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WEARING APPAREL.

A point of some interest in insolvency matters came before the Judge of the County Court of Middlesex, (Ont.) a short time ago. The insolvent, one Sanborn, having retained an expensive watch, valued at $150, an application was made under the 143rd section of the Act of 1875, for an order to require him to deliver up the article to the assignee. The application was opposed, on the ground that this watch, which the insolvent had been in the habit of wearing on his person, came under the head of necessary and ordinary wearing apparel. In support of this pretension, the County Court Judge was referred to the definition of the word "apparel" as given in Worcester's Dictionary and elsewhere, from which it was argued that the word comprised not only clothing, but also such ornamental things as are usually worn. The Judge gave the case serious consideration, and while rejecting the application, viewed it with so much indulgence that he ordered the costs to be paid out of the estate. He pointed out, however, the obvious objection to a pretension such as that put forward on behalf of Sanborn. "For instance," he remarked, "a person perceiving that insolvency was likely to overtake him, might invest a large portion of his funds, or indeed in some cases, he might readily invest all his assets, in the purchase of a costly watch, set with costly jewels, and claim to have it exempted from the control of the assignee, and thus preserve his property from his creditors. Perhaps so gross a case might come within the domain of fraud, and in this way the insolvent might be reached. But it is easy to see how a very large expenditure could be incurred in the purchase of a valuable watch, and secured to the insolvent, if in all cases a watch can be said to be a necessary and ordinary article of apparel. In this case the insolvent's estate will pay 20 cents in the dollar, and previous to his final collapse he compounded with his creditors for 60 cents in the dollar. Some eight months previous to the composition he became the purchaser of this watch, which he values at $150. Now was this watch such an article as in ordinary cases would be worn by a person in his condition? I think it is not reasonable that a man pecuniarily situated as he was, should have $150 invested in a watch. Neither is it shown that there was any necessity for his having a watch at all. Nothing more is urged than the usual convenience of a watch to any one. If this was a common inexpensive watch, I should feel disinclined to accede to this petition. But the words, necessary and ordinary, must be taken to have a relative signification. That is to say, this meaning must be governed by comparison and by circumstances. *Spitzen* v. *Chaffer*, 14 C.B., N.S, 714, shows that there is a substantial distinction between wearing apparel and necessary wearing apparel. In this case I feel myself compelled to look to the reasonableness of the thing, otherwise a man might, as I have said, invest a very large sum in a watch, or it might be in a diamond pin, or some such article, and claim to have the article exempted, thus opening the door to a fraud upon his creditors."

There are some parts of the world in which people consider themselves dressed *en règle* if they have on a necklace or a watch, and nothing else. Before the courts of those countries, if they have any, Mr. Sanborn's pretension might not appear unreasonable. But as our laws and customs permit insolvents to retain more substantial clothing, we take the County Judge's decision to be a perfectly sound one.

INEQUALITIES OF THE BANKRUPT SYSTEM.

On one of the last days of the Parliamentary Session, in England, Mr. Macdonald placed the following notice on the order book of the House of Commons:—"To call the attention of the House to the inequality of the existing bankruptcy laws; and to move, 'That no alteration of the bankruptcy laws can be satisfactory which does not afford to the wage-earning classes a cheap and easy mode of arranging with creditors, in a like manner as the upper or commercial classes.'" Mr. Macdonald is no doubt puzzled by the strange sight of the wage-earning class struggling and pinching in order to make both ends meet, in other words, to pay

twenty shillings in the pound, while persons in trade can indulge in every luxury and live with the greatest ostentation during the twelve months preceding the collapse, and finally settle their debts at a farthing in the hundred pounds. We agree, however, with the London *Economist*, that "a raising of the standard, not a lowering, is the thing really wanted; the evasion of debts should be made more difficult, not less difficult." "It is quite true," the same journal remarks, "that men of the working classes are under this difficulty, that if they cannot scrape together sufficient to pay the stamp duty and solicitors' charges they cannot avail themselves of the provisions of the Bankruptcy Act. A trader may be quite as insolvent as a bankrupt labourer, and even more dishonest, but if he can meet the needful expense, he can obtain a discharge from his liabilities by filing a liquidation petition, which the poorer man from his very poverty is unable to do. Thus one man may fail for £70,000 or £80,000, and get off scot free without paying a single penny to his creditors; while another man who possibly owes £10 may have to struggle on in the direst poverty, and perhaps have his goods seized in execution besides, until he has paid 20s. in the pound. Mr. Macdonald's motion curiously marks the very unsatisfactory state of feeling which the existing state of the law and the facility with which the payment of debts can be evaded has produced in the public mind."

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Sept. 30, 1878.

JOHNSON, J.

KANE v. WRIGHT et al.

Partnership Adventure—Tendering for a Contract—Termination of Partnership Interest.

The plaintiff and another entered into a partnership with the two defendants to tender for some dredging and harbor works. Their tender and supplementary tender were not accepted, and the defendants subsequently took a sub-contract from another person whose tender (supplementary tenders having been asked for) had been accepted.

Held, that the rejection of the tender put an end to the partnership interest of the parties making it, there being no evidence that the rejection was improperly brought about by the defendants; and the latter were not precluded from taking a sub-contract for their individual benefit for the same work.

JOHNSON, J. This was a very long case, and there were a great many witnesses heard—and a great many letters produced; but after all perhaps the leading facts are few, and the points to be decided are simple. The plaintiff is a gentleman residing in Montreal, and the defendants are Mr. Wright, of New York, and Mr. Moore, of Portland, Me., well known public contractors.

In January 1877, the Quebec Harbour commissioners invited tenders for the construction of some public works about the harbor there—which I need not specify with particularity, except to say that among these works, which were of an extensive character, there was some dredging of a difficult kind. These works were described in the specifications as to be seen at the office of the commissioners, and parties tendering were to furnish the names of two sureties for $50,000, and deposit an accepted bank cheque for $3,000.

The important allegations of the plaintiff are that about the 27th January, 1877, at Montreal, he and a Mr. Angus McDonald, and the two defendants, made a partnership, each having one fourth interest—and that the objects of this partnership were to tender for and to construct these works, particularly the dredging; and the duration of the partnership was to be the time necessary for their construction. Mr. McDonald subdivided his share with his two sons—but that is immaterial; and the firm was Moore, Wright & Co., and in that name the tender was made on the 31st of January. Supplementary tenders were afterwards asked for by the commissioners, and notice given to the parties who had tendered, of whom there were several, besides the plaintiff and his partners, and among them, a Mr. Peters.

On the 13th of March, (the supplementary tenders being required by the 26th), the plaintiff and McDonald communicated with the defendants, and sent them a blank form of supplementary tender, which they sent back from Portland to Montreal, to be signed by the sureties, which was done; and it was agreed to reduce the original tender by $30,000 to $60,000, and the defendants were empowered to act for the plaintiff and for the firm, and make the sup-

plementary tender on the most advantageous terms that could be got, and to telegraph to McDonald if necessary. The plaintiff lays stress upon the fact that at this stage in the proceedings, the defendants without his or his co-partners' knowledge, gave directions that the answer from the department was to be addressed to Moore, Wright & Co., Portland, Me., and that they somehow got wind of this gentleman, Peters, having the best chance of obtaining the contract; and the fact or the theory upon which the present action is based, is in short that the defendants showed Peters the figures of their tenders so as to enable him to get the contract, and share the dredging with them, cutting out the plaintiff and his co-partners from all participation: That is to say, the plaintiff maintains that while the partnership between himself, McDonald and the defendants still existed, they, the defendants, betrayed the confidence placed in them by their co-partners, and got for themselves alone what all were equally entitled to; and he therefore brings his action of damages for this violation of an essential condition of this as of all other partnerships; and he lays his damages at $25,000 — measuring them by his share of the supposed profits.

The plea admits the tender and the supplementary tender, and then sets up substantially that the tender made by the defendants and their co-partners was not accepted, and they became perfectly free after its rejection, to take a sub-contract under Peters who got the contract from the commissioners; and that though they appear as co-partners of Peters, that course was taken at the suggestion of the commissioners or engineers to facilitate direct payment to them instead of their being paid through Peters; and they deny all imputations of fraud or false dealing towards the plaintiff and McDonald, adding that though they were not at all held to do so, they actually invited the plaintiff and McDonald to join with them in their sub-contract, but never got their answer until after they had completed their arrangements with Peters, when it was too late to make new ones with the plaintiff or McDonald.

Now I have said that the correspondence and the evidence are very long; but it is obvious that there are only two points upon which the case rests:—

1st. The fraud and false representations to the harbour commissioners charged against the defendants;

2nd The duration of the agreement as to the tender.

Of course the second depends in great measure upon the first, for if the rejection of the tender made by plaintiff and his associates was the consequence of fraudulent representations by the defendants as charged in the declaration: If they, the defendants, gave the commissioners to understand that they and their associates had withdrawn; if they gave Peters the figures of their tender so as to facilitate his getting the contract, and with a view to their own benefit to the exclusion of their associates; in one word, if they themselves are the cause of the rejection of their own tender for their own personal profit, and to get an advantage over their co-partners, they may be said to have got for themselves what ought to have been got for the partnership, and to have got it improperly—so that they cannot profit by it at the expense of the others.

There can be no doubt that the position of the defendants is impregnable if it is true. If the tender of the plaintiff and his co-partners was *bonâ fide* rejected, there was an end of the objects of the agreement between them. The plaintiff does not deny this. He admits that the defendants would have had perfect liberty of action after the rejection of their common tender, if that rejection had not in fact proceeded from them, and been suggested for their own individual objects in violation of the rights of the other parties; but he puts his case on the distinct ground of deceit, and consequent profit made by breach of the partnership agreement. I have paid every attention in my power to the evidence, and to the arguments adduced from the correspondence. There was something perhaps to excite Mr. Kane's surprise and even suspicion, until it was explained; but I must say that I feel the weight of evidence is with the defendants. The plaintiff appears to have acted in the most honorable and confiding manner throughout: to have done all that could be expected of him as one of those who tendered—in the way of exerting himself to the utmost for the benefit of those associated with him, and was no doubt disappointed at the result; but it is impossible to condemn these defendants for having withdrawn

the tender, and conspired with Peters to the injury of their partners, and got what they could for themselves, without clear evidence to the point; and here it falls far short of that. It would even seem that the defendants felt for the plaintiff's disappointment, and tried to give them a share along with themselves in the subcontract with Peters; but that fell through without any apparent fault of theirs. There cannot be a doubt in my mind that the rejection of the first tender put an end to the interest of the parties making it, unless that rejection was deceitfully brought about by the defendants, of which I do not see sufficient evidence.

Action dismissed with costs.

Girouard, Q. C., for plaintiff.

Bethune & Bethune, for defendant.

Montreal, Sept. 25, 1878.

JOHNSON, J.

PRENTICE v. THE GRAPHIC CO.

Costs, Security for—Domicile—Residence—29 C.C.

It is not sufficient, to entitle a defendant to security for costs, to allege that the plaintiff has left his "domicile" in the Province of Quebec.

JOHNSON, J. Two of the defendants move for security for costs. I thought at first that the question would be whether the plaintiff resided in Lower Canada or not, and I gave myself some trouble to refer to notes and authorities on the distinction between domicile and residence. In most of these cases the circumstances have to be looked at to see if the liability to give security exists. The parties here, however, have given themselves the trouble to make affidavits that are of no use, for, on turning to the terms of the motion, I see that the only ground taken is that the party has left his domicile in the Province of Quebec and has now no domicile there. The 29th art. C. C. does not require domicile, but only residence, and though domicile does not exclude residence, residence does certainly not extend to include domicile. Motion rejected.

J. L. Morris for plaintiff.

T. W. Ritchie, Q.C., for defendants, Simpson and Stephen moving.

BEAUDRY v. THE CITY OF MONTREAL.

Assessment—Representation by Agent—Appeal from Recorder—Jurisdiction.

1. The Assessors of Montreal may, in their discretion, hear complaints made by the agents of the proprietors interested.

2. On an appeal from the judgment of the Recorder in an assessment case, the Court cannot hear evidence and give a final judgment on the merits.

JOHNSON, J. The petitioner was assessed on certain real estate for 1877–8, and petitioned for a reduction of $664.80 as required by the statute, and sent his agent to the office of the assessors to represent him by special power of attorney, and he was examined by the assessors, and they revisited the property and made certain reductions. Then the case came before the Recorder's Court in due course under the 77 sec. of the 37 Vic. c. 51, sub-section 4, and the learned Recorder refused to hear the proof on the ground that the party complaining had not appeared before the assessors as required by the law. The assessors were public officers, and took the evidence and examination of the agent in their discretion, and I do not see that they did wrong. The agent and manager of a large estate of immense value like this would probably know more about the matter than the owner. Therefore, the learned Recorder ought, I think, to have heard the evidence. The point was before Mr. Justice Torrance before, and he decided it in the same way; but that is not the difficulty in the case. The Act says that any one dissatisfied with the judgment of the Recorder in such matters may come here by summary petition, and all the papers are to be sent before this Court, and after hearing the petitioner, the Court is to give such order as to law and justice shall appertain. Acting upon this, or upon the view he took of this provision of the statute, the plaintiff's attorney got a day fixed for proof; though I had some doubts at the time about it, I allowed the witnesses who were present to be examined—subject, however, to the objection made by the counsel of the Corporation. I have now considered the case, and I think the only order I can make is to send the case back to the Recorder to hear the evidence and the case on the merits. The statute gives me no distinct power to hear and determine the case upon the evidence; it only says the papers are to be sent here and the petitioner is to be heard. The general words, "make such order as to law and justice may "appertain," do not include the power of giving final judgment on the merits and proof. The

Recorder is, I think, the proper person to deal with this subject, and the order is that that officer should proceed after notice to the parties, as provided by the statute, to hear the evidence and give his judgment on the petition for reduction.

A. Dalbec for petitioner.
R. Roy, Q.C., for defendants.

Montreal, Sept. 30, 1878.

RAINVILLE, J.

GRAND TRUNK RAILWAY CO. v. THE CITIZENS' INSURANCE CO.

Guarantee Bond—Negligence.

An employee of the Grand Trunk Railway left a sum of $22,000 in an open bag in his room while he went to lunch. He had a desk with locked drawers and a strong metal box in the room appropriated for his use. There was also a safe vault in the building. The money disappeared while he was at lunch. *Held*, that it was for the defendants to prove that the money had been stolen, and even if such proof had been made, there was fault and negligence on the employee's part, in failing to lock up the money, sufficient to bring the loss within the terms of the guarantee bond cited below, and his employers were entitled to recover.

RAINVILLE, J. The plaintiffs claim from the defendants the sum of $22,077. By their declaration they allege that on the 1st of April, 1869, the defendants issued a policy in their favor for $25,000, guaranteeing David Faulkner, then in the employ of the plaintiffs as paymaster. That on the 22nd June, 1877, while this policy of assurance was still in force by renewals, Faulkner received a check for $22,489.45, which he cashed at the Bank of Montreal, but had not remitted this sum, with the exception of $411.65, leaving a balance of $22,077, for which he had not accounted. That under the policy in question the defendants are responsible for this money, and the plaintiffs therefore conclude that the defendants be condemned to pay them said sum. To this action the defendants plead that in fact Faulkner had received the money from the Bank, that he took it to a room appropriated to his use in the plaintiffs' offices, that he put it in his desk in said room, this place being as safe as any other in said office, and being where he was accustomed to put sums of money received by him as paymaster, and this to the plaintiffs' knowledge. That by the custom and rules of the plaintiffs, Faulkner had a right to a certain time in the middle of the day to take his lunch, and that on the day in question, after having thus put away the money, he left his office, to go to lunch, and locked the door. That on his return after a short absence, he found the door of his office unlocked, and $22,077 had been stolen. That Faulkner acted with all requisite prudence, and if the plaintiffs suffered a loss it was through their own fault in not providing a safe place for the deposit of moneys which Faulkner might have in his hands. To this plea the plaintiffs answered specially that Faulkner had not followed the rules of the company; that he had acted imprudently in leaving so large a sum in his room; that he had at his disposal a metal box in which he might have deposited the money; that he had also a desk with lock drawers, where he might have put it, and, lastly, that there was a vault in the building where he was bound to place moneys that he received. On the issue thus joined the parties went to evidence, after giving admissions of the principal facts up to the time of the alleged theft. The defendants' evidence consists chiefly in the deposition of Faulkner, who establishes the facts as he related them at first, that is to say, that he had been the victim of a theft. The plaintiffs on their side have proved the facts alleged in their special answer, that is, that there was in Faulkner's room a lock desk; that he had a strong metal box for his exclusive use, and that there is a safe vault in the building occupied by plaintiffs. One of the witnesses states that Faulkner had the key of this box, and that he gave it to him only after his discharge, and another establishes that it would have taken ten or fifteen minutes to open this box by force, and that it could not have been done without making considerable noise. Such are the facts of the case. Let us settle first the legal position of the parties. To what were the defendants bound by the policy? Did they guarantee only the fidelity and honesty of Faulkner, or did they guarantee his acts and faults? Let us see the terms of the contract. It guarantees that "the said *employé* shall honestly, diligently, and faithfully discharge and transact the duties devolving upon him... and shall faithfully account for, and pay over to the said Railway Company all such moneys as he, the said *employé*, shall receive for or from the said Company.... and in default thereof,

that the said Company (defendants) shall indemnify the said railway against all loss and damage, costs and expenses which the said Railway Company shall sustain or incur by reason of *any act, matter or thing whatsoever, done or committed or omitted* to be done by the said *employé* in or arising out of his said employment, and for which the said *employé* shall be liable by law, to indemnify the said Railway Company." The defendants in the terms of this contract are therefore bound as sureties of Faulkner, and responsible in the cases in which Faulkner would be. They are liable therefore for his acts and faults, whether of commission or omission, as well as for his fidelity. Now, what is the responsibility of Faulkner? It is regulated by Arts. 1072 and 1200 of our Civil Code. Art. 1072 says the debtor is not bound to pay damages and interest when the inexecution of the obligation is caused by *cas fortuit* ou *force majeure*, without any fault on his part. Art. 1200 says when the thing perishes or the delivery becomes impossible, without the act or fault of the debtor, the obligation is extinguished. The debtor is bound to prove the "cas fortuit" which he alleges. (His Honor cited Demolombe on Obligations, T. 1, No. 560; T. 5, No. 765-769, and Larombière, T. 1, p. 537, and continued:) It is in accordance with this doctrine that I decided the case of *Souliere* v. *Lazarus*, reported in Lower Canada Jurist, Vol. 21, p. 104. In that case I gave judgment in favor of defendant, who was a pawnbroker, because he proved that he had guarded the things with the care of a good father of a family, and that the theft took place under circumstances which no human prudence could foresee. It was on the same principle that the case of *Martin & Gravel* was decided by the Courts of this country, and even by the Privy Council. From the exposition of these principles, it is easy to conclude that the procedure in this case is perfectly regular, and that the defendants' objection that the plaintiffs were attempting to make a new action by their special answer, in alleging facts of negligence on the part of Faulkner—facts which should have been alleged in the declaration, is unfounded. Why, in fact, should the plaintiffs have answered in advance a plea which might not have been filed? It was incumbent, therefore, on the defendants to prove that the sum in question had been stolen, and the theft had taken place without any fault on Faulkner's part. To prove the theft, the defendants have only the testimony of Faulkner, who is not an incompetent witness, but who is greatly interested in the suit, because the defendants have a recourse against him if they are condemned. His interest, according to Art. 252, C. P., affects only the degree of credit to be accorded to his testimony. I must, therefore, appreciate this evidence, and I cannot find legal proof of a theft in the mere evidence of Faulkner, destitute as it is of all proof of circumstances. I have no legal proof, though I have a moral conviction, and though I have no doubt of the honesty and fidelity of this unhappy Faulkner. But, supposing that the theft was proved, I have evidence, even according to Faulkner's own account, that he acted with imprudence, and that if a theft was committed it was the result of his fault. It is sufficient to state the fact of a man having a desk locking with a key, a metal box for his exclusive use also locking, and a safe in the building, leaving on the floor of the room, in a mere bag, not closed, a sum of $22,000, and quitting the room for 30 or 40 minutes, to establish both imprudence and negligence. Did he lock the door of his room? He swears that he did, but when he returned the door was open, without its having been forced. It might have been opened with a false key. But it is just this that shows the imprudence of Faulkner. I am of opinion that the defendants have not proved their plea of *cas fortuit*, and the plaintiffs must have judgment.

G. Macrae, Q. C., for plaintiffs.

Abbott, Tait, Wotherspoon & Abbott, for defendants.

COURT OF REVIEW.

Montreal, Sept. 30, 1878.

JOHNSON, TORRANCE, RAINVILLE, JJ.

DUPUIS v. RACINE.

Sale to two Persons Successively—Possession—Art. 1027 C. C.

When a party has obliged himself successively to two persons to deliver to each of them a moveable article, that one of the two who, in good faith on his part, has been put in actual possession, is preferred and remains owner of the thing, although the purchase by the other was anterior in date.

JOHNSON, J. This suit began by the plaintiff revendicating as his a piano in the hands of the defendant. His title was a purchase of the instrument from a Madame Fournier on the 13th April, 1877. He was met by a plea alleging that on the 13th November the defendant had bought the piano from the same vendress, and had then got, and since kept possession of it. The plaintiff answered that his purchase had been anterior to that of the defendant; that the seller had no power to sell to another and the second sale was fraudulent and simulated. The judgment dismissed the plaintiff's action on the ground that the first buyer never got possession, and the second one did, while no bad faith was proved against him. I have not the slightest doubt that this is a correct judgment, and such is the unanimous opinion of the Court. Of course, if there were fraud on the defendant's part it would vitiate his possession, which is, however, under the circumstances, of itself title until the contrary is proved. The article 1027 clearly applies, and the plaintiff never had a right to revendicate at all, his recourse being evidently against his vendress only. I may add, that in my view, according to the evidence, it may be doubted whether it was ever contemplated that the plaintiff should get possession at all. Judgment confirmed. I may observe that this is not the case of purely and simply title by possession acquired from a non-proprietor. It is the case of the second purchase from the same vendor, which is exceptional, and provided for by the article in question.

Judgment confirmed.

De Lorimier & Co. for plaintiff.

Forget & Forget for defendant.

PARTNERS—CLAIM TO PROFITS MADE IN SEPARATE BUSINESS CONTRARY TO COVENANTS.

The Court of Appeal has, in the case of *Dean* v. *McDowell*, (31 L. Rep. N. S. 862), dealt in a question of extreme importance in the Law of Partnership. From the facts of that case it appears that the plaintiffs and defendants entered into partnership as salt merchants and brokers, and by the articles of partnership mutually covenanted not to engage, alone or with any other person, directly or indirectly, in any trade or business except upon the account and for the benefit of the partnership. Two years before the expiration of the partnership by effluxion of time, the defendant purchased the business of a firm of salt manufacturers, and kept the matter secret from plaintiffs, putting his son into the business so purchased till the expiration of the partnership, when the defendant openly entered into the business of salt manufacturing, which was carried on in the name of the firm from which he had purchased it. The salt manufactured by the latter firm continued to be sold on commission by the plaintiffs' firm till the expiration of the partnership, from which time the defendant sold the salt himself, without employing a broker. The plaintiffs did not discover the trading by the defendant till after the expiration of the partnership, whereupon they filed a bill to make the defendant account to the partnership for the profits made by him in the other business during the partnership, and they subsequently brought an action against him in the Chancery Division, claiming that his interest in the other business formed part of the partnership assets. The suit and action were heard together by the Master of the Rolls, who was of opinion that the plaintiffs had no right to an account of the profits, but that, as the defendant had committed a breach of his covenant, the bill in the first suit must be dismissed without costs; and that the claim in the second action being extravagant, there must be judgment in it for defendant with costs. His Lordship pointed out that two clauses relied on by the plaintiffs merely amounted to this, that the defendant would devote himself diligently to his business and not engage in any trade except the partnership business. There was, however, no covenant that, if he violated these clauses, he was to account to the partnership for the profits made by him. The plaintiff appealed. In the argument on appeal a number of cases was cited. It will suffice for our purpose to touch upon a few of them.

The bill in *Somerville* v. *Mackay* (16 Ves. 382) alleged that the plaintiff entered into an agreement with the defendant for shipping goods to Russia upon their joint account, one of the terms of the agreement being that neither of them should send any goods upon their separate accounts to A. and Co., or to any other person in Russia. The bill prayed that the plaintiff

might be declared entitled to a moiety of the profits of all goods sent by the plaintiff and defendant, or by the defendant separately, to Russia, consigned to A & Co., or to any other person; and that an account might be taken of all goods sent upon the joint account, or by the defendant upon his private account, to such consignees. The defendant put in an answer which admitted the agreement, but denied that its effect was to prohibit him from so trading on his separate account. A motion was subsequently made, calling upon the defendant to produce his books and papers in which the accounts were contained. Lord Eldon put the result of the case thus: The plaintiff contends that the meaning of the partners was that no trade should be carried on with Russia except on the joint account; alleging that the defendant did, in fraud of that agreement, and concealing the fact, carry on a separate trade with various persons, insisting that this conduct gave the plaintiff a right to a moiety of the profits. The course taken by the defendant was not to demur or plead, but to state by answer that, according to the true construction of the letters containing the terms of the agreement, he had full liberty to carry on this separate trade; that afterward, not choosing to rest upon that any longer, he carried it on with the leave of the plaintiff. His Lordship thought it was by no means clear as to the conclusion of fact that the defendant had any right to trade with other persons, but was of opinion that he had no right to trade separately with A. & Co. He mentioned, however, that if the answer had contained a clear, positive, unequivocal averment of the plaintiff's acquiescence and permission, the question whether the defendant was bound to make the discovery would fairly arise. This decision is useful only by reason of the side light which it throws upon the question under discussion.

Burton v. *Wookey* (Mad. & G. 367) is an authority for the proposition that a person who stands in a relation of trust or confidence to another shall not be permitted, in pursuance of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The plaintiff and defendant, who keep a shop, were in partnership to deal in *lapis calaminaris*. Instead of paying ready money the defendant supplied to the sellers goods from his shop, and in accounting to his partner charged as though he paid cash. "The defendant," said Vice-Chancellor Leach, "stood in a relation of trust or confidence toward the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price; when in the place of purchasing the *lapis* he obtained it by barter of his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff;" an account was decreed against the defendant, viz, an account of the profit made by the defendant in his barter of the goods. A temptation, however, to the abuse of partnership property is not sufficient to induce the Court to interfere by injunction. Thus when all the partners in a publication except one were also partners in a rival publication, an injunction, to restrain the using of the effects of the former partnership to assist the latter in consideration of an annual sum, was refused. But in this case there was an agreement permitting the use on those terms: *Glassington* v. *Thwaites*, 1 S. & S. 124.

The question with which we are concerned was definitely raised in *Russell* v. *Austwick* (1 Sim, 52). In that case A, B, C, and D, were common carriers carrying from L to F, a separate portion of the road being allotted to each. It was stipulated between them that no partnership should exist *inter se*. A for himself and the other partners agreed with the Mint to carry coin from L to F, and afterwards made another agreement with the Mint to carry other coin to places not on the road. B, C, and D, upon discovering this circumstance, claimed a share in the profits of the latter agreement. In carrying out this latter agreement it would be occasionally necessary to proceed for a short distance along the road from L to F. On behalf of the defendant it was argued that this was not a case of partnership as between the parties, though it might be as regards the public. The plaintiffs on the other hand admitted that the common concern had no connection with the provincial roads which were the occasion of the second agreement, and it was not upon that ground they claimed to participate in the profits. But they insisted that the second agreement was entered into by the officers of the Mint as connected with and a continuation of the first agreement, and in confidence of the responsibility of the parties to the first agree-

ment. Vice-Chancellor Leach did not think that the testimony of the officers of the Mint was so pointed upon this subject as it might have been, but he was of opinion that it was sufficiently plain that the defendant did not apprise them that he was treating for himself in exclusion of the plaintiffs, and that upon the settled principles of equity he could not exclude them from the same proportion of profits as they were entitled to under the first agreement. A declaration was accordingly made that the second agreement was to be considered as made on account of the several parties interested in the first agreement in the proportions in which they were entitled under the first agreement, and accounts were taken accordingly.

Gardner v. McCutcheon (4 Beav. 534), was a motion to restrain the defendant from receiving certain wools. The defendant was part owner and master of a ship, which he sold at Sidney. Soon after the sale he made large purchases of wool, which were consigned to England. The plaintiffs were also co-owners of the ship, and were all interested in the common adventure. They insisted that the wools in question were purchased with partnership property and on the partnership account. They, therefore, claimed the wool as partnership property. For the defendant it was contended that, besides acting as master of the ship, and trading on the joint account, he had a right to trade and did trade on his separate and private account, and that he purchased the wool with his own effects. As a general rule there is no doubt that the master of a ship is bound to employ his whole time and attention in the service of his employers, and that a partner in trade has no right to employ the partnership property in a private speculation for his own benefit. The defendant, however, alleged a custom as making it lawful for him to carry on private trade, and set up acquiescence on the part of the plaintiffs. "As to the alleged custom of trade," said Lord Langdale, "I could not, even if it were uncontradicted, which it is not, pay much attention to it on the present occasion. The master of a ship is an agent bound to give all his time and attention to his principal. In this case the duty of the defendant as master was, when the ship was employed on a trading adventure, to act for the common benefit of the owners, and when the ship was freighted or chartered, to obtain freight on the best terms he could for the owners, free from all bias of separate interest on himself, or of leave given to himself by the charterers to trade for himself; and I think it will be very difficult to support a custom, which, if illegal, as alleged, would entitle him to trade for himself separately, when it was his duty to trade to the best of his ability for the joint interest of himself and the other owners, and would give him a discretionary power to place his own interest in competition with the joint interest, an option to give the advantage to himself whenever he pleased, without the knowledge of his co-owners, and without giving them notice of his proceedings in this respect; a custom also which would make it valid for a person in the relation of co-owner or partner, having complete control over the ship which was partnership property, to employ it at the joint risk for his own private benefit.

The Master of the Rolls had said, in *Dean* v. *M'Dowell:* "The mischiefs of his and the defendant engaging in business are two-fold. It may be that it diverts his mind from the partnership business, and takes away his time and attention, which did not happen in this case; or it may be that it makes him liable for the losses of the other business, and may involve him and damage the partnership in which he is engaged; and therefore, the other parties have an option of intervening by injunction, and that has been the remedy usually adopted. Those are the two remedies. But ever since the Court of Chancery existed, till it was abolished, no one ever heard of such a bill as this. That is pretty good proof that there is no such equity." His Lordship also went upon the words of the clause, considering the covenant as a negative and not an affirmative one. In the Court of Appeal great reliance was placed on the case of *Somerville v. Mackay,* 16 Ves. 382; but as Lord Justice Cotton pointed out, the plaintiff and defendant in that case had agreed to enter into a joint adventure or partnership, for the purpose of exporting goods to Russia, and there was a special provision that the partners should not, on their separate account, export goods to the country or to the particular person named. The defendant, nevertheless, had exported goods to Russia and to the person named. "In that case, there-

fore," said his Lordship, "the business in which he had engaged contrary to the partnership articles was within the scope of the partnership. It was partnership business except for his attempt to withdraw it from the partnership contract, and to get the profits of it for his own benefit." That case, however, the Court of Appeal held had no bearing upon the present case, where the business in which the defendant engaged, was in no way within the scope of the partnership. The same learned judge summed up the law in the following succinct terms: "There are clear rules and principles which entitle one partner to share in the profits made by his co-partners. If profit is made by business within the scope of the partnership business, then the partner who is engaging in that secretly, cannot say that it is not partnership business. It is that which he ought to have engaged in only for the purposes of the partnership. Again, if he makes any profit by the use of any of the property of the partnership—including, I may say, information to which the partnership is entitled—then the profit is made out of the partnership property, and therefore, of course, it must be brought into partnership account. So, again, if from his position as partner he gets a business which is profitable, or if from his position as partner he gets an interest in partnership property, or in that which the partnership requires for the purposes of the partnership, he cannot hold it himself because he acquires it by his position of partner, and acquiring it by means of that fiduciary position, he must bring it into the partnership account." It will be noticed in the present case that there was no doubt whatever as to the fact that a breach of covenant had been committed; but a doubt did exist respecting the remedy. The lucid judgments of the Master of the Rolls, and the Court of Appeal will render the existence of such a doubt impossible in the future.—The London *Law Times*.

APPOINTMENTS.

An Extra of the *Canada Gazette*, Oct. 9, contains the following judicial appointments:—Hon. H. E. Taschereau to be a *puisné* Judge of the Supreme Court, *vice* Hon. J. T. Taschereau, resigned; R. L. Weatherbe, of Halifax, to be a Judge of the Supreme Court, of Nova Scotia; Hon. M. Laframboise, of Montreal, to be a *puisné* Judge of the Superior Court, District of Gaspé; H. T. Taschereau, of Quebec, to be a *puisné* Judge of the Superior Court; Archibald Bell, of Chatham, to be County Court Judge, County of Kent.

DIGEST OF ENGLISH DECISIONS.

Acceptance.—See *Contract*, 3.
Account of Profits.—See *Partnership*, 1.
Accumulation.—See *Will*, 2.
Acquiescence.—See *Principal and Agent.*
Action.—See *Husband and Wife*, 2.
Ademption.—See *Will*, 5.
Adjacent Support.—See *Damages.*
Administration.—See *Mortgage*, 1.
Advancement.—See *Annuity*, 2.
Advocate.—See *Attorney and Client*, 1.
Affidavit.—See *Solicitor.*
Agent.—See *Principal and Agent.*
Agreement.—See *Contract*, 2.

Annuity.—1. Testator gave some annuities, and then bequeathed his personal estate not specifically disposed of to trustees, "to stand possessed thereof upon trust, out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed as for the time being shall be payable, and subject thereto" upon other trusts. The income of the personal estate was less than the amount of the annuities. *Held*, that the deficiency should be made up out of the capital.—*In re Mason. Mason* v. *Robinson*, 8 Ch. D. 411.

2. By a deed of separation made in 1860, between M. and his wife, he covenanted to pay each of his six daughters an annuity of £200, to cease, in each case, if M. and his wife should come together again. The wife died in 1871, and M. in 1874, the latter intestate. They had not lived together again. *Held*, that the annuities paid during M.'s life were not advancements, and that the value of the annuities at the death of M. should be brought into hotchpot.—*Hatfield* v. *Minet*, 8 Ch. D. 136.

Anticipation.—See *Husband and Wife*, 1; *Married Women*, 1.

Appointment.—See *Settlement*, 2.

Arbitration.—The plaintiff and the defendants, G., N., and F., all British subjects, entered into partnership articles for carrying on business in Russia, with the head office at St. Petersburg. The articles were in the Russian language, and registered in Russia. G. and N. had the privilege to ask back their capital within a year; and, if their demand was not satisfied within a month, they could wind up the firm. "In case of any disputes arising between the parties,... such disputes, no matter how or where they may arise, shall be referred to the St. Peters-

burg commercial court.... The decision of such court shall be final." G. and N. duly demanded their capital, and took steps in Russia to secure it by winding up proceedings. The plaintiff thereupon began an action in England, alleging that there were three parts to their agreement, all executed in England, although one was translated into Russian, and by one of the English parts he was to have compensation for the withdrawal of G. and N.; that the proceedings for winding up were taken without his knowledge and consent; and that they were invalid, and not according to Russian law. He claimed a dissolution, compensation according to the English agreement, and the appointment of a receiver in England. Defendants moved for a reference of all matters to St. Petersburg. *Held*, that the agreement in the articles to refer was a good arbitration clause under the Common Law Procedure Act, 1854, and a stay of proceedings was ordered to await the result of proceedings in the Russian court.—*Law* v. *Garrett*, 8 Ch. D. 26.

Attorney and Client.—1. Shipowners sued the charterers for not discharging the cargo according to the charter-party, and in a subsequent action the charterers resorted to their remedy over against the merchant on the contract of sale. *Held*, that correspondence between the charterers and their solicitors in the first action, and between their solicitor and the shipowners' solicitor and relating to the questions in the second action, were privileged, and need not be produced in the second action.—*Bullock* v. *Corry*, 3 Q. B. D. 356.

2. In an action by a company against its former engineer for money wrongly charged to it in the final account with him, the defendant applied for inspection of three documents scheduled in the plaintiff's affidavit of discovery, and consisting of shorthand notes of conversations between an officer of the company and the chimney-sweep, and between the chairman of the company and the present engineer, and a statement of the facts drawn up by the chairman, all prepared for submission to plaintiff's solicitor for his advice as to their action, two of which had already been submitted to him. Refused, on the ground that the documents were privileged.—*The Southwark & Vauxhall Water Co.* v. *Quick*, 3 Q. B. D. 315.

Auction.—See *Sale*, 3.

Average.—See *Shipping and Admiralty*.

Bank.—1. A firm had an account at a bank, and the individual members, among whom was the defendant, also had accounts there. Each member could draw on the firm account. One member of the firm died, and the defendant was one of the trustees of his estate. Previous to the death, the defendant had transferred funds from the firm account to his own account. The defendant purchased certain property, and got the bank to allow him to overdraw his account, on deposit of the title-deeds thereof. On proceedings by the bank to enforce payment of the balance out of said property, the other trustees of the deceased partner claimed a first lien on the property, as having been bought in part with trust-money improperly transferred to his own account by the defendant. The bank had, in fact, no knowledge that such was the case with the accounts, and did not know the defendant was a trustee. The contention that the bank was bound to know whether the transfer was proper and authorized, *held* not maintainable.—*Backhouse* v. *Charlton*, 8 Ch. D. 444.

2. The plaintiff bank, established in Lima, arranged, in 1871, with the G. company, in London, to draw on the latter to the extent of £100,000, the credits to be covered within ninety days by other bills furnished by the plaintiff bank. In 1875, the G. company was in difficulties, and on March 3 arranged for a loan from the defendant bank, on the basis that the latter should discount certain remittances from the plaintiff bank then *en route*, and which were expected to arrive on or before the 17th. Before their arrival, the defendant bank agreed to the proposition, and chose as agents to receive the securities on their arrival one S., managing director of the G. company, and another. The money was lent between the 3d and the 5th. On the 16th there arrived remittances from the plaintiff bank, and S. took them to the defendant bank, and G., the general manager thereof, and who had formerly been managing director in the G. company, and knew of the arrangement of 1871, selected a bill of exchange for £1,000 and a box of gold eagles, the bill of lading for which, with said bill for £1,000, was delivered to him for his bank. The next day, the G. company suspended, and was finally wound up. *Held*, that the property in the bill of exchange and the box of eagles had passed

from the plaintiff bank, and there could be no recovery.—*Banco de Lima* v. *Anglo-Peruvian Bank*, 8 Ch. D. 160.

Bankruptcy.—See *Execution*; *Partnership*, 3; *Sale*, 4.

Bequest.—S. died in 1628, leaving a will containing a bequest of £1,000 for "the relief and use of the poorest of my kindred, such as are not able to work for their living, *videlicet*, sick, aged, and impotent persons, and such as cannot maintain their own charge....And my will is, that, in bestowing....my goods to the poor charitable uses, which is, according to my intent and desire, those of my kindred which are poor, aged, impotent, and any other way unable to help themselves, shall be chiefly preferred." The income from the charity fund became very large. *Held*, that the bequest was a charity; that the objects of it were primarily the kindred of the testator actually poor; and if, after such were provided for, something remained, it should be applied to the relief of poor persons in general, by the doctrine of *cy-près*. A well-to-do person among the kindred could not take, although by comparison "poorer" than some of the kindred. *Dictum* of WICKENS, V. C., in *Taylor* v. *Gillam* (L. R. 16 Eq. 581), criticised. —*Attorney-General* v. *Duke of Northumberland*, 7 Ch. D. 745.

Bill of Lading.—See *Bank*, 2; *Sale*, 2.

Bill of Sale.—See *Sale*, 4.

Bills and Notes.—A check had been given for a debt, when a trustee or garnishee process was served upon the debtors, whereupon they ordered payment on the check to be stopped. The check had not been presented. *Held*, that the stopping of payment of the check revived the debt, and the debt was held by the trustee process.—*Cohen* v. *Hale*, 3 Q. B. D. 371.

Bonus.—See *Will*, 5.

Boundary.—See *Landlord and Tenant*, 2.

Burden of Proof.—See *Slander*.

By-laws.—See *Railway*, 2.

Cancellation of Stock.—See *Company*, 1.

Carrier.—See *Common Carrier*.

Causa Proxima.—See *Negligence*, 1.

Charity.—See *Bequest*; *Trust*, 1; *Will*, 4.

Charter-party.—A charter-party began thus: "A 1½ Record of American and Foreign Shipping Book, London, 4th Sept., 1876. Charter-party. It is mutually agreed between the owners of the ship.....newly classed as above.....and B. Newgass & Co.," &c. At the above date, the ship was on record classed "A 1½," as above, but subsequently she was declared unseaworthy by the agent of the Shipping Association, and said classification stricken off. In an action by the owner against the charterer for refusing to load the ship, *held*, that the above statement was simply a warranty that the ship was classed in said record A 1½ on said date, and not a warranty that the classification was correct, or that she should continue of that class.—*French* v. *Newgass*, 3 C. P. D. 163.

Check.—See *Bank*, 1; *Bills and Notes*.

Collusion.—See *Judgment*.

Common Carrier.—See *Railway*, 1, 3.

Company.—1. In 1860, the N. Company, limited, was formed to insure lives and injuries to health, and "generally" to effect such lawful insurances of all kinds as might "be determined upon by a general meeting" of the company. In 1872, a general meeting voted to add fire insurance to the company's business, and to issue new shares, called B shares, for this purpose. This was to form a separate department, and the assured under it were to be confined in their remedy to the B shares. Eminent counsel afterwards advised the company that this proceeding, and the issue of the B shares were *ultra vires*; and a B shareholder accordingly got an order from chancery removing his name from the list of shareholders. An arrangement was then made by the N. company to form a new company for the fire business; and it was agreed between the N. company and the new fire company that the latter should take all the assets and assume all the risks and liabilities of the old fire department; that the fire company should issue its shares to the N. company and the other holders of the B stock, and credit them with the amounts paid thereon, and the N. company should cancel all the old B stock. The appellant, a B stockholder, took stock in the new fire company, got credit for his B stock, and the latter was cancelled. Afterwards, on an order to wind up the N. company, a fire-policy holder, who had insured in the N. company previous to the formation of the fire company, moved to place the appellant on the list of contributories in respect to his B shares. *Held*, that the issue of the B shares was not *ultra vires*; and that although the cancelling of the appellant's B shares in the formation of the new company was also valid, yet that, as to creditors of the N. company, whose rights had attached previous to such cancelling, the appellant was liable as a contributory.—*In re Norwich Provident Insurance Co. Bath's Case*, 8 Ch. D. 334.