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MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. JUNE, 1892. No. 6.

ABORTION—See Crim. Law 6.

ACCIDENT INSURANCE — See Insurance, Accident.

ACCOMPLICES—See Crim. Law 5.

ADVERTISING IDEA, USE OF — See Contract 2.

AGENCY—See Contracts 3.

APPEAL—SEE ALSO ELECTION 3.

1. ACTION TO SET ASIDE MUNICIPAL BY-LAW — SUPREME AND EXCHEQUER COURTS ACT, S. 24 (G).

In virtue of a by-law passed at a meeting of the council of the corporation of the city of Quebec, in the absence of the mayor, but presided over by a councillor elected to the chair in the absence of the mayor, an annual tax of $800 was imposed on the Bell Telephone Company of Canada, the appellants, and a tax of $1,000 on the Quebec Gas Company. In actions instituted by the appellants for the purpose of annulling the by-law, the Court of Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court and dismissed the actions, holding the tax valid. On appeal to the Supreme Court of Canada:

Held, that the cases were not appealable, the appellants not having taken out or been refused, after argument, a rule or order quashing the by-law in question, within the terms of s. 24 (*g*) of the Supreme and Exchequer Courts Act, providing for appeals in cases of municipal by-laws.

Varennes v. Verchères, 19 S.C.R. 365. Sherbrooke v. McManamy, 18 S. C. R. 594 followed. Appeal quashed without costs. *Bell Telephone Co.* v. *City of Quebec; Quebec Gas Co.* v. *City of Quebec.* Supreme Court of Canada, April, 1892.

2. LEAVE TO APPEAL — EXTENSION OF TIME—APPLICATION AFTER EXPIRATION OF TIME — EXCHEQUER COURT ACT, 1887, S. 51-53 V., C. 35, S. 1 — GROUNDS FOR EXTENSION.

Where sufficient grounds are disclosed, the time for leave to appeal from a judgment of the Exchequer Court of Canada prescribed by s. 51 of the Exchequer Court Act, as amended by 53 V., c. 35, s. 1, may be extended after such prescribed time has expired. The application in this case was made within three days after the expiry of the thirty days within which an appeal could have been taken.

(2) The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired.

(3) Pressure of public business preventing a consultation between the Attorney-General for Canada and his solicitor within the prescribed time for leave to appeal, is sufficient reason for an extension being granted, although the application therefor may not be made until after the expiry of such prescribed time. *Clark* v. *Reginam*, Exchequer Court of Canada, March 1892.

ARREST FOR MISDEMEANOR — See Crim. Law 1.

ASSESSMENT.

MUNICIPAL IMPROVEMENTS — ASSESSMENT OF RAILWAY COMPANY — ROAD-BED.

The road bed of a railway company is property legally subject to assessments for benefits resulting from the building of a sewer. *State* v. *City of Passaic*. N. J. Supreme Ct., 23 Atl. Rep. 945.

BAGGAGE, LOSS OF—See Carriers 2.

BANK ACT—See Banks and Banking 2.

BANKS AND BANKING—SEE ALSO PARTNERSHIP 2.

1. COLLECTIONS—DEFAULT OF CORRESPONDENT.

Where a bank receives for collection a note or bill, payable at a distant point, with the understanding that such a collection is an accommodation only, or that it shall receive no compensation therefor, beyond the customary exchange, and the bank transmits such paper to a reputable and suitable correspondent at the place of payment with proper instructions for the collection and remittance of the proceeds thereof, it will not be liable for the default of such correspondent. In such a case, the holder will be held to have assented to the employment in his behalf of such agents as are usually selected by banks in the course of business in making collections through correspondents, and the correspondent so selected will, in the absence of negligence by the immediate agents and servants of the transmitting bank become the agent of the holder only. The exchange which is usually charged by banks for the transmission of money from one place to another is not a sufficient consideration to support an implied undertaking to answer for the default of a correspondent. *First Nat. Bank of Pawnee City* v. *Sprague*, Sup. Court of Nebraska, 51 N. W. Rep. 846. (Cent. L. J.)

2. EQUITABLE ASSIGNMENT—PRIORITIES BETWEEN ASSIGNMENT AND ATTACHING ORDERS—BANKS AND BANKING—THE BANK ACT — POWERS OF BANKS AS TO BUSINESS TO BE DONE.

This was an interpleader issue directed to try the right to certain moneys sought to be attached by the defendants in the issue, in the hands of the C. P. R. Co., under various attaching orders issued in actions against Egan Bros.

The moneys were claimed by the plaintiffs as assigned to them or to the plaintiff Nicholls, the manager of the plaintiffs' bank, for securing certain moneys due by the Egans to the bank upon their notes indorsed by Strevel.

Egan Bros., through their agent Edward Egan, agreed with Strevel that, if he would indorse their notes in favour of the bank to the amount of $10,000, they would give an assignment to the bank of all moneys to be payable to them from the C. P. R. Co. on contracts made and to be made by them with that company, to secure the notes. In pursuance of this agreement the Egans gave to the plaintiff Nicholls, the manager of the bank, a power of attorney authorizing Nicholls, for the use and benefit of the bank, to collect of the C. P. R. Co., all moneys which then were or thereafter might be payable to the Egans under any contract then made or thereafter to be made by them with that company ; the moneys in question were moneys payable on contracts then and thereafter made by the company with the Egans for such railway construction. Strevel indorsed the notes and the advances were made, and there was unpaid thereon an amount equal to the amount in question.

Held, that this transaction amounted to an equitable assignment to the bank of the sum in question. Any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of that fund. That moneys arising out of future contracts can be assigned, is clearly settled.

The transaction was also objected to as not within the powers of the bank, which was a corporation subject to the Banking Acts of Canada. The transaction was effected before the coming into force of the Bank Act, 53 V., c. 31,

and would appear to be governed by R. S. C., c. 120.

The contention of the defendants was that such a transaction was void unless expressly authorized by that Act, and that such was not the case.

Held, that the lending of money upon such security was properly a part of the business of banking. Although s. 45 of R. S. C., c. 120, refers to the dealing in gold and silver and bills of exchange and the negotiating of promissory notes and negotiable securities, it is not to be understood that this is intended to limit the business of the banks to such transactions. It is equally a part of a banking business to advance moneys upon the security of other choses in actions, except in so far as the Banking Acts expressly exclude such transactions.

For the protection of the indorser Strevel, and under the agreement with him, the plaintiff Nicholls could enforce the assignment. Verdict for plaintiffs. *Molsons Bank* v. *Carscaden*, Manitoba Queen's Bench, April 1892. (Can. L. T.)

BENEVOLENT SOCIETY — See Insurance 13.

BILLS OF EXCHANGE ACT—See Bills and Notes 1.

BILLS AND NOTES.

1. PROMISSORY NOTE—BILLS OF EXCHANGE ACT—EVIDENCE — DELIVERY OF NOTE TO PLAINTIFF.

This was a motion for a new trial. The action was brought on a promissory note indorsed to the plaintiff by the payee, to which the defendant pleaded no indorsement. The ground relied on for a new trial was that there was no evidence of the delivery to the plaintiff of the note on which the action had been brought.

Held, that under the provisions of the Bills of Exchange Act such evidence was not necessary; and a new trial was refused. *Adams* v. *Noonan*, New Brunswick Sup. Ct., April 1892. (Can. L. T.)

2. NOTE—ORDER ON EXECUTORS—STATUTE OF FRAUDS.

(1) A testatrix executed and delivered to plaintiff the following writing: "One year after my death I hereby direct my executors to pay J. (plaintiff), his heirs, executors or assigns, the sum $1,976.90, being the balance due him for cash advanced at various times by him to H., my son, and others, as per statement rendered by him this day, without interest." *Held*, that such writing was a promissory note, and not a testamentary paper. Carnwright v. Gray, 127 N. Y. 92, followed.

(2) The addition of the words in such note that the money is due the payee "for cash advanced at various times to H., my son, and others, as per statement rendered by him this day," does not alter the implication that the money is due the payee from the maker, so as to bring it within the statute of frauds. *Hegeman* v. *Moon*, N. Y. Ct. of Appeal, March 15, 1892.

3. LIMITATIONS — STATUTE OF—(21 JAC. 1. C. 16), S. 3—PART PAYMENT—PAYMENT NOT MADE TO HOLDER OR HIS AGENT.

Part payment on account of a debt will not prevent the operation of the Statute of Limitations, unless made to the creditor or his agent. Clark v. Hooper (10 Bing. 480; 4 Mo. & Sc. 353; 3 Law J. Rep. C. P. 159) discussed.

The payee of a promissory note made by the defendant indorsed the note and pledged it with the plaintiffs. The defendant, having no notice of the indorsement, paid off the amount due on the note by several instalments to the pledgor. On one such instalment being paid the pledgor informed the plaintiffs thereof, who made an entry in their books that the note was *pro tanto* discharged:

Held, in an action on the note, first, that the instalment of which the plaintiffs had notice was not made to the pledgor as agent for the plaintiffs, and, therefore, was not a part payment sufficient to prevent the operation of the Statute of Limitations; secondly (by Lord Herschell), that, if the plaintiffs could adopt the pledgor as their agent for the purpose of that instalment, they could not, without previous notice to the defendant, repu-

diate his agency with respect to the other instalments, but must treat the note as wholly discharged. Judgment of Williams, J., affirmed. *Stamford, Spalding, and Boston Banking Co.* (*Lim.*) v. *Smith* (App.) 61. L. J. Rep. Q. B. 405.

Note.

(Lord Herschell.) "The action on the promissory note is *prima facie* barred by the Statute of Limitations, but the plaintiffs seek to avoid the operation of the statute by saying that there has been a part payment made by the defendant in respect of the note which takes the case out of the statute. The payment relied on was made on the 9thof November, 1885, and if that payment can be relied on by the plaintiffs as a part payment or acknowledgment of the debt, then, as it was made within six years before the action was brought, it would take the case out of the statute. That payment, however, was not made to the plaintiffs, who now hold the note; it was made to Konow, the original holder of the note."

"The plaintiffs, however, contend that that payment, being made in respect of the note, amounted to an acknowledgment that the remainder of the debt was still due, and that that acknowledgment enures to the benefit of the plaintiffs. The balance of the note was at a later date paid to Konow by the defendant, who did not know that the note had been indorsed away by Konow. The plaintiffs argue that, though the payment was not made intentionally to Konow as agent for them, or with the knowledge that they had any interest in the note, but was made in the belief that the debt was still due to Konow, yet nevertheless the plaintiffs can take advantage of the payment as being in effect an acknowledgment of the defendant that he still owed the remainder of the debt to any one who was entitled to sue upon the note. It cannot now be disputed that an acknowledgment in order to exclude the operation of the statute must be absolute and unconditional, and one from which a promise to pay the debt can be inferred. It was argued by Mr. Lindsell that the fact of the acknowledgment was the material thing, and that it did not signify to whom it was made. Such appears to have been the law at one time. There are certainly *dicta* to that effect. But in my opinion the law is now well settled that an acknowledgment to a stranger will not be sufficient. The acknowledgment must be such that a promise to pay made either with the creditor or his agent can be inferred from it. The law is so stated by Chief Baron Pollock in Godwin v. Culley, 4 Hurl & N. 373."

"Mr. Lindsell relied mainly on Clark v. Hooper 10 Bing. 480, where a payment had been made to a person as administratrix, who had not, in fact, taken out letters of administration in the proper diocese. There are, no doubt, *dicta* in some of the judgments in that case that the payment had the same effect as an acknowledgment made to a third person, and that that was sufficient. In my opinion, the decision in the case cannot be supported on that ground, although the decision itself may be supported on the ground—which I will presently explain—of its being an exception to the general rule."

"If, then, an acknowledgment, in order to be sufficient, must amount to a promise to pay made either with the creditor or his agent, it would seem, *a fortiori*, that the payment must be a payment made either to the creditor or his agent. Indeed, if it were not made to the creditor or his agent, it would be a misuse of language to call it a payment at all. Unless it operated as a discharge, wholly or *pro tanto*, of the obligation in respect of which it was given, it could not be a payment; money might pass, but there would be no payment, no discharge of the debt, unless it was received by the person to whom the debt was due or by an agent on his behalf."

"There may, however, possibly be an exception to this general rule of law—*e. g.*, where a payment is made to a person as filling a representative capacity, or who is believed to fill a representative capacity, and is received by that person for the benefit of those whom he represents, it may be that such payment enures for the benefit of the persons for whose benefit it was intended to be made. The case of Clark v. Hooper, *supra* may be supported on that ground. The payment in that case was intended to be for the benefit of the estate of the deceased creditor. At the time the payment was made there was no person to whom the payments due to the estate could properly be made. But the intention of the debtor in making the payment was to make a payment in discharge of his debt due to the estate, and not to the administratrix for her own benefit; and it might well be that such payment enured for the benefit of the estate, and that when a proper administration was taken out the proper administrator could avail himself of it."

"In my opinion, therefore, the acknowledgment or payment must be made to the creditor, or to some person on his behalf."

"In the present case, however, the defendant, when in 1885 he made the payment to Konow, did not intend to pay it to him in any representative capacity; he paid it in the belief that he was discharging the liability he thought himself to be still under to Konow. There was no promise or acknowledgment to any one except Konow. The plaintiffs, therefore, can only establish their case by shewing that Konow was their agent. At the time of payment Konow was admittedly not their agent; and therefore at that time there was really no payment at all, and the plaintiffs could have the next day sued the defendant for the full amount of the note. But it is said on behalf of the plaintiffs that they afterwards adopted the transaction, and accepted Konow as their agent, and treated the payment as a payment made in respect of the note. I am not satisfied that that would be sufficient; but, even if it were sufficient, then the plaintiffs are in this difficulty, that if they adopt Konow as their agent for receiving the

payment made by the defendant in 1885, they cannot repudiate the subsequent transactions in which Konow, acting just as he had done before, received other payments from the defendant, who had received no notice from the plaintiffs that they had put an end to Konow's agency. The plaintiffs would therefore be bound by Konow's receipt of the balance on the subsequent occasion."

"On the grounds given, I think the plaintiffs have not established any case for excluding the operation of the statute, and their action is accordingly barred by the statute. The appeal must be dismissed, with costs."

(Lindley, L.J.) "There was a time, no doubt, when an acknowledgment to a third person would have been held sufficient; but since the case of Tanner v. Smart 6 B. & C. 303, the law has changed in that respect, and it is now well settled that to take the cases out of the statute the payment must be a payment to the creditor or his agent so as to be a *pro tanto* discharge. The case of Clark v. Hooper, (*supra*) only amounts to this, that a mistake made by both parties would not prevent the payment having the effect that it was intended to have. The payment there was made and intended to operate as a payment to an administrator, although he had not taken out administration in two counties. It was made to him as administrator, and was held good. I agree however, that the grounds given for the decision cannot now be supported, but I see no reason to quarrel with the decision itself."

(Kay L. J.) "Lord Tenterden's Act (9 Geo. 4, c. 14. s. 1) provided that no acknowlgment or promise by words only should be deemed sufficient evidence of a new contract whereby to take any case out of the operation of the Statute of Limitations. But Lord Tenterden's Act did not take away or lower the effect of any payment of principal or interest. Before Lord Tenterden's Act a part payment of the debt within the statutory limit of time was held sufficient to take the case out of the Statute of Limitations; but it was never held that the mere handing over of money to a third person—not the creditor or his agent—was a payment from which a promise to pay could be inferred. The only payment from which a promise to pay could be inferred was a payment which discharged the debt in part. A mere handing over of money to a third person is not payment of a part of the debt, and is no bar to the Statute of Limitations. I think the Statute of Limitations is a complete answer to the present claim.

BOND.

SURETY—AFFIDAVIT OF JUSTIFICATION — CROSS-EXAMINATION — PARTNERSHIP.

A surety on a bond, who is a member of a mercantile partnership, but justifies on his own individual property, not on his share in the partnership, is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership. *Douglas* v. *Blackey*, Ontario Q. B. D April 1892, (Can. L. T.)

BREACH OF PROMISE OF MARRIAGE—See Marriage.

BROKERS—See Contracts 1.

CANADA TEMP. ACT — See Intox. Liquor 1. 2. 3. 4.

CARRIERS.

OF GOODS.

1. GOODS LOST "EN ROUTE"—LIABILITY.

Held :—That a carrier who receives goods *en route* from another carrier, enters them on its way-bills and collects all the freight charges from the consignee, is not responsible for goods lost by the former carrier. The consignee being misled by the way-bills of the second carrier the latter is adjudged to pay the cost of an action for damages. *Behan Bros.* v. *Grand Trunk Ry. Co.*, 17 Q. L. R. 299.

2. LOSS OF BAGGAGE — LIMITING LIABILITY—INSTRUCTIONS.

Defendant, a railroad company, sold a ticket to plaintiff, which entitled her to ride and have her baggage carried on defendant's railroad and other connecting lines from Portland, Ore., to Indianapolis. The baggage consisted of a trunk containing wearing apparel and other articles. The ticket provided that "none of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding $100." On the arrival of the trunk plaintiff discovered there had been abstracted therefrom a sealskin cloak and other articles amounting to $330.

Held, that as defendant did not attempt to account for the failure to deliver the property, the jury were entitled to infer negligence, and it was liable to plaintiff for the full amount lost. *Louisville, N. A. & C. Ry. Co.* v. *Nicholai*, Indiana Appellate Court, March 1, 1892.

OF PASSENGERS.

3. NEGLIGENCE—RIGHTS OF PERSONS NOT PASSENGERS.

Held, that a person who enters a railroad car to assist a lady to a seat cannot demand that the train be held for the full length of time usually required for passengers to get on or off at that place, but only that it be held long enough for the said person to get off, upon notice to the trainman that he desires to do so. *Lawton* v. *Little Rock & Fort Smith Ry Co.*, Supreme Court of Arkansas.

CHARTER-PARTY — See Ships and Shipping 2.

CHILD-BIRTH—See Crim. Law 4.

CIVIL CODE (Quebec — arts. 2262, 2267, 2188, 2211—See Neg. 3.

CIVIL CODE (Quebec) art. 1188—See Procedure.

COMPANIES.

1. DIVIDEND—PROFITS — INCREASE IN VALUE OF ASSETS—LAND COMPANY.

A company is not bound to devote profits earned to the restoration of a portion of its capital written off, or treated as having been lost, in the accounts of a previous year. In the accounts of a land company for the year 1882, the capital value of its assets was written up as being 69,233*l*.10*s*.4*d*. above cost price, and that increase in value was brought into the profit and loss account and balanced *pro tanto* against a bad debt of 72,326*l*. In the accounts for the year 1885, a profit was earned upon income account, and the directors proposed to divide it in the shape of dividends.

Held, that such disposition of the profit was not *ultra vires*, and that, even assuming that upon valuation there should be found a loss of the capital of the company, the company was not bound to devote the profit to the restoring of the loss. Lee v. The Neufchatel Asphalte Company (Lim.), 58 Law J. Rep. Chan. 408; Law Rep. 41 Ch. D. 1 followed. *Bolton* v. *Natal Land and Colonisation Co.* (*Lim.*), 61 Law J. Rep. Chanc. 281.

2. MISREPRESENTATION —WINDING-UP— CONTRIBUTORY.

The directors of a company formed in 1887 issued a prospectus in December 1890, which contained material misrepresentations as to the state of the company's affairs. After a number of new shares had been taken up on the faith of this prospectus, the directors on the 12 May 1891, issued a circular to all the new shareholders acknowledging the misleading character of the prospectus, and intimating that they proposed to present to the Court a petition for authority to rectify the register by deleting therefrom the names of the new shareholders. Two of the new shareholders W. & D., wrote in reply to this circular on 14th and 20th May respectively, expressing their desire to have their names removed from the register, and approving of the course which the directors proposed to take. On the 18th May the directors issued a notice of an extraordinary general meeting, to be held on the 26th May, for the purpose of passing resolutions confirming a provisional agreement for the transference of the company's business to another company, and for the voluntary winding-up of the company. On 20th May the directors presented a petition for removal of the new shareholders' name from the register. The petition was intimated to each of the new shareholders and no answers were lodged, but before the inducie had expired a petition was presented on 26th May to have the company wound up by the Court, and under this petition an order was subsequently pronounced for the judicial winding-up of the company. In a note by the liquidators for settlement of the list of contributories, the Court *held* (1) that the company not having been publicly declared insolvent, the directors were acting within their powers in issuing the circular of the 12th May and presenting the petition of 20th May, and that it was irrelevant for the liquidators to aver that the directors had acted in the knowledge that the company was insolvent at the date the circular was issued, and in order fraudulently to avoid the personal liability

which they had incurred; (2) that W. & D. were entitled to have their names removed from the list of contributories in respect that before the petition for winding-up was presented they had, by their acceptance of the offer contained in the director's circular, taken steps to have their names removed from the register; and (3) that the names of all the other new shareholders must be placed on the list of contributories. *Edin. Employers Assur. Co.* v. *Griffiths et al.*, 29 Scot. Law Rep. 518.

CONSIDERATION—See Contracts 1.

CONSPIRACY TO DEFRAUD — See Criminal Law 3.

CONSTRUCTIVE TRUSTS—See Title to Land.

CONTRACTS.

1. BROKERS—CONSIDERATION—DISOBEYING INSTRUCTIONS—MEASURE OF DAMAGES.

(1) Where defendants, stock brokers, were carrying a "short" sale of stock for plaintiff, and the stock began to rise, whereupon plaintiff wished to cover his sale and go "long" on the stock, which defendants advised him not to do, the fact that plaintiff, to his pecuniary loss, refrained from doing as he wished, was sufficient consideration for defendants' promise to carry the stock without additional margin until plaintiff could get out without loss.

(2) Where a stock broker who is carrying a "short" sale for a customer, disobeys instructions given on a rise in the market to buy so as to cover the "short," the customer's measure of damages is the difference between the market value at the time of the broker's instructions to buy and the price at which the broker actually bought. Campbell v. Wright, 118 N. Y. 594. *Rogers* v. *Wiley*, N. Y. Ct. of Appeals, March 1892.

2. USE OF ADVERTISING IDEA — PROPERTY RIGHTS.

Where an inventor, in order to induce a person to employ him, communicates in confidence a valuable system of advertising, without any agreement as to compensation therefor, and the latter refuses to employ him, but uses the idea, the inventor cannot recover the value of such use, his property in it being lost by the disclosure. *Bristol* v. *Equitable Life Assur. Soc. of United States*, New York Court of Appeal, March 1892.

3. DEED OF LAND — EVIDENCE — AGENCY — STATUTE OF FRAUDS — PAROL TESTIMONY.

M. owned certain property which was mortgaged and had been advertised for sale under a power of sale in the mortgage. Before the date fixed for the sale M. made an assignment for the benefit of his creditors and his wife tried to purchase the property. It was not sold on the day named, and the next day M.'s wife went to the solicitors of the mortgagee and arranged for the purchase by making a cash payment and giving a mortgage for the balance. She had some other property on which she wished to raise the money for the cash payment and B. offered to lend the amount at seven per cent, interest for a year, he taking the wife's property and holding it in trust for that time. B. and M. went to the office of the mortgagee's solicitors, where a contract was drawn up in the terms agreed and signed by B., who told the solicitors that he did not know whether the deed would be taken in his own name or his daughter's, but that he would advise him by telephone. On the following day a telephone message came to the solicitors to have the deed made in the name of B.'s daughter, which was done; the deed was executed, the money paid, and a mortgage was given to the original mortgagee as agreed. Subsequently the daughter claimed that she purchased the property absolutely for her own benefit, and an action was brought by M.'s wife against B. and his daughter to have the daughter declared a trustee of the property subject to repayment of the loan from B., and for specific performance of the agreement with B., the action charging collusion and conspiracy on the part of B. and his daughter to deprive the plaintiff of her property. The defendants pleaded the

Statute of Frauds in addition to denying the alleged agreement.

Held, affirming the decision of the Court of Appeal and that of the trial Judge, Strong, J., dissenting, that the evidence established the agreement by B. to lend the money and take the property in trust as security; that the daughter was aware of this agreement; and that the deeds executed having been made in pursuance thereof, the daughter must be held a trustee of the property, as B. would have been if the deed had been taken in his name.

Held, further, Strong, J., dissenting, that the Statute of Frauds did not prevent the agreement being enforced notwithstanding it was not in writing. *McMillan* v. *Barton*. Supreme Ct. Canada, April 1892.

4. TORONTO STREET RAILWAY COMPANY — PURCHASE OF RAILWAY BY CITY OF TORONTO—FRANCHISE—PROPERTY—ROAD-BED.

Held, that under the agreement and statutes relating to the Toronto Street Railway Company, their "privilege" could not be properly said to have been limited to 30 years only, because there was no obligation on the part of the city to assume the ownership of the railway at the expiration of that term.

Held, however, that this privilege or franchise could not be construed to be "property," the value of which was intended to be taken into account by the arbitrators when the city assumed the ownership of the railway. No provision was made for its valuation, either as to the basis on which it was to be ascertained, or otherwise, indicating that it was not contemplated by the respective parties that the city should, in money, pay the company for that which they, with the sanction and authority of the legislature, had granted for a term, which they had the right to terminate after a fixed period.

Held, also, that the arrangement between the Street Railway Company and the city as to the road-bed did not entitle the former to have this road-bed treated as part of its railway property, to be valued and paid for by the city, which had at its own expense contributed it.

Held, lastly, that the franchise having been terminated by the city, it no longer constituted a property of the company to be valued by the arbitrators. *In re* Toronto Street Ry. Arbitration Ont. Chanc. Div., April 1892 (Can. L. T.)

CONTRIBUTORY NEGLIGENCE — See Negligence.

CORPORATION.

SUBSCRIPTIONS BEFORE ORGANIZATION—WITHDRAWAL.

A subscription to the capital stock of a corporation to be thereafter formed does not take effect as a contract until organization, and before that time a subscriber may withdraw. *Hudson Real Estate Co.* v. *Torrer*. Mass. Supr. Court. N. E. Rep. 465.

COSTS—See Procedure—Ships and Shipping 6.

COUNTIES—See Mun. Corp. 2.

COURTS.

LESSOR AND LESSEE — AMOUNT CLAIMED—ARTS. 887, 888 C. P. C.—JURISDICTION OF CIRCUIT COURT.

Held, affirming the judgment of the Court below, that where in an action brought by the lessor under Arts. 887 and 888 C. P. C., to recover possession of the premises, a demand of $46 is joined for the value and occupation since the expiration of the lease, such action must be brought in the Circuit Court, the amount claimed being under $100; Fournier, J., dissenting. *Blatchford* v. *McBain*, Supreme Ct. of Canada, April 1892.

CRIMINAL LAW.

1. ARREST FOR MISDEMEANOR — ESCAPE—KILLING BY OFFICER.

In arresting a person charged with a misdemeanor, or in preventing his escape after arrest, the arresting officer cannot take the life of the accused, or even inflict on him great bodily harm, except to save his own life or prevent a like harm to himself. *Thomas* v. *Kinkead*, Supreme Court of Arkansas.

2. Uttering a Forged Note — Incipient Fraud.

This was an appeal from the decision of the judge of the county court for Westmoreland under the Speedy Trials Act. The prisoner was charged with uttering a forged note, and convicted. It appeared that the prisoner was in custody on a capias in a civil action for debt, and the constable in whose charge he was had instructions to release him and accept as security for the debt the joint promissory note of himself and his son Manley Ricker. The prisoner produced to the constable a note signed by himself and Whitfield M. Ricker, his son, and represented that Whitfield M. Ricker was that one of his sons known as "Manley." The "M." in the name, he said, stood for Manley. The note was accepted, and R. released from custody. Afterwards it was discovered that Whitfield M. was an entirely different person from Manley, the two being different sons of the prisoner.

Held, that the facts showed that the note had in its inception been made with the clear intention to defraud; and that the conviction should be confirmed.

Held, *per* King, J., that had the charge been forgery, the case would have been even more clear. *Reg.* v. *Ricker*, New Brunswick Sup. Ct., April 1892. (Can. L. T.)

3. Conspiracy to Defraud—Evidence—Motion for Reserved Case—Presence of Defendants.

Held:—That, on a trial for conspiracy to defraud by means of the fraudulent and collusive transfer of a pretended promissory note and the institution, maintenance and prosecution in the civil courts of an oppressive, unfounded, false and malicious suit at law based on said note, a deposition made in such civil suit by the plaintiff therein, one of the accused, may be received and read to the jury as evidence not only against him but also against his co-defendant.

That a motion for a reserved case, after conviction on indictment for such conspiracy, cannot be considered by the court in the absence of the defendants. *Regina* v. *Murphy*, 17 Q. L. R. 305.

4. Culpable Homicide — Childbirth—Neglect to Call for Assistance—Indictment—Relevancy.

A charge was preferred against a woman, that having been delivered of a child, she did then and there compress the throat of said child, and did suffocate and kill it, or otherwise that being delivered of a child, she did refrain from calling for assistance when the time of her being delivered had arrived, in consequence whereof the said child died.

Held, that the alternative charge was *irrelevant*, but *opinion* that if a child dies of suffocation or other cause consequent on the mother's reckless neglect to call for assistance at the time of her delivery—assistance being at hand—the mother is guilty of culpable homicide.

Culpable Homicide—Child

Injuries causing the death of a child which has breathed and cried may constitute the crime of culpable homicide, although at the time the injuries are inflicted the child is not completely born.

Culpable Homicide—Proof — Evidence in Defence—Letters of Panel—Admissibility.

In the course of the trial of a woman for the culpable homicide of her infant child, counsel for the panel proposed to put in evidence letters written by the panel to her mother prior to and during her pregnancy, with the object of showing that the panel having suffered from irregularity of menstruation prior to pregnancy was ignorant of the probable period of her confinement.

Held, that the letters were *inadmissible* as evidence in panel's favour. *H. M. Advocate* v. *Scott*, 29 Scot. Law Rep. 629.

5. Accomplices—Instructions.

Where the principal evidence against a defendant is the testimony of his co-defendants, who admit that they committed the crime, and say that the defendant hired them to do it, it is reversible error to refuse to instruct

the jury to the effect that, while a person accused of crime may be convicted upon the uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case, and ought not to convict upon such testimony alone unless, after a careful examination of such testimony, they are satisfied beyond a reasonable doubt of its truth, and that they can safely rely upon it. *Hoyt* v. *People*, Ill. Sup. Ct., March 24, 1892. (Alb. L. J.)

Note.

It has often been questioned in England and in this country, by courts of the highest respectability, whether convictions on such testimony alone should be allowed to stand, but it is held by this court, in conformity with the prevailing ruling elsewhere, that convictions may be sustained on such testimony alone, although the court may in its discretion in such cases advise the jury not to convict. Gray v. People, 26 Ill. 347; Cross v. People, 47 id. 153; Collins v. People, 98 id. 584, and Friedberg v. People, 102 id. 160. But the authorities agree, and common sense teaches, that such evidence is liable to grave suspicion, and should be acted upon with the utmost caution, for otherwise the life or liberty of the best citizen might be taken away on the accusation of the real criminal, made either to shield himself from punishment or to gratify his malice. And thus it is said in 1 Phillips on Evidence (Cow. & H. and Edw. notes), page 111: "Accomplices, upon their own confession, stand contaminated with guilt. They admit a participation in the very crime which they endeavor by their evidence to fix upon other persons. They are sometimes entitled to earn a reward upon obtaining a conviction, and always expect to earn a pardon. Accomplices are therefore of a tainted character, giving their testimony under the strongest motives to deceive. * * * And it is said in Best on Evidence, page 266, section 170, in speaking of approvers and accomplices: "No doubt if it was not absolutely necessary for the execution of the law against notorious offenders that accomplices should be received as witnesses, the pratice is liable to many objections, and though, under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with the jury to convict the offenders, it being so strong a temptation to a man to commit perjury if by accusing another he can escape himself. Let us see what has come in lieu of the practice of approvement: A kind of hope that accomplices who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment. This is in the nature of a recommendation to mercy. The accomplice is not assured of his pardon, but gives his evidence *in vinculis*, in custody, and it depends on the title he has from his behavior whether he shall be pardoned. * * *" See also to like effect 1 Greenl. Ev., § 379; 1 Whart. Crim. Law (7th ed.), 785.

6. ABORTION—EVIDENCE—DECLARATION.

(1) On a trial for abortion, declarations of the deceased, indicating present pain, were admissible, but not her declarations in regard to her health and condition, not made to a physician for the purpose of treatment.

(2) Testimony that deceased had refused to see her sisters on one occasion, many months before, was incompetent to show that the relations between them were not friendly, where there was nothing to show the reason or circumstances of such refusal.

(3) On a trial for abortion it was enough, if it was proven beyond a reasonable doubt, by circumstantial evidence, that defendants committed the crime, and it was unnecessary to show that it was impossible for persons other than defendants to commit the crime.

(4) Where the theory of the prosecution was that the death was caused by the introduction of an instrument into the *uterus*, and evidence was offered by physicians tending to prove that it was impossible for the deceased to have inserted the one used herself, and that it would be impossible for any woman unaided to insert one into her own *uterus*, it was competent for defendants to show by a witness that the witness had, unaided, inserted such one into her own *uterus*. *Commonwealth* v. *Leach*, Supreme Judicial Court of Massachusetts, Feb. 27, 1892.

Notes.

1. When an expert witness testifies to a matter of opinion, it has often been declared that it is competent for him to give the reasons upon which his opinion is founded, and to state that it is the result of observations and experiments, in order to confirm his testimony. Lincoln v. Copper Co., 9 Allen, 181, 191, 192; Williams v. Taunton, 125 Mass. 34, 40; Eidt v. Cutter, 127 Mass. 522; Emerson v. Gas-Light Co., 6 Allen, 146; Sullivan v. Com., 93 Pa. St. 284, 296; Boyd v. State, 14 Lea, 161, 169-174; Smith v. State, 2 Ohio St. 513.

2. If other experts are called on the other side, and testify to a contrary opinion, the same rule would allow them to state that their opinion also was the result of observa-

tion and experiments. But where the testimony to be met is the opinion of expert witnesses that it is impossible in the nature of things for a particular thing to be done, it is not necessary to rely on expert opinions to the contrary, if it can be shown as a matter of fact that the thing has been done. —Opinion of the Court.

3. If, for example, expert witnesses were to testify that it would be impossible to propel a vessel by steam across the Atlantic ocean, or to navigate the air with balloons or flying-machines, or to propel cars by electricity, or to communicate with other persons at a long distance away by telegraph, or by spoken words, or to store up sounds in a machine or instrument so that long afterwards they could be reproduced, or to render one temporarily insensible to pain by anæsthetics, it would not be necessary in reply to call other experts to give opinions to the contrary. The direct facts might be testified to by any person who knew them. —Opinion of the Court.

4. It was held in Cottrill v. Myrick, 12 Me. 222, that one familiar with fish might testify to his opinion as to the ability of fish to overcome particular obstructions in rivers. If such a witness were to testify that in his opinion salmon could not overleap certain dams or falls, can it be doubted that one who had seen them do it might be called in reply to testify to the fact?

5. In Reeve v. Dennett, 145 Mass. 23, 11 N. E. Rep. 938, the plaintiff's evidence tended to show that a certain compound was worthless for the purpose of allaying pain in filling teeth, and it was held competent to meet his evidence by calling witnesses to testify that operations upon their own teeth, when this compound was used, were practically painless.

6. In Nevarro v. State, 24 Tex. App. 378, it was held that when the prosecutrix, in a prosecution for producing an abortion by a violent and unlawful assault, had testified to the violence used upon her, and to her subsequent delivery of a dead child, and the condition of its body, it was held that she was incompetent to testify that the abortion was the result of the violence, she being a non-expert.

CROWN, LIABILITY OF — See Neg. 3 —Revenue.

CULPABLE HOMICIDE — See Crim. Law 4.

CUSTOMS WAREHOUSE, GOODS STOLEN FROM—See Revenue.

DAMAGES—SEE ALSO RAILROAD COMPANY 4.

1. FIRE—TITLE TO SUE—INSURANCE.

Held, in an action of damages on account of a fire caused by a spark from a locomotive, that the fact that the pursuers' loss was covered by insurance formed no objection to their title to sue. *Port Glasgow Sailcloth Co.* v. *Caledonia Ry. Co.*, 29 Scot. Law Rep. 577.

2. TRESPASS—FRUIT TREES.

The proper measure of damages in an action for the destruction of fruit trees is the difference between the value of the realty before and after the injury. *Dwight* v. *Elmira, C. & N. R. Co.*, Court of Appeals of New York, Second Division, March 15, 1892.

Notes.

1. Where timber forming part of a forest is fully grown, the value of the trees taken or destroyed can be recovered. In nearly all jurisdictions, this is all that may be recovered; and the reason assigned for it is that the realty has not been damaged, because, the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. 3 Suth. Dam. p. 374; 3 Sedg. Dam. (8th Ed.) p. 45; Single v. Schneider, 30 Wis. 570; Webster v. Moe, 35 Wis. 75; Webber v. Quaw, 46 Wis. 118, 49 N. W. Rep. 830; Haseltine v. Mosher, 51 Wis. 443, 8 N. W. Rep. 273; Tuttle v. Wilson, 52 Wis. 643, 9 N. W. Rep. 822; Wooden-ware Co. v. U. S. 106, U. S. 432, 1 Sup. Ct. Rep. 398; Graessle v. Carpenter, 70 Iowa, 166, 30 N. W. Rep. 392; Ward v. Railroad Co., 13 Nev. 44; Tilden v. Johnson, 52 Vt. 628; Adams v. Blodgett, 47 N. H. 219; Cushing v. Longfellow, 26 Me. 306.

2. In New York State it is settled that even where full-grown timber is cut or destroyed the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting or destruction complained of. Argotsinger v. Vines, 82 N. Y. 308; Van Deusen v. Young, 29 N. Y. 36; Easterbrook v. Railroad Co., 51 Barb. 94.

3. The rule is also applicable to nursery trees grown for market, because they have a value for transplanting. The soil is not damaged by their removal, and their market value necessarily furnishes the true rule of damages. 3 Sedg. Dam. (8th Ed.) p. 48; Birket v. Williams, 30 Ill. App. 451.

4. Coal furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages, where it has a value after removal, and the land has sustained no injury because of it. 3 Sedg. Dam. (8th Ed.) p. 48; 3 Suth. Dam. 374; 5 Amer. & Eng. Enc. Law, p. 36, note 2; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Coal Co. v. Rogers, 108 Pa. St. 147-152; Dougherty v. Chesnutt, 86 Tenn. 1, 5 S. W. Rep. 444; Coleman's Appeal, 62 Pa. St. 252; Ross v. Scott, 15 Lea, 479-488; Forsyth v. Wells, 41 Pa. St. 291; Chamberlain v. Collinson, 45 Iowa, 429; Morgan v. Powell,

3 Q. B. 278; Martin v. Porter, 5 Mees & W. 351.

5. On the other hand, cases are not wanting where the value of the thing detached from the soil would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land. This is the rule where growing timber is cut or destroyed. Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damage, therefore, necessarily extends beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled. Longfellow v. Quimby, 33 Me. 457; Chipman v. Hibberd, 6 Cal. 163; Wallace v. Goodall, 18 N. H. 439-456; Hayes v. Railroad Co., 45 Minn. 17-20, 47 N. W. Rep. 260.

6. In Wallace's Case, *supra*, the court said: "The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land, stripped of its trees may be valueless. The trees, considered as timber, may from their youth be valueless; and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil."

7. The same rule prevails as to shade-trees, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. Nixon v. Stillwell (Sup.). 5 N. Y. Supp. 248, and cases cited *supra*.

8. The current of authority is to the effect that fruit-trees and ornamental or growing trees are subject to the same rule. Montgomery v. Locke, 72 Cal. 75, 13 Pac. Rep. 401; Mitchell v. Billingsley, 17 Ala. 391-393; Wallace v. Goodall, 18 N. H. 439-456; 3 Sedg. Dam. (8th Ed.) § 933.

9. It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the freehold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. Ensley v. Mayor, 2 Baxt. 144; Striegal v. Moore, 55 Iowa, 88, 7 N. W. Rep. 413; Longfellow v. Quimby, 33 Me. 457; Foote v. Merrill, 54 N. H. 490.

DANGEROUS PREMISES—See Neg. 1.

DEED OF LAND—See Contract 3.

DEMURRAGE—See Ships and Shipping 2.

EASEMENT—See Railway Comp. 2.

ELECTIONS.

1. QUEBEC ELECTION ACT—RECOUNT—NOTICE OF ORDER.

On the fourth day after the returning officer had made his final addition of the votes, the petitioner obtained a judge's order for a recount, under the Quebec Election Act 42-43 V., c. 15, but did not thereof notify the returning officer until three days afterwards. In this interval the returning officer transmitted to the clerk of the Crown in Chancery the election writ with his return indicating the respondent as the person elected.

Held:—That under these circumstances the judge had no power to proceed with the recount. 17 Q. L. R. 294.

2. PROMISE TO PROCURE EMPLOYMENT BY CANDIDATE—FINDING OF THE TRIAL JUDGES—49 V., c. 8, s. 84 (b).

On a charge by the petitioner that the appellant had been guilty personally of a corrupt practice by promising to a voter W. to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial judges held on the evidence that the charge had been proved.

The promise was charged as having been made in the township of Thorold on the 28th February, 1891. The evidence of W., who some time before the trial made a declaration upon which the charge was based at the instance of the solicitor for the petitioner, and had got for such declaration employment in Montreal from the C. P. R. Co. until the trial took place, was principally relied on in support of the charge, and the promise was found by the court to have been made on the 17th February. Moreover G., the appellant, although denying the charge, admitted in his examination that he intimited to the voter that he would assist him, and there was evidence that after the elections, he wrote to W. and procured him the situation, but the letter was not put in evidence, having been destroyed by W. at the request of the appellant.

Held, affirming the judgment of the court below, that the evidence of W. being in part corroborated by the evidence of the appellant, the con-

clusion arrived at by the trial judges was not wrong, still less so entirely erroneous as to justify this court as an appellate tribunal, in reversing the decision of the Court below on the questions of fact involved. Appeal dismissed with costs. *Welland Election Appeal. German* v. *Rothery*, Supreme Court of Canada, April 1892.

3. DOMINION CONTROVERTED ELECTIONS ACT — APPEAL — EVIDENCE — REVERSAL — LOAN FOR TRAVELLING EXPENSES—PROOF OF CORRUPT INTENT —40 V., c. 3, ss. 88, 91; s. 84 (a), (e), s. 131—EXECUTORY CONTRACT—FREE RAILWAY TICKET.

G., a voter and supporter of the respondent, holding a free railway ticket to go to Listowel to vote and wanting $2 for his expenses while away from home, asked for the loan of the money from W., a bar-tender and a friend. W., not having the money at the time, applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G. to enable him to go to Listowel to vote. S., the agent, lent the money to W. who handed it over to G., and W. returned the $2 to S. the day before the trial. The judges at the trial held that it was a *bona fide* loan by S. to W. On appeal to the Supreme Court of Canada:

Held, reversing the judgment of the trial judges, that, as the decision of the court below depended on the inferences drawn from the evidence, their decision could be reversed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G., and so within the provisions of s. 88 of the Dominion Elections Act and a corrupt practice sufficient to avoid the election under s. 91.

Strong, J., dissenting, was of opinion that there was no evidence that the loan of $2 was made to G. with the corrupt intent of inducing him to vote for the respondent.

Patterson, J., dissented on the ground that, as the decision of the court below depended on the credibility of the witnesses, it ought not to be interfered with.

Held, also, *per* Strong and Patterson, JJ., affirming the judgment of the court below, that upon the evidence the G. T. Railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case, were free tickets, and that as the free tickets had been given to voters who were well known supporters of the respondent prepared to vote for him and for him alone if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of s. 88 of the Dominion Elections Act.

Berthier Election Case, 2 S. C. R. 102, followed.

Per Strong, J., that the tickets issued by the G. T. Railway Co., having been furnished with notice that they were to be used as they were in fact, the price thereof could not have been recovered at law: s. 131, Dominion Elections Act. *In re North Perth Dominion Election. Campbell* v. *Grieve*, Supreme Court of Canada, April 1892.

ELEVATOR ACCIDENT — See Master and Servant 3.

EMPLOYERS' LIABILITY ACT (ENG.) —See Master and Servant 5.

EQUITABLE ASSIGNMENT—See Banks 2.

EVIDENCE—See Bills and Notes 1—Contracts 3—Crim. Law 3. 4. 6—Ins. 2. 14—Neg. 2—Partnership 1.

EXCHEQUER COURT—See Ships and Shipping 3.

EXCHEQUER COURT ACT 1887—See Appeal 2.

EXECUTOR, ORDER ON — See Bills and Notes 2.

FABRIQUE—See Procedure.

FACTORIES ACT — See Master and Servant 3. 4.

FELLOW SERVANT—See Master and Servant 1.

FIRE—See Damages 1.

FIRE INSURANCE—See Ins. Fire.

FIRM NAME—See Partnership 3 — Good-will.

FORGED NOTE, UTTERING — See Crim. Law 2.

FRANCHISE—See Contract 4.

FRAUD—See Crim. Law 2 — Ins. 10.

FRUIT TREES—See Damages 2.

GOOD WILL — SEE ALSO PARTNERSHIP 3.

WHAT CONSTITUTES — ASSIGNMENT —TRADE NAME.

By giving his own surname to a building as a sign of the hotel business, a tenant does not make the name a fixture to the building, and the property of the landlord upon the expiration of the lease. *Vonderbank* v. *Schmidt*, Louisiana Supreme Court, Feb. 8, 1892. 45 Alb. L. J. 400.

Notes.

1. The Michigan court say in Chittenden v, Witbeck, 50 Mich. 401: "Good-will has been defined by this court to be the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage," or as stated by Lord Eldon in Cruttwell v. Lye, 17 Ves. 335, say the court, "the probability that old customers will resort to the old place." The same court say in Williams v. Farrand, 50 N. W. Rep. 446: "Good-will may be said to be those intangible advantages or incidents which are impersonal so far as the grantor is concerned, and attach to the thing conveyed. When it consists in the advantage of location, it follows an assignment of the lease of the location." Or as previously said by that court in the Chittenden Case: "Good-will attaches to the property, and in case of a lease it belongs to the lessee only during its continuation.....The claim to an interest in the good-will is inseparable from the claim to an interest in the lease, and when one falls the other falls with it." To a like effect is the opinion of the same court as expressed in Myers v. Buggy Co., 54 Mich. 215; S. C. 52 Am. Rep. 811.

2. There is considerable difficulty in defining accurately what is included under the term 'good-will.' It seems to be that species of connection in trade which induces customers to deal with a particular firm. Wedderburn v. Wedderburn, 22 Beav. 84.

3. "It is the chance or probability that custom will be had at a certain place of business, in consequence of the way in which that business has been previously carried on." England v. Downs, 6 Beav. 269.

4. "It may be described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity." Story on Partnership Sec. 99.

5. In further illustration of this principle we have selected the following paragraph from Williams v. Farrand (See Partnership, No. 3 this issue), as giving a careful analysis from a commercial point of view, of what passes by an act of sale containing no stipulations of good-will, viz.: "A retiring partner conveys without stipulating good-will, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success; the new an experiment. The old is a going business, and produces its accustomed profits on the day after its transfer. It is capital already invested and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time at least it is capital awaiting investment, or invested earning nothing. The retiring partner takes these chances or advantages. He does not agree that the benefit derived from his *connection* with the business shall continue. He does not agree that the *old business shall continue to have the benefit of his name, reputation or service, nor does he guarantee the continuance of that patronage which may have been attached by his name or reputation or service, nor does he guarantee the continuance of that patronage which may have been attached by his name or reputation.* He does not pledge a continuation of conditions. *He takes out of the business an element that he contributed to the success of the business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor.* He sells only so much of the custom *as will continue in spite of his retirement and activity.* He sells probabilities and not assurances." Page 449. (Italics ours). As a corollary of the foregoing opinion, an extract may be properly selected from that of the Connecticut court in Cottrell v. Man'f. Co., 54 Conn. 138, in reference to what passed by a bill of sale of goods, etc., accompanied by a transfer of the good-will merely, viz.: "By purchasing the good-will merely Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that the old customers would continue to go there. If he desired more he should have procured it by positive agreement. The matter of good-will was in his mind. Presumably he obtained all that he desired. At any rate *the express contract is the measure of his right, and since that conveys a good-will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition, by all lawful means, with the vendee in the same business.* No restraint upon trade may rest upon inference. Therefore in the absence of any express stipulation to the contrary, the vendor might lawfully establish a similar

business at the next door," etc. (Italics ours.) (Extract from opinion of the Court.)

INJUNCTION—See Mun. Corp. 1.

INSTRUCTION—See Crim. Law 5.

INSURABLE INTEREST — See Ins. 3, 15.

INSURANCE — SEE ALSO DAMAGES 1.

ACCIDENT.

1. IMMEDIATE NOTICE OF DEATH — WAIVER — EXTERNAL INJURIES PRODUCING ERYSIPELAS — PROXIMATE OR SOLE CAUSE OF DEATH.

An accident policy issued by the appellants was payable in case *inter alia*, the bodily injuries alone should have occasioned death within ninety days from the happening thereof; and provided that "the insurance should not extend to hernia, etc., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this contract, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death."

The policy also provided that "in the event of any accident or injury for which claim may be made under this policy, immediate notice must be given in writing, addressed to the manager of this company at Montreal, stating full name, occupation, and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice shall invalidate all claims under this policy."

On the 21st March 1886, the insured was accidentally wounded in the leg by falling from a verandah and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued on the 13th of April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company acknowledged receipts of proofs of death, which were subsequently sent, without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease and therefore the company could not recognize their liability. At the trial there was some conflicting evidence as to whether the erysipelas resulted solely from the wound, but the Court found on the facts that the erysipelas followed as a direct result from the external injury.

On appeal to the Supreme Court:—

Held, reversing the judgment of the Court below, Fournier and Patterson, JJ., dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this respect.

Per Fournier and Patterson, JJ., affirming the judgment of the Court below, that the external injury was the proximate or sole cause of death within the meaning of the policy. *Accident Ass. Co. of N. Amer.* v. *Young*, Supreme Ct. of Canada, April, 1892.

FIRE.

2. MORTGAGE — LOSS OF PREMISES BY FIRE — PAYMENT PRO TANTO BY INSURANCE—EVIDENCE.

In an action to foreclose a mortgage, where the court finds that the plaintiff issued a policy of insurance to one of the defendants upon a dwelling house situated upon mortgaged premises, and made the loss payable to the mortgagee, and that the mortgagee assigned the notes, mortgage, and such policy to another, with the knowledge of the insurer, and that the property insured was totally destroyed by fire, of which the company had notice, and that it inspected the loss, and, after such inspection, paid the amount of the

policy to the assignee, and took an assignment of the notes, mortgage, and policy to itself, *held*, that such findings are sufficient to show an indebtedness upon the part of the plaintiff to the defendant to an amount equal to the policy, and that such payment should be considered as a satisfaction *pro tanto* of the amount due on the notes and mortgage. *Home Insurance Co.* v. *Marshall*, 29 Pac. Rep. 161.

3. INSURABLE INTEREST—WAIVING CONDITIONS OF POLICY.

Administrators conveyed property to plaintiff, in trust to sell it, and distribute the proceeds among the heirs of their intestate, and on receiving the conveyance, plaintiff orally agreed to take possession of the property, care for it, rent it, and keep it insured.

Held, that plaintiff had an insurable interest.

A fire insurance policy issued to plaintiff in such case contained the usual conditions declaring it void if plaintiff was other than the sole and unconditional owner, or if the buildings were on ground not owned by the assured in fee simple, or if they should become or remain vacant for 10 days. Plaintiff's son was the general agent of defendant company, and personally examined the buildings before issuing the policy, and knew that they were vacant. He also had notice of the nature of the title and the policy described plaintiff as a "trustee." Plaintiff made no representations to the agent, and there was no claim of collusion.

Held, in an action on the policy, that the conditions were waived, and that defendant was bound, even if it was deceived by its agent as to the condition or title of the property. 11 N. Y. Supp. 948, *mem.*, affirmed. *Cross* v. *National Fire Ins. Co.*, N. Y. Court of App., 30 N. E. Rep. 390.

4. NOTICE AND PROOF OF LOSS — WAIVER.

Where a policy of fire insurance provided that the assured should give written notice of loss, but did not state in what manner the proofs should be made, nor by nor to whom the notice should be given, it was sufficient that the company's local agent immediately notified it of the loss, and that it thereupon sent an adjuster, who investigated the loss, and made an estimate of the same. *Phœnix Ins. Co. of Brooklyn* v. *Perry*, Ind. Supreme Ct., 30 N. E. Rep. 637.

5. WAIVER—ACTION ON POLICY—PLEADING—PRACTICE.

In an action on a fire insurance policy, which by its terms distributes the amount of the policy in certain sums on different articles, though the policy is an entire contract, and though the complaint alleges a total loss, plaintiff may recover the amount placed on some of the articles, which are shown to have been totally destroyed, when other articles are not shown to have been destroyed, or where the action as to them is withdrawn, or may recover for a partial loss on any article. *Pioneer Manuf'g Co.* v. *Phœnix Assur. Co. of London*, 14 S. E. Rep. 731. N. C. Supreme Ct.

6. CONDITION — VACANCY OF PREMISES—WAIVER.

An insurance policy covered sixteen tenement houses, consisting of eight double houses, separated by lanes, each of the sixteen being valued at $187.50, and provided that, if the premises became unoccupied, and remained so for twenty days, without the consent of the company, the policy should be void.

Held, that a vacancy of several of the houses beyond the prescribed time did not render the policy void as to the occupied houses, nor did the occupancy of a portion of the houses exempt the unoccupied portion from the operation of the condition.

The company did not waive the benefit of such condition by issuing the policy in question at a time when the premises were unoccupied. *Connecticut Fire Ins. Co.* v. *Lilley*, 14 S. E. Rep. 851. Va. Ct. of App.

7. CONDITIONS OF POLICY—WAIVER BY AGENT—TIME FOR BRINGING SUIT.

Where the adjuster of an insurance

company is authorized to settle with the assured, and to demand satisfactory proofs of loss before settling, the assured being by the company specially referred to him as so authorized on demand being made on it by him for payment, and the adjuster demands the production of vouchers and other proofs which it is impossible for the assured to furnish until after the expiration of twelve months from the date of the loss under the policy, he has the implied authority to, and may by his action alone, without writing, waive a condition in the policy that suits thereon shall be barred unless brought within twelve months after the loss, notwithstanding a stipulation that no officer or agent of the company shall be held to have waived any of the conditions of the policy until such waiver shall be indorsed thereon in writing. Merrimon, C. J., dissenting. *Dibbell* v. *Georgia Home Ins. Co.*, 14 S. E. Rep. 783. N. C. Supreme Ct.

8. Conditions of Policy — Incumbrances — Scire Facias—Proofs of Loss—Waiver.

An insurance policy, conditioned to be void if the assured incumbered the property without the company's consent, is not vitiated by incumbrances made by other persons, nor by those made by the assured, not exceeding the original incumbrance when the insurance was effect.

The issuance of a *scire facias* on the property by the mortagee of the assured does not violate the policy, though conditioned to be void if a foreclosure suit has been or shall be hereafter begun.

Failure to furnish proofs of loss till a few days after the time limited in the policy does not violate the policy, where the loss is total.

Where the insurance company denies its liability formal proofs of loos are unnecessary.

An insurance company, by retaining the proofs of loss for 86 days without objection waives the fact that they were delivered a few days late. *Weiss* v. *American Fire Insurance Co.*, 23 Atl. Rep. 991. Pa. Sup. Ct.

10. Waiver of Conditions—Compromise — Fraud — Insurable Interest.

(1) An insurance policy provided that it should be void if without notice to the company, and permission therefor in writing indorsed on the policy, the "interest of the assured be any other than the entire, unconditional and sole ownership," and that "no agent has any power to waive any condition of this policy." The legal title to the property was in the son of the assured, and assured was in possession under a contract that he should have the use of the property during his life, on condition that he keep it insured, in repair and pay the taxes, of which assured, when he made his application, informed the company's general agent. *Held*, that the evidence was sufficient to sustain a finding that the condition of the policy as to title of the property was waived.

(2) Where the adjuster of the company, after a loss under such policy, represented to assured that the policy was void, because the title to the property was not in him, whereupon assured settled with the adjuster for about one-half of the amount due on the policy, the settlement will be set aside as procured by fraud, though the adjuster acted in good faith.

Note.

2 Pom. Eq. Jur., §§ 847-849; Will. Eq. Jur., pp. 68, 69; Busch v. Busch 12 Daly, 476; Wheeler v. Smith, 9 How. 55; Cook v. Nathan, 16 Barb. 342; Boyd v. De La Montagnie, 73 N. Y. 498; Jordan v. Stevens, 51 Me. 78; Insurance Co. v. Bowes, 42 Mich. 19; Freeman v. Curtis, 51 Me. 140.

(3) In such case, where plaintiff before suit, and in his complaint, offered to return the draft, and on trial produced it in court, to be subject to the decree, the tender to return what he had received was sufficient.

(4) One in possession of property for life under a verbal agreement with the owner to pay the insurance, repairs and taxes, has an insurable interest therein. Second Division, N. Y. Ct. of Appeal, March 8, 1892. *Berry* v. *American Cent. Ins. Co. of St. Louis.* (Alb. L. J.)

Note.

A person may insure against his liability with reference to a certain property as well as his interest therein. Insurance Co. v. Chase, 5 Wall. 509-513; National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535-541; 3 Kent Com. (6th ed.) 276. The test of insurable interest is whether an injury to the property or its destruction by the peril insured against would involve the assured in pecuniary loss. Wood Ins., § 282. Thus a common carrier may insure goods intrusted to him to their full value without regard to his liability to the owner. Crowley v. Cohen, 3 Barn. and Adol. 478; Railway Co. v. Glyn, 1 El. & El. 652. So may a warehouseman, although liable to the owner only for his own negligence. Waters v. Assurance Co., 5 El. & Bl. 870; Stillwell v. Staples, 19 N. Y. 401; De Forest v. Insurance Co., 1 Hall, 94. So may a charterer of a vessel, who is liable to pay its value in case of loss, or has contracted to insure it against usual risks. Oliver v. Greene, 3 Mass. 133; Bartlet v. Walter, 13 id. 267. Insurers of a building have an insurable interest therein which they may reinsure. New York Bowery Ins. Co. v. New York Ins. Co., 17 Wend. 359. And a tenant who has agreed verbally to keep the demised property insured is liable to the lessor for a breach of that agreement, and has an insurable interest in the property to the extent of the amount agreed to be insured. Lawrence v. Insurance Co., 43 Barb. 479. Other illustrations of this rule are to be found in Herkimer v. Rice, 27 N. Y. 163; Kline v. Insurance Co., 7 Hun, 267; 69 N. Y. 614; Waring v. Insurance Co., 45 id. 606; May Ins., chap 6; 1 Wood Ins., chap. 8. The principle upon which these cases all rest is that there is a possible liability arising out of the peril insured against, and that creates an insurable interest. Under the contract with his son the plaintiff had agreed, among other things, to keep the property insured, and this agreement gave him a right to insure the buildings in his own name to their full value. The defendant contends that as the contract with his son was by parol, and hence void, the plaintiff had no interest in or liability toward the insured property. This proposition might have some weight if the insurance was upon the title or interest of the plaintiff as life-tenant, or if there had been representations on the part of the plaintiff that such was the interest intended to be insured. But we think it has no application to the case made by the evidence. The plaintiff, while in the unquestioned enjoyment and possession of the property, could not deny his liability under the contract with his son to insure, and under that agreement, so far as is disclosed in this action, he would have been liable for the loss of the buildings if he had failed to insure them. The defendant, if it had notice of the relation which plaintiff bore to the property, cannot deny the legality of its contract, although it may be that the plaintiff could not have enforced against his son his right to use the property for life had that been denied. (Opinion of the Court.)

LIFE.

11. APPLICATION — FALSE STATEMENTS.

Where an application for insurance, which is made a part of the policy, stipulates that the answers to the questions propounded are warranted by the insured to be true, and that the rights of the insured shall be forfeited if any untrue or false statements are made, the policy is avoided by a false answer to the question whether the insured had ever been rejected from any other life insurance company. 16 N. Y. Supp. 378, *mem.*, reversed. *Clemans* v. *Supreme Assembly Royal Soc. of Goodfellows*, 30 N. E. Rep. 496. N. N.Y. Ct. of App.

12. PREMIUMS—PAYMENT—CONDITIONS.

Where an insurance company, at maturity of premiums on a policy issued to a wife on the life of her husband, receives the husband's notes on which interest is payable, and gives renewal receipts, the notes will be considered as payments; and non-payment of the notes does not vitiate the policy, though conditioned to be void for non-payment of the premiums. *Michigan Mut. Life Ins. Co.* v. *Bowes*, 51 N.W. Rep. 962. Mich. Supreme Ct.

13. BENEVOLENT SOCIETY—CERTIFICATE PAYABLE TO "LEGAL HEIRS"—EFFECT OF, BETWEEN THEIR CHILDREN AND SUBSEQUENT WIFE.

A widower, having two children, insured in a benevolent society, and took out his certificate payable "to his legal heirs," and subsequently married a second time. At the time of his death he left his wife surviving, but no other children than the two by his first wife.

Held, that the two children took the whole fund payable under the certificate, to the exclusion of the wife. *Mearns* v. *A.O.U.W.*, Ont. Chanc. Div. April, 1892 (Can. L. T.)

14. PREMIUM NOTE—NON-PAYMENT OF—FORFEITURE—ELECTION—CONDITIONS OF POLICY — CONDUCT OF DEFENDANTS—EVIDENCE.

The defendants insured the life of the plaintiff's husband and issued a policy to him, taking his promissory note for the amount of the first year's premium. The note was several times renewed, and at the death of the insured, which took place within the first year, one of the renewals was overdue and unpaid. During the currency of one of the renewal notes the insured wrote to the defendants asking them what they would let him off with by cancelling the policy, and they answered him that his request that they should cancel the policy was unreasonable. On the day before the death of the insured the defendants wrote to him that they had expected to hear from him with a remittance, and asked him to kindly give the matter his immediate attention. After the death the amount of the note and interest was tendered to the defendants, but they refused to accept it. In the application for the insurance, which was made part of the contract, it was provided that if a note should be given for a premium and should not be paid at maturity, the insurance or policy should thereupon become null and void, but the note must nevertheless be paid; and indorsed on the policy was a provision that if any premium note should not be paid when due, the policy should be void and all payment made upon it forfeited to the defendants.

Held, that the policy was voidable upon default being made in the payment of the premium note, but only at the election of the defendants; that, upon the evidence, the defendants had elected not to forfeit it but to continue it, and had treated it as subsisting up to the time of the death; that the policy was in force at the time of the death; and no subsequent act of the defendants could affect the plaintiff's claim.

Held, also, upon the evidence, that it could not be said that the defendants were at any time electing to forfeit the policy and nevertheless insisting upon the payment of the note, as they might have done under the provision in the application above mentioned. *McGeachie* v. *North Amer. Life Assur. Co.*, Ontario Q. B. D., Feb. 1892. (Can. L. T.)

MUTUAL BENEFIT.

15. Insurable Interest—Change of Beneficiaries.

Where the charter of a benevolent association does not require the beneficiary of a certificate of membership to have an insurable interest in the life of the member, and the member himself made the contract with the association, the beneficiary, in an action on the certificate, need not allege an insurable interest.

The beneficiary of a certificate of membership in a benevolent association has no vested right in the certificate before the death of the member on whose account it was issued; and the right of the member to change the beneficiary without the consent of the beneficiary is not affected by the fact that the beneficiary has paid the assessments, and has possession of the certificate.

Where neither the constitution nor by-laws of the benevolent association prescribed any formalities for the change of beneficiary, the designation of a different beneficiary, who should hold the fund in trust for certain legatees in the member's last will, formally executed and duly probated, wrought an effectual change of beneficiary. *Masonic Ben. Ass'n of Central Ill's* v. *Bunch et al.*, Supreme Court of Missouri, Division No. 2, March, 1892.

Notes.

All the authorities agree that the right of the members of benefit societies in the sums agreed to be paid at death is simply the power to appoint the beneficiary, and that the constitution or charter and the by-laws are the foundation and source of such power. Van Bibber v. Van Bibber, 82 Ky. 347; Duvall v. Goodson, 79 Ky. 224; Arthur v. Association, 29 Ohio St. 557; Society v. Clendinen, 44 Md. 433; Bac. Ben. Soc. s. 237.

2. And it is equally well settled that the beneficiary acquires no vested interest, nor has he any property, in the certificate. He has simply an expectancy, which may be divested by the member by changing the beneficiary. Fisk v. Aid Union (Pa. Sup.) 11 Atl. Rep. 84; Beatty's Appeal, 122 Pa. St. 428, 15 Atl. Rep. 861; Byrne v. Casey, 70 Tex. 247, 8 S. W. Rep. 38; Brown v. Grand Lodge, 80 Iowa, 287, 45 N. W. Rep. 884; Hirschel v. Clark, (Iowa,) 47 N. W. Rep. 78;

Barton v. Association, 63 N. H. 535, 3 Atl. Rep. 627; Supreme Council v. Franke, (Ill. Sup.) 27 N. E. Rep. 86; Supreme Conclave v. Capella, 41 Fed. Rep. 1; Supreme Council v. Morrison, 16 R. I. 468, 17 Atl. Rep. 57.

3. Nor is the right to change the benefit affected by the fact that the first beneficiary paid the assessments. Byrne v. Casey, supra; Fisk v. Aid Union, (Pa. Sup.) 11 Atl. Rep. 84.

4. Nor does the possession of the certificate by the beneficiary deprive the member of the right to make the change. Society v. Burkhart, 110 Ind. 189, 10 N. E. Rep. 79, and 11 N. E. Rep. 449; Richmond v. Johnson, 28 Minn, 447, 10. N. W. Rep. 596; Splawn v. Chew, 60 Tex. 534.

5. In this respect there is a marked distinction between an ordinary policy of life insurance and a certificate of membership in a benevolent society. In the former, the beneficiary's interest is a vested right immediately upon the issuing of the policy, whereas in a benevolent society like plaintiff the beneficiary has no vested right in the certificate before the death of the member on whose account it was issued, and the member may change the beneficiary without the consent of the beneficiary. Holland v. Taylor, 111 Ind. 125, 12 N. E. Rep. 116.

6. This right of change has generally been held analogous to a testamentary disposition of the benefit. It, like a will, is revocable at any time during the life of the testator. Association v. Montgomery, 70 Mich. 587, 38 N. W. Rep. 588; Chartrand v. Brace (Colo. Sup.) 26 Pac. Rep. 152; Duvall v. Goodson, 79 Ky. 244; Thomas v. Leake, 67 Tex. 479, 3 S. W. Rep. 703; Association v. Kirgin, 28 Mo. App. 80.

INTOXICATING LIQUOR.

1. CANADA TEMPERANCE ACT—SUMMARY CONVICTION—MINUTE OF ADJUDICATION—VARIANCE—R. S. C., c. 178, s. 53.

B. was summarily convicted for unlawfully selling intoxicating liquor contrary to the Canada Temperance Act. The minute of adjudication required by R. S. C., c. 178, s. 53, to be drawn up by the magistrate on the conclusion of the case, adjudged the defence proved as charged in the information, and ordered B. to pay a fine of $50 and costs forthwith; and in default of sufficient distress whereon to levy such fine and costs, to be imprisoned in the common gaol of the county, at, etc., for the space of two months, "unless said fine and costs be sooner paid." The conviction followed the form (J) in the schedule to 51V., c. 34, and included "costs and charges of conveying to gaol."

Held, that the variance between the minute of adjudication and the conviction was sufficient to warrant the rule being made absolute to bring up the original proceedings; and the Court declined to entertain an application to amend the conviction until the return of the *certiorari*. *Ex parte Boyer*, New Brunswick Sup. Ct., April 1892 (Can. L. T.)

2. CANADA TEMPERANCE ACT — 51 V., C. 34, S. 8—INFORMATION.

Held, That in prosecutions for violations of the second part of the Canada Temperance Act, brought before two justices of the peace, an information laid before one justice is insufficient. *Ex parte* Sprague, New Brunswick Sup. Ct., April 1892 (Can. L. T.)

3. CANADA TEMPERANCE ACT — INSTRUCTION TO COUNSEL TO DEFEND DO NOT WARRANT HIM IN PLEADING GUILTY.

This was an applications for a *certiorari* to quash a conviction for unlawfully selling intoxicating liquor contrary to the Canada Temperance Act. Affidavits showed that the defendant told her husband to employ counsel to defend the case, which he did. The counsel was instructed to appear and defend. At the trial, in the absence of the defendant, he pleaded guilty to the charge, for the reason that he believed the same capable of proof; and the defendant was accordingly convicted by the magistrate.

Held, that instructions to an attorney to appear and defend a case did not warrant him in pleading guilty to the charge; and the conviction was quashed. *Ex parte Erickson*, New Brunswick Sup. Ct., April 1892 (Can. L. T.)

4. CANADA TEMPERANCE ACT—PROSECUTION — JUDGE'S ORDER STAYING PROCEEDINGS—EFFECT OF—ADJOURNMENT—SUMMARY CONVICTION.

E. was prosecuted for a fourth offence against the provisions of the second part of the Canada Temperance Act. At the trial a witness for the prosecution refused to answer the question, "Did you purchase intoxicating liquors in defendant's premises between

the dates named in the information ?" alleging as his reason that in doing so he believed he would criminate himself by making himself liable to a prosecution. The magistrate committed the witness for contempt in refusing to answer. An application was made to a Judge of this Court for an order *nisi* for a *certiorari* to remove the proceedings upon which the witness had been committed, and in granting that order, the Judge, under a misapprehension of the facts, ordered all proceeding then being taken against E. to be stayed. This order was served on the magistrate, who obeyed it by making a memorandum of his record of the service, and adding "Court separated." This happened on the 13th March, and on the 25th of the same month an order was served on the magistrate from the same Judge by which the stay of proceedings in this case was removed, counsel for both parties being present. The magistrate then resumed the case, subject to the objection of E.'s counsel that the Court having separated on the 18th inst., without adjournment, the magistrate had now no jurisdiction to proceed. The magistrate did proceed with the case, heard further evidence for the prosecution and evidence for the defence, and convicted the defendant, and imposed a penalty of two months' imprisonment. A rule *nisi* for a *certiorari* having been obtained on the above objection, the Court on the return of the rule,

Held that the magistrate should have adjourned the hearing on being served with the stay; and ordered the rule for a *certiorari* to be made absolute. *Ex parte Edwards*, New Brunswick Sup. Ct., April 1892 (Can. L.T.)

LICENSED GROCER—BREACH OF CERTIFICATE — HOSPITALITY — PUBLIC HOUSES ACTS AMENDMENT (Scotland) Act 1862 (25 and 26 Vict. c. 35).

A licensed grocer gave a person a glass of whiskey, to be drunk on his licensed premises, on the suggestion of a third party that the person who got the whiskey might become a new customer. No money was paid for the whiskey. He was charged with "trafficking in or giving" excisable liquor within licensed premises to be drunk on the premises, in breach of his certificate, although no money was paid for the whiskey.

Held, that the conviction was good, because it did not appear that the whiskey had been given by way of hospitality. *MacPherson* v. *Campbell*, 29 Scot. Law Rep. 618.

Notes.

It has been decided that if the holder of a license for sale of liquor gave liquor to his friends in his premises, in payment of which no money passed, he was not guilty of any breach of his certificate. McPetrie v. Cadenhaed, March 19, 1885. 12 R. (J. C.) 35, and 5 Coup. 661; Kay v. Gemmell, November 13, 1884. 12 R. (J. C.) 14; Smith v. Stirling, March 6 1878. 5 R (J. C.) 24 and 4 Coup. 13.

JURISDICTION OF CIRCUIT COURT—See Courts.

KILLING BY OFFICER — See Crim. Law 1.

LAND COMPANY—See Comp. 1.

LESSOR AND LESSEE—See Courts.

LIBEL.

1. SUFFICIENCY OF COMPLAINT.

A complaint for libel alleged the publication in defendant's newspaper, under the title "The McGinnis Cohorts," and the further heading, "They Rally Round the Brewers' Flag in the Senate," of the language: "The distribution of the $50,000 slush fund sent here by the liquor interests may enable Senator McGinnis to make good his boast that he did not care whether the house passed the high license bill or not, he could defeat it in the Senate;" that the matter so published purported to be part of a letter written to the paper by its special correspondent at the capital, where plaintiff was in attendance as a member of the Senate, before which a bill to regulate intoxicants was then pending; that by said language the defendant charged plaintiff with bribery, or that he had knowledge of and was willing to avail himself of the use of money by others to defeat the bill, and that the article was false and malicious; *held*, sufficient on demurrer. *McGinnis* v. *George Knapp & Co.*, Missouri Supreme Court, March 14, 1892.

2. PRIVILEGED COMMUNICATION.

Held :—That the following words in a business letter were not libellous. "We are afraid that Mignault is a rascal and is stealing from you as he has stolen from us." 17 Q. L. R. 320.

3. SLANDER — PRIVILEGE — STATEMENT BY PHYSICIAN CALLED IN TO SEE PATIENT.

A mid-wife brought against a physician an action of damages for slander in which she averred that the defender was called in to see a patient whom the pursuer had attended, and that on hearing that the pursuer had given the patient a drug to soothe her pains, the defender, conceiving that it would be a favourable opportunity for indulging his hostile and malicious feeling towards the pursuer, falsely, wickedly, calumniously and maliciously stated to the patient's husband that the pursuer had poisoned his wife.

An issue not containing malice and want of probable cause proposed by the pursuer for the trial of the cause *approved*, the court holding that although *prima facie* a case of privilege was stated on record, yet it was not absolutely clear at that stage that the case was one of privilege, and that if the evidence at the trial raised such a case, it was the duty of the judge to direct the jury that malice on the part of the defender must be proved before they could find for the pursuer. *Reid* v. *Coyle*, 29 Scot. Law Rep. 638.

LICENSED GROCER—See Intox. Liquor 5.

LIEN—See Ships and Shipping 2.

LIFE INSURANCE—See Ins. Life.

LIMITATIONS, STATUTE OF (ENG.)—See Bills and Notes 3—Title to Land.

MARITIME LAW — See Ships and Shipping.

MARRIAGE.

BREACH OF PROMISE—SYPHILIS.

Where a man contracts syphilis, but afterward, being by skilled physicians pronounced cured and fit to marry, makes a promise of marriage in good faith, the subsequent reappearance of the symptoms of the disease, without fault on his part, in such form that his physicians advise him that he ought not to marry justifies him in refusing to fulfill the contract. *Shackleford* v. *Hamilton*, Kentucky Court of Appeals, March 1892, 45 Alb. L. J. 448.

Note.

While the contract to marry is silent as to any condition, it must be implied that any subsequent change in the physical or mental condition of either party without fault, so as to render it impossible, in the nature of things, to accomplish the objects for which the marriage relation is brought about, will release the parties from the agreement. Impotency, insanity or such a diseased condition of the body as would affect the offspring and endanger the life of the mother if the contract was carried out, would certainly be within this rule. Any other doctrine would require the same construction to be given the agreement to marry that is given to contracts for the sale and delivery of personal property, where the party can recover it must be in damages for the breach, although impossible to perform it; in other words, it is urged that the woman must have either the husband or damages in his stead, if he is able to have the marriage ceremony performed. This is also the objection to the majority opinions rendered in the Court of Queen's Bench in the case of Hall v. Wright, 96 E. C. L. 745. We concur with the minority opinions in that case that the contract of marriage is subject to implied conditions peculiar to itself. In that case the defense was that after the promise and before the breach, the defendant was afflicted with bleeding from the lungs, and by reason of the disease became incapable of marriage without great danger to his life, and therefore unfit for the married state, of which the plaintiff had notice. After reviewing the authorities upon the question Erle, J., said: 'The principle deduced from the cases seems to be that a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided if by the act of God or the opposite party the circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract.' The majority opinion was rendered on the idea that the disease was not such a state of health as made it improper for the defendant to marry, and therefore not impossible of performance, and if a case like the one being considered had been presented, we doubt if any difference of opinion would have been expressed. Pollock and other text-writers on contracts, in alluding to this opinion, say that it is so much against the tendency of the later cases that it is now of little or no authority beyond the point decided, but if that opinion had been unanimous, although entitled to great weight, we would not be in inclined to follow its reasoning, or concur the conclusion reached. The only American case we have found on the question is reported in 86 North Carolina, 91 (Allen v.

Baker, S. C., 41 Am. Rep. 444), the opinion delivered by Ruffin, J. In that case the defendant refused to comply with his contract, because he was afflicted with a disease similar to the one this defendant had. The disease was contracted before the contract was entered into, but the defendant had been advised, and in fact believed, that it could be cured in time to enable him to fulfil his engagement. Acting in good faith, and from a conscientious conviction that his disease was incurable, he refused to comply with his agreement, and the court in that case said: 'We cannot understand how one can be liable for not fulfilling a contract when the very performance of it would in itself amount to a great crime, not only against the individual but against society itself.' The present case is much stronger for the defence than the case cited. In the one the defendant knew the disease was upon him when he made the contract, but was advised that he would be well in time to consummate it, while in this case the defendant believed he was well at the date of the contract, and had been so advised by his physicians long before the contract was entered into. *Opinion of the Court.*

MASTER AND SERVANT — (See also Patents).

1. Fellow-Servant.

Plaintiff was employed by a stevedore hired to unload defendant's vessel. Defendant furnished steam power and a man to run the winch. While hoisting cargo the rope slipped from the drum of the winch, and plaintiff, while attempting to replace it, directed the winchman at the proper time to "come back," but instead of turning back, he went ahead drawing plaintiff's hand against the drum, and cutting off his fingers.

Held, that defendant was liable, the winchman, though receiving his orders from plaintiff when to lower and when to hoist, not being a fellow-servant. It is quite apparent that it was the intention of the defendant to retain charge of the steam power and winch, and operate it through its own servants and employees. And the fact that the winchman received orders from the plaintiff when to hoist and when to lower under the circumstances of this case, does not operate to change his relations to the defendant as its servant. Sullivan v. Railroad Co., 112 N. Y. 643, 647; Sanford v. Oil Co., 118 id. 571; Kilroy v. Canal Co., 121 id. 22; Butler v. Townsend, 126 id. 105. *Johnson* v. *Netherlands-American Steam Nav. Co.* Second Division, N. Y. Ct. of Appeal, March 22, 1892.

2. Injury to Employee—Who is a Vice-Principal.

A section foreman of defendant railroad had full power to employ and discharge track hands who worked under him. On taking his gang, at the close of the day, on a hand-car to the tool-house, one of his men was injured through the negligence of the foreman in not properly applying the brake.

Held that, while the foreman was a vice-principal in the matter of hiring and discharging hands, he was merely a fellow-servant in transporting his men to and from their work, and defendant was not liable. — *Justice* v. *Pennsylvania Co.*. Supreme Court of Indiana, February, 1892.

3. Workmen's Compensation for Injuries Act—Elevator—Accident—Negligence—Employer's Liability—Employment of Infant under Twelve—Factories Act.

The plaintiff, a lad under twelve, was hired to work a hoist for the defendants in their factory. A larger boy, who had been in charge before, was detailed for a few hours one afternoon to go up and down with the plaintiff so as to show him how to raise and lower the hoist. The elevator was worked by ropes on the outside of the cab or frame which was handled by the person standing within, through a square opening cut in the framework. The plaintiff was cautioned by the bigger boy against putting his head out at this place when the hoist was going.

The elevator stopped when going up, and the plaintiff put his head out of the aperture to see what stopped it, when, the elevator starting again, the plaintiff received the injuries complained of. On this evidence the plaintiff was nonsuited in an action against his employers for negligence.

Held, that the nonsuit should be set aside and a new trial ordered.

Per Boyd, C.—The employment of a child under twelve to work an elevator for the uses of a manufacturing concern

is made illegal by the Factories Act; and for this reason, the employer has to exercise more than ordinary precautions for the well-being and safeguarding of minors who have been put into factory work contrary to the prohibition of the legislature. *O'Brien* v. *Sanford*, Ontario Chanc. Div., March 1892.

4. WORKMEN'S COMPENSATION FOR INJURIES ACT — MACHINERY — ACCIDENT — NEGLIGENCE — EMPLOYER'S LIABILITY — KNOWLEDGE OF EMPLOYER OF DANGER OF EMPLOYEE — FACTORIES ACT — WANT OF GUARD.

The plaintiff, a lad of seventeen years of age, worked at a stamp machine in the defendant's factory. Part of his duty was to clean the upright part from oil which ran down from oil holes over the shafting. There was a space of about twelve inches between this upright and the cog-wheel, and to clean when the wheel was in motion was very dangerous. Being refused cotton waste and even rags for this work, he finally took to using pieces of bagging as the only thing he could get. On the occasion of the accident he had wrapped a piece about his hand, but one end flapping loose got caught in the cogs and the plaintiff lost his hand.

The evidence showed that the employer was daily in the workshop and saw him cleaning the machine under the same circumstances in which he was hurt, and did not forbid him. The jury found that there was no contributory negligence and awarded the plaintiff a verdict of $1,400. It appeared that a cheap and simple guard would have prevented the accident.

Held, that as the place where the plaintiff worked was dangerous, and called for a guard under the provisions of the Factories Act, the failure to furnish such a guard was *per se* evidence of negligence on the part of the defendants; (2) that the employer was also chargeable with personal negligence in seeing this lad, a minor, working with improper appliances, in a dangerous place, and not making proper provision for his safety by supplying him with waste, or without having the machinery stopped while the cleaning was going on.

Judgment in the plaintiff's favour for $1,400 affirmed with costs. *Thompson* v. *Wright*, Ontario Chanc. Div. March 1892.

5. MASTER AND SERVANT — NEGLIGENCE—COMPENSATION FOR PERSONAL INJURIES: EMPLOYERS' LIABILITY ACT, 1880 (43 and 44 VICT. c. 42), s. 1, SUB-S. 3).—England.

A joiner, employed by a firm of lift contractors in the construction of a lift in a house in the course of erection, having with the sanction of his employers borrowed a workman *from a* firm of builders engaged on the premises, ordered him to put a plank across the well of the lift and stand upon it, and then started the lift, whereby the plank was upset and the workman was injured. The workman sued the lift contractors under the Employers' Liability Act, and obtained a verdict.

Held, that there was evidence to go to the jury, first, that the plaintiff was, at the time of the injury, a workman in the service of the defendants; secondly, that the order to stand upon the plank was given by a person to whose orders the plaintiff was bound to conform

Held further, that the injury resulted from the plaintiff having so conformed. Decision of the Divisional Court reserved.

The negligence referred to in section 1, sub-section 3, of the Employers' Liability Act is not confined to negligence in the order itself; and in order to establish liability under that subsection it is not necessary that conformity to the order should be the *causa causans*, of the injury, though, *semble*, there must be an intimate connection between the negligence, the injury, and the conformity to the order.

The second ground of decision in the judgment of Lord Coleridge, C. J., in Howard v. Bennett (58 Law J. Rep. Q. B. 129) overruled. *Wild* v. *Waygood*, (App.,) 61 Law J. Rep. Q. B. 391.

Note.

(Lord Herschell): In Millward v. The Midland Railway Company, 14 Q. B. D. 68, in which, it must be remembered, the only

question was whether there was evidence to go to the jury, the learned judge said: "I think there was evidence that the injury resulted by reason of the plaintiff conforming to the order given by him to Hicks, to assist in the operation that was being performed, and in the performance of which Hicks was guilty of negligence"; although in the order, and in conforming to the order in that case, there would have been no injury except for the subsequent negligence of the person who gave the order. Then, in Wright v. Wallis, 3 Times L. R. 779, I think Lord Esher took the same view as that which I have presented in this case, although it can only be treated as a *dictum*; and, again, in Kellard v. Rooke, 19 Q. B. D. 585, I think that both Mr. Justice Smith and Lord Esher entertained the same view of the law, from the observations which they then made.

The case which has naturally been much relied upon by the learned counsel for the respondents is the case of Howard v. Bennett, 60 L. Times Rep. 152; and it was upon the authority of Howard v. Bennett that this case was decided by the learned judges in the court below. I think it is clear, on reading their judgments, that although they did not criticise that decision, they followed it rather than indicated concurrence with it.

MEASURE OF DAMAGES — See Contracts 1.

MORTGAGE — See Ins. 2 — Registry Laws.

MUNICIPAL CODE ARTS. 757 AND 938 —Mun. Corp. 2.

MUNICIPAL CORPORATIONS

1. INJUNCTION—ACTION TO RESTRAIN WORKS OR CAUSE REMOVAL OF OBSTRUCTIONS—RIGHTS OF RATEPAYERS.

Held: That an individual ratepayer of a municipality has no right of action to restrain works or cause the removal of obstructions on the public highway, without showing that the works or obstructions complained of have caused, are causing, or will cause him some damage peculiar to himself, and different from the damage which they may cause to the public generally. *Bélair* v. *La Ville de Maisonneuve & The Royal Elec. Co.* 1 Q. R. (S. & C. C.) 181.

2. ROAD DECLARED A COUNTY WORK —COST OF MAINTENANCE—ARTS 757 AND 938—MUN. CODE.

Held: (1) When a county council declares a road and bridge to be county works, and assumes the control thereof, it becomes by law solely charged with the obligation of maintaining the same.

(2) A resolution imposing on certain of the local municipalities the charge of maintaining works declared to be county works, is null and void. *Corp. Township of Granby* v. *Corp. County of Shefford.* 1. Q. R. (S. & C. C.) 113.

3. SUIT FOR SERVICES RENDERED ON INSTRUCTIONS OF COMMITTEE — WANT OF BY-LAW — NO BENEFIT TAKEN BY CORPORATION.

Appeal from a County Court.

The plaintiff, a solicitor, sued the defendants for his services in drawing an agreement under instructions of a committee of the council and in visiting Winnipeg and attempting to sell debentures of the municipality.

The County Court Judge entered judgment for the plaintiff upon the ground that the municipality accepted and took the benefit of his services; and from this judgment the defendants appealed.

Held, that the appeal must be allowed, and a nonsuit entered, with costs of the appeal, and in the Court below.

In the present case there was no evidence appearing upon the papers to show that the council adopted the agreement drawn by the plaintiff, or availed itself in any way of his services. The council can act only by formal resolutions and by-laws, and none were produced. It must then be assumed that the request referred to was made by individual members of the council. Nothing came of the visit to Winnipeg. There was no benefit to adopt, and the council did not appear to have taken any action based upon it. *Curran* v. *Municipality of North Norfolk.* Manitoba Q. B., April, 1892, (Can. L. T.)

Note.

See 1 M. L. D. & R. 204. (Counties 2.)

MUTUAL BENEFIT INS. — See Ins. Mut. Ben.

NEGLIGENCE—SEE ALSO MASTER AND SERVANT — CARRIERS 3 — RAILROAD COMP. 3—SHIPS AND SHIPPING 4.

1. DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE.

(1) Defendant, the owner of an apartment-house, who occupied the ground floor, allowed a dark hallway to remain unlighted. In the hall were two adjacent doors, one opening on a flight of stairs and the other opening into a water-closet used by all the occupants of the house. A visitor of one of the occupants opened the stair door by mistake for that of the water-closet and fell down the stairs. *Held*, that the owner was not negligent in failing to light the hall and to keep the stair door locked.

(2) Plaintiff testified that the hallway was dark; that after opening the door he could not see into the space in front of him; that he had never been there before, and that he had no information which might mislead him or cause him to think that there was but one door, and that the door into the closet. *Held*, that he was clearly guilty of contributory negligence. *Hilsenbeck* v. *Guhring*, N. Y. Ct. of Appeals, March 1892.

2. STREET RAILWAY—EVIDENCE.

A section of sewer-pipe standing on the edge of an excavation, and within eighteen to twenty-four inches of the rail of a horse-car track, was struck by a passing car so that it fell into the excavation and injured a workman there. Before reaching the place the driver stopped the car, and did not proceed until he was notified to do so by the foreman in charge of the workmen.

Held, that it was not shown that the driver was negligent. A careful man is guided by a reasonable estimate of probabilities. His precaution is measured by that which appears likely, in the usual course of things. The rule does not require him to use every possible precaution to avoid injury to others. He is only required to use such reasonable precautions to prevent accidents as would ordinarily be adopted by careful, prudent persons under like circumstances. Barker v. Savage, 45 N. Y. 191; Ray Neg. 133. Had the pipe stood in front of the defendant's car, so that the driver could have seen that the car must necessarily strike it, a different question would have been presented. The pipe was not so placed. It was negligently placed by the employees of the contractor so near the track that it was hit by the car, but the driver standing upon the platform, looking at it from that position, could not see that his car would hit. He proceeded under the signal of the foreman, with the supposition that the employees of the contractor had placed it a sufficient distance to permit the passage of his car, and under the circumstances, it does not appear to us that it was necessary for him to stop and measure before proceeding, and that he is chargeable with negligence because of his failure so to do. He but did what every other man would have done under like circumstances. *Schmidt* v. *Steinway & H. P. Ry. Co.* Second Division, New York Court of Appeal, March 15, 1892.

3. NEGLIGENCE OF SERVANT—CROWN—LIABILITY OF—50-51 V., C. 16—PRESCRIPTION—ARTS. 2262, 2267, 2188, 2211 C. C.

Held, reversing the judgment of the Exchequer Court; even assuming 50-51 V., c. 16 gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty, (upon which point the Court expresses no opinion) such act is not retroactive in its effect and cannot be relied on for injuries received prior to the passing of the Act.

Held also, even assuming that under the common law of the Province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of having been received more than a year before the filing of the petition, the right of action was prescribed.

Appeal allowed without costs. *Reg.* v. *Martin*, Supreme Court of Canada, April, 1892.

4. RAILWAY — FIRE CAUSED BY SPARK FROM ENGINE—CONTRIBUTORY NEGLIGENCE.

A flax store situated in close proximity to a railway had no windows, and when light was required it was obtained by opening the doors of the store. On one occasion when two doors were open, one on the side next to, and one

on the side away from the railway, a spark from a passing engine was blown in at the former, and falling among some loose flax, caused a fire which destroyed the store. In an action by the owners of the store, the Court *held* that they were not barred by contributory negligence from claiming damages from the railway company. *Port Glasgow Sailcloth Co.* v. *Caledonian Ry. Co.*, 29 Scot. Law Rep. 577.

5. Accident — Street Railway — Driving over Man in Daylight — Neglecting to Stop a Car — Contributory Negligence.

The plaintiff, having hailed a westward bound tramway car, crossed over from the south side of the street to get into it; the eastward bound car was coming along at a fast trot, but was some hundred feet away to the west. The plaintiff was somewhat intoxicated. While he had hold of the westward bound car to board it, the eastward bound car ran over his foot which was on the rail. It was broad daylight. The jury found a verdict for the defendants.

Held, that there must be a new trial.

Although it might be said that the plaintiff did not by direct evidence shew any specific act or omission on the part of those in charge of the eastward bound car on which to rest his action, yet the happening of the accident and the attendant or surrounding circumstances were sufficient to raise the presumption that there was negligence on the part of those in charge of that car, the consequence of which was the happening of the accident. There was reasonable evidence, in the absence of any explanation by the defendants, that the accident arose from want of care on their part. Assuming that the plaintiff was guilty of some negligence himself, the defendants did not prove that his negligence was such that the accident could not have been avoided by due diligence on their part, that is, they did not prove that his negligence was the *proximate* cause of the accident, and therefore did not establish their defence of contributory negligence.

Per Robertson, J.—Another ground for a new trial was the injustice done in this case, by counsel for the defendants appealing to the jury on the ground that, as they were ratepayers, they would be giving damages against themselves if they gave the plaintiff a verdict, by which appeal they appeared to have been influenced. *Forwood* v. *The City of Toronto.* Ontario Chanc. Div., March, 1892 (Can. L. T.)

6. Overflowing of Land — Bursting of Timber Boom — Right to erect Booms in Rivers.

Action for damage caused by overflowing the plaintiff's land.

It appeared that the defendants having a quantity of timber boomed in the S. river, the boom broke by reason of the heavy floods, and to prevent the logs floating down the river into the lake at the mouth, the defendants constructed another boom lower down near to a certain bridge. But so great was the force of the water, and the quantity of logs and debris brought down by it, that this boom also broke, and the logs became massed against the bridge.

The jury found that the injury to the plaintiff's lands was caused by excess of rain, and from the jam at the bridge, by which the water was raised. They did not find negligence on the part of the defendants, but said they were guilty of a wrongful act in throwing a boom across the river.

Held, that the defendants were entitled to judgment.

Per Boyd, C.—According to English law a man may lawfully adopt precautions to defend his property against what may be described as the extraordinary casualty of a great flood; and this is not actionable though injury result to his neighbour from this "reasonable selfishness." And again, this use of the boom being lawful by statute, R. S. O. c. 121, s. 5, and no negligence in its construction being pretended, it was impossible to say that what is thus expressly legalized, can be made the ground of action of tort. *Langstaff* v. *McRae*, Ontario Chanc. Div., March 1892.

Notes—See Bills and Notes.

ONUS PROBANDI—See Railroad Co. 4.

PAROL TESTIMONY—See Contracts 3.

PARTNERSHIP—SEE ALSO BOND—TRUST.

1. HOLDING OUT PERSON AS PARTNER—EVIDENCE—LIABILITY.

C., who had been carrying on a general store and hardware business, in May 1887, sold out the general business to M., retaining the hardware business, and took from M. to secure payment of the purchase money, a chattel mortgage. The businesses continued on the same premises as before, a partition separating the hardware from the general business, but with a door leading from the one to the other generally kept open. A certificate was registered stating that M. was carrying on the general business alone, under the firm name of C., M. & Co. It was ostensibly carried on under the firm name, which was the name of the sign over the door and in the bill-heads and advertisements.

The plaintiffs, who had supplied goods to C. prior to the sale to M., continued to supply goods, which were charged to the firm, no notice being given them that C. was not a member thereof, while the circumstances led to the belief that he was such member.

Held, that C. was liable for the goods so supplied to the firm. *McLean* v. *Clark*, Ontario Com. Pleas Div., Feb. 1892.

2. BANKING—MISAPPROPRIATION.

Where plaintiff deposits to his credit with a trust company a draft drawn on a partner in his individual capacity, he is not liable for a misappropriation of partnership funds by a payment of the draft with the firm's check. *Wheatland* v. *Pryor*, N. Y. Court of Appeals, April 12, 1892. (Alb. L. J.)

Notes.

1. To sustain their contention, the defendant's counsel cite the following, among other, authorities: Dob v. Halsey, 16 Johns, 38; Elliott v. Dudley, 19 Barb. 329; Bank v. Savery, 82 N. Y. 299; Bank v. Underhill, 102 id. 336; Rogers v. Batchelor, 12 Pet. 229; Moriarty v. Bailey, 46 Conn. 592; Kendall v. Wood, L. R., 6 Exch. 243.

2. We do not think any of these authorities are applicable to this case. If we assume that the plaintiff employed the Boston Trust Company to collect the draft on Pryor, and that the trust company thus became his agent for that purpose, then the Bank of the Republic became the agent of the trust company, and not of the plaintiff. Allen v. Bank, 22 Wend. 215; Commercial Bank of Pennsylvania v. Union Bank of New York, 11 N. Y. 203; Ayroult v. Bank, 47 id. 570. The Bank of the Republic did not become responsible to the plaintiff, and the plaintiff could not in any way control or direct its conduct in the discharge of the duty which *it had assumed to the trust company*. The rule of constructive notice to a principal can have no operation whatever in a case where the agent himself has not received actual notice. There are undoubtedly cases where an agent is authorized by his principal to employ sub-agents, and where the nature of the business intrusted to the agent is such that it must be assumed he was authorized to employ sub-agents for the principal, and in such cases it is frequently true that both the agents and the subagents are the representatives of the principal, and the knowledge which either of them acquired in the business may be imputed to the principal. But here it is settled upon abundant authority that the agent employed by the Boston Trust Company to collect its draft had no relation whatever to the plaintiff, and owed a duty, not to the plaintiff, but solely to the trust company. So in any view of this case, the knowledge acquired by the Bank of the Republic when it received the firm check in payment of the draft upon Pryor individually cannot be imputed to the plaintiff. The plaintiff, in the end, in some form, received his money from the Boston Trust Company in good faith, without notice, and he cannot be made to account for it to the defendants. Stephens v. Board, 79 N. Y. 183.

3. DISSOLUTION—RIGHTS OF RETIRING PARTNERS—CONTINUING BUSINESS—FIRM NAME—GOOD-WILL.

Upon the dissolution of a partnership, the retiring partners, who sell their fellows "all their right, title and interest in the firm," may, in the absence of a stipulation to the contrary, engage in the same business, and personally solicit the dissolved firm's old customers, and it is immaterial whether the good-will was included in the sale to their copartners.

When the name of the old firm was F., W. & Co., and those of the retiring partners were F., W., C., and F., jr., such new business could be conducted by them under the firm name of F., W. & C. *Williams* v. *Farrand*, Michigan Supreme Court, Nov. 20, 1891, 45 Alb. L. J. 392.

1. The following propositions must be regarded as established by the clear weight of authority:

Notes from the case.

(1). Though a retiring partner may have assigned his interest in the partnership business, including the good-will thereof, to his copartner, he may, in the absence of an express agreement to the contrary, engage in the same line of business in the same locality, and in his own name. He may, by newspaper advertisements, cards and general circulars, invite the general public to trade with him, and through the same mediums advertise his long connection with the old business, and his retirement therefrom.

(3). He will not be allowed however to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence will not be allowed to advertise himself as its successor.

(4). The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

(5). That no man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure such other person.

In Myers v. Buggy, Co., 54 Mich. 215, A., B. and C. had been carrying on business as copartners at Kalamazoo, under the name and style of "The Kalamazoo Wagon Company." A., B. and C. sold to complainant "all their interest in the property, money, assets and good-will," etc., in and to their business. After such sale complainant's assignors formed a corporation under the name of "The Kalamazoo Buggy Company;" pitched their plant in the same locality; commenced the manufacture of the same class of goods; issued circulars to the trade, with descriptive cuts of the same character and appearance as those contained in complainant's circulars, and advertised their place of business as being in the same locality. In that case the name of "The Kalamazoo Wagon Company" was an assumed name. The only distinctive feature in the name adopted by defendant was the use of a word of similar meaning to that for which it had been substituted. The defendants were not using their own names. It was a pure case of piracy, and the facts clearly indicated an intention to deceive the public. As was said in Burgess v. Burgess, 3 De Gex. M. & G. 896: Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by him as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that defendant is selling his goods as the goods of the plaintiff." In Lee v. Haley, L. R. 5 Ch. App. 155, plaintiff had been doing business at No 22 Pall Mall, under the artificial name of "Guinea Coal Company." Defendant, who had been their manager, set up a rival business under the name of "Pall Mall Guinea Coal Company," at 45 Pall Mall. His envelopes and business cards were printed in such a way as to resemble the plaintiff's. In Glenny v. Smith, 2 Drew & S. 476, defendant had been in plaintiff's employ and started in business on his own account. Over his shop he had his own name, Frank P. Smith, printed in large, black letters on a white ground, but on the brass plates in the windows of his shop he had engraved the word "from" in small letters, and the words "Thrasher & Glenny" (the name of plaintiff's firm) in large letters. He had an awning also in front of his shop, which, when let down, would cover his own name, and expose only the name of the plaintiff's firm. The court held that defendant was deceiving the public, and an injunction was issued. Croft v. Day, 7 Beav. 84; Levy v. Walker, 10 Ch. Div. 438; Turton v. Turton, 42 id. 128; Hookham v Pottage, L. R. 8 Ch. App. 91; Meneely v. Meneely, 62 N. Y. 431; Fullwood v. Fullwood 9 Ch. Div, 176.

(6). That when an express contract has been made to remain out of business, or for the use by a purchaser of a fictitious name, or a trade name, or a trade-mark, the court will enjoin the continued violation of such agreement. In Grow v. Seligman, 47 Mich. 607, defendant had carried on the clothing business at Bay City, under the name and style of "Little Jake," and sold out to complainant, and expressly conveyed the right to use the name and style of "Little Jake," and agreed that he would not again engage in that business at Bay City, and defendant was enjoined from violating his agreement. In Shackle v. Baker, 14 Ves. 468, defendant agreed that he would not, for the space of ten years, carry on or permit any other person to carry on the same business in Middlesex, London or Westminster, and that he would use his best endeavors to assist plaintiff and procure customers for him. In Hitchcock v. Coker, 6 Adol. & E. 438, Coker had agreed to enter the service of plaintiff, and that he would not at any time thereafter engage in the business in which his employer was engaged. To the same effect are Beal v. Chase, 31 Mich. 490; Doty v. Martin, 32 id. 462; Burckhardt v. Burckhardt, 36 Ohio St. 261; Vernon v. Hallam, 34 Ch. Div. 752; Tode v. Gross, 28 N. E. Rep. (N. Y. App.) 469.

(7). That an assignment of all the stock, property and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade names as have been in use in such business. These incidents attach to the business or right of manufacture, and pass with it. Courts have uniformly held that a trade-mark has no separate existence; that there is no property in words as detached from the thing to which they are applied, and that a conveyance of the thing to which it is attached carries with it the name. Dixon Co. v. Guggenheim, 2 Brewst. 321; Lockwood v. Bostwick, 2 Daly, 521; Derringer v. Plate,

29 Cal. 292. In Gage v. Publishing Co., 11 Ont. App. 402, Gage and Beatty were co-partners, and among other things, were engaged in publishing "Beatty's Headline Copy-Books," Beatty sold out to Gage all his interest in the business, and engaged in the drug business. Gage continued for some years the sale of the copy-books, when Beatty licensed defendant to publish "Beatty's New and Improved Headline Copy-Books." In Hoxie v. Chaney, 143 Mass 592, Hoxie and Chaney were copartners, engaged in the manufacture of soaps, two brands of which were known as "Hoxie's Mineral Soap" and "Hoxie's Pumice Soap." These were simply trade names by which the articles were known, and the right to use them passed with the right to manufacture the articles. In Cement Co. v. Le Page, 147 Mass. 206, Brooks and Le Page, as co-partners, sold to plaintiff the good-will of their business and the right to use their trade-marks. They were engaged in the manufactured of glues. Their light glues they named "Le Page's Liquid Glues." The court held that the right to use the name by which the articles were known to the trade passed with the right to manufacture the articles. In Merry v. Hooper, 111 N. Y. 415, the parties were formerly partners. Hooper sold to Merry, but afterward undertook to use certain trade-marks, viz., the "Lion Brand" and "Phoenix Brand," but the court held that these trade-marks passed to the assignee. In Hall v. Barrows, 4 De Gex, J. & S. 150, the firm had marked the chief part of their output of iron with the initial letters of their partnership name, "B., B. & H.," surmounted by a crown, and the court held the letters and crown had become a trade-mark, and as such should be included as a subject of value. Brown Trade-Marks, 358; Millington v. Fox, 3 Mylne & C. 338-352; Myers v. Buggy Co., 54 Mich. 215; Sohier v. Johnson, 111 Mass. 242; Shipwright v. Clements, 19 Wkly. Rep. 599; Rogers v. Taintor, 97 Mass. 291.

(8.) A corporate name is regarded as in the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation. Statutes providing for the organization of corporations usually prohibit the adoption of the same name by the two companies. Holmes v. Manufacturing Co., 37 Conn. 278. These propositions are sustained by a long line of authorities, but in none of the cases cited does the question hinge upon a grant of good-will. Complainants insist however that a grant of good-will may be implied, and when express or implied, it imposes certain restraints upon the vendors, viz.: (1) That they cannot afterward personally solicit customers of the old firm, and (2) that they are restricted in the use that may be made of their own names.

2. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good-will be included or not, cannot personally solicit the customers of the old firm, has no support in principle.

3. In Labouchere v. Dawson, L. R. 13 Eq. 322, the court say that a retiring partner who sells the good-will of a business is entitled to engage in a similar business, may publish any advertisement he pleases in the papers, stating that he is carrying on such a business; he may publish circulars to all the world, and say that he is carrying on such a business, but he is not entitled, by private letter, or by visit by himself or agent, to solicit the customers of the old firm.

4. But in Pearson v. Pearson, 27 Ch. Div. 145, Labouchere v. Dawson is expressly overruled. The court say: "The case of the plaintiff is founded on contract, and the question is, what are his rights under the contract? There is no express covenant not to solicit the customers of the old business, but it is said that such a covenant is to be implied. I have a great objection to straining words so to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation. It is said that there was a sale of the good-will. I think that there was, taking good-will as defined by Lord Eldon in Cruttwell v. Lye, 17 Ves. 335. The purchaser has a right to the place and a right to get in the old bills: so the purchaser gets the good-will, as defined by Lord Eldon. But the term "good-will" is not used, and when a contract is sought to be implied we must not substitute one word for another. But suppose the word did occur, what is the effect of the sale of "good-will." It does not, *per se*, prevent the vendor from carrying on the same class of business."

5. Vernon v. Hallam, 34 Ch. Div. 752, held that a covenant by a vendor of a business, including the good-will thereof, that he would not for a term of years carry on the business of a manufacturer, either by himself or jointly with any other person, under the name or style of J. H. or H. Bros, (the name of the business which he had sold), is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and the injunction was granted to restrain a breach of that covenant.

6. Defendants have no right to advertise their business as a continuation of the old firm business. They are subject to the rule already laid down, that no man has the right to sell or advertise his own goods or business as that of another, and so mislead the public and injure such other person. In Lathrop v. Lathrop, 47 How, Pr. 532, after dissolution J. Lathrop formed a copartnership with one Tisdale, and adopted the name of J. Lathrop & Co., which was the style of the old firm. *Held*, that in the absence of any covenant with his late partner, he might legally do so. In Reeves v. Denicke, 12 Abb. Pr. (N. S.) 92, the court say: "In this case the firm name was not sold or transferred to defendants as constituting a part of the partnership property, nor did the sale, in terms or by necessary implication, include the good-will and it is therefore unnecessary to determine whether the partnership name was a part of such good-will. There was no restraint upon

a retiring partner holding him from engaging in a similar business, and he violated no obligation by forming a new firm under his own name, and transacting a business in all respects like that he had released to them. It is quite clear that defendants acquired no right to continue the use of the partnership name of the old firm. If the good reputation of that firm was intended to pass and become a part of defendant's new firm, it should have been provided for in the conveyance. That it was not intended it should pass is evident from the omission to include it." Seed Co. v. Dorr, 70 Iowa, 481; Bassett v. Percival, 5 Allen, 345; McGowan v. McGowan. 22 Ohio St. 370. In Turton v. Turton, 42 Ch. Div. 128, although there were no contract relations between the parties, the court say: "No one can have the right to represent his goods as the goods of another; therefore if a man uses his own name, that is no *prima facie* case, but if he, besides using his own name, does other things which show that he is intending to represent, and is in point of fact making his goods represent, the goods of another, then he is so prohibited, but not otherwise." In Hookham v. Pottage, L. R., 8 Ch, App. 91, plaintiff and defendant had been copartners as Hookman & Pottage. Plaintiff succeeded to the business, and defendant afterward set up a shop only a few doors away, and printed over the door the words, "Pottage, from Hookham & Pottage." The court held that "defendant had a right to state that he was formerly manager, and afterward a partner, in the firm of Hookham & Pottage, and that he had a right to avail himself by the statement of that fact of the reputation which he had so acquired, but he had no right to make that statement, or to avail himself of that reputation, in such a way as was calculated to represent to the world that the business which he was carrying on was the business of Hookman & Pottage, or that Hookman had any interest in it." In Meneely v. Meneely, 62 N. Y. 431, the court say; "If defendants were using the name with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors of the old-established foundry which was being conducted by plaintiffs, and thus enticing away customers, and if with that intention they used the name in such a way as to make it appear that of the plaintiffs' firm, or resorted to any artifice to induce the belief that defendants' establishment was the same as that of plaintiffs, and perhaps without actual fraudulent intent, they had done acts calculated to mislead the public as to the identity of the establishment, and produce injury beyond that which resulted from similarity in name, then the court would enjoin them, not from the use of the name, but from using it in such a way as would deceive the public .... Every man has the absolute right to his own name in his own business, even though he may thereby interfere with or injure the business of another, bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any thing calculated to mislead." In Fullwood v. Fullwood, 9 Ch. Div. 176, R. J. Fullwood carried on business as manufacturer of annatto at 24 Somerset place, Hexton, from 1785 to 1832. Plaintiff and three brothers, one of whom was the defendant, succeeded to the business, but ultimately the right to carry on the business vested in the plaintiff. Defendant, Mathew Fullwood, and another brother formed a copartnership in the name of E. Fullwood & Co., and issued and distributed in various ways cards containing the following: "Established over 85 years. E. Fullwood & Co. (late of Somerset place, Hexton), Original Manufacturers of Liquid and Cake Annatto." They also placed around the bottles containing the annatto a wrapper resembling that which plaintiff used. The court say: "Defendants are entitled to carry on their business under the firm name which they have adopted, if they are so minded, provided they do not represent themselves to be carrying on the business which has descended to plaintiff." In Bininger v. Clark, 60 Barb. 113, the defendant wrongfully advertised himself as successor to the old firm, and made such a use of his own name as to indicate a fraudulent intent. Hegeman v. Hegeman, 8 Daly 1; Levy v. Walker, 10 Ch. Div. 436. In Churton v. Douglas, Johns. Eng. Ch. 174; 5 Jur. (N. S.) 887, plaintiff and defendant had carried on the business as stuff manufacturers at Bradford in a building owned by defendant, and known as "Hall Ings," under the name and style of John Douglas & Co. Defendant sold out to plaintiff all his share, right and title in the business, including the good-will, and executed to plaintiff a seven years' lease of the premises occupied by the firm. Within a short period defendant set up in the same line of business, next door to plaintiff, in a part of the same building, known as "Hall Ings," adopting the old firm name of John Douglas & Co. The court held that defendant, by the use of the old firm name, and the surroundings, would be obtaining the custom of the old firm, by inducing the belief that his was a continuation of the old establishment. The court says: "The authorities, I think, are conclusive upan this point, that the mere expresssion of parting with or selling the good-will does not imply a contract on the part of the person parting with that good-will not to set up again in the similar business; but I use the expression 'similar' to avoid including the case of the vendor seeking to carry on the identical business. He does not contract that he will not carry on an exactly similar business, with all the advantage which he might acquire from his industry and labor, and from the regard people may have of him, and that in a place next door, if you like, to the very place where the former business was carried on. It is settled that it is the fault of those who wish any protection against such a class that they do not take care to insert the provision to that effect in the deed."

7. The same principle obtains with reference to trade-marks. One may have a right in his own name as a trade-mark, but he cannot have such a right as against another

person of the same name, unless the defendant use a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. Sykes v. Sykes, 3 Barn. & C. 541; Holloway v. Holloway, 13 Beav. 209; Rogers v. Taintor, 97 Mass. 291; Gilman v. Hunnewell, 122 id. 139; Goodyear's India Rubber Glove Manuf. Co. v. Goodyear Rubber Co., 128 U. S. 598. The test applied by all the authorities in this class of cases are: Is a corporate or trade or fictitious name simulated? Is the name assumed or adopted false in fact? Is it used in connection with locality or other representations, so as to convey the impression that the business is a continuation of the old business? Defendants are not responsible for the blunders made by clerks, postal clerks, mail carriers, telephone employees or news-paper reporters. In Meneely v. Meneely, the court say: "When the only confusion created is that which results from the similarity of names, the court will not interfere." In Turton v. Turton it is said that "defendants are not responsible for the blunders made by the business community in not distinguishing between John Turton & Sons and Thomas Turton & Sons." See also Richardson & Boynton Co. v. Richardson & Morton Co. (Sup.), 8 N. Y. Supp. 52; Goodyear's India Rub. Gl. Manuf. Co. v. Goodyear Rub. Co., 128 U. S. 598.

PATENTS.

LICENSE — MASTER AND SERVANT — WRONGFUL DISCHARGE—PLEADING.

(1) A contract provided that a corporation should employ a certain patentee as its general manager for ten years, subject to termination by either party on one year's notice, or by the patentee's death or inability to act, and that, in the event of a termination of the agreement, the corporation should have a license to use his patents on payment of a certain royalty. *Held*, that a wrongful discharge of the patentee by the corporation was a mere breach of contract, and did not terminate the agreement so as to render the corporation liable to pay the royalty.

Johnson v. Signal Co. (N. Y. App.), 29 N. E. Rep. 961, followed.

(2) In an action to recover such royalty the complaint alleged that "the said contract was terminated by said company, and the said (patentee) was notified by the defendant to that effect, and that his services would be no longer accepted by the said defendant after said 1st day of March, 1888." The answer did not deny these allegations, but admitted "that on March 1, 1888, the defendant dismissed (the patentee) from its employ." *Held*, that such answer did not admit that the discharge of the patentee terminated the contract. *Miller* v. *Union Switch & Signal Co.* Second Division, New York Ct. of Appeals, March 15, 1892. Opinion by Landon, J., 13 N. Y. Supp. 711, reversed.

PHYSICIAN—See Libel and Slander 3—Ships and Shipping 4.

PLEADING—See Patents—Procedure.

PLEDGE.

CARE OF GOODS—DUTY OF PLEDGEOR.

Where the pledgee of goods, to whom a warehouse receipt has been delivered, does not claim or exercise his right to the exclusive and absolute control of the goods pledged, but permits the pledgeor to have free access to them, it is equally the duty of the pledgeor to care for them, when he knows they are in danger, and make the damages as little as possible, and if he fails to do so he cannot hold the pledgee responsible for the loss. *Willets* v. *Hatch.* Second Division, N. Y. Ct. of Appeals, March 8, 1892. Opinion by Bradley, J., 11 N. Y. Supp. 73, affirmed.

PRESCRIPTION—See Bills and Notes 3—Neg. 3—Railroad Comp. 2.

PRINCIPAL AND AGENT—See Ships and Shipping 5.

PROCEDURE.

UNLIQUIDATED DAMAGES PLEADED IN COMPENSATION—C. C. 1188—FABRIQUE — AUTHORIZATION TO PLEAD—SPECIAL REPLICATION TO SPECIAL ANSWER—COSTS.

The plaintiff, salaried beadle of the parish church, claimed $140, from the *Fabrique* for alleged special services in connection with his employment. Plea, that by plaintiff's gross neglect the church was burned, and plate and valuables lost, whereby defendants suffered great damage, which they set up in compensation. Demurrer to plea, on the ground, 1st, that defendants claim being for unliquidated damages

could not be urged in compensation, 2nd, that defendants did not allege that at a regular meeting of the fabrique, or of the parishioners, they had been authorized so to plead.

Held :—1st, that inasmuch as the respective claims of the parties appeared to be about equally easy of liquidation, justice required that they should be tried by one suit, and 2nd, that the want in defendants' plea of allegation of authorization to defend the suit, was not good ground for demurrer; though a motion to compel them to produce the authorization would probably have succeeded.

Where a special replication to a special answer is fyled, without leave of court, but appears to be pertinent, it will not be rejected, but the party moving for its rejection will get his costs of motion. *Giroux* v. *Les Curé etc. de Beauport*, 17 Q. L. R. 315.

QUARANTINE, DETENTION AT — See Ships and Shipping 1.

QUEBEC ELECTION ACT — See Elections 1.

RAILWAY COMPANIES—SEE ALSO ASSESSMENT—NEGLIGENCE 4.

1. UNDUE PREFERENCE — UNEQUAL MILEAGE RATES — RIVAL TRADERS — ACCESS TO COMPETING LINE — GROUPING — RAILWAY CLAUSES CONSOLIDATION ACT, 1845 (8 & 9 V., c. 20) s. 90 —RAILWAY AND CANAL TRAFFIC ACT, 1854 (17 & 18 V., c. 31) s. 2—RAILWAY AND CANAL TRAFFIC ACT, 1888 (51 & 52 V., c. 25), ss. 17, 27, 29 AND 55).

In determining whether mileage rates charged by a railway company to one trader on a lower scale than to another do or do not amount to an undue preference, the Court may take into consideration the fact that one of the traders has access to a competing line of railway. *Phipps* v. *London & North-West Ry. Co.* (App.) 61 L. J. Rep. Q. B. 379.

2. GRANT OF EASEMENT BY—USER—"ULTRA VIRES"—TITLE BY PRESCRIPTION.

A company incorporated for any particular purpose has only power to do acts which are authorized by its charter or can be derived therefrom by reasonable implication as incidental to the purpose for which the company was created.

Held, in this case, that a railway company had no power to grant the privilege of laying pipes along their right of way for the conveyance of water to a town; and that any user thereof short of forty years would not estop the company from objecting to its further use. *Canada Southern Ry. Co.* v. *Town of Niagara Falls*, Ont. Chanc. Div. March 1892, (Can. L. T.)

3. NEGLIGENCE—CONSTRUCTION OF ROAD — INTERFERENCE WITH HIGHWAY—NEGLECT TO RING BELL.

The Midland Railway Co. in building a portion of its road, left at a crossing the road bed some feet below the level of the highway and operated it without erecting a fence or otherwise guarding against accident at such crossing. The road was afterwards operated by the G. T. Ry. Co., and S. was driving along the road one day and as he approached the crossing an engine and tender came towards him on the track; the horses became frightened and broke away from the coachman who had jumped out to hold them, wheeled round and the waggon rolled over the edge of the highway on to the track in front of the train. S. lost his arm, and a lady who had been in the carriage with him was killed. In actions by S. and the administrators of the deceased lady, the jury found that the bell had not been rung as required by the statute, and that the defendant company was guilty of negligence thereby, and also in not fencing, or otherwise protecting, the dangerous part of the highway.

Held, affirming the decision of the Court of Appeals (18 Ont. App. R. 184) and of the Divisional Court (19 O. R. 164) that the Midland Ry. Co. had no authority to construct the road as they did unless upon the express condition that the highway should be restored so as not to impair its usefulness, and it or any other company operating the road was liable for injury resulting from the dangerous condition of the highway to persons lawfully using it.

Held further, that the bell not having been rung as the statute required, the company was liable for injuries caused by the horse taking fright and overturning the waggon so that the occupants were thrown on to the track though the engine and the waggon did not come in contact. G. T. R. Ry. Co. v. Rosenberger (9 Can. S. C. R. 311) followed. Appeals dismissed with costs. *Grand T. Ry.* v. *Sibbald, Grand T. Ry.* v. *Tremayne*, Supreme Ct. of Canada, April 1892.

4. FIRE CAUSED BY SPARK FROM ENGINE — DAMAGES — NEGLIGENCE— ONUS OF PROOF.

The owners of a flax store situated near a railway, which had been set on fire by a spark from a passing engine, sued the railway company for damages, alleging that they had omitted to take proper precautions against the emission of sparks in not fitting the engine with a contrivance known as the "spark arrester." The evidence showed that the engine in question was of a new type to which the "spark arrester" was inapplicable, and that it was fitted with the best known means for preventing the emission of sparks available in engines of that class. It was not proved that the risk of communicating fire had been sensibly increased by the new method of construction. The Court *held* that the defenders had not been negligent, and therefore *assoilzied* them from the conclusions of the action.

Observations as to the extent to which a railroad company may, in improving the general efficiency of its engines, increase the risk of their discharging dangerous sparks, without incurring liability for the damage that may result.

Observed by the Lord President, that it is a rule fixed by a series of decisions, that if a fire is caused by a locomotive the railroad company is not liable for the damage done unless they are proved to have been negligent. *Port Glasgow Sailcloth Co.* v. *Caledonian Ry. Co.*, 29 Scot. Law Rep. 577.

REGISTRY LAWS.

R. S. N. S. 5TH. SER. C. 84 S. 21— REGISTERED JUDGMENT—PRIORITY— MORTGAGE — RECTIFICATION OF MISTAKE.—NOVA SCOTIA.

By R. S. N. S. 5th. Ser. c. 84, s. 21, it is provided that a judgment duly recovered and docketed shall bind the lands of the party against whom the judgment shall have passed from and after the registry thereof in the county or district wherein the lands are situate, as effectually as a mortgage, whether such lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first regis- his judgment."

D. had agreed to mortgage certain properties, one of which had been conveyed to her late husband, through whom she claimed, by four different deeds, three conveying a one-sixth interest each, and the fourth a half interest. The conveyancer who prepared the mortgage had before him one of the deeds conveying a one-sixth interest, and by mistake and inadvertence that interest, instead of the whole, was described and conveyed. On 3rd December, 1887, the property mortgaged was sold under foreclosure and conveyed by the sheriff to M. On the 27th September, 1887, a judgment was recovered and registered against D., and in July, 1889, an execution was issued on that judgment under which the sheriff attempted to levy on the five-sixths of the property of D. which should have been included in the mortgage.

In an action to have the mortgage rectified and the judgment creditor restrained from levying upon and selling the said property,

Held, affirming the judgment of the Supreme Court of Nova Scotia, Strong and Patterson, JJ., dissenting, that the parol agreement by D. to give a mortgage of the five-sixths parts of the said property was void against the registered judgment, and the action could not be maintained. Grindley v. Blaikie, 19 Nova Scotia Reports. 27, approved and followed. *Miller* v. *Duggan*, Supreme Court of Canada, April 1892.

REVENUE.

GOODS STOLEN WHILE IN BOND IN CUSTOMS WAREHOUSE — CLAIM FOR VALUE THEREOF AGAINST THE CROWN — CROWN NOT A BAILEE — PERSONAL REMEDY AGAINST OFFICER THROUGH WHOSE ACT OR NEGLIGENCE THE LOSS HAPPENS.

The plaintiffs sought to recover from the Crown the sum of $465.74 and interest, for the duty paid value of a quantity of glazier's diamonds alleged to have been stolen from a box, in which they had been shipped at London, while such box was at the Examining Warehouse at the Port of Montreal.

On the 21st February, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway, at Point St. Charles, Montreal; and on that day the plaintiffs made an entry of the goods at the Customs House, and paid the duty thereon ($107.10). On Monday, the 24th, the Customs officer in charge of the warehouse at Point St. Charles delivered the box to the foreman of the Customs House carters, who in turn delivered it to one of his carters who took it, with other parcels, and delivered it to a checker at the Customs Examining Warehouse. The box was then put on a lift and sent up to the third floor of the building, where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen,—the theft having been committed by removing the bottom of the box. Although the evidence tending to show that the theft was committed while the box was at the Customs Examining Warehouse at Montreal was not conclusive, the court drew that inference for the purposes of the case.

Held, that, admitting the diamonds were stolen while in the Examining Warehouse, the Crown is not liable therefor.

In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy except such as the injured person may have against the officers through whose personal act or negligence the loss happens. *Corse* v. *Reginam*, Exchequer Ct. of Canada, March 1892.

SALE OF GOODS.

PLACE — DELIVERY IN ANOTHER COUNTY.

Defendant, having a wholesale bottler's license in P. county, received in the regular course of business at his place in that county orders from retailers in M. county. On receipt of the orders the liquor was set apart to the purchasers, and charged to them on defendant's books, and was then delivered to them in M. county, by means of defendant's own wagon.

Held, that defendant was not guilty of selling liquor in M. county, since the sale, as between him and the purchasers, was completed in P. county. *Commonwealth* v. *Hess*, Pennsylvania Supreme Court, March 28, 1892, 45 Alb. L. J. 456.

Notes.

The true question is—and it has been wholly overlooked in many of the cases—whether there was a sale and delivery as between the vendor and the vendee. Our books are full of cases in which the sale has been held to be incomplete, for want of a delivery to the vendee, as against creditors, but in no one of them has it ever been held that it was not good between the parties, and that the title did not pass as to them.

As before stated, when the defendant received the orders from his customer, the goods were set apart for the latter and charged to him. Had the order been accompanied by the cash, and the goods thus set apart, no one would contend that the sale was not complete as between the parties. Can it make any possible difference that the liquors were charged to the purchasers upon the books of the defendant? The giving of a credit was as effective in passing the title as the payment of the money when the order was given. The acceptance of the order in either case is effective to pass the

title as between vendor and vendee. In such case the vendee has the right of property with the right of possession. Under all the authorities the vendor acts as bailee, and not as owner, in carrying or delivering the goods. This is the rule where the rights of creditors or *bona fide* purchasers without notice do not interfere. There is abundant authority for this principle. The general rule is that it is the contract to sell a chattel and not payment or delivery which passes the property. Benj. Sales, 357.

2. The rule that the contract of sale passes the property immediately, before payment or change of possession, has been universally recognized in the United States. Benj. Sales, 329.

3. In Dixon v. Yates, 5 Barn. & Adol. 313, Baron Parke lays down the rule as follows: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it without delivery. Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel by the vendor and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract therefore is to vest the property in the bargainee."

4. Justice Lowrie, in Winslow v. Leonard, 24 Penn. St. 14, says "the class of cases which have tended most powerfully to embarrass this question are those wherein the real question was not, has the title vested in the vendee? but has it absolutely vested as to take away the lien of the vendor for unpaid purchase-money or his right to stop *in transitu*? Yet to this class belong most of the older cases, which are usually referred to as leading cases in the present question, though they have nothing to do with it, for it is very plain that the title may vest while the vendor has such remaining control over the goods as entitled him to arrest their full delivery in default of payment or on the failure of the vendee."

SALVAGE—See Ships and Shipping 5. 6.

SHIPS & SHIPPING.

1. TOWAGE—DETENTION AT QUARANTINE—COMPENSATION.

Held: The owner of a towboat is intitled to compensation for her detention at quarantine by reason of disease on the vessel towed, which existed at the time of making the contract and was not disclosed by her master.

But he cannot make an extra charge for providing another tug to complete the towage after the expiration of the period of quarantine. *Kaine* v. *Sorensen*, 1. Q. R. (S. & C. C. 184).

2. CHARTER-PARTY—CESSER CLAUSE—DETENTION AT PORT OF LOADING—DEMURRAGE—LIEN.

By a charter-party it was stipulated that the ship should proceed to a loading-berth at the port of loading, and there receive on board a full and complete cargo, and being so loaded, should proceed to the port of discharge, "All liability of charterers to cease on completion of loading, provided the value of the cargo is sufficient to satisfy the lien which is hereby given for all freight, dead freight, demurrage, and average (if any) under this charter-party"—"To be loaded as customary, ... and to be discharged as customary at the average rate of not less than 100 tons per working day from the time the ship is in berth and ready to be discharged, and notice thereof has been given by the master in writing. Demurrage to be at the rate of 20*l.* per day."

Held, in an action by the shipowners to recover damages for undue detention of the ship at the port of loading, that the stipulation as to the cesser of the charterers' liability did not apply to liability for damages for detention at the port of loading, for the cesser of the charterers' liability must be taken to be co-extensive with the lien created by the charter-party; and, upon the true construction of the charter-party, the ship-owners had no lien in respect of such damages, "demurrage" under the charter-party not being applicable to the port of loading. Lockhart v. Falk, (44 Law J. Rep. Exch. 105; Law Rep. 10 Exch. 132) followed and approved. *Dunlop* v. *Balfour, Williamson & Co.*, (App.) 61, L. J. Rep. Q. B. 354.

3. MASTER OF VESSEL—CLAIM FOR WAGES—WINDING-UP PROCEEDINGS—LEAVE GIVEN TO SUE IN EXCHEQUER COURT TO ENFORCE MARITIME LIEN.

The applicant Bergman was the master of the steamer *Aurora*, the property of the above company. When the company went into liquidation Bergman filed his claim in the winding-up proceedings, and asked to be scheduled on the preference list of creditors. The

steamer was mortgaged, and his claim would have ranked after the mortgages, unless he had a maritime lien for his wages, which in a suit in the Admiralty Court would rank before the mortgages. He therefore applied in the winding-up proceedings for leave to proceed in the Exchequer Court to enforce his lien.

Held, that, although it was not clear that the claimant had a lien, as the question could be properly raised only by a suit in the Exchequer Court, he might have leave to proceed there against the steamer. If he had a lien, it was only by proceedings in that Court that he could get relief to the full extent to which he was entitled. The costs of the present motion should be reserved until after that suit was disposed of. *In re Lake Winnipeg Transport Co. Bergman's Claim*, Man. Q. B., April 1892, (Can. L. T.)

4. LIABILITY OF OWNERS — NEGLIGENCE OF PHYSICIAN.

Under the Passengers' Act of Great Britain, passed August 14, 1855, which provides that every passenger ship shall carry a duly-qualified medical practitioner, and that the owner shall furnish a proper and necessary supply of medicines, to be properly packed and placed under the medical practitioner's control, the ship-owner is not liable for injuries incurred by a passenger by taking calomel furnished by the medical practitioner through negligence or mistake, in response to a request for quinine. *Allan* v. *State S. S. Co., Limited*, Second Division, New York Ct. of Appeal, March 8, 1892.

Note.

The defendant's liability must be sought for in its failure to perform the duty imposed upon it by the statute. Beyond that it had assumed none, and had none to perform, and consequently violated none, owing to its passengers. If the things which the statute required it to do were performed with due and proper care, its duty to the passengers was discharged. The obligations imposed by the statute were twofold: First, to employ a duly-qualified physician; and second, to provide a supply of medicines properly packed and labelled, and suitable and necessary for disease incident to sea voyages. When these two things had been done, and the certificate of their performance given by the government officers, the ship was permitted to proceed upon its voyage, and the medicines were from that time under the charge of the physician, to be used at his discretion. No negligence is claimed to exist in the performance of either of these duties. No evidence was offered that the supply of medicine was insufficient in quantity or quality, and the respondent's counsel concedes that the competency of the physician was established, and the court charged the jury that for his negligence the defendant was not responsible. As already stated, there was no evidence of a failure to provide an adequate and proper quantity of medicine, of good quality, and none that they were not properly packed and labelled, or that the "surgery" was not properly fitted up, or that it was an improper place for the purposes designated. When the ship-owner has employed a competent physician, duly qualified as required by the law, and has placed in his charge a supply of medicine sufficient in quantity and quality for the purposes required, which meet the approval of the government officials, and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to its passengers; that from that time the responsible person is the physician, and errors and mistakes occurring in the use of the medicines are not chargeable to the ship-owner; and that no different rule is applicable to such mistakes as are the result of improper arrangement in the care of the medicines than to those which are the result of errors in judgment. The work which the physician does after the vessel starts on the voyage is his, and not the ship-owner's. It is optional entirely with the passengers whether or not they employ the physician. They may use his medicines or not, as they choose. They may place themselves under his care, or go without attendance, as they prefer, and they determine themselves how far and to what extent they will submit to his control and treatment. The captain of the ship cannot interfere. The physician is not the ship-owner's servant, doing his work and subject to his direction. In his department, in the care and attendance of the sick passengers, he is independent of all superior authority except that of his patient, and the captain of the ship has no power to interfere except at the passenger's request. These views find support in Laubheim v. Steamship Co., 107 N. Y. 229, and in O'Brien v. Steamship Co., (Mass.), 28 N. E. Rep. 266. (Opinion of the Court).

5. SALVAGE OF SHIP AND CARGO — PRINCIPAL AND AGENT — POWER OF ATTORNEY GIVEN BY CREW TO AGENT OF OWNERS OF SALVING VESSEL FOR PURPOSE OF ADJUSTMENT OF SALVAGE CLAIM—CONSTRUCTION OF.

A crew of a fishing schooner had performed certain salvage service in respect of a derelict ship, and gave the following power of attorney respecting the claim for such services to the agent of the owner of the schooner: "We the undersigned, being all the crew of the schooner *Iolanthe* at the

time said schooner rendered salvage services to the barque *Quebec*, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney, with power of substitution for us and in our name and behalf as crew of the said schooner, to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe*, hereby granting unto our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint from time to time as occasion may require one or more agents under him or to substitute an attorney for us in his place, and the authority of all such agents or attorneys at pleasure to revoke."

Held, that this instrument did not authorize the agent to receive the salvage payable to the crew or to release their lien upon the ship in respect of which the salvage services were performed.

(2) That payment of a sum agreed upon between the owners of such ship and the agent to such agent and his receipt therefor, did not bar the salvors from maintaining an action for their services. *The "Quebec"*, Exchequer Ct. of Canada, March 1892.

6. SALVAGE — MARITIME LIEN — CLAIMS FOR RESCUE OF VESSEL — NATURE OF SERVICES RENDERED — EXPRESS AGREEMENT FOR PAYMENT —EXTENT OF LIEN — VALUE OF RES AT TIME OF SALVAGE — ADDITIONAL VALUE BY REASON OF REPAIRS — AMOUNT OF SALVAGE—COSTS.

A vessel having been for a long time stranded, the hull was rescued and delivered to a dry dock company for repairs. The value of the hull when so delivered was $300; after the repairs had been made the vessel was sold for $850.

Several salvage claims were made for services rendered before the delivery to the company.

One of the claims included a charge for eighteen days' personal services of the salvor, not on the wreck, but in procuring and forwarding supplies.

Held, not a salvage service.

It was argued that another claim, being for the use of a steam pump, under express agreement, could not rank as a maritime lien for salvage.

Held, that the agreement did not alter the nature of the service as a salvage service, and the Court should give effect to its provisions in awarding remuneration according to its terms, it being free from fraud and made with a competent knowledge of all the facts.

Another claim was for an unsuccessful attempt to pull the vessel off the place where it was stranded. There was no evidence that the service resulted in the slightest benefit; and no agreement shown that the claimant was to be paid in any event.

Held, not a salvage service. Salvage is a reward for benefits actually conferred, not for services attempted and resulting in nothing.

The salvors claimed to be entitled to a lien up to the added value resulting from the work done by the company.

Held, that the value of the *res* is to be taken at the time the vessel is salved and handed over to the salvors; and it is with reference to this value that the amount to be allowed for salvage is to be computed.

There being no special circumstances of danger or risk in the services rendered, and the only exceptional feature being the small value of the property salved, the usual rule was followed and the amount of salvage fixed at $150, being a moiety of the value of the property salved. The other moiety was allowed to the salvors for their costs. *The "Glenifer"*, Exchequer Ct. of Canada, March 1892.

SLANDER — See Libel and Slander 3.

STATUTE—Can. 49 V., c. 8, s. 84 (b) —See Elec. 2.

STATUTE—Can. 40 V., c. 3, s.s. 88-91; s. 84 (a), (e), s. 131—See Elec. 3.

STATUTE — Can. 51 V., c. 34, s. 8— See Intox. Liquor 2.

STATUTE—R. S. C., c. 178, s. 53—See Intox. Liquor 1.

STATUTE — (Quebec) 42-43 V., c. 15—See Elections.

STATUTE — Canada 50-51 V., c. 16—See Neg. 3.

STATUTE—R. S. N. S, 5th Ser., c. 84, s. 21—See Registry Laws.

STATUTE OF FRAUDS—See Bills and Notes 2—Contracts 3.

STREET CAR—See Neg. 2. 5.

STREET RAILWAYS — SEE ALSO CONTRACT 4.

VALIDITY OF ORDINANCE REGULATING TIME OF RUNNING CARS.

Where the charter of a horse railroad provides that its cars "shall be run as often as the convenience of passengers may require," and the road "shall be subject to such reasonable rules and regulations in respect thereto as the common council . . . may, from time to time by ordinance prescribe," an ordinance requiring the several street surface roads of the city to operate their roads "not less than one car every twenty minutes between the hours of 12 midnight and 6 o'clock a. m., each and every day, both ways, for the transportation of passengers," will be presumed to be a reasonable and valid exercise of the legislative power of the city, until evidence rebutting such presumption is adduced by defendant road prosecuted for the penalty provided for the violation of such ordinance.

In such a case the convenience of passengers, and not the cost to the defendant of running the cars, is the test of the reasonableness of the ordinance, which is a question of law for the court.

The rejection of evidence offered by defendant for the purpose of showing that, with respect to one of its branch lines, such ordinance is unreasonable, is ground for reversal. *Mayor, etc., of New York* v. *The Dry Dock, etc., R. R. Co.*, Court of Appeals of New York, April, 1892.

SUBSCRIPTION BEFORE ORGANIZATION—See Corporation.

SUPREME AND EXCHEQUER COURTS ACT, S. 24 (g)—See Appeal 1.

SURETY—See Bond.

SYPHILIS—See Marriage.

TAXATION—See Assessment.

TELEPHONE COMPANIES.

DISCRIMINATION BY TELEPHONE COMPANIES.

Telegraph and telephone companies, while not required to extend their facilities beyond such reasonable limits as they may determine upon, cannot discriminate between individuals of classes which they undertake to serve.

Thus a telephone company may confine the use of its facilities to the carriage of personal messages for individuals, excluding those of telegraph companies and others who forward messages for hire; but if it send messages for one telegraph company, it cannot deny the use of its wires to another. *State ex rel. Postal Telegraph Cable Co.* v. *Delaware and Atlantic Telegraph & Telephone Co.*, U. S. Circuit Court of Appeals. Third Circuit, April, 1892, 11 R. R. and Corp. L. J. 218.

TICKET, FREE RAILWAY—See Elec. 3.

TITLE TO LAND.

ACTION AGAINST ESTATE FOR DEBT OF EXECUTOR—PURCHASE BY EXECUTOR AT SALE UNDER EXECUTION—CONSTRUCTIVE TRUST—STATUTE OF LIMITATIONS.

D. M. was one of the executors of his father's estate and an action was brought against the estate on a note made by him, which his father, in his lifetime, had endorsed for his accommodation. Judgment was recovered in said action and an execution issued under which land devised to A. M., a brother of D. M., was sold and purchased by D. M., who gave a mortgage to the judgment creditors. D. M. afterwards sold the land to another brother, W. M., who paid off the mortgage, and it having been offered for sale under execution issued on a judgment against W. M. it was again purchased by D. M. The original devisee of the land A. M.,

took forcible possession, and D. M. brought an action to recover possession.

Held, affirming the decision of the Court of Appeal (17 Ont. App. R. 192) and of the Divisional Court, Strong, J., dissenting, that the land having been sold in the first instance for a debt of D. M., he became, when he purchased it at such sale, a constructive trustee for the devisee, and this trust continued when he purchased it the second time.

Held, further, that if D. M. was in a position to claim the benefit of the Statute of Limitations there was not sufficient evidence of possession to give him a title thereunder. Appeal dismissed with costs. *McDonald* v. *McDonald*, Sup. Ct., Canada April 1892.

TITLE TO SUE—See Damages 1.

TORONTO STREET RY. — See Contract 4.

TOWAGE—See Ships and Shipping 1.

TRADE NAME—See Good-Will—Partnership 3.

TRESPASS—See Damages 2.

TRUSTS.

POWERS OF TRUSTEES — PARTNERSHIP — ONE OF THREE TRUSTEES — PARTNER IN A BUSINESS FORMING PART OF THE TRUST-ESTATE — TRUST ADMINISTRATION.

By trust-disposition and settlement in favour of his children a truster nominated three persons to be his trustees, with power to carry on any business in which he might be engaged at the time of his death, or to continue his interest in any business in which he might be a partner at his death. One of the three trustees was his brother, who for several years had managed two of his businesses receiving in return half the profit of one of them. There was no writing instructing a partnership. The trustees after deliberation, and having taken legal advice, continued to carry on these businesses for some years under the same arrangement as to management and remuneration as before, with great benefit to the trust-estate.

In an action of count, reckoning, and payment at the instance of some of the beneficiaries against the trustees for the purpo e of having the share of profits paid to the truster's brother replaced to the credit of the trust funds, it was *held*, after a proof—chiefly parole, and at which the principal witnesses were the trustees and their law agent,—that the truster's brother was at the time of the truster's death a partner with him in the business from which he had drawn half the profits, and that the continued payment of these to him was not in the circumstances open to challenge.

Opinion per Lord Kyllachy, but *reserved* by the judges of the Inner House, that even if the truster's brother were not held to have been a partner, the arrangement with him was in the circumstances a proper act of trust administration. *Lawrie* v. *Lawrie's Trustees*, 29 Scot. Law Rep. 525.

TRUSTEE—See Will 1.—Trusts.

"ULTRA VIRES" — See Railroad Comp. 2.

VICE PRINCIPAL, WHO IS—See Mast. and Servt. 2.

WILLS.

1. CONSTRUCTION—DEVISE TO CHILDREN AND THEIR ISSUE—ESTATE TO BE "EQUALLY" DIVIDED—PER STIRPES OR PER CAPITA—STATUTE OF LIMITATIONS—POSSESSION—TRUSTEE.

T. B. by his will made provision for the support of his wife and unmarried daughters, and then directed as follows: "When my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto." The testator's wife and unmarried daughters having died, and some of his sons having previously died, leaving children, proceedings were taken to

have the intention of the testator under the above clause ascertained.

Held, reversing the judgment of the Court of Appeal, 18 A. R. 25, and restoring that of the trial judge, Ritchie, C. J., dissenting, that the distribution should be *per capita* and not *per stirpes*.

J. B., a son of the testator and one of the executors and trustees named in the will, was a minor when the testator died, and after coming of age he did not apply for probate, though leave was reserved for him to do so. He did not disclaim, however, and he knew of the will. With the consent of the acting trustee, he went into possession of a farm belonging to the estate some time after he had attained his majority and remained in possession for over twenty years, when the period of distribution under the clause above set out arrived, and he then claimed to have acquired a title under the Statute of Limitations.

Held, affirming the decision of the Court of Appeal, that, as he held by an express trust under the terms of the will, the rights of the other devisees could not be barred by the Statute. *Wright* v. *Bell*, Supreme Ct. of Canada, April 1892.

2. CONSTRUCTION—LEGACY—PERIOD OF VESTING — CHILDREN — GRANDCHILDREN.

A testator devised and bequeathed his real and personal estate to his wife for life or until remarried, with certain powers of disposal; and devised and bequeathed the residue, not specifically devised or bequeathed and not sold or disposed of by his wife, immediately after the death or remarriage of his wife, whichever should first happen, to his executors to sell and convert the same into money, and out of the proceeds to pay $500 to each of his five sons, and to divide the balance, share and share alike, between his three daughters; and providing that if the daughters should die before him or before the distribution, leaving issue, the share or shares of the daughters so dying should be divided ratably and proportionately amongst the child or children of said daughter or daughters living at the time of the distribution, so that the issue of any of the daughters who might be dead should receive her or their parents' share.

The widow survived the testator and died without having remarried. A son, C. K. R., and a daughter, M., also survived the testator, but died prior to the widow, the former leaving no issue, and the latter a son, F., and a daughter, M. C., the last named daughter having also died leaving two children.

Held, that the word "children" must be taken in its primary sense, and excluded grandchildren; so that F., took the whole of his mother's share to the exclusion of the children of M. C.

Held, also, that the legacy to C. K. R. became vested on the testator's death payable on the widow's death; and so his personal representatives were entitled thereto. *Rogers* v. *Carmichael*, Ontario Com. Pleas Div. Feb. 1892.

3. CONSTRUCTION — "EFFECTS" — REAL ESTATE, WHETHER INCLUDED.

The word "effects" in a will held on the context to pass real estate. *Hall* v. *Hall*, (App.) 61 L. J. Rep. Chanc. 289.

WINDING-UP COMP. — See Company 2—Ships and Shipping 3.

WORKMEN'S COMPENSATION FOR INJURIES ACT—See Master and Servant 3. 4.

PARTNERSHIP.

POWER OF A PARTNER TO BIND THE FIRM IN GENERAL TRADING PARTNERSHIPS.

The general rules affecting partnerships in respect of the power of a partner to bind the firm, are the same in all the leading commercial nations. It is only in the practical application of these rules that, as might be expected, the jurisprudence differs.

The general principle as settled by the course of English jurisprudence, is thus stated in the Partnership Act of 1890 at sec. 5, this act being a codification of the outlines of the law of partnership.

" Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

As can be seen at a glance this section leaves plentiful opportunities for the multiplication of case law in the effort to determine what acts of the partner are within the scope of the partnership business, and as to authority and notice of authority to third parties, constructive or otherwise.

The article of the French *Code de Commerce* relative to this subject thus states the law of trading parnerships.

Art. 22 (Trans.) " The members of a trading partnership are jointly and severally liable for the firm's contracts, even where signed by but one partner, provided the signature is in the firm's name."

The law is to the same effect in Quebec, including the joint and several liability, but like the English act the contract must be in the " usual course of dealing and business." Arts. 1866-1867. At common law the liability is only joint. See Lindley on Partnership. Also Partnership Act 1890, sec. 9.

There are two ways in which a partner can bind the firm.

1. By a contract entered into in his own name.

2. By a contract entered into in the name of the firm.

As to the first, two methods of contracting in his own name must be distinguished.

a. Where the contract is entered into on behalf of the firm;

b. Where it is entered into on his own behalf.

We will commence with the latter, (*b*). There is no doubt that if the partner is not acting in his character of agent, but simply as a private individual he alone is liable, and his acts cannot be imputed to the firm no matter how much they may have subsequently benefited by them.

It is thus stated by Lindley on Partnership 189. " It is an erroneous but popular notion that if a firm obtains the benefit of a contract made with one of its partners it must needs be bound by that contract. Now, although the circumstance that the firm obtains the

benefit of a contract entered into by one of its members tends to show that he entered into the contract as the agent of the firm, such circumstance is no more than evidence that this was the case; and the question upon which the liability or non-liability of the firm upon a contract depends is not: "Has the firm obtained the benefit of the contract? but, Did the firm, by one of its partners or otherwise, enter into the contract?"

In regard to the civil law M. Troplong says, citing Pothier:

No. 814 (Trans.) But even where the firm received the benefit of the loan, it is certain that it would only be bound where the debt was contracted *nomine sociali* because, where the debt is contracted in the name of the contractor only, the firm would simply be benefited in the relation of third party (Pothier, No. 105).

At first sight there might seem much conflict not only between the French decisions and those of the common law countries as to the effect of a firm having had the benefit of a partner's private contract, but also between French doctrine and jurisprudence. But the conflict is really more apparent than real, the deviation from M. Troplong's definition of the rule given above arising from the various interpretations put upon the contracts of partners acting apparently in their own name and on their own account, but in reality for the firm. For after all, the fact as to whether the partner is acting on behalf of the firm or not must often be one of presumption to be derived from the particular features and circumstances of the contract. Lord Lindley says at page 176, that, whether a contract is entered into by an agent as such, or by him as principal, is not always apparent from the form of the contract.

We will give one or two exemples to show the nature of the grounds on which the French doctors differ. The learned Merlin has, according to Troplong, been entirely misled in his interpretation of the Roman law as well as of the French jurisprudence in respect of the present point. The former claims, that whenever the firm has benefited by a loan made in a partner's name, the creditor has a *direct* and solidary action against the firm.

M. Troplong thus explains a decision of the Court of Cassation which Merlin takes to the credit of his own views, (No. 780). Allonde and Billaut were partners in the business of buying and selling cattle. The judgment of the first court showed that the facts were that Allonde had never before acted *singly* and that Billaut had always acted under the firm's name; that the fact of Allonde and Billaut being partners was notoriously and generally known, and it was also generally known that agreements entered into by Allonde were for the purpose of the partnership and done with the knowledge and consent of Billaut.

These were the circumstances under which Allonde had signed in his own name a contract relating to the partnership business, and Billaut set up the defense that the contract should not affect him.—But was it set up in good faith? was it lawful? No! For, from the moment that it was proved that Allonde gave himself out publicly as a partner, that he was contracting as such and the third parties were in the real belief that they were not dealing with him singly, but with the firm, it mattered little that the firm name was not used.

Billaut was held bound on the contract in the court of Limoges and in the court of Cassation on appeal thereto. (Decree 28 Germinal year XII). But

it was not for the reasons set forth by Mr. Merlin. The decree supposed that the loans had in fact been made to two merchants notoriously known to be partners

781. On the same grounds must be explained a decree of the Court of Cassation of 26 March 1817, confirming a judgment of the Court of Paris, which held one Hom to be jointly and severally liable with his partner for notes signed by the latter in his own name. It was ascertained that the liability was incurred for coal furnished to the glass factory and for the working of which the partnership had been formed; and further the Court found that in the transaction the *vendors had entirely relied upon the credit and good standing of Hom.*

In both the above cases the courts had given the firms a wrong denomination, calling the former a *société anonyme* and the latter a *société en participation*, but as M. Troplong points out, this is only an error in name; it was quite clear that they were in fact general trading partnerships.

We now come to the consideration of the distinction (*a.*), where the contract is entered into on behalf of the firm, though in the private name of the contracting partner.

There are different aspects under which this subject can be considered.

We will first take that where the contract, although actually signed in the contracting member's private name, is either on its face purported to be on behalf of the firm or is constructively so.

It was observed that the French Code of Commerce distinctly states that the firm is only liable where the contract is signed in the firm's name. But as the jurisprudence shows, this passage must not be construed too formally. It is not of a sacramental nature. Thus, the member of a partnership who signs as head of the firm is deemed to have signed in the firm's name and consequently binds the firm (Cass. 23 April 1816).

And even where the managing partner signs in his own name, where the tenor of the agreement shows that it is entered into on behalf of the firm the latter will be bound. (Cass. 21 August 1811).

Under the English law, as a general rule, a firm is not liable for negotiable paper signed by one member in his own name, yet this will not prevent it from being liable for the *original consideration*, as for money lent or goods sold, if the sale was made to and upon the credit of the firm (Bates, Partnership §§ 439-440 and Eng. & Amer. Cases there cited).

And also, if a note signed by one partner appear on its face to have a joint operation and to be on partnership account, the payee can sue the maker or all his partners at his election (Crozier v. Kirker, 4 Tex 252, 257).

The English jurisprudence exactly coincides with that of France in cases where the firm has received the benefit of the contract which was entered into in the name of one partner only. Where the firm is held liable, it is, as M. Troplong says, because it in fact did enter into the contract, although in the case of a written one it might appear on its face to have been done with the sanction and in the name of one partner only. Thus Lord Lindley says (p. 178). "If, therefore, one partner only enters into a written contract, the question whether the contract is confined to him, or whether it extends to him and his copartners, cannot be determined simply by the terms of the contract. For supposing a contract to be entered into by one partner in his own name only, still if in fact he was

acting as the agent of the firm, his co-partners will be in the position of undisclosed principals."

And so much so do the English decisions resemble that of Allonde and Billaut cited *supra*, that in regard to parol contracts, if one partner, acting in fact for the firm, orders goods, and they are supplied to him, the firm will be liable to pay for them, although no mention was made of his copartners (City of London Gas Lt. & Coke Co. v. Nicholls, 2 Car & P. 365; Whitwell v. Perrin, 4 C. B. N. S. 412) and they were unknown to the seller of the goods. (Ruppell v. Roberts, 4 Nev. & Man 31; Robinson v. Wilkinson, 3 Price 538; Bottomley v. Nuttall, 5 C. B. N. S. 122 and many American cases to the same effect).

These decisions are governed by the general rules of agency. If the fact of agency is not disclosed and the agent acts as if he were principal, the person dealing with him may, on discovery of the principal, hold either at his election. It naturally follows that owing to the peculiar nature of contracts under seal, the execution of one by the agent in his own name, even if the fact that he is but an agent be disclosed, will bind him alone. Bates, Partnership, § 436.

Where the name of the firm is the same as that of the individual. In this event "it has long since been decided and uniformly held in the United States" says Denman, J., in Yorkshire Banking Co. v. Beatson (4 C. P. D. 212), "that where the name of one partner is identical with that of the firm, the burden of proof is upon the plaintiff to shew that the bill is the paper of the firm, and not of the individual partner." . . . . . "We think this is in accordance with the true principles of the law of agency, of which the law of partnership is a branch, and that the weight of English authority is in favour of the American view of the law."

If there is evidence that the transaction was a partnership matter, as where the partner declared the purchase or loan was for the business, or for the firm, if the plaintiff knew there was a firm, or if the plaintiff himself at the time avowed to the partner that he was dealing with him in the capacity of partner or was trusting the firm, this shows the transaction to be a partnership one, and the name represents and binds all the partners (Bates, Partnership § 443).

The conclusion of this part of our subject will naturally lead us on to the next, for if the contract is within the scope of the business, the mere fact that a single partner is dealt with is immaterial, where not expressly on his individual credit, and the contract will be deemed to be with the firm unless the contrary appears (Bates on Partnership 447).

We will therefore consider the second part of our subject, which is that of contracts entered into in the name of the firm.

In this case the law of both France and the English speaking countries is, that the firm is absolutely bound in all cases where the contract is broadly speaking within the scope of the partnership business.

All the leading French authors teach this, but the Court of Cassation has gone farther in its interpretation of Art. 22 C. de C., they regarding the presence of the firm signature as proof of its liability which is *juris et de jure*. The only exception they allow is that of actual connivance on the part of the third party in the positive fraud of the partner.

The jurisprudence of the Court of Cassation has been constant in this respect up to the present date :

The general rules are thus laid down by Lord Lindley (Partnership 125).

1. "That if an act is done by one partner on behalf of the firm and it was necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be liable, although in point of fact the act was not authorized by the other partners."

2. That if an act is done by one partner on behalf of the firm, and it was not necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be not liable."

"In the first case the firm will be liable *unless* the one partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority; whilst in the second case the firm will not be liable *unless* an authority to do the act in question, or some ratification of it, can be shown to have been conferred or made by the other partners"

Substantially the same principles are laid down by M. Troplong, at No. 810: (Trans.) A partner who borrows in the name of the firm, binds the firm, and it is not incumbent on third parties to follow up the ultimate destination of the loan.

811. However, there are some modifications to this rule.

The first is that the agreement must not be clearly beyond the scope of the partnership business. For in cases of fraud and collusion it is clear that the plaintiff could not recover.

Where a manager clearly surpasses his powers by mortgaging the inalienable realty of the firm, the mortgagee would rank as an ordinary creditor on simple contract.

812. The second modification arises where there is an express clause in the deed of partnership restraining the authority of one or other of the partners, and the creditor dealing with that partner has had actual or constructive notice of it.

At this point it will be opportune and, we think, instructive, to note the points of divergence of the two systems of jurisprudence and the reasons therefor.

The furthest point reached by the Court of Cassation is thus stated in the syllabuses of the decisions dated 11 May 1836; 22 April 1845; 7 May 1851. (Trans.) "A contract made in the firm's name by one of the members, binds jointly and severally all the members of the firm, even where such contract was made with the sole view to its application to the contracting member's private debts, and that the creditor was aware of its application." In the next and latest decision we find this modification which was inserted to partly meet the severe criticisms made against their former decisions:

"Held thus, where the creditor had reason to believe that the contracting member was using the firm's name with the consent and in the interest of the firm." (Cass. 21 Feb. 1860.)

It appears from the facts in this case that plaintiff was acting in good faith, believing that the firm was sufficiently interested in the welfare of one of its members to take up his debts although such debts were anterior to the formation of the present firm. There was, it is true, a clause in the partnership deed declaring each member solely liable for his own debts, but this clause had not been published, and thus the plaintiff had not legal notice of it. But here is another reason for the decision. The old firm had dissolved (Lemichez Frères) and in forming a new one (Lemichez Frères & Cie) the new members specially absolved themselves from all liability for the debts of the old firm and hence the clause in the deed of partnership

But plaintiff was not aware of this clause, and knowing that the new firm had taken over the assets of the old one, had good reason to believe that it would also assume its liabilities.

All this makes the decision look much less alarming than would appear from a perusal of the head note alone.

And yet many of the French authors criticizing these decisions insist upon putting their own interpretations upon them, and which are quite different to what the Court of Cassation clearly intended to be the rule. The intention of this court is to protect the innocent vendor of goods or lender of money, and except in cases of clear fraud, the presence of the firm signature is a presumption *juris et de jure* of the firm's indebtedness, and this is quite in keeping with Art. 22, *Code de Commerce.*

How does this rule compare with that of the common law which says that the firm signature is only binding where the contract is within the *scope* of the partnership business? The most cursory examination of the nature and quantity of the English jurisprudence on this point will shew the unsatisfactoriness of the English rule. Where is the difference, as to its effect upon the firm, of a dishonest partner acting under the English or the French law? In the former case he can borrow money within the scope of the partnership and afterward misapply it to his own use, still the firm is liable. [Okell v. Eaton, 31 L. T. N. S. 330 (Q. B.); Brown v. Watson, 4 Leg. News (Quebec) 404 and many others.] In France, in the case above cited, the partner could equally have bound the firm by the simple expedient of representing to the lender that the loan was for the ordinary partnership business and then misappropriated the money. If the borrower in this case had been in England, this is the course he would have adopted, but knowing in France that the firm signature would be binding in any event, he just told the straightforward truth as to the destination of the loan, although acting just as fraudulently in applying the loan contrary to the terms of the partnership deed and concealing from the lender that clause in the deed prohibiting such an application of the loan.

The main argument relied on by the French authors in their condemnation of these decisions is, that they violate one of the plainest rules of the law of agency, which is, that in order to bind the principal, the act done must be within the scope of the authority committed to the agent. For where the agent is acting without the scope of his authority, the third party who purports to be dealing with the firm through him is *presumed* to be guilty of either negligence, (ordinary or gross), or actual fraud and connivance according to the circumstances. The Court of Cassation presume otherwise. That is the difference.

The result of the presumption under the English law is seen in the following cases:

O'KELL v. EATON
31 L. T. N. S. (Q. B.)

In order to bind the partnership it is not necessary that it should have received the benefit of the loan, for where one partner borrows money on the credit of the partnership, and applies it to his own purposes, it is no defense to an action by the lender against the partnership that he negligently omitted to communicate with the other partners, and to make inquiries as to the borrower's authority to pledge the partnership credit, provided he acted *bonâ fide* in advancing the money.

LOYD v. FRESHFIELD
2 Car. and P. 325.

If money be lent to one of two partners, who says he borrows it for the firm, and he misapply it, and there be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover against the other partner.

The English courts, therefore, reduce the question to one chiefly of negligence, which everyone knows, and jurisprudence shows to be, a most delicate and unsatisfactory one.

The Court of Cassation, on the other hand, where the contract is entered into in the name of the firm, lay down a clear and sharp line, as they are entitled to do by Art. 22, *Code de Com.*, and make the partners liable not only for the acts of each other within the scope of the ordinary business, but outside as well, only excepting cases of clear fraud on the part of third persons. This does away with all questions of ratification, scope, negligence and many others, and prevents all chance of a firm denying their liability for moneys received and used in their business. It also protects innocent third parties dealing with the firm.

Whatever may be the relative merits of the controversies as to the interpretation of Art. 22 of the *Code de Commerce*, the incident furnishes a splendid example of the utter impossibility of laying down the law in a code as it was intended it should be.

The peculiar interpretation put upon a code article, will often, as in this case, put the law on the point in a much more chaotic state than it ever was before.