them with money supplied by the company, but took the transfer to himself as "manager in trust." The shares remained in that position until the company was put into liquidation under the Winding-up Acts, when the Master placed McC. upon the list of contributories as a shareholder.

Held, on appeal that knowledge on the part of C. that the transfer was being made to a nominee of the company would have vitiated the transfer, but as there was no evidence of any such knowledge, and as the transfer was made for a consideration paid to the "manager in trust" with no notice of the character in which he was to hold the shares, there was a valid transfer which would relieve the first holder and impose (as against creditors) liability on the transferee. *McCord's Case*, Ontario Chancery Div. H. C. J.

3. Company—Question of Insolvency—Proof.

Petition by a creditor for a winding-up order, alleging among other things that by virtue of a certain execution and seizure the sheriff had entered on the premises of the company and proceeded to sell and dispose of the goods of the company, and that he had already sold under such execution the greater portion of the goods and intended to proceed under the execution and sell and dispose of and was then from day to day selling and disposing of the remainder thereof.

By the winding-up act, R. S. C. c. 129, s. 5 a company is deemed insolvent, "(h) if it permits any execution issued against it *** to remain unsatisfied till within four days of the time fixed by the sheriff, or proper officer, for the sale thereof, or for fifteen days after such seizure."

Held, that an order for the winding-up of the company could not be made on the material before the court.

There was no pretence for bringing the case under any of the provisions of the Winding-up Act, unless it could be brought under ss. (h) of s. 5. *In re Manitoba Milling and Brewing Co.*, Manitoba, Queen's Bench, 12th Oct. 1891.

WITNESS.

Impeachment.

Where it is sought to impeach a witness by proving, either by his own answer to a question put to him, or by calling other witnesses to swear that he has made statements out of court contrary to what he has testified at the trial, the witness' attention must be called to the statement which it is claimed he made out of court, and to the time, place, and other circumstances of his making it, and the statement must be contrary to what he has testified at the trial. *Daley* v. *Melendy*, Neb. 49 N. W. Rep. 926.

Writ of Summons—See Service.

PUBLIC POLICY.

IN ITS RELATION TO CONTRACTS IN RESTRAINT OF TRADE. — A COMPARISON OF THE CIVIL AND COMMON LAW DOCTRINES.— RECENT CASES.— CANADIAN DECISIONS.

The early English rule affecting contracts in restraint of trade is thus laid down in the leading case of *Mitchell* v. *Reynolds* (Smith's Leading Cases, vol. 1, part 2, p. 756) "A bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good. *Secus*, if it be on no reasonable consideration, or to restrain a man from trading at all."

Greenhood in his work on public policy in that part relating to restraint of trade, at page 687, says, "The origin of the rule may well be inferred from what has already been said. The Roman law partially recognized it; but whether it is established in the jurisprudence of any other countries than England and her colonies, and America, we are unable to state; but it is certain that in France no such rule is known, for, in one English case, the plaintiff claimed that the English courts should recognize a contract in general restraint of trade, on the ground that such a rule was unknown in France, where the contract was made to operate in England." (Rousillon v. Rousillon, L. R. Ch. Div. 351). In that case it is stated, "He (the French advocate) also said that *there is no objection in French law to any agreement in restraint of trade.*"

This statement is surely an error if it is taken literally, for a very cursory examination of the French doctrine will shew that in many respects it coincides with that of the common law.

In France the matter is regulated by arts. 1131 and 1133 of the Civil Code which read thus, "Art. 1131. L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet." "Art. 1133. La cause est illicite quand elle est prohibée par la loi, quand elle est contraire aux bonnes mœurs ou à l'ordre public."

These articles are identical with the provisions of the Civil Code of the Province of Quebec relating to this matter, the English version of the latter article reading thus: "Art. 990. The consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order."

In the present discussion we have only to concern ourselves with "public order" and particularly that part of it relating to restraint of trade. As there are no local decisions of importance bearing on the latter subject, the French jurisprudence is quite to the point in this province, the more so in view of the similarity of the articles of the codes. We will endeavour to shew the concordance between the French decisions and those of the common law where it exists.

The French doctrine is thus stated by Dalloz in his Répertoire, Vo. Industrie, No. 214, writing of art. 1133, C. C. (Transl.) "Thus all agreements containing an absolute renunciation of the right to engage in a certain industry are void. Such agreements, being destructive and not merely modificative of industrial liberty, are not valid."

No. 215. "On the other hand, agreements restricting the right to engage in a certain business, within a certain period or district, are valid. — Thus it has been adjudged, 1st. that an agreement whereby a workman in consideration of employment by his master for a certain period and remuneration, binds himself not to engage in a similar

business in any district wherein such business might conflict with the interests of the master and his family, is valid. 2nd. where one, who, according to the usual custom, is engaged in the joint business of general baker and baker of bread, sells his bread oven and agrees not to carry on the business of a baker for a certain period, is deemed to have renounced for the same space of time the right to set up an oven for baking in general."

But an equitable doctrine exists in France, relating to the good-will of a business, which renders it unnecessary in certain cases that there should be an express renunciation of the right to set up an opposition business of the same character and in the same locality, as the one disposed of, for the courts will so interpret the sale as to imply such renunciation. The rule is, that where a business has been disposed of, the value of which largely consists in its good-will and custom, such as an hotel, restaurant, or shop, the renunciation by the vendor of any right to enter into a similar business in such proximity as would in any degree withdraw such good-will or custom from its rightful owner, will be implied by the court. Thus, 1st, where one has sold his stock-in-trade and everything incident thereto, and has written letters to his customers informing them that the purchaser was his successor in the business; he is deemed to have renounced the right to engage in a similar business in the same town.. 3rd, in the sale of the stock of a café, the vendor is deemed to have renounced the right to set up another café in the neighbourhood, although there was no express agreement to that effect, and the circumstance that at the time of the sale he owned another café in another part of the town, far from militating in favour of the right of the vendor to set up another one in any district he might choose, should rather be interpreted as limiting him to the running of that café only, and not as allowing him to interfere with the good-will of the one he had sold; and further, the judges can in such case enforce the closing up of the new café, in addition to allowing damages to plaintiff (Dalloz, Industrie, No.217).

On the other hand, where in the judicial winding up of a partnership carried on for the sale of novelties, one of the partners wished to restrain the others from setting up a similar business within competing distance, before the judicial sale of the partnership stock, owing to the depreciation of price sure to result at the sale from the competition: the court said that "the sale of a business does not always or necessarily of itself infer a restriction on the vendor that he will not engage in a like business in the same place. Whereas our jurisprudence admits in general that, in the silence of the act of sale, the vendor cannot set up a rival establishment alongside of his successor, it is because, in interpreting the agreement of the parties, the courts have recognized the implied intention to do so, and the act was a purely voluntary one on the part of the vendor. In the present case they had not to interpret a contract of sale, but had to determine what should be the conditions of a judicial sale which is an obligatory and forced one.................. To admit plaintiff's claim would be to restrain and prevent the carrying on of an industry which should be free to all; that this liberty is in conformity with the principles of natural law, with the rules of political economy and the interests of trade in general." (Genet c. Beliard, Dalloz, Rep. Vo. Industrie, p. 726 n.)

Also the sale of a factory with a part of the land which contains it, does not imply on the part of the vendor a prohibition to establish a similar factory on contiguous land, when the contract neither contains nor implies any restrictive clause in this respect. (Cass. 17 July, 1844).

The English doctrine on this point differs considerably from the French. Greenhood in his work on public policy at page 724 says: "The authorities are conclusive that the sale of the good-will of a business without more, does not imply a contract on the part of the vendor not to engage again in a similar business. He and, *a fortiori*, his executor, is not precluded from carrying on a precisely similar business with all the advantages he may be able to acquire from his own industry and labour, and from the regard people may have for him, and that in a place next door for example, to the very place where he conducted his former place of business. If the purchaser wishes to prevent that step from being taken, it is his fault if he does not take care to insert provisions to that effect in the deed." Smith in his work on Mercantile law (Pomeroy's Smith § 247) says: "The sale of a good-will does not preclude the seller from setting up the same kind of business again in the same neighbourhood, if he do not describe himself as setting up the identical business that has been purchased." Where one has sold the good-will of his business to another for a valuable consideration, equity will upon application restrain him from holding himself out to the public by advertisement or otherwise as continuing his former business, or as carrying on such business at another place. (Hall's appeal 60 Pa. St., 458). Also, a physician who sells his practice and good-will, will be enjoined from practising in the neighbourhood, although the contract does not in terms prohibit him. *Dwight* v. *Hamilton*, 113 *Mass.* 175.

Laurent, a Belgian author, and very prolific commentator of the Civil Law, dealing with the subject of "freedom of industry and articles 1131, 1133 of the Civil Code says (Trans.) "Freedom of competition is another aspect of liberty. Has it a limit? Can particular covenants interfere with it? We have no text of law that decides these difficult questions. Hence the inevitable incertitude of the jurisprudence." He then cites a case where eight manufacturers of earthen-ware combined for the purpose of keeping up the price of their wares, and to this end agreed to send all their products to one common establishment, the selling price to be fixed by a committee of three. The members agreed not to sell goods through any other medium during a period of ten years. Numerous difficulties cropped up to prevent the satisfactory working of the agreement, whereupon one of the members sought to annul it. This was done by the court of Bourges on the ground that the manufacturers in combining and fixing the price of the goods, were acting in detriment of public order, which exacts complete freedom of commerce. On appeal to the Court of Cassation, it was held, that no contract is contrary to public order unless it violates a certain law, and interpreted article 1133 of the Civil Code as meaning that, agreements detrimental to "public order" are such as contravene an express law; but the appeal was dismissed and the judgment of the court below sustained, because they thought the judges might possibly have interpreted the agreement as contravening the law of the 25th Jan. 1815.

However, in a later case cited by

Laurent, one which embodies the French doctrine generally on this point: where four wood dealers of a town combined, and agreed to fix their selling price so as to assure to themselves a profit of five or six per cent: upon disagreement and an effort on the part of one of the contractants to annul the contract, the tribunal of commerce declared it to be void as being in restraint of trade, and consequently against public order. The court of Douai confirmed this decision entirely on the grounds of articles 1131 and 1133 of the Civil Code, and made no mention of the violation of a special law.

To shew further, that the French and English rules do not differ as to general principles, in respect of contracts in restraint of trade, we cite from Dalloz Vo. Obligations No. 613. (Transl.) "Contracts in restraint of trade are void as contrary to public order." Thus it is only in the application of these principles that the two countries differ, as might be expected. The best way then, we conceive, of comparing the two systems, will be to give a comparative list of some of the decisions of the two countries, citing on one side the French cases, and on the other side as far as possible analagous cases decided in the common law countries.

FRENCH.	ENGLISH.
A An agreement by a commercial traveller whereby he covenanted with his employer upon good consideration not to engage in a similar business on his own account until two years after he shall leave his employ, is valid. *Brussels*, 14 Jan. 1841.	**A** A., in obtaining employment as a traveller for a wine-merchant, agrees not to carry on the wine business for two years after leaving the employment of the promisee. The business of the promisee extends throughout England and Scotland, and business done anywhere in the kingdom will interfere with him. The agreement is valid, and is construed to exclude A. from the kingdom altogether for the stipulated period. *Rousillon* v. *Rousillon*, L. R. 14 Chy. Div. 351, 1879.
B An agreement between the booksellers of a town to keep their shops closed on Sundays and fête days, is valid. *Colmar*, 10 July 1837.	
C A clause in a contract of sale of a mill, whereby the purchaser, and the vendor, who is also proprietor of another mill on the opposite bank of the river, reciprocally agree not to grind for the inhabitants on the side opposite to their respective mills and not to sell flour to the same, is valid. *Agen*, 11 Dec. 1861.	**C** A. B. & C., rival box and trunk manufacturers, for the purpose of preventing the inconvenience and loss from all doing business in the same places, divide England into three districts, each taking one, and the other two engaging not to carry on any business in such district. The agreement is valid. *Wickens* v. *Evans*, 3 Y. & J., 318.
D A clause in a contract of sale of quarries whereby the vendor binds himself not to sell stone of a certain quality in the department in which the quarries sold are situated, is lawful. *Cass.*, 1st July, 1867.	**D** A. sells B. a magazine, and agrees to publish no other magazine of like nature. The agreement is valid. *Ainsworth* v. *Bentley*, 14 Weekly Reporter, 630.
E An agreement whereby a merchant or manufacturer binds himself with another, not to engage in the same or a similar business within a certain radius, is valid. *Cass.*, 24 Feb. 1862.	**E** A. a publisher and printer in Michigan, whose business extends throughout the State, on the sale thereof, covenants never to carry on the same business within the State. The covenant is valid. *Beal* v. *Chase*, 31 Mich., 490. An apothecary agrees not to set up business within twenty miles of Aylesbury, Eng. The agreement is valid. *Hagnard* v. *Young*, 2 Chitty, 407.
F An agreement made with a person, not to enter into a certain business in any place and for all time, is illegal, and such an	**F** A. gives a bond conditional that he shall never carry on or be concerned in, the business of founding iron. The bond is void.

FRENCH.	ENGLISH.
engagement cannot be maintained by the tribunal by modifying it so as to restrict it to a certain locality. *Cass.*, 25 May 1869.	*Alger* v. *Thacher*, 19 Sick, Mass 51. A covenant not to carry on the trade of a brewer in S. or elsewere. The covenant is void. *Hinde* v. *Gray*, 1 M. & G. 195.
G An agreement between manufacturers of the same kind of goods, to combine so as to share the common profits and loss of their business, and to sell their products in one general store at a certain price, if it results in avoiding free competition and the consumers of their wares are placed in immediate dependence upon them, is unlawful. *Bourges*, 11 Aug. 1826.	**G** The proprietors of five lines of boats engaged in the transportation of persons and freight, combine, and stipulate that they all shall charge a certain price, the net earnings of all to be divided according to certain fixed proportions. The agreement is invalid. *Hooker* v. *Wandevater*, 4 Denio, N. Y. 349.

Upon a comparison of both sides, and a careful perusal of the leading cases of both systems of jurisprudence, we shall not be far out, in stating that their doctrines are considerably alike. This is seen very prominently in the case of Rousillon v. Rousillon, wherein the contract was held valid and not in restraint of trade both in France and England. No doubt, previous to this much cited case, the English rule may, in a great number of instances, have been interpreted in a manner less favorable to such contracts. Mr. Justice Fry in rendering judgment in the above case, said *inter alia* .... " In the next place, the rule, viz, (that the contract shall be limited as to space) is pressed on me as an artificial rule, an absolute rule, or, as it was called by the late Vice-Chancellor Wickens, a hard and fast rule. Such a rule might always be evaded by a single exception. No exception can be said to be colourable to a rule of this description, because you can only judge whether an exception be colourable or not by the principle of the rule, and if the rule be an artificial one without principle, there is no criterion for saying whether the evasion is colourable or not. It appears to me for these reasons that I ought not to hold such a rule to exist unless it be clearly established." After citing authorities *pro* and *con* his Lordship goes on to say, " I have therefore, upon the authorities, to choose between two sets of cases, those which recognize and those which refuse to recognize this supposed rule, and, for the reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognize this rule, and I consider that the cases, in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable."

It remains then for us, to determine what interpretation the rule has received since the time of Rousillon & Rousillon, 1880, considering this case as a land-mark in the vast field of decisions. That the rule in that case is sanctioned by most of the United States can be seen by a statement to that effect in Greenhood on Public Policy, p. 696. "It can, perhaps, be safely stated that, unless a contract has the absolute effect of driving its maker from the country, it is not void, if valid on the ground of protection, although its operation extends to every inch of ground over which the sovereignty of the general government extends. When a business is so colossal that its extent is limited only by the bounds of the nation itself, it seems absurd to raise the objection that, because a change of business would be requisite if its possessor should sell it, the sale of the "good-will," accompanied by a contract to engage in

no competition with the vendee, would be void. Such a doctrine would make such a business unsalable, and its application could never be seen except in such cases as the illustration given fairly represents." Also, p. 695, "It would be difficult to contend that any different rule should prevail in the United States than England, when the same relation of things to each other exists in both countries."

In *Herreshoff* v. *Boutineau*, Supreme Court, Indiana, April, 1890, it is said, "In this country the cases have been quite similar to those in England." In this case also it was urged by respondent that Rousillon v. Rousillon had been overruled by the recent case of *Davies* v. *Davies*, 36 Chy. Div. 359; but the judge did not think so, and said: "While Cotton, L. J., showing great willingness, if not anxiety, to overrule it, based his opinion upon the ground that the restriction was void, because unlimited in space, Bowen, L. J., did not put his decision on that ground, and Fry, L. J., adhered to his opinion in Rousillon v. Rousillon. That Davies v. Davies was not received in England as overruling the last named case, see note to this case in Law Quarterly Review, vol. 4, p. 240. In view of these cases we do not think it is now the rule in England that restraint throughout the kingdom is absolutely void."

The point decided in *Davies* v. *Davies* was this: On a dissolution of partnership the retiring partner, who received a large sum of money, covenanted "to retire from the partnership; and, *so far as the law allows*, from the business, and not to trade, act or deal in any way so as directly or indirectly to affect the continuing partners." The business had been carried on at Wolverhampton and in London.

In an action by the survivor of the continuing partners and his assignees to restrain the retiring partner from carrying on a similar business in Middlesex: *Held*, (reversing the decision of Kekewick, J.) that the covenant to retire from the business, *so far as the law allows*, was too vague for the court to enforce.

By Cotton, L. J., (Bowen & Fry, L. JJ., giving no judicial opinion): The old rule that the law does not allow an *absolute* covenant in restraint of trade is still binding, and the covenant was void on that ground also.

Held, also, that the covenant not to trade, act or deal, so as to directly or indirectly affect the continuing partners, was personal to the continuing partners, and could not be sued upon by their assignees.

And *semble*, it was also too vague for the court to enforce.

Bowen, J., speaking in this case of the assignment of such covenants said: "It is a covenant which seems to me to be personal to Edward Davies and Edward Albert Davies, and cannot be assigned. It is perfectly true that there is a class of covenant in restraint of trade which would affect established businesses, which can be assigned. For instance, a covenant not to carry on business in a particular street or particular town, may pass by assignment to the assignee of the business, but if the contract in its nature, on its true construction, is a personal one, then it cannot be assigned. The rule of law is plain, you cannot assign the benefit of covenants which are purely personal. I think this is a purely personal covenant, and it cannot therefore, be assigned and cannot be enforced by the present plaintiffs." The remarks of Cotton, L. J., were to the same effect.

In Greenhood on Public Policy it is said at p. 732: "All contracts in restraint of trade which are permitted by law, are capable of assignment:

also p. 733, "such contracts survive to the representatives of the obligee."

In regard to the creation of monopolies, the courts have no hesitation in declaring the obnoxious provisions void. Thus, where the contract, between plaintiffs and defendants who were each manufacturers of lumber, provided that defendants were to make and deliver to plaintiffs during the year 1881, two million feet of lumber, at eleven dollars per thousand feet, and they further agreed not to manufacture any lumber during such period for sale within a specified territory, except under the contract. and to pay plaintiff twenty dollars per thousand feet for any lumber manufactured, and sold to parties other than the plaintiff, and there were similar contracts made by plaintiff with other lumber dealers, the object of all of which was to form a combination among all the manufacturers of lumber, at or near that point, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, the court held the contract void as an illegal combination, and against public policy. (*Santa Clara M. & L. Co.* v. *Hayes*, 76 Cal 387.) Where all the grocers of a town agreed with a firm which was about to open a butter store that they would not buy or take in trade any butter for the term of two years, but the butter firm paid nothing to the grocers and bought out no established business, it was held that the contract was void and in restraint of trade. (*Chaplin* v. *Brown*, 48 N. W. Rep. 1074). And in an agreement, between the owners of rival steamboats on the Kentucky River, that in order to prevent rivalry and consequent reduction of charges, the net profits of each should be shared in a certain proportion, each bearing its own expenses, and that if the owners of either boat should sell with a view of going out of the trade, notice should be given to the owners of the other boat, a further provision that the parties so selling should not enter the trade again within one year was held tobe void. *Anderson* v. *Jett*, 12 S. W. Rep. 670.

Upon this subject Wm. L. Murfree jr. in the Central Law Journal, Sept. 18, 1891 says p. 229 : There would seem to be manifest reasons why the rule against the establishment of monopolies should be more rigidly enforced in considering contracts affecting public agencies like common carriers, than when dealing with the transactions of individuals who hold no franchise from the public, and are charged with no corresponding duties."

"But if the monopoly is one the validity of which is recognized by the law, as a patent right, secret process of manufacture etc., a contract which fosters and protects it, will not be held invalid on that ground. One of the peculiarities of a patent for an invention is, that it permits the establishment of a monopoly. The owner does not possess it even upon condition that he shall make or vend the patented article, or allow others to do so for a fair and reasonable compensation. He may suppress it altogether. An agreement by a patentee to allow an association and its members the sole use and sale of his invention upon the payment of a certain royalty, is not void as in restraint of trade, although the association and the members do not bind themselves to use or sell the machinery at all. (*Good* v. *Tucker & Carter Cordage Co.*, 24 N. E. Rep., 15). See also *Bowling* v. *Taylor*, 40 Fed. Rep., 404. But on the other hand, a covenant in a contract for the sale of a patent right on the part of the vendor not to "manufacture sell or cause to be sold, any sand-papering

machines of any description," cannot be said to be in any sense incidental to the sale of the patent, or necessary as a just and lawful protection of the business of manufacturing and selling thereunder, and was held void as against public policy, although it affected only a single class of machines. (*Berlin Machine Works* v. *Perry*, 38 N. W. Rep., 82). In *Fowle* v. *Park*, 131 U. S. 88, a contract which communicates in confidence the ingredients of a certain proprietary medicine and a full and true copy of the receipt for preparing the same and provides in substance that each party shall enjoy a monopoly of the sale of it within certain defined parts of the United States was held to be neither unreasonable nor in restraint of trade. See also *Tode* v. *Gross*, 4 N. Y. Supp. 402."

"The result of these cases seems to be: That while the law will not lend its aid by sustaining the validity of a contract, the purpose, object and tendency of which is to create a monopoly, yet where the subject matter of the contract is a monopoly which the law recognizes, such as a patent right or a secret process of manufacture, it cannot be held invalid as tending to establish a monopoly by the restraint of trade. And moreover, where a party by his enterprise and energy has succeeded in extending his trade until he has a practical monopoly, a stipulation in the contract by which he disposes of it, protecting hispurchaser from his competition, will not be deemed within the rule."

The latest decision bearing upon contracts in restraint of trade in England, is that of *Mills* v. *Dunham*, 64 L. J., (N. S.) 712, decided by the Court of Appeals, where, by an arrangement made between the plaintiffs, who carried on the business of manufacturers of an antiseptic substance, and the defendant, it was agreed that the defendant should become the traveler and assistant of the plaintiffs at a salary, and that he should "call upon and solicit orders" for all articles and commodities in the way of the plaintiffs' business of antiseptic manufacturers ; that one week's notice on either side should terminate the agreement, and that, in the event of such termination, the defendant should not for or on account of any employer, or on his own account, at any time, either by himself or in partnership with any other person or persons or firm, "call upon or directly or indirectly solicit orders from or in any way deal or transact business with" any person or firm who during the continuance of the agreement should be customers of the plaintiffs, or any of their successors, or any of the successors in business of such customers. The agreement was terminated and the defendant entered the employment of a rival firm of antiseptic manufacturers, and solicited and obtained orders from some of the plaintiff's customers for the substance manufactured by his then employers. Upon a motion to restrain the defendant from committing any further breach of the agreement, *Held*, (affirming the decision of Chitty, J.) that, according to the true construction of the agreement, its object was to prevent the defendant, after he had left the plaintiffs' employment, from transacting with any person who had been the plaintiffs' customers, business of a similar kind to that carried on by the plaintiffs ; that the agreement did not go beyond what was reasonable for the protection of the plaintiffs, and it was therefore valid and could be enforced by injunction.

Lindsay, L. J., in rendering judgment, said, *inter alia*, "Then comes the fifth, which is the important clause,

and provides that, after the determination of the agreement by notice, or by breach of the stipulations or otherwise. "The said J. V. Dunham shall not, for or on account of any employer, or on his own account, at any time, either by himself or in partnership with any other person or persons, or firm, call upon or directly or indirectly solicit orders from, or in any way deal or transact business with, any person or firm who during the continuance of this agreement shall be the customers of the said G.S. Mills and A. Mitchell, or any future successors of the Food Antiseptic Company, or any of the successors in business of such customers." That clause is expressed in very wide terms. It is contended on one side that it means literally what it says, and according to that construction, it would preclude the defendant from having communication with any of the customers of the plaintiffs' firm on any business whatsoever; would forbid his calling on any of those customers to solicit orders for a watchmaker or an umbrella-maker. Mr. Levett says this is what the parties were driving at. The other side say you must look to the other clauses of the deed to see what the parties were driving at, and that this clause must be limited to business similar to that carried on by the plaintiffs, and that to give it any wider operation, though not doing violence to the language of the clause, would be doing violence to the spirit of the agreement. Now, the first thing we have to do is to ascertain the real meaning of the parties by construing the agreement without any leaning either way. I think that Mr. Levett's contention that you are to treat a restraint of trade as *prima facie* bad, and throw upon the person supporting it the *onus* of shewing that it is reasonable, is introducing a wholly unsound principle into the construction of documents. I do not think that James, V. C., in *Leather Cloth Company* v. *Lorsont*, 21 L. T. Rep. (N. S.) 662; L. R. 9 Eq. 353, meant to lay down any such rule. His Lordship says: 'All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract.' And on these expressions Mr. Levett relied. But his Lordship went on to say:

'Public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that, does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable having regard to the subject matter of the contract.' Looking at the whole of the language, I do not understand his lordship as saying that you are to approach the contract with a leaning either way. You are to construe the contract, and then see whether it is legal. In my opinion the construction which Chitty, J., has put upon this contract is the true one. I cannot think that the parties intended, such a wide restraint as has been contended for by

Mr. Levett. The object of the plaintiff was to prevent the defendant from being allowed to do anything which would be detrimental to their business: I think that "transact business" ought to be construed as confined to business similar to that of the plaintiffs. If that view is correct, it does not appear to me that the agreement goes beyond what is reasonable for the protection of the plaintiffs, and that, considering its nature, it is according to the cases referred to in *Davies* v. *Davies*, 36 Ch. Div. 359, not made unreasonable by there being no limitation as to distance or time. It is therefore unnecessary to consider the question whether the covenant is severable." Lopes, L. J., to the same effect. Likewise Kay, L.J., who cited *Mumford* v. *Gething*, 7 C. B. (N. S.) 305 to shew that stipulations of this kind are looked upon as advantageous to the public if so restricted as not to go beyond what is needed for the protection of the employer. They ought not then to be construed with a bias as being *prima facie* illegal, but construed fairly.

There can be no doubt then, in view of this and other decisions of the English courts, that the rule as laid down in *Rousillon* v. *Rousillon* has the same interpretation in England at the present day, viz: "that where there is a sufficient consideration, a contract in restraint of trade will not necessarily be unreasonable because it contains no limitation, as to time or distance."

Reasonableness, and the effect of the restraint on public welfare, are the key-notes to the construction of all such contracts, the circumstances of each particular case being taken into consideration.

In order to determine what at the present day is the general doctrine in the United States as to contracts in restraint of trade, we think it best to make extracts from a recent decision of one of the Federal courts. In *Carter* v. *Alling*, U. S., C. C. N. D., Ill., June 30, 1890. 43 Fed. Rep., 208. Blodgett, J. said, "A contract between a manufacturing corporation, whose business extends throughout the United States and Canada, and one of its travelling salesmen, who has been in its employ for several years, whereby he agrees not to enter the service of any business competitor of the corporation for three years after leaving its service is valid. .... "In later years a further relaxation of the old rule has grown up both in England and America, and the courts have repeatedly recognized the validity of contracts in restraint of trade throughout an entire State or country, where such restraint was not unreasonable, in view of the nature and extent of the business of the covenantee." .... "In the case now under consideration the complainants were manufacturers of inks and similar commodities, and their business extended throughout the entire United States and Canada. The defendant Alling was employed to canvass for purchasers, and to advertise the products of complainants' business. Prior to making the contract now under consideration, he had been for several years employed in a similar capacity by the complainants, and it must be presumed that he had acquired an extensive knowledge, not only of the complainants' business methods, but of their trade secrets, and this knowledge he had acquired while under the pay of complainants, and acting for them. It does not therefore seem to me unreasonable that the complainants should exact from him a covenant that he would not reveal their trade secrets, and would not enter the employ, of any competitor of com-

plainants for the time specified in his convenant after his employment by complainants should terminate."

Having examined the French, English, and American doctrines, we will conclude by giving abstracts of all the Canadian decisions on this subject; and they are not at all numerous.

SUPREME COURT OF CANADA. — In 1869, the E. & N. A. Ry. Co. owning the road from St. John, N.B., westward to the U.S. boundary, made an agreement with the Western Union Tel. Co. giving the latter exclusive right for ninety-nine years to construct and operate a line of telegraph over its road. *Held*, not a contract in restraint of trade, or against public policy. *Can. Pac. Ry. Co.* v. *West Union Tel. Co.*, 17 Supreme Court Rep., 151.

ONTARIO—Plaintiff sued defendant on a bond conditioned not to commence business as an hotel-keeper within three years in a certain township.

At the assizes the cause and all matters in difference between the parties in connection with it were referred. A verdict was taken for the penalty, subject to a reference. An award having been made in favor of the plaintiff, defendant moved to arrest judgment, on the ground that the condition was void, being in restraint of trade. The application was refused, on the grounds that the arbitrator might for all that appeared have decided the point now raised, as he had power to do, or the award might have been upon some other matter connected with the contract; but *Held*, that if the motion had been after verdict, without a reference, defendant must have succeeded, for the contract being in restraint of trade it was necessary to show a consideration, and none appeared in the declaration. *Dawes* v. *Wilkinson*, 19 Q. B., 604.

A purchaser covenanted by deed with one E. F. a clerk of the vendors, to buy all his goods from them. *Held*, that the covenant not to purchase elsewhere was not binding on the purchaser. (*Esten V. C. doubting*), *Fisken* v. *Rutherford*, 8 Chy. 9.

Defendant sold to the plaintiff the goodwill of the business of an innkeeper which he was carrying on in London in this Province. *Held*, in appeal, varying the appeal below, that a covenant in the agreement that the vendor should pay $4,000 in the event of his carrying on business as an innkeeper within ten years, was void as undue restraint of trade. *Mossop* v. *Mason*, 18 Chy. 453. See same case 16 Chy. 302, 17 Chy. 360.

Several incorporated companies and individuals, engaged in the manufacture and sale of salt, entered into an agreement stipulating that the several parties agreed to combine and amalgamate under the name of the Canadian Salt Association for the purpose of successfully working the business of salt manufacturing and to develop and extend the same, and which provided that all parties to it should sell all salt manufactured by them through the trustees of the association and should sell none except through the trustees; *Held*, *not* void as contrary to public policy or as tending to a monopoly or being in undue restraint of trade. *The Ontario Salt Co.* v. *The Merchant's Salt Co.*, 18 Chy. 540.

D. entered the employment of W. as agent in the vending of teas and coffees and covenanted with W. not to engage in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as an agent for any other person for at least two years after leaving W's employ. *Held*, that the covenant was not invalid on grounds of public policy. A covenant in restraint of trade is

not invalid unless the restraint is larger and wider than the protection of the covenantee can possibly require. *Wicher* v. *Darling*, 9 O. R. 311.

Certain individuals forming a Cigar Manufacturing Association, amongst whom was the defendant, considering themselves aggrieved by the members of the Cigar Makers Union, who refused to lower the price of making a certain kind of cigar, entered into an agreement in writing between themselves of the first part and S. of the second part, as follows: "Whereas for the mutual advantage and protection of the parties hereto * * * it has been agreed that the parties of the first part shall become severally bound to S. in the sum of $500 liquidated damages in case any of them shall at any time during the continuance of this agreement, either directly or indirectly, buy or sell any cigars marked * * with the labels of the Cigars Makers Union, or shall use * * in connection with the manufacture of cigars by him any Cigar Makers Union label * * or shall permit * * any cigar-makers union, or any union or set of men to compel him to hire or employ union men only, or to dismiss any employee. Now, therefore * * the parties hereto of the first part severally covenant with S. each for himself that he will, in case he shall at any time hereafter violate any of the foregoing stipulations [setting them out] immediately pay to S. the sum of $500; the intention being that in case of a violation of all or any of the stipulations * * aforesaid by any of the parties hereto of the first part, he, the said party so offending, shall immediately forfeit and pay to S. the full sum of $500, * * because of his so offending, as liquidated and ascertained damages, (and not as a penalty) to be by S. applied, etc. * * The intention, also, being that the entire sum of $500 shall be the amount of the ascertained and liquidated damages of any violation or breach whatever, of any of the stipulations * * aforesaid on the part of any one of the parties of the first part."

The defendant having broken the above agreement in all respects, S. brought this action against him to recover $500, as liquidated damages.

Held, that the mutual obligations imposed by the contract constituted a sufficient consideration for it.

Held, also that the agreement was not invalid, on ground of public policy, and as in undue restraint of trade.

Collins v. *Locke*, L. R. 4 App. Cas. 674; and *Hornby* v. *Close*, L. R. 2, Q. B. 153 distinguished.

Held also that the sum of $500 was liquidated damages and not a penalty. *Schrader* v. *Lillis*, 10 O. R. 358.

NEW-BRUNSWICK—An action against defendant, owner of a tug boat in the harbour of St. John, for breach of agreement entered into between the proprietors of 16 tug-boats respecting the towage of vessels according to what was known as the "regular turn system." By this they agreed, among other things, that every tug-boat should take its regular turn in order; that every ship coming into the harbour should count as such turn, and that such tug should be entitled to all her towage till she went to sea. That on arrival of a vessel at Partridge Island, the tug, whose turn it might be, must be prepared to attend the vessel. If more than one vessel arrived, the tug, whose turn it might be, should then have the option of choosing the largest vessel, the next in turn to choose from the remainder. That all new vessels up or down the Bay of Funday, beyond Quaco or Musquash, should be towed on special terms to Partridge Island,

and on arrival there should be towed into the harbour by the steam tug, and should, in falling to such tug's general turn, count as such, but if the vessel did not fall to such tug's general turn, then it should be allowed to said tug as a general turn ahead; and all tugs on the general turn list ahead of such tug, which had not their general turn, should take the next vessel arriving as their turn. The agreement then prescribed the order of tugs for new vessels beyond Quaco and Musquash. The breach of agreement complained of was, that a new vessel beyond Quaco required to be towed into the harbour; that it was the turn of the plaintiff's tug to do the towing according to the agreement, but that the defendant contrary to the agreement towed the vessel into the harbour with his tug, and afterwards towed her out to sea, though the plaintiff was ready and willing to do the work. On demurrer, the court *held* the agreement to be void, as being contrary to public policy, and in restraint of the freedom of trade the parties having restricted themselves from carrying on their own choice, but according to the will of others, and that the interest of the public, particularly of shipowners, would be prejudiced by giving effect to such an agreement. *Pratt* v. *Tapley*, 3 Pug 163.

NOVA SCOTIA—Defendants assigned to plaintiffs the exclusive right to manufacture and sell, within the Dominion of Canada, the Island of Newfoundland and the West Indian Islands, a preparation designed for the treatment and cure of pulmonary diseases known as Puttner's Emulsion of Cod Liver Oil. Defendants reserved the right to manufacture and sell the emulsion in the United States, but agreed as part of the consideration for the purchase by plaintiffs, that they would not sell the emulsion or any other emulsion in the preparation of which Cod Liver Oil was used, or which was essentially or substantially the same as that assigned to plaintiffs within any part of the prescribed limits.

Held, that the restriction contained in the agreement between the parties, in view of the subject matter of the contract, was not unreasonable, or void as in restraint of trade. *Irish et al.* v. *Puttner et al.*, 19 Nova Scotia, 405.

ELECTRIC RAILWAYS.

TELEPHONE—INJUNCTION—INTERFERENCE.

Cases involving a conflict of interests between telephone and electric railway companies are becoming more numerous. The Supreme Court of New-York, in *Hudson River Tel. Co.* v. *Watervliet Turnpike and Railroad Co.*, 15 N. Y. Supp. 752, considered the question, and seems to have held in opposition to the later current of authorities. The decision in that case was that a grant by the legislature and municipal authorities to a street railway company, to use electricity as a motive power, though it does not designate the particular system by which the power is to be supplied, does not give the company a right to use a system by the use of which the electricity will pass from the street and interfere with the current of a telephone company, which has previously lawfully erected its poles and wires on private property, where there are other systems which might be used by the railway company at a greater expense, but at less additional expense than would be required for the telephone company to change its system. When a street railway company is about to use electricity as a motive power, to be

supplied by a system which will allow the current to escape to the wires of a telephone company, erected on private property, and to continuously interfere with and injure the business of the telephone company an injunction will lie, there being no adequate remedy at law. From the lengthy opinion of the court we quote the following :

It will be observed in this case that the language in the legislative and municipal grant of authority to the defendant relates only to the power to be used by it, and specifies no particular mode of its application. If the single trolley system was the only method of applying electricity as a motive power to cars, then the authority to use electricity might be said to contain an authority for the use of that system, nothwithstanding its injurious effect upon others, provided the legislature has the constitutional power to grant a right to a corporation to invade private rights or destroy the property of other corporations or individuals; but, as the case discloses that the single trolley system is not the only method of applying electricity as a motive power for the propulsion of railroad cars, we are not called upon to examine the constitutional question. The referee having found that all injury to the plaintiff's business and property can be obviated by the adoption of the double trolley system or storage battery system, it follows that enjoining the use of the single trolley system would not deprive the defendant of the use of electricity as its motive power, but leave it in the beneficial enjoyment of the grant by the legislature and of the ordinance of the common council, neither of which confines the grant of the use of electricity to the single trolley system. The defendant having it in its power to avail itself of the use of electricity, conferred by the statute and ordinance, in a manner in which the rights of the plaintiff would not be affected injuriously, cannot be permitted to justify an injury to the plaintiff under such statute and ordinance. In the case of *Hill* v. *Managers*, 4 Q. B. Div. 433, the Act of Parliament authorized the erection of an asylum for infirm and insane paupers in the Metropolitan asylum district in London, to be designated by the "poor-law board," and authorized the purchase and leasing and fitting up a building for that purpose. The act referred to small-pox patients as among the class of persons to be provided for. Under this act the managers erected a hospital in close proximity to the plaintiff's house, which the jury declared a nuisance. No precise definite site was fixed by the Act of Parliament, except a general designation of the Metropolitan asylum district in London. The commissioners might have selected a site which would not have injured the plaintiff. The defendant sought to justify under the act. But it was held that the statutory sanction sufficient to justify the commission of a nuisance must be expressed; that the particular land or site for the hospital most have been defined in the act; that it must appear by the act, while defining certain general limits, that it could not be complied with at all without creating the nuisance. Lord Watson used this language: "If the order of the legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the legislature has directed it to be done. Where the terms of the statute are imperative, but submissive, when it is left to the dis-

cretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for that purpose." The reasoning and conclusion of the Court of Queen's Bench in the above case was adopted and fully acquiesced in by the Court of Appeals in the case of *Cogswell* v. *Railroad Co., supra.* The rule, therefore, seems settled and of universal application that when a grant is given by the legislature to conduct a business in the conduct of which two or more ways exist, and by one of which the rights of others will be injuriously affected, and by the adoption of the other methods other parties will not be injured, a Court of Equity will interfere, and enjoin the use of the mode by which the rights of others will be injuriously affected.

We are cited to numerous cases by the learned counsel for the defendant where it is held that injuries remote and consequential must be submitted to by the citizen in the march of public improvements, and that the injury in such cases is *damnum absque injuria*; such as building docks in navigable rivers, cutting down on the line of abutting premises in excavating for public streets, and the like; but I have found no case like this, where the injury is direct and not remote, and where the act has not been ordered by the legislature, where the court has refused relief or redress to the party injured.

It is also urged by the learned counsel for the defendant that, as the electrical system to be used by the defendant in the propulsion of its cars has not been defined by the legislature, it must be left to the determination of the defendant as to what method or system it will adopt, and that the power of selection is not the subject of review. The doctrine, when applied to public bodies and municipalities, is sound, and supported by authority; but I think with private corporations and individuals a different rule obtains, and, while they may adopt such devices as they please, so long as their selection does not affect the rights of others, they are bound so to use their own as not to injure others. An individual may use for his own purposes a powerful, ferocious, and dangerous animal; but he must do so at his peril, and, if others are injured by such animal, known by the owner to be dangerous, no one would question the liability of the owner. But it is also said that the defendant has selected the best known method, and therefore cannot be interfered with in its use. It is true that the referee has found that the system of the defendant in the use of electricity as a motive power is the most efficient and economical system in use. It is equally true that the plaintiff's system of telephoning is shown to be the usual and approved method, and it is not claimed that its use in any way injures the business of the defendant. Assuming, as we must, that each company, within their chartered privilege, is in the pursuit of laudable and useful business, no reason is perceived why they should not each be accorded the protection guarantied by law to other business and pursuits, and in like manner be subject to the duties and obligations imposed by law. Wood in his Law of Nuisances, defines such rights and obligations as follows: "Every person who, for his own benefit, profit, or advantage, brings upon his premises

and collects and keeps there, anything which, if it escapes, will do damage to another, (subject to some exceptions for industrial interest), is liable for all consequences of his acts, and is bound at his peril to confine and keep it upon his own premises." Wood, Nuis., p. 115, § 111. We see no reason why this principle is not applicable to the parties in action.

NOTES. (1) In the present condition of electrical science, a telephone company cannot maintain a bill for an injunction against the operation of an electric railway to prevent damages incidentally sustained by the escape of electricity from its rails. " If in the case under consideration it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it; and should have no doubt of our power to aid the complainant by an injunction; but, as the proofs show that a more effectual and less objectionable and expensive remedy is open to the complainant, we think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained." *Cumberland Telephone and Telegraph Co.* v. *United Electric Ry. Co.*, 42 Fed. Rep., 273.

(2) " The fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city prior to the operation of an electric railway thereon, will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and, if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be to readjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway." *Cincinnati Inclined Plane Ry. Co.* v. *City and Suburban Tel. Ass'n.* Supreme Court of Ohio, June, 1891, 10 Ry. & Corp., L. J., 82.

TRIBUNAL OF COMMERCE OF TOURNAI.

BELGIUM, 16 Oct. 1891.

Robert Mullie v. *Dusançois.*

(Concurrence Déloyale).—Unfair Competition in Business.

TRADE MARK.

(*Translation*).

Competition is lawful and even advantageous to the public, so long as it is carried on in a spirit of fairness, but it ceases to be so when it acts in violation of good faith and without respect for the property of others.

Commercial honesty forbids that a merchant should seek to draw away custom from a place renowned for a certain manufacture, to his own locality by means of deceptions.

It has been settled by jurisprudence that the name of a place renowned for its manufactures, constitutes the collective property of the manufacturers of that place, and that they have a right to sue those who usurp the name, and to claim damages for the harm done by such unfair competition.

In opposing the claim of the plaintiffs, defendant states that he did not brand his lime *chaux de Tournai*, but *chaux du Basin de Tournai*, a designation which he claims the right to use because in reality his lime belongs geologically to the Tournai basin.

Plaintiffs claim the contrary, setting forth with well grounded scientific reasons, and the testimony of eminent

geologists,] the contention that the Basècles lime belongs to the Visé basin and not to the Tournai basin.

But it is not necessary to settle the question from a scientific point of view; the fact is certain, that the trade in Tournai lime, which has a universal reputation as an hydraulic lime, has to a certain extent been monopolized by plaintiffs; that Basècles lime has neither the same quality nor value. In selling for lime of Tournai Basin, a lime of inferior quality and price, defendant sought to palm off his products under guise of an assumed name, and was guilty towards the plaintiff of unfair competition. It did not matter that he used the name *chaux du Bassin de Tournai* instead of *chaux de Tournai;* his intention, and the object sought by him, leaving no doubt, and the public making no distinction between these two denominations, whereas there is a distinction between Tournai and Basècles lime.

Defendant cannot justify himself on the plea that it was upon the demand of a customer that he placed on his sacks a special mark which he never used. He should not have acceded to such a demand.

NOTE.

Browne on Trade-marks, § 43.

Unfair competition in business.—In examining cases classified in digests and books of reports as those of trade-marks, the reader is sometimes puzzled. In the absence of the slightest evidence that technical trade marks have been infringed, courts of equity have granted full and complete redress for an improper use of labels, wrappers, bill-heads, signs, or other things that are *publici juris*. The difficulty is, that wrong names are used. French speaking nations have a standard name for this kind of wrong. The term used is *concurrence déloyale.* This term may fairly be Anglicized as a dishonest, treacherous, perfidious rivalry in trade. In the German Imperial Court of Colmar in 1873 the court said that current jurisprudence understands by *concurrence déloyale* all manœuvres that cause prejudice to the name of a property, to renown of a merchandise, or in lessening the custom due to rivals in business. The euphonism employed as a head to this section will answer the present purpose. It implies a fraudulent intention, while on the contrary, an enjoinable infringement of a technical trade mark may be the result of accident or misunderstanding, without actual fraud being an element. At law, special damage, unless damage is necessarily presumed, deceit, or fraudulent intent, must be proved in all cases to warrant a recovery. This is not always so in equity, but it is both in common law and equity where the infringement is perpetrated by other modes and means than the use of any part of a trade-mark itself; and whether a trade-mark is shown to have been imitated or not, if the goods of one have been intentionally and fraudulently sold as the goods of another, and the latter has sustained damage, or the former threatens to continue acts tending to that end, a court of equity will restrain a further commission of them.