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MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. OCTOBER, 1893. NO. 10.

ACCOUNTING—See Partnership 2.

AGENCY—See Principal and Agent.

ANIMALS.

KILLING TRESPASSING DOG — The fact that a dog wanders from a highway upon uninclosed land, and is about to destroy growing plants there, does not justify killing him, although the land-owner may have been subjected also to repeated annoyances of the same sort from other dogs. *Tenhopen* v. *Walker*, Mich., 55 N. W. Rep. 657.

ARBITRATION.

ARBITRATION—CONTRACT—CLAUSE OF REFERENCE.

A firm of contractors offered to construct certain waterworks in terms of a specification issued by the police commissioners of a burgh, which provided that the contractor would get possession of ground "immediately after acceptance of tender," and that he must enter into a formal contract. The tender was accepted on 11th September, 1889, and a formal contract was thereafter executed between the parties, which, while declaring that the specification was incorporated therewith, provided that the commissioners reserved right "to appoint the time when the second parties may enter on the lands and proceed with the works." The contract further provided that in the event of any dispute arising between the parties "in relation to the execution, construction, or completion of the said whole works contracted for, or any of them, or any part or portion thereof, or as to the quality or quantity of the work or the materials thereof, or as to the settling of accounts, or as to any points or matter whatever in regard to the works, or as to the contract, or the true intent, meaning, or effect thereof, or of the plans, drawings, specification, or conditions," the same should be referred to the decision of an arbiter named.

The contractors did not get entry to any part of the lands until June 1890, and they subsequently claimed damages from the commissioners on the ground that the latter were bound to have given them entry on acceptance of their tender, or shortly thereafter, and that they had failed to give timeous entry in terms of the contract. They maintained that the question whether timeous entry had been given should be referred to the arbiter.

Held, that that question did not fall to be referred to the arbiter, in respect (1) that the clause of reference did not give the arbiter power to assess damages, and that it only gave him power to determine the meaning of the contract, where such power was necessary to enable him to decide points of dispute specially referred to him by that clause; and (2) that the pursuers had not made any relevant statement of a dispute as to the meaning of the contract—*diss.* the Lord President, who *held* that a question was raised as to the meaning of the contract, and that it fell to the arbiter to decide it. *G. Mackay & Son* v. *Police Commissioners of Leven*, 30 Scot. Law. Rep. 919.

ASSAULT—See Crim. Law 8.

ASSESSMENT OF CORPORATIONS—See Taxation 1.

ATTORNEY AND CLIENT—

SEE ALSO EVIDENCE, PRIVILEGED COMMUNICATIONS.

CONTRACT.

Where the president of a corporation, who is authorized to make contracts for it, employs attorneys to render services in an action to which he is a party, and in which the corporation is also interested, and the interests of both are fully disclosed to such attorneys, and nothing is said as to who is to be liable for such services both the president and the corporation are liable. *Humes* v. *Decatur Land Improvement & Furnace Co.*, Ala. 13 South. Rep. 368.

BAGGAGE — See Carriers of Passengers 3.

BANKS AND BANKING.

1. COLLECTIONS—INSOLVENCY.

Where a bank sends commercial paper to another bank for collection and credit on general account, the custom between them being to enter the credit only when the paper is collected, the relation between the banks is that of principal and agent until the collection is made and the money received by the second bank ; and if the latter sends it to another bank, which collects the paper, but does not remit the proceeds until after the agent bank has failed, the principal can recover the proceeds from the receiver thereof. *Beal* v. *National Exchange Bank of Dallas*, U. S. C. C. of App., 55 Fed. Rep. 894.

2. DRAFTS—ASSIGNMENT.

A draft given on a bank in the ordinary course of business does not constitute an equitable assignment of the fund ; nor is it sufficient to constitute such an assignment that the draft is drawn by a bank against its reserve fund in another city, and is given in exchange for clearing-house certificates, upon the president's representation that it owes a heavy debt at the clearing house, which it is unable to meet, and his statement showing the amount of the reserve fund against which the draft is drawn. *Fourth Street Nat. Bank* v. *Yardley*, U. S. C. C. (Penn.), 55 Fed. Rep. 850.

3. POWERS OF OFFICERS.

The cashier of a banking corporation has, by virtue of his office, no authority to accept in payment and discharge of a debt due the bank certificates of the capital stock of an insurance company. *Bank of Commerce* v. *Hart*, Neb., 55 N. W. Rep. 631.

4. CONTRACT BY OFFICERS—ULTRA VIRES.

Where a bank receives property from a debtor worth $7,000 to pay his claim of $2,000, under an agreement by its officers out of the surplus to pay other creditors of the debtor, it cannot set up the defense of *ultra vires* in an action by a creditor to recover his share of the surplus. *Tootle* v. *First Nat. Bank of Port Angeles*, Wash., 33 Pac. Rep. 345.

5. LOANS—FRAUD OF OFFICER.

The vice-president of the Fidelity National Bank wrote a letter to the Chemical National Bank, signed by himself as vice-president, requesting a loan upon a certain certificate of deposit, and certain bills receivable, as collateral. The Chemical Bank made the loan, crediting the Fidelity Bank with the amount, and so notified the cashier. The amount was thereupon placed to the vice-president's credit by his order, and was used by him so that the bank received no benefit therefrom. The certificate of deposit was false, and the notes deposited as collateral were obtained by him for the purpose of raising money for his personal use.

Held, that, as the Chemical Bank dealt with him solely in his official capacity, the Fidelity Bank is estopped to deny that the loan was made to it, and for its benefit, and it is liable for its repayment. *Stewart* v. *Armstrong*, U. S. C. C. (Ohio), 56 Fed. Rep. 167.

6. TITLE—TRANSFERANCE OF—INDORSEMENT FOR COLLECTION.

An indorsement of a draft to a bank "for collection," accompanied by a credit of the amount of the draft upon

the indorser's account with the bank, does not transfer to the bank the legal title to such draft, and a correspondent of the bank, who collects the draft for it, is responsible therefor to the indorser. *Tyson* v. *West. Nat. Bank of Balto.*, Court of Appeals of Maryland, March 16, 1893, 26 Atl. Rep., 520.

7. BANKERS—DEPOSITORS — DEATH OF PARTNER—LIABILITY OF DECEASED PARTNER'S ESTATE—FRESH RECEIPT NOTE—NOVATION.

One G. Head was, at his death in December, 1890, a partner in a bank, the firm consisting of himself and his son G. S. Head, a customer of the bank had, in the lifetime of G. Head deposited £1,400 with the bank, on a deposit note carrying interest at 3½ per cent. On the death of G. Head the bank was carried on by the son G. S. Head alone; the customer subsequently withdrew £550 and received a fresh deposit note for the balance £850 the old deposit note being given up and cancelled. The customer was aware of the death of G. Head, and continued to receive interest on the balance of the amount on deposit till the bank suspended payment. The customer now claimed to be entitled to prove against the estate of G. Head for the £850 remaining due from the bank.

Chilty, J., *held*, that the acceptance by the customers from the surviving partner, of a fresh deposit note for the balance of the debt, was not sufficient evidence of novation to discharge the estate of the deceased partner, and that the customer was therefore entitled to prove against the estate of G. Head for £850 the balance of the deposit due from the bank. *In re Head, Head* v. *Head*, Ch. D. [1893], W. N. 138.

BANKRUPTCY.

PROOF OF DEBT — LOAN TO TRADER INTEREST VARYING WITH PROFITS — BOVILL'S ACT (28 & 29 V., C. 86), S. 5 —PARTNERSHIP ACT, 1890 (53 & 54 V., C. 39), S. 3.

Appeal by the trustee in the bankruptcy of H. Hildesheim against the reversal by a Divisional Court (Vaughan Williams and Bruce, JJ.) of the decision of the judge of the Manchester County Court, affirming the rejection by the trustee of a proof for 20,329*l.*, which had been tendered in the bankruptcy of D. Hildesheim, a brother of the bankrupt. The bankrupt was a trader. On the 1st of July, 1881, the brother advanced to the bankrupt a sum of 20,000*l.*, upon the terms of an agreement in writing, dated the 28th of December, 1880, which provided (*inter alia*) that the borrower should pay to the lender interest on the 20,000*l.*, at the fixed rate of 5 per cent. per annum, and also, by way of additional interest, such an amount as might be equal to one-fourth of the net profits from time to time made by the borrower in his business. Towards the end of the year 1885, negotiations took place between the brothers as to an alteration of the terms of the agreement. The borrower offered to pay off the loan, and said that he would be able to do so, because a sum of 19,850*l.* was coming to him from an insurance company on the 31st of December, 1885. The lender replied that he did not want to have the loan repaid. Ultimately a new agreement in writing, dated the 25th of January, 1886, was entered into, by which the lender agreed, as from the 1st of January, 1886, "to continue his existing loan" to the borrower of 20,000*l.*, upon the terms therein contained, and the borrower agreed to pay to the lender interest on the 20,000*l.* at the rate of 10 per cent. per annum.

In January, 1893, a receiving order was made against the borrower, and he was afterwards adjudicated a bankrupt. The County Court judge held, that there had not been a new advance in 1886, but that the old loan continued, and therefore, by virtue of Bovill's Act and the Partnership Act, 1890, the lender could not prove till all the other creditors of the bankrupt had been paid in full. The Divisional Court held that in substance the original loan was repaid in 1886, and a new advance was made upon terms which did not come within the Acts. The Court accordingly admitted the proof.

The Court (Lord Esher, M. R., and

Bowen and Kay, L.JJ.) allowed the appeal. *Ex parte* Mills (Law Rep. 8 Ch. 569); *Ex parte* Taylor (12 Ch. D. 366); and *In re* Stone (33 Ch. D. 541), shewed that the question was, what was the state of things when the advance was made. If there was only one advance, and at the time when it was made, it came within the Act, the Act still applied, although the terms of the loan were altered. Here the new agreement was "to continue the existing loan" on altered terms. The original loan was not repaid, and there was no new advance. The Act, therefore, applied, and the borrower could not prove until all the other creditors of the bankrupt had been paid in full. *In re Hildesheim, ex parte The Trustee* C. A. (Eng.) 1893, W. N. 137.

BILLS AND NOTES—See also Custom and Usage 2.

AMERICAN CASES.

1. Note—Indorser.

"To take care of" matured paper construed as meaning to take it up by payment or renewal, or to secure an extension of the time of payment. *Yale* v. *Watson*, Minn., 55 N. W. Rep. 957.

2. Note—Collateral Agreement.

Defendant agreed in writing, with other stockholders of a corporation, "to donate the company our notes for the same amount as we now hold shares in said company, provided that shareholders now holding the paper of the company will donate as much paper as they hold shares in the company." Defendant gave his note, but the agreement was not complied with by some of the other parties thereto:

Held, in an action on defendant's note by an indorsee having knowledge of the agreement under which it was given, that the two instruments should be construed together as one contract. *Traders' Nat. Bank* v. *Smith*, Tex., 22 S. W. Rep. 1056.

3. Note—Transfer after Maturity.

A person who takes notes after maturity takes subject to all the equities in the hands of the party from whom he received them; and where defendant has taken after maturity notes as security for a debt due from plaintiff's husband, which notes were indorsed by plaintiff to her husband, plaintiff is not estopped from showing that they were transferred for collection only, and that she had never received anything for them. *Huddleston* v. *Kempner*, Tex., 22 S. W. Rep. 871.

4. Note—Notice of Protest.

Where a notary sent a notice of protest of a note addressed to the indorser to the payee, whose bookkeeper duly mailed it to the indorser, stamped, and with direction to return if not delivered in five days, and the letter was not returned, it was sufficient evidence that the notice was sent and received. *Swampscott Mach. Co.* v. *Rice*, Mass., 34 N. E. Rep. 520.

5. Burden of Proof.

The plaintiff sought to recover upon a promissory note, which was set out at length in the petition, and appeared to bear a specified rate of interest. The defendants' answer was a general denial, duly verified; and they claimed at the trial that the note had been altered, and that the provisions therein for interest had been added to the note, without consent, since its execution.

Held, under the issues formed, that the burden was upon the plaintiff to prove the execution of the note as alleged in the petition, and that under the verified general denial the defendants were properly permitted to offer proof of the alteration. *J. I. Case Threshing Mach. Co.* v. *Peterson*, Kan., 33 Pac. Rep. 470.

6. Promissory Note—Payment to Take Out of Statute of Limitations.

Where, after the maturity of a note, there are independent business transactions between the maker and payee, which are unsettled at the time action is brought on the note, the fact that there was a balance due the maker on such transactions, which ought to have been indorsed on the note, does not

constitute a partial payment thereon, so as to prevent the running of the statute of limitations against the note prior to the time that such transactions ceased, in the absence of any agreement by the maker that it should be so indorsed. *Sears* v. *Hicklin*, Court of Appeals of Colorado, May 22, 1893, 33 Pac. Rep. 137.

BONDS—See Companies 1.

BROKERS — See Gambling Transactions 1.—2.

CANAL—See Riparian Proprietors.

CARRIERS.

OF GOODS.

1. SHIPMENTS—DELAY.

The bills of lading being silent as t the time within which delivery was to be made at New York and Philadelphia, the law presumes it was to be done in a reasonable time, and parol evidence is not admissible to negative this presumption by showing that a definite and specific time was agreed upon either expressly or by implication. *Central Railroad & Banking Co.* v. *Hasselkus*, Georgia, 17 S. E. Rep. 838.

OF PASSENGERS.

2. CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence, as matter of law, for a person to attempt to board a slowly-moving electric street car. *Central Pass. Ry. Co.* v. *Rose*, Ky., 22 S. W. Rep. 745.

3. LIABILITY FOR STOLEN BAGGAGE.

When a passenger buys a ticket from a carrier to a point beyond its line, which limits the carrier's liability to its own line, and the passenger procures her baggage to be checked, and pays for the excessive weight over 100 pounds, the carrier is not liable for property stolen from the baggage before reaching its destination, but while on a connecting line. *Gulf, C. & S. F. Ry. Co.* v. *Ions*, Tex., 22 S. W. Rep. 1011.

4. DEFECTIVE ROAD-BED.

It is not culpable negligence on the part of a railroad company in the construction of its road-bed, track, and culverts, if it has failed to provide against such extraordinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by that degree of engineering skill and experience required in the prudent construction of such railroad. *Libby* v. *Maine Cent. Ry. Co.*, Me., 26 Atl. Rep. 943.

5. Where a person who gets on an express car without having purchased a ticket, and remains thereon, in violation of the company's rules, is ejected from the train, and he afterwards reenters it, and is carried to his destination, he receives the full benefit of the contract of carriage, if it was a valid one. *Chicago & E. Ry. Co.* v. *Olsen*, Ind., 34 N. W., Rep. 531.

6. TRESPASSER ON HORSE CAR—WHO IS AUTHORIZED TO PERMIT ONE TO RIDE.

Where a horse car has both a driver and conductor, and the driver alone sees a boy stealing a ride on the car, it not being his duty to put the boy off, the boy being injured cannot claim that he was given an implied permission to ride. *Wynn* v. *City & Sub. Ry. Co.*, Supreme Court of Georgia, March 20, 1893.

7. NEGLIGENCE OF EMPLOYEE — DAMAGES.

Where a passenger who has procured a ticket for himself and family is by the negligent mistake of one of the employees of the railroad directed into a car which is cut off and left standing when the train leaves, one of his children with him being sick at the time, he is entitled to compensatory but not to punitive, damages. *Norfolk & W. Ry. Co.* v. *Lipscomb*, Supreme Court of Appeals Virginia, 1893, 37 Cent. L. J. 232.

The Court says: Under the circumstances of this case, can the defendant be lawfully held to respond in exemplary or punitive damages? It was said by Judge Staples, speaking for this court, in Borland v. Barrett, 76 Va. 132: "In a

legal sense, every unlawful act, done willfully or purposely, to the injury of another, upon slight provocation, is, as against such person, malicious, and the law so presumes." And this is as strongly as this doctrine could be stated, it being conceded that this presumption may be rebutted by proof. No matter nor any evil intent can be presumed from a mistake or misadventure. To state the proposition is to prove it. It is self-evident. An absence of evil purpose is an absence of malice. No mere inadvertence, mistake, or accidental occurrence can be malicious, although negligence. And this would seem to be sufficient for this case; and it is scarcely necessary to go into the other question, whether the company is responsible for the malicious act of its employees. In the case of Railroad Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261, Mr. Justice Gray reviews this subject, and cites many authorities, among them the case of Hagan v. Railroad Co., 3 R. I. 88, 91, which is highly indorsed, where it is said: "We do not see how such damages can be allowed when the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's acts. No man should be punished for that of which he is not guilty." When the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes nor ratifies the act, and the criminality of the act is as much against him as against any other member of society, we think that it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." In this case the instructions are that the jury could assess exemplary, punitive damages against the defendant for the willful, negligent act of the servant or agent. This is contrary to the plain principles of justice, and the decided cases are to the contrary. Exemplary or punitive damages do not lie in such a case. The amount of damages is not large, abstractly considered, but, when considered in the light of the evidence in this case, they are much beyond any compensatory basis. There was no hurt, nor pecuniary nor other loss which is proved, which can be brought by this evidence to this amount. There was delay, vexation, distressing anxieties, and some loss; but the sum of $500 could not be reached upon any other principle than the ascertainment of punitive damages under the erroneous instructions of the court, which cannot be allowed, the transaction involving neither fraud, malice, oppression, nor gross negligence, nor reckless indifference to the rights of others.

CHARITABLE CORPORATION — See Neg. 7.

CHARTERPARTY — See Ships and Shipping 3.

COMMERCE, INTERFERENCE WITH — See Constit. Law.

COMBINATIONS IN RESTRAINT OF TRADE—See Restraint of Trade.

COMPANIES.

1. BONDS—ISSUE TO STOCKHOLDERS.

Bonds issued to stockholders of a corporation will not be canceled at suit of another holder merely because of no consideration paid by the stockholders, where such bonds are not yet due, and no default has been made in payment of interest, or any impairment of the mortgaged property, and where also the holder does not have control of the earnings or management of the company, or of the money received as a loan. *Bibb* v. *Montgomery Iron Works*, Ala., 13 South. Rep. 224.

2. CONSTRUCTION — CORPORATION PROMOTERS.

R agreed to convey certain property to H, or to a corporation to be formed by H, and H agreed to pay R $5,000, to issue to him half of the capital stock of the corporation, and to deposit with the corporation's treasurer $25,000 to be used in developing said property.

Held, that the $25,000 paid to the corporation should not be credited to R on the books of the company. *Hardee* v. *Sunset Oil Co.*, U. S. C. C. Cal.), 5 Fed. Rep. 51.

3. MEMORANDUM AND ARTICLES OF ASSOCIATION—CONSTRUCTION—POWER TO BORROW—"ISSUE"—ORAL CHARGE ON UNCALLED CAPITAL.

The memorandum of association of a company limited by shares stated one object of the company to be "to borrow money by the issue of debentures, debenture stocks, bonds, mortgages, obligations, and other securities for money upon all or any part of the company's undertakings, revenues, and property, including uncalled capital." One of the articles of association (art. 51) empowered the directors to borrow for the purposes, of the company to a limited amount, and to "raise or secure the repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit, and in particular (but without prejudice to such generality) by the issue of debentures of the company charged

upon all or any part of the property of the company, including the uncalled capital thereof."

The directors borrowed money from a bank on the security of an oral charge on the uncalled capital, and in the subsequent winding up of the company the bank applied for a declaration that they had thereby a first charge on the uncalled capital.

Vaughan Williams, J., said that, *primâ facie*, the words of the memorandum suggested a security in writing, but that it was ambiguous in its meaning. But the memorandum and articles being contemporaneous documents, the articles could be looked at to interpret the former, and, under art. 51, the directors could borrow money in any way they chose. The applicants were therefore entitled to the charge which they claimed. *In re Tilbury Portland Cement Co.*, Ch. D. 1893, W. N. 141.

4. WINDING-UP—JUST. AND EQUITABLE—SUBSTRATUM GONE—WISHES OF CONTRIBUTORIES — COMPANIES (WINDING-UP) ACT — (ENG.) 1890 s. 8.

A committee of shereholders had reported that the company could not go on unless the directors found certain money, which they were not able to find; but a meeting of shareholders, summoned by the Court, had passed a resolution against a compulsory winding-up, though they had not voted in favour of the continuance of the business.

Vaughan Williams, J., in making a compulsory winding-up order, said he based his decision on the ground that the properties of the company could not be worked at a profit, and that its substratum was gone. *In re General Phosphate Co.*, Ch. D. [1893] W. N. 142.

5. DIRECTORS—PRESENT FROM PROMOTER TO DIRECTOR—NOMINAL VENDOR WITH NO INTEREST.

P. and Q. were working a quarry in partnership. P. also owned an adjoining quarry, and had the option of taking a lease of S. Quarry. Wishing to form a company for working the quarries they called in A. and B. to assist them. A lease of the S. Quarry was granted to P., Q., A. and B., and on the same day the four entered into an agreement with a trustee for the intended company to sell to the company the three quarries for a sum to be paid partly in cash and partly in paid up shares, A. and B. to receive 120 shares each. The company was formed. B. was one of the first directors; the agreement was confirmed, and A. and B. received their shares. The company was ordered to be wound up, and it turned out that A. and B. had no interest in the property sold to the company except their interest as lessees of S. Quarry under the lease of even date with the agreement, and B. admitted that he had no interest in the S. Quarry till that day, and had nothing to do with fixing the price. The articles provided that the agreement for sale should not be impeached on the ground of the directors, or any of them, being vendors or being promoters of the company, nor should they be accountable for benefits secured to them. *Kekewich*, J., held that B. was liable to contribute to the assests of the company a sum equal to the nominal amount of the shares issued to him and to A. on the ground of his misfeasance as director in accepting the shares allotted to himself and in allowing A.'s shares to be issued to him.

Held, affirming this decision, that, although if A. and B. had been *bona fide* owners of shares in the S. Quarry and had agreed to sell their interests for shares in the company, the transaction could not have been impeached the insertion of their names as vendors when they had no real interest in the property sold was a device for enabling them to get fully paid-up shares for their services in the promotion of the company, and that the issuing them was a misfeasance on the part of the directors, and that as it was not known to the company that A. and B. were not really vendors, the clause in the articles did not protect B. *In re Westmoreland Green and Blue Slate Company. Bland's Case* C. A. [1893] 2 Ch. 612.

COMPENSATION—See Partnership 2.

CONDITION PRECEDENT—Ships, etc. 3.

CONSTITUTIONAL LAW.

HAWKERS' AND PEDDLERS' LICENSE.

The ordinance of the city of Vicksburg which provides for the payment of a privilege tax by all transient peddlers doing business in the city, so far as it applies to a travelling agent, a citizen of another State, selling goods only by sample for his principal, who resides in such other State, is an attempted regulation of interstate commerce, and unconstitutional. *Overton* v. *State*, Miss., 13 South. Rep. 226.

CONTRACTS — See also Mun. Corp. 1. — Insur. 5. — Atty. and Client — Arbitration — Gambling Transactions—Restraint of Trade.

1. PUBLIC POLICY.

An agreement between two real estate agents, representing different principals, to divide commissions in case they could effect a sale or exchange between their respective principals, is void as against public policy. *Levy* v. *Spencer*, Colo., 33 Pac. Rep. 415.

2. INTERPRETATION — COURT ROOM —HARMLESS ERROR.

A contract to furnish a certain number of "car loads" of whitewood is not void for uncertainty because a car load varies from 35,000 to 60,000 feet. *Indianapolis Cabinet Co.* v. *Herrmann*, Ind. 34 N. E. Rep. 579.

3. ACTION ON—BENEFITS.

If one party, without the fault of the other, fails to perform his side of the contract in such a manner as to enable him to sue upon it, still, if the other party has derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth, less any damage that may have been sustained by reason of the partial non-fulfillment of the contract. *School Dist.* v. *Lund*, Kan., 33 Pac. Rep. 595.

CONTRE LETTRE — See Partnership 2.

CONTRIBUTORY NEGLIGENCE — See Carriers 2—Negligence.

CONTRACTOR, LIABILITY OF — See Negligence 11.

COPYRIGHT.

1. OF PHOTOGRAPH—INFRINGEMENT BY LITHOGRAPH.

Held, that a photographer who poses and makes an artistic picture of a sitter becomes the author of an original work of art, the product of his intellectual invention, and is entitled to copyright the photograph on complying with the provisions of the act of Congress for the obtaining of copyrights. The use of a picture so copyrighted as the basis of a lithograph or cut constitutes an infringement if the design of the photographer be so far copied as to appropriate his manifestation of his conception or a substantial part thereof. *Salk* v. *Donaldson*, United States, Circuit Court, Southern District of New York, July, 1893.

2. TIME-TABLES—INTERDICT.

In an action by the proprietor of a local time-table to have the proprietors of a rival time-table interdicted from publishing his work as being a breach of the complainer's copyright, the question was whether the respondents, instead of compiling a time-table for themselves from common and public sources of information, took advantage of the complainer's labour, and substantially copied his time-table. After a proof, the Lord Ordinary (Low) *affirmed* this proposition and *granted* interdict, but the first Division recalled this interlocutor and *refused* the prayer of the note. *Leslie* v. *Young*, 30 Scot Law Rep. 910.

The LORD PRESIDENT, in delivering the judgment of the Court, said—The Lord Ordinary says in his opinion. "The question seems to me to be mainly one of fact, viz., whether the respondents, instead of compiling a time-table for themselves from common and public sources of information, took advantage of the complainer's labour and substantially copied his time-tables."

On this question of fact the author of the time-table, and the several persons engaged in its preparation have been examined as witnesses, and their testimony is primary and direct evidence. They all say that the former and not the latter of the two alternative methods specified by the Lord Ordinary

was that which was actually adopted. I do not understand the Lord Ordinary to have been unfavourably impressed by any of these witnesses while they were being examined, or to have any reason for rejecting their testinony except what his Lordship considers the impossibility of reconciling it with the real evidence of the case. This being so, I do not know that we are in a less favourable position than the Lord Ordinary for weighing the evidence upon which the question is to be determined. And after full consideration of that evidence, I am unable to agree with the Lord Ordinary. I consider that on the issue stated by his Lordship the complainer has failed to prove his case.

We begin by finding that the respondents had in the compilers of their time-table, persons perfectly competent to do the work without illegitimate aid. The A B C part of the book is admittedly their own work, and it demanded more pains and originality than the part now in dispute. But further, it is indisputable that in what may be called relatively the broader features of the part of the book in dispute, the respondents have worked independently of the complainer's book. The selection of routes is different, the order is not the same, nor is the structure of the pages. Where a selection of stations is made, the stations selected are different in nearly as many instances as they are the same. That there should be even with independent work a coincidence or concurrence to the extent to which there is in what I call the broader features of the books, is almost inevitable from the necessary limitations of choice attending the enterprise.

Turning, then, to the region of detail in which the Lord Ordinary has found the grounds of his judgment, I observe that, except in a few instances, what the respondent is said to have purloined from the complainer is matter which the complainer had taken from the companies' tables, and which the respondents could equally have got from the same source. Now, it does not appear that there was any great temptation to use the complainer's book instead of the railway books, so far as saving of trouble was concerned. Mr Adam, indeed, who is conversant with work of this kind, thinks it would have been easier to go to the official sources at once.

These considerations seem to show that the respondents had the ability to do the work themselves; that in more difficult matters they put forth that ability; and that the matter in dispute did not present strong temptations to go wrong. And now I turn to an aspect of the case to which the Lord Ordinary does not seem to have attached the importance which I am disposed to assign to it. The respondent Mr J. M. Young, who is really the author of the book in dispute, has deponed in detail to the method he adopted for its compilation. He traces the various stages of its preparation and the various duties which were severally devolved on the compositors employed. He has produced MSS. which show or exemplify the scheme of the tables, and the marked copies of the official time-tables which indicated the stations selected, and he depones that written slips were handed to the compositors indicating "where to find the page in each official book, and what they were to set up in the shape of stations and trains so as to fill the columns." With regard to the setting up of the different pages of the respondent's time-table, Mr. J. M. Young set up certain pages, which he names, and he gives in detail the pages which each of the compositors got to do. According to Mr J. M. Young's evidence, each man was supplied with instructions and materials which rendered him dependent solely on the official time-tables of the several companies, and which did not involve any further aid.

Now, it has been suggested that this method was impracticable; and if this had been made out it would have gone far to clear the way for the Lord Ordinary's conclusion. But according to the evidence the complainer's own time-table was originally made up, apparently without any difficulty, from the same materials; and one of the two skilled witnesses for the complainer in so many words affirms the practicability of the method in question. Accordingly, so far as the scheme of the book in question is concerned, it seems to be proved that it was entirely independent of the complainer's book, and was practicable without resort to the complainer's book, and without substantial temptation to those executing the scheme to ressort to it.

The remaining question is, whether this scheme was not carried out, but was departed from in favour of the method of copying the complainer's book, or rather (and this is a material qualification of the proposition) in favour of the plan of copying the complainer's book in so far as this could be done in accordance with the differences which actually exist.

Now, a point was made of the condition of the MSS. said to have been used by the compositors. Those papers were said to be now too clean to have been used in the way alleged; but this difficulty was not put the persons who said they used the MSS., or to the skilled witnesses. Various explanations are possible, and I am not prepared to reach conclusions adverse to sworn testimony on matters of fact where the soundness of the adverse inference is left to depend on what to me is only conjecture.

It is said, however, that when the two books are compared—that of the complainer and that of the respondents—various coincidences occur in points on which both books differ from the common sources of information, so numerous and so striking that they can only be accounted for by the use of the complainer's book in the preparation of the respondents' book. Now, that the complainer's book was known to the persons engaged in the preparation of the respondents' book, that it was in their hands, and that it was referred to, is admitted; and it is also admitted that certain pieces of information were taken from it—the mileage and the circular tours. I am disposed to think also that one or two of the compositors may now and then have looked at the complainer's book to see how it put things—how it arranged a column or indicated a route. I

think this likely, and there are points of identity in detail for which it seems the natural explanation; although, as regards some of the more noticeable instances, I do not feel sure of it, as they were not put to the witnesses who did the work. Assuming, however, that in some instances a compositor has copied a bit here and a bit there of the complainer's book, I am prevented from inferring that the whole has been copied, or indeed any material part, by the fact that side by side with those points of identity there are points of difference which cannot be accounted for on the complainer's theory, as they negative any continuous or wholesale copying.

I must add that I do not think that a sound conclusion is reached in this case unless due regard is had to the nature of the printed matter in which the complainer has copyright. The thing is a compilation, and the complainer has no monopoly of each several part, for that is the work of the railway officials, from whose book it is taken. Accordingly, the mere fact that at one particular table the compositor has looked on at the complainer's book instead of the official book is not of itself a breach of the complainer's copyright, but may be evidence of a more comprehensive appropriation. For the reasons already given, I do not think that the more extensive inference can be drawn.

I am of opinion that the Lord Ordinary's interlocutor should be recalled, and the prayer of the note refused.

LORD ADAM—I am of the same opinion, and for the same reasons.

LORD M'LAREN—I concur, and would only add a few words with regard to the distinction that may be taken between the present case and the recent one of Harper, 1892, 20 R. 133, in which we held that a trade circular was entitled to the protection of the Copyright Act. It was there proved that the whole work was original. It was not originality of a very high order, consisting as it did of computing dimensions of pulleys, &c., and of fixing prices by aid of experience gained in the trade; but it was held that there was a sufficient amount of originality to satisfy the Copyright Act, and that it was not permissible for another firm to use the complainer's tables although the prices were different.

The publication of the complainer here does not profess to be an original work, but only an abridgment of the railway companies' time-tables. In case of such an abridgment, I should say that in general the only things the complainer is entitled to protect by copyright are the selection of routes and the order of the arrangement. It is clear that there can be no copyright in particulars extracted from the railway companies' tables. Now, when we come to what has been proved in this case, I think the respondent has shown that he made an independent selection of stations, and did not appropriate the complainer's ideas. As to the question how the hours of the trains at the different stations were filled in after the selection of stations was made, it is clear the result would have been the same whether the times were taken from the companies' tables or from the complainer's book. The compositors, it may be, were entitled to fill in the columns in the way most convenient for them, but I hold it proved that they took the lines from the railway companies' tables, and that very little use was made of the complainer's book. There being no motive for literary piracy, and nothing taken in which the complainer can prove he had any exclusive right, I am against presuming in face of his sworn testimoney that the respondent here ran the risk of an action by using the complainer's tables instead of going to the sources open to both parties.

LORD KINNEAR—The question between the parties is only one of fact. The complainer's compilation is no doubt a useful one. but all the matter it contains was already in the possession of the public, and its compiler cannot complain merely because information similar to what he furnishes is to be found in the defender's publication. At the same time he is entitled to say that the defender must not take advantage of his time-table, but must go to the independent sources open to both. He must not copy the work which the complainer has made his own and has published. The real question then is, whether the defender's work is a mere copy of that of the complainer, or whether he has gone direct to the railway companies' tables and constructed by his own industry and intelligence from information contained in these public sources.

I agree with your Lordships on the facts. Had I read the Lord Ordinary's opinion as meaning that the defender was not a credible witness, I should have had great difficulty in reversing his Lordship's judgment, but I do not so understand his opinion. I think that he would have come to the same conclusion as your Lordships had he not thought that after a comparison of the two time-tables he could not give effect to the sworn testimony of the defender. We are therefore in an equally favourable position with the Lord Ordinary for judging of this matter. After comparing the publications we are to say whether the result is such as leads us to disbelieve the sworn testimony. I am of opinion that it does not.

CORPORATIONS — See Companies — Neg. 7.

CRIMINAL LAW.

1. FORGERY.

Defendant and one H were charged with forging the name of one K to a note. Defendant was the brother-in-law, and H the brother, of K. On the trial it appeared that K was willing that his name should be so used, but the State claimed that he was to be notified when his assistance was needed, while defendant claimed that he was to be notified when his name was

actually used: *Held*, that defendant was not guilty of forgery. *McCay* v. *State*, Tex., 22 S. W. Rep. 974.

2. Carrying Weapons — Self-Defence.

The fact that a weapon is drawn in self-defence does not exempt the one drawing it from indictment for unlawfully carrying arms: *Miller* v. *State*, Texas, 1893, 22 S. W. Rep. 141.

3. Theft—What Constitutes.

Where defendant, who wished to leave the neighborhood to avoid a difficulty, took his cousin's saddle on the pretense of borrowing it to go hunting, but left with him more than sufficient property to pay for it, with a letter directing him to take such property in payment, such taking did not constitute theft. *Beckham* v. *State*, Texas, 22 S. W. Rep. 411.

4. Homicide—Aider and Abettor.

A person who becomes involved in a fight with one or more antagonists should not, upon that ground only, be held an aider and abettor of another, who may be present, and incited by the struggle to commit an independent act of violence that causes the death of the antagonist, or one of them, if there were more than one.

In such case, to constitute the person engaged in the fight an aider or abettor of the homicide, it should appear, either that there was a prior conspiracy, or that he purposely incited or encouraged the slayer, or did some overt act himself with an intent to cause the death of his antagonist. Supreme Court of Ohio. *Woolweaver* v. *State*, 21 N. E. Rep. 476.

5. Larceny by Bailee — Attorney's Lien.

Defendant, an attorney, received money for which he gave a written receipt, reciting that it was received of W. for bail of L., to be returned to W. on final disposition of the charge.

Held, on indictment for the crime of larceny by bailee, in that defendant, after receiving back the money from the magistrate, converted it to his own use, that it was not varying the receipt by parol testimony to show, in proof of the allegation of the indictment, that the money belonged to another than W. *State* v. *Lucas*, Oreg., 33 Pac. Rep. 538.

6. Prostitution.

The offense of taking away a girl for the purpose of prostitution is not committed by one who takes her to an unoccupied house, that a third person might, for that one occasion, have intercourse with her. *Haygood* v. *State*, Ala., 13 South. Rep. 325.

7. Justifiable Homicide.

Held, (1) it is the duty of the court to instruct the jury upon every phase of the case made by the evidence. Where evidence is offered to prove a certain state of facts, and the claim is made that they are proved, the court should, if requested so to do, charge the jury what the law is as applicable to the facts claimed to be proved. State v. Tucker, 38 La. Ann. 536, 789.

(2) When two parties have had a difficulty, if one of them quits the combat, and retreats in good faith, and is pursued by the other, who continues to follow him up with violence and hostility, and should it become absolutely necessary for the one retreating to turn and kill his pursuer in order to save his own life, he is justifiable, whether he was the aggressor in the beginning of the difficulty or not. State v. Tucker, 38 La. Ann. 536, 789; 1 Archb. Crim. Pl. & Pr. 690; 9 Am. & Eng. Enc. Law 602.

(3) A person free from fault, when attacked by another, who manifestly attempts by violence to take his life, or to do him great bodily harm, and under such circumstances that no retreat is practicable, is not only not obliged to retreat, but may pursue his adversary untill he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense. 1 East P. C. 271, 272; Luby v. Com., 12 Bush 1; Pond v. People, 8 Mich. 177; 2 Starkie Ev. 963; Fost. Cr. Law 273. *State* v. *Thompson*, Supreme Court of Louisiana, July, 1893.

8. Assault — Administration of Poison.

The unlawful infliction of an injury

by administering poison constitutes an assault. In Warner v. State, 114 Ind. 137, the Sup. Ct. of Indiana held that an assault is a constituent element of the crime of murder. In Com. v. Stratton, 114 Mass. 303, the court says: "Although force and violence are included in all definitions of assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts;" citing 3 Chit. Crim. Law, 799; 1 Gabb. Crim. Law, 82; Rosc. Crim. Ev. (8th Ed.) 296; 3 Bl. Comm. 120, and notes; and 2 Greenl. Ev. § 84. It is there further said: "If one should hand an explosive substance to another, and induce him to take it, by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it, and cause it to explode in his pocket or hand, and should be injured by it the offending party would be guilty of a battery, and that would necessarily include an assault. * * * It would be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured, externally or internally, by mechanical or chemical force." Reg. v. Button, 8 Car. & P. 660. Supreme Court of Indiana, *Carr* v. *State*, 34 N. E. Rep. 533.

9. Written Instructions by Judge—The Word "Guilty" Written on Margin by Inadvertence Instead of "Given."

Where the judge inadvertently writes the word "guilty" on the margin of an instruction given to the jury, and permits the instruction thus written upon to be taken by the jury to their room.

Held, (1) That the presumption is that the extraneous word was read by the jury, unless the contrary was clearly shown;

(2) That as the writing of such word by the judge was capable of and tended toward influencing the jury detrimentally to the defendants, the presumption was that it did so influence them, unless the contrary was clearly shown, and that the burden was upon the State to show beyond a reasonable doubt that such writing upon the charge was not read by the jury, or, if read by them, that it did not result in injury to the defendants; and

(3) That such word written upon the charge, and sent with the jury to their room, was reversible error, unless it clearly appeared that no injury resulted to the defendants therefrom. *Hawkins* v. *State*, Supreme Court of Florida, July, 1893.

10. Forcible Defilement — Evidence.

The defendants were indicted for the crime "of compelling a woman to be defiled against her will." It appeared that Defendant F. had previously been criminally intimate with the woman, and that he and defendant B. arranged that the latter should surprise F. and the woman in *flagrante delicto*, and, under threats of exposure, induce the woman to allow B, to have sexual intercourse with her. When so surprised, the woman at first refused to consent to B.'s proposal, but subsequently did so, under fear of B.'s threats of exposure. It was held that the evidence was sufficient to warrant the conviction of both defendants. *State* v. *Fernald and Brown*, decided in the Supreme Court of Iowa in May, 1893, 55 N.W. R. 534.

11. Evidence — Larceny — Photograph.

On a trial for larceny a winess testified that at the time of the commission of the crime defendant had side whiskers and a mustache, while certain witnesses for defendant testified that they had known defendant since the spring of 1887, and that he had never worn side whiskers.

Held, that it was proper to admit in evidence a photograph of defendant to show that when it was taken, in July, 1887, he wore side whiskers. *Commonwealth* v. *Morgan*, Mass., 34 N. E. Rep 458.

12. Trial — Duty of Prosecutor to Call all Witnesses.

The question in this case was whether it is the duty of a prosecutor in a criminal case to call and examine all eye-witnesses to the occurrence. The Court *held* that it was not his duty to do so where the testimony of the witnesses called, or some of them, is direct and positive and apparently covers the entire transaction. *State* v. *McGahey*, Supreme Ct. of No. Dakota, 37 Cent. L. J. 190.

13. EVIDENCE—HOMICIDE.

In a murder trial, evidence that a dog trained to follow the tracks of a human being was shortly after the homicide put on what appeared to be the tracks of the guilty person, and followed them to defendant's house, where defendant was shown to have been the night after the killing, is admissible. *Hodge* v. *State*, Ala., 13 South. Rep. 385.

CRUELTY TO ANIMALS

CONVICTION OF MASTER FOR ACT OF SERVANT—PREVENTION OF CRUELTY TO ANIMALS ACT 1850 (13 AND 14 VICT. CAP. 92), SEC. 1. SCOTLAND.

The owner of a horse and the carter who drove it were convicted of a contravention of the above section by having caused the horse to draw a load of gravel while unable to work from having an open sore beneath the saddle. It was not proved that the owner had any personal knowledge of its condition at the time.

Held, that the facts proved did not warrant the conviction against the owner of the horse. *Downie and Another* v. *Fraser*, 30 Scot. Law Rep. 897.

CUSTOM AND USAGE — SEE ALSO GAMBLING TRANSACTIONS 2.

1. EVIDENCE.

Custom or usage may be proved, not only to explain the meaning of terms to which is affixed a peculiar and technical meaning, but also to supply evidence of the intention of the parties regarding matters of which the contract itself affords indication, or, it may be, no indication at all. *Destrehan* v. *Louisiana Cypress Lumber Co.*, La. 13 South. Rep. 230.

2. PROMISSORY NOTE — NOTICE OF DISHONOR.

Plaintiffs, doing a banking business, after abandoning a practice to give notice of the dishonor of notes by mail notwithstanding that the indorser and holder lived in the same town, could not rely on such custom, even though it continued to prevail among other banks. *Isbell* v. *Lewis*, Ala., 13 South. Rep. 325.

CYCLISTS—See Intox. Liquors 2.

DAMAGES—SEE ALSO CARRIERS 7—RAILWAYS 2—RIPARIAN PROPRIETORS—SALE OF GOODS 2.

MEASURE OF—DECEIT.

In an action of assumpsit for the price of certain ores, the evidence showed that the defendants were induced to enter into the contract by plaintiff's false statements, but accepted the ores after discovering the falsity of the statements.

Held, that the true measure of damages for the *deceit* was the difference between the contract price of the ores and their value in the market at the time, unaffected by the false representation, and not such sum as the jury might find from all the evidence was the value of the ores to defendants; Peek v. Derry, 37 Ch. Div., 541, and Smith v. Bolles, 10 S. C. Rep., 39; 132 U. S., 125, distinguished. *McHose* v. *Earnshaw*, Circuit Court of Appeals, 55 Fed. Rep., 584.

DECEIT—See Damages.

DEEDS—See Delivery.

DELAY—See Carriers of Goods 1.

DELIVERY.

DEEDS.

A grantor, in the presence of his son D, handed to his wife the deed, saying: "Here is D's deed. I want you to take it, and take care of it for him."

Held, that, the wife having taken possession of it, there was a valid delivery, though she did not give it to the grantee till after the grantor's death. *White* v. *Pollock*, Mo., 22 S. W Rep. 1077.

DIVORCE—See Domicile.

DOMICILE.

JURISDICTION—DIVORCE—HUSBAND AND WIFE—DOMICILE OF SUCCESSION.

A husband, English by origin, married a Scotswoman in 1878, and from 1881 the spouses had their domicile in Scotland until after the commission of certain alleged acts of adultery by the wife in Edinburgh in 1892. In December of that year the husband went to live with his relations in England, while his wife remained in occupation of a house in Edinburgh, of which he continued to be tenant till Whitsunday 1893.

In April 1893 he raised an action of divorce for adultery, and at the proof in June he stated that he had then no intention of returning to Scotland.

Held, that as he had not in fact changed his residence nor evinced any intention of doing so at the date of the action, the Scottish Court had jurisdiction to entertain the action. *Hunter* v. *Hunter*, 30 Scot. Law Rep. 915.

DRAFTS—See Banks and Banking 2,6.

DURESS—See Insurance 4.

EASEMENTS—See Waters 2.

ESTOPPEL—SEE ALSO PARTNERSHIP 1—PRIN. AND AGENT 3.

WHAT CONSTITUTES.

In an action for the purchase price of oats, defendants alleged that plaintiffs were the stockholders, officers, and agents of a mill company; that the oats in question were bought by defendants of said mill comyany; that the price of the oats was credited on an indebtedness of the mill company to defendant; and that the price paid was higher than defendant would have paid if he had not purchased from the mill company, which was his debtor, as aforesaid.

Held, that these facts did not constitute an estoppel. *Walker* v. *Baxter*, Wash., 33 Pac. Rep. 426.

EVIDENCE — (SEE ALSO CRIM. LAW—CUSTOM AND USAGE 1.

PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT.

Communications between an attorney and his client concerning proposed infractions of law are not privileged. *Hickman* v. *Treen*, Supreme Court of Missouri, Sherwood, J., Gantt, P. J., dissenting, May 2, 1893, 22 S. W. Rep. 455.

Note.

See in this connection 1 Wharton's Crim. Evid. (3d ed.), § 590 and cases cited; also 7 Amer. and Eng. Ency. of Law 103.

FALSA DEMONSTRATIO NON NOCET—Insurance 3.

FALSE ARREST.

FALSE IMPRISONMENT—WHAT CONSTITUTES — ARREST ON SUSPICION — JUSTIFICATION—PROBABLE CAUSE.

1. Whether the facts in a particular case constitute probable cause, which justifies an officer in arresting a person without a warrant on information that a felony has been committed, and on suspicion that the person arrested is the guilty party, is generally a question of law, for the court.

2. In an action for false imprisonment, it appeared that defendant, a sheriff, received from the sheriff of another county information that one R and a Mrs. N had eloped, taking with them her five children. In the letter was a description of both, and a photograph of it. On receiving a telegram from defendant that the man wanted was at his city, the sheriff who sent the letter replied that he had a warrant for R's arrest, and requested that he be arrested; and defendant arrested plaintiff, who was not R, but a travelling salesman. He had been in the city five days, and boarded where there were several other boarders, and where three days before a woman who first gave her name as C, and afterwards as N, and who had two children was arrested for larceny. There was a resemblance between the photograph and plaintiff, but in the letter R's age was given as 50, while plaintiff was 36. Plaintiff at no time manifested any concern regarding the woman, and there was no evidence of any intimacy between them. Defendant made no inquiry as to plaintiff's business, or as to his relations with the woman. When arrested, plaintiff ex-

hibited letters, tax receipt, and his memorandum book with his name on it.

Held, that the jury should have been instructed that defendant was not justified in arresting plaintiff. Hooker, C. J., and Montgomery and Long, JJ., dissenting. *Filer* v. *Smith*, Supreme Court of Michigan, July 25, 1893. Cent. L. J.

"It is undoubtedly true that an officer is justified in making the arrest of a person formally charged with an offense, though it turns out that the person so charged be innocent. So, if he makes an arrest for a felony without a warrant, although he has no personal knowledge, but acts upon information received from one whom he has reason to rely upon, although it may be that the person so charged is not guilty, or no felony in fact be committed. Samuel v. Payne, 1 Doug. 359; Hobbs v. Branscomb, 3 Camp. 420; Holley v. Mix, 3 Wend. 350; Burns v. Erben, 40 N. Y. 463; Cahill v. People, 106 Ill. 621; Crock. Sher. § 49; 1 Chit. Crim. Law, 22. In Williams v. Dawson, referred to in Hobbs v. Branscomb, *supra*, Buller, J., laid down the rule "that if a peace officer, of his own head, takes a person into custody on suspicion, he must prove that there was such a crime committed." The rule is laid down by Mr. Bigelow, in his work on Torts (4th Ed., p. 140), that the officer, in executing his process, must arrest the person named in it. If he do not, though the arrest of the wrong person was made through a mere mistake, it may be a case of false imprisonment; citing Coote v. Lighworth, Moore, 457; Dunston v. Paterson, 2 C. B. (N. S.) 495. A number of authorities may be cited in support of this rule: Add. Torts, § 805; Davies v. Jenkins, 11 Mees. & W. 754; Gwynne, Sher. 99; Griswold v. Sedgwick, 6 Cow. 460; Lavina v. State, 63 Ga. 513; Hays v. Creary, 60 Tex. 445; Comer v. Knowles, 17 Kan. 436. I do not think, however, that an officer who, through an honest mistake, and after such investigation into the facts and circumstances as the particular case enables him to make, upon a charge of felony, arrests a party, having reasonable grounds to suppose him to be the guilty party, and the one named in his warrant, is liable to the arrested party, who turns out to be innocent, for whatever damages he may suffer in consequence of the arrest. Such a rule would materially interfere with the apprehension of fugitives from justice. Probable cause is a justification for criminal proceedings. Criminals who seek safety in flight are usually apprehended through officers in other localities, and by means of photographs and descriptions of the person. As is said in Brockway v. Crawford, 3 Jones (N. C.), 433, the law encourages every one—as well private citizens as officers—to keep a sharp lookout for the apprehension of felons, by holding them exempt from responsibility for an arrest or prosecution, although the party charged turns out not to be guilty, unless the arrest is made, or the prosecution is instituted, without probable cause, and from malice. In Eanes v. State, 6 Hump. 53, a murder had been committed in Franklin county by one Payne, who made his escape, and the governor issued a proclamation offering a reward for the apprehension of the criminal. One Martin was arrested in Sullivan county. The particulars of personal description annexed to the governor's proclamation applied in some respects to Martin and in others did not. The Court say: "The liberty of the citizen is so highly regarded that the officer arresting a supposed felon without warrant must act in good faith, and upon grounds of probable suspicion that the person to be arrested is the actual felon. If he may not, under such circumstances, make an arrest, the escape of criminals would be but little obstructed by the official proclamation of governors, and the police of the State, instead of being, as public policy urgently requires, vigilant and effective, would be altogether the contrary." The rule was laid down in Maliniemi v. Gronlund (Mich.), 52 N. W. Rep. 627, that a private person has a right to arrest a man on suspicion of felony, without a warrant, but if he does, and it turns out that the wrong man is imprisoned, he must be prepared to show, in justification — First, that a felony has been committed; and, second, that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed it, or was implicated in it. This rule is supported by a long line of authorities. Cooley, Torts (2d Ed.), p. 202, and cases cited. But, as Mr. Cooley says, "A peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief, he will be excused, even though it appears afterwards that in fact no felony has been committed." 7 Amer. & Eng. Enc. Law, p. 675, and cases cited. In Rolan v. Sarvin, 5 Cush. 281, the Court say: "The public safety, and the due apprehension of criminals charged with heinous offenses, requires that such arrests should be made without warrant by officers of the law. Constables and other peace officers, acting officially, the law clothes with greater authority than private persons, and they are held to be justified if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party to await further proceedings, under a complaint on oath, and a warrant thereon." Upon the same principle, and for the same reason, an officer making an arrest upon a warrant, or upon knowledge that a warrant is out, of one whose person is unknown to him, who can, under the circumstances, only act, if he act *at all*, upon photograph or description or both, should be excused, if he act honestly and prudently, making such inquiry and examination as the circumstances of each particular case affords him an opportunity to make. It is practically impossible to apprehend run-

aways in any other way, and the protection of society from these major crimes demands that some latitude be given to these officers of the law, who are separated from local influences and clamor, and must be presumed to act fairly and honestly. But in all such cases, where the facts are not disputed, the question of probable cause is one of law, for the Court. Hamilton v. Smith, 39 Mich. 222, 227; Burns v. Erben, 40 N.Y. 463; McCarthy v. De Armit, 99 Pa. St. 63. To afford a justification, there must be not only a real belief, and reasonable grounds, for it (1 Chit. Crim. Law, 15), but, where there is an opportunity for inquiry and investigation, inquiry and investigation should be made. In Holley v, Mix, 3 Wend. 350, the Court, referring to an arrest made upon information received say: " The officer should not, however, receive every idle rumour, but should make such diligent inquiry touching the truth of the charge as the circumstances will permit, before he assumes to arrest one upon the information of another."

Defendant was bound to use all reasonable means to avoid possible mistake, and the arrest of an innocent man. Stanton v. Hart, 27 Mich. 539, 541. He was not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph (Sugg v. Pool, 2 Stew. & P. 196), especially as there was, within easy reach, means of identification. He says he did not know, and did not ask, plaintiff's name or business, until after the arrest. A few moments devoted to inquiry at the boarding house would have revealed the situation, and would have shown that there was no reason for associating him with the woman in question. An officer is not warranted in relying upon circumstances deemed by him suspicious, when the means are at hand of either verifying or dissipating those suspicions without risk, and he neglects to avail himself of those means. The case made by defendant did not justify the arrest, and the jury should have been so instructed.

FIRE INSURANCE—See Insur. Fire.

FIREWORKS—See Negligence 3.

FORGERY—See Crim. Law 1.

GAMBLING TRANSACTIONS

1. DEALING IN STOCKS.

While a broker employed to buy and sell stocks under an agreement that no stock should be actually delivered, but that he should either make bargains to that effect with the other parties to the transactions, or should protect his principal from being called upon to accept or make actual deliveries, is a participator in an illegal contract, and cannot recover money advanced, yet a mere expectation on the part of the principal and broker that purchasers from the principal would be willing to adjust the transactions by paying or receiving differences, when there is no agreement to that effect, does not render the contract illegal. *Barnes* v. *Smith*, Mass., 34 N. E. Rep. 403.

Note.

This case comes very timely and affords a valuable comparison with the following Quebec one just decided, and which is to go to the Privy Council.

2. STOCK SPECULATIONS—BROKER'S COMMISSION—ART. 1927 C. C.—USAGE —PLEDGE—ART. 1792 C. C.

In an action by appellant, a stockbroker against respondent for the recovery of advances made on purchases of shares and for commissions, upon transactions anterior to the passing of the Dominion Statute prohibiting stock gambling, respondent pleaded Art. 1927 C. C., which denies an action for the recovery of money claimed under a gaming contract or bet.

Held, (Hall, J. dissenting) That appellant's claim being on its face legitimate, the presumption is in his favor, and it is for respondent to prove that the transactions were in fact gaming contracts. In the absence of direct evidence the court must determine the original intention of the parties from the nature of the relations between them, according to the circumstances of the case. The broker, in order to hide the real character of the transaction or to protect himself may make serious contracts of purchase and sale with third parties; but the court will not overlook that it is the *nature* of the contract between the broker and his client that has to be appreciated.

Therefore, under the facts of the case, where appellant, who was instructed by respondent to buy and sell shares mentioned in the latters account, bought them with his own money and in his own name, treating them generally as if they were his own property, and there was no delivery or agreement to deliver, and respondent was a bank clerk with a modest income, quite insufficient to enable him to make a *bona fide* purchase of the shares in question, the broker being aware of this.

Held, that such a contract constitutes a gaming transaction.

And further; where appellant retained the shares as a pledge and tranferred them to a bank as collateral security for a loan on his own account, according to a usage of the Stock Exchange.

Held, that such usage cannot be maintained, inasmuch as it is in violation of Article 1792 of the Civil Code which says that the debtor is owner of a thing pledged, which remains in the hands of a creditor only as a deposit; and of Article 1971 which adds that the creditor cannot in default of payment of the debt dispose of the thing given in pawn. He must seize it and sell it in course of law. This treatment of the shares by the appellant further indicates that he considered himself the owner. *Forget* v. *Ostigny*, (Lacoste, C. J., Baby, Bossé, Blanchet and Wurtell, J. J., Hall, J. *diss.* Queen's Bench in Appeal, Montreal, Sept. 27, 1893.)

Lacoste C. J. (for the majority of the court,—Stock jobbing has given rise to a great number of suits the solution of which is generally difficult. An unfortunate speculator is tempted to invoke the exception of gaming to escape a loss which he owes to his own imprudence, and it has sometimes occurred that a broker has had recourse to this defence in order to retain the monies received by him from his client or on his client's account. I admit that at first sight the position assumed by these unfortunate speculators may shock the sentiment of honor. But the Legislature, for reasons of public order and morality, has properly refused the aid of the law to those who wish to enforce the execution of obligations in contracts which are only gaming transactions. These gaming transactions which usually originate in an unrestrained passion for becoming rich without work at the expense of others, bring disaster and ruin to the family, and these financial crises to society which affect the innocent as well as the guilty. It is on the Stock exchange that contracts, known under the name of *jeux de bourse* are generally made. They are facilitated by the legalized organization of the Stock Exchange and by the resemblance they have to speculation, properly so called, authorized by law. We are not concerned here with foreign legislation which has often varied according to the ideas of the time. For example, in France the legislature, alarmed by the disastrous consequences of stock jobbing, some times prohibited even certain serious and legitimate transactions; and afterwards, feeling itself impotent to prevent abuses, and thinking it right to favor unlimited freedom of commercial transactions, and not to place any obstacle in the way of their execution, it abolished the defence of gaming to stock exchange contrats. Several other countries followed the example of France. Our Parliament did not follow this course, for it made stock gambling an offence. The dispositions of our statute, however, do not apply to the transactions which are the subject of the present litigation, for they are anterior to the passing of the law. No legal principle is contested in the present case; the whole difference consists in the appreciation of the evidence and the facts which have been established. Art. 1927 of the Civil Code denies the action for the recovery of money or any other thing claimed under a gaming contract or a bet. This is the only law which was in force when the transactions between the parties took place, consequently the respondent in order to succeed was bound to prove that the money claimed by the appellant was exigible under a gaming contract or a bet and he pretends that he has made this proof. The contract invoked by the appellant is a mandate; he sues for the recovery of the balance of advances made on purchases of shares at the Stock Exchange, for the respondent, at his request, for interest on the advances, and for his commission on the purchases and sales. The statement produced by the appellant shows that from the 19th Lecember, 1882, to the 22nd February, 1884, he brought for the respondent at different times 275 shares of the Montreal Street Railway company, and that he sold for him an equal number of shares; that he purchased 250 shares of Montreal Gas company and sold 250; that responded lost on the speculations in these stocks; that, in 1885, appellant bought ten shares of Bank of Montreal, which he sold at a certain profit in 1886. The statement shows, further, that respondent from time to time paid sums on account. The whole is balanced with a statement of interest and commission, and it is the amount which remains at the debit of respondent which is claimed by appellant. On its face appellant's claim, as formulated by him, is legitimate; the presumption is in his favor, and it is for respondent to prove that the transactions were, in fact, gaming contracts, In the absence of direct evidence courts must determine the nature of the relations between parties according to the circumstances of the case. It is sometimes difficult to draw the line between speculation and gaming transactions. The business done by frequenters of the bucket-shops do not leave any doubt, these are always bets on the rise or fall. But elsewhere gambling transactions have often the appearance of serious contracts. Thus a person sells a stock deliverable on a fixed day; the contract is lawful but the circumstances of the case may show that the intention of the parties was not to give and take delivery, but only to gamble. In such cases the courts of France and this province have declared these transactions to be gaming debts. How can it be known that there is gambling? The doctrine and jurisprudence answer that we must ascertain the original intention of the contracting parties.

If they intended to fulfil in good faith the contract of purchase or sale made by them, it is a speculation authorized by law; but if the contract of purchase and sale is merely ostensible and the parties did not intend to give or take delivery, but wished to limit their responsibility to the payment of the differences occasioned by the rise and fall, then it is a gaming contract. This gaming contract may be made either with a broker or with any other person, and the latter either to hide the real character of the transaction or to protect himself, may make serious contracts of purchase and sale with third parties; but the court will not overlook that it is the nature of the contract between the broker and his client that has to be appreciated. Let us see what is shown by the proof in the present case. The appellant, instructed by the respondent to buy and sell shares mentioned in the latter's account, bought them with his own money and in his own name; he notified respondent and gave him credit in his books for the shares and debited him with the price which he had paid and with the interest on the price. He did not offer to deliver the shares and respondent has not asked for them. Appellant himself gave these shares with others to a bank as collateral security for a loan which he was obtaining for himself. He made the sales at the request of respondent and accounted for the price. These transactions extended over two or three years, during which appellant obtained from respondent a margin to secure himself against a decline in price. Respondent in the end was a debtor, and as he refused to pay the margin asked for, appellant instituted the present action. It seems strange that the respondent, having instructed appellant to buy for him, did not take delivery, and that appellant has not offered dellvery. Forget, however, appellant's employee, tells us that the usage of the Stock exchange permits a broker to do this, and that if the client does not ask delivery within twenty-four hours the broker may borrow for the client on the security of the stocks which he has just bought and which he holds as a pledge. The client may a. any time ask for delivery of the stock, but if he does not do so and he neglects to pay the margin asked for, then the broker sells the stock and a settlement is made by the payment of the differences. The witness Forget tells us that respondent was acquainted with this usage. It results from this practice that the client does not take delivery of the shares and that his responsibility is limited to the payment of the margin and the interest on the advances made by the broker. The intsruction to buy, therefore, is not serious, but is only given to permit gaming on the rise or fall. Both parties understood it so. If Ostigny had made a written agreement with Forget in the following terms: "You shall buy such a stock in your own name and with your own money, you shall keep it until I tell you to sell it. I will supply you if necessary with sufficient margin to secure you in the event of a fall, I will pay you interest on your advances, you on your part shall hand me over the profit which may be made by the sale of the stock, but I do not intend to take delivery," would not such a contract have been a gaming contract? In the present case there is no written proof of such an agreement, and of the common intention of the parties not to give or take delivery; but this intention appears from the circumstances. The modest position of the respondent, a bank clerk, was known by appellant and Forget, his employe. The appellant ought to have known that respondant could not take delivery and that the custom which I have just mentioned would be followed. He understood this so well that he treated the shares as if they were his own property; he gave them to the Savings Bank with other valuable securities as guarantee for loans which he obtained for himself and he disposed of a number of them before he received respondent's order to sell them. His clerk tells us that on the 21st February, on respondent's order, he sold 200 shares of the Street Railway Company, and that he could not deliver more than 135, because he was short of the rest. If appellant really held the shares as a pledge how could he transfer them to the bank as security for a loan not limited to the amount which he had advanced for the purchase of the shares? What text of law authorized him to dispose of the pledge? Usage, it is said, but is not usage in violation of the law an abuse? And art. 1792 says that the debtor is owner of a thing pledged, which remains in the hands of a creditor only as a deposit; and art. 1971 adds, that the creditor cannot in default of payment of the debt, dispose of the thing given in pawn; he must seize it and sell it in course of law. This treatment of the shares by the broker indicates that he considered himself the owner. Under the circumstances I cannot say that the judge in the court below incorrectly appreciated the evidence, and I cannot reverse his judgment. The question is important and presents difficulties. I hope before long we shall have a judgment of the court of last resort, the Supreme court or the Privy council, to settle the jurisprudence in one sense or the other.

HALL, J., *dissenting.*—The appellant, a stock-broker of this city, was employed by the respondent to make certain transactions in stocks, between 19th December, 1882, and 22nd February 1884. During this interval purchases and sales were made of shares in the Montreal City Passenger Railway Company and the Montreal Gas Company, varying in the amount from $1,631 to $8,981, upon the aggregate of which the respondent was indebted to appellent in a balance of $1,307.40. In October, 1885, the respondent instructed the appellant to purchase for him 10 shares of the Bank of Montreal, and subsequently, in February, 1886, to sell them again. From this latter transaction a profit of about $150 resulted, which was carried to respondent's credit, leaving thus a balance against him, including commissions and interest upon advances, of $1,926.87, and it is for this sum, with interest that respondent was sued on the 17th July, 1890. The defendant pleaded 1st. That the last transaction of 1886 having resulted in a profit did not give rise to any portion of plaintiff's pretended claim; that all the other transactions took place more

than five years prior to the action and hence were prescribed, 2nd. That the transactions in question were not serious ones, but in the nature of gambling transactions upon the rise and fall of stocks made upon margin and without any intention of a real purchase of such stocks on the part either of plaintiff or defendant, and hence were illegal and could not form the basis of an action at law. The plaintiff met the plea of prescription by an allegation that it had been interrupted by payment on account and by recognition by compensation. It is proved that a statement of each transaction was rendered by the plaintiff Forget to his client, Mr. Ostigny. The latter was perfectly cognizant, therefore, in February, 1884, after the termination of his transactions in City Passenger Railway and Gas stocks, of the balance standing against him in Forget's books. More than a year afterward, in October, 1885, he sent to Forget a new deposit of $100 as margin for the purchase of ten shares in the Bank of Montreal. He received notice that these shares were sold in February, 1886, at a profit of $150, and he admits in his evidence that he has never made application or demand upon the appellant either for his profit or the return of his deposit. When asked why he had not demanded this amount, he replied: "Parce que M. Forget l'a appliqué sur ce qui était dû antérieurement. Q. Vous le saviez cela a vous et avez acquiescé? R. Je ne lui ai pas demandé de remboursement." These admissions coupled with defendant's knowledge of the balance standing against him in plaintiff's books, were sufficient to lead Mr. Justice Pagnuelo to hold in the Superior court that prescription had been interrupted, not by the transmission of the $100 as a payment on account, as plaintiff claimed, but by defendant's tacit acquiescence in the evident application both of this deposit and of the $150 profit in the Bank of Montreal transaction to the credit of his general account. With this view we are entirely of accord. Upon defendant's second plea that the transaction was a gambling one, and hence illegal, Mr. Justice Pagnuelo has made an interesting and exhaustive study, and in a very able judgment, reported in 21, L. N. 387, has adopted defendant's pretensions and dismissed the action. From that judgment the present appeal has been taken; an appeal which, in my opinion, should be maintained, but in that view I have the misfortune to be alone. The only text of law applicable to the case is to be found in art. 1927. C.C. "There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet." Mr. Justice Pagnuelo holds that a transaction in stocks, in which it is apparent from all the attending circumstances that the real intention of the parties was not a bona fide purchase for investment but a mere speculation in the rise and fall of the market quotations, is "a gaming contract" within the prohibitive terms of the article. M. Justice Pagnuelo states clearly that the mere fact of stock purchases being made "upon margin," as it is called, and the carrying of the stock by means of a loan made either by the purchasing broker or his banker, are not necessarily conclusive proof that the transactions are in the nature of gambling ones, but that the essential turning question is, what was the intention of the parties, and that in the determination of this question no precise rule can be laid down, but that each case must be weighed and determined by its attending circumstances, the financial condition of the purchaser, and the character and extent of his transactions, and the facts proved in this case led him to come to the conclusion, not without hesitation, he admits, that the transactions in question were not intended to be serious ones and therefore could not form the basis of a legal demand. The principal facts which led him to this conclusion were the moderate means of the defendant, who was at the time a bank clerk upon an annual salary of $900 or $1.000, the disproportion between defendant's apparent means and the value of the stocks purchased for him; and lastly the circumstance that no delay was ever agreed upon between the parties within which the price should be paid and the shares delivered. I agree cordially with Mr. Justice Pagnuelo's appreciation of the disastrous effects of this kind of speculation, for speculation it undoubtedly was, on the part of the respondent in this case; speculation which almost always results, as in the present instance, in serious ultimate loss to the novice who attempts it. We couple such transactions most naturally with the purchase and sale of stocks, because of the daily public quotations of their value and the facility of transferring the certificates by which they are represented. It is possible that by reason of the greater temptation in connection with this class of security special legislation should be enacted in the interest of those who have not judgment and prudence for their own protection, to impose special conditions upon civil contracts for the sale of stocks, instead of leaving them, as the legislature has thus far done, to be determined by those general principles under which ordinary commercial contracts are governed. Until such special legislation is enacted, however, the courts or jurisprudence should be careful not to vary the ordinary rules under which commercial contracts are interpreted, nor the liability naturally and legally resulting from such contracts. The attempts at such remedial legislation in other countries have not only proved entirely ineffectual for the purpose intended, but have so hampered legitimate trade that in every case the original freedom of action in reference to shares and bonds has been quickly restored, and we have today in the legislation of modern France, England, Switzerland, Italy, Spain, Germany and Belgium prohibitions against the use of a plea like that of the defendant in this cause in actions to enforce contracts for the purchase and sale of stocks. Our Dominion Parliament in 1888 attempted, and, I believe, with success, to check an abuse of speculation in stocks which had sprung up under the name of "bucket shops." A system of purely fictitious purchases and sales of stocks was carried on by irresponsible persons in imitation of the usual method of purchase and sale of stocks by licensed brokers. A black

board was set up in a conspicuous part of the shop or office, upon which the rapid changes in certain well known stocks were carefully noted. The visitor was invited to try his chance of speculation by depositing a certain margin or cash with the attendant and then entering into a form of contract for a certain number of shares at a higher or lower valuation than the then quotation. These shops professed to be in telegraphic communication with the Stock exchange and to record accurately the hourly fluctuations in the stocks upon their list. The manager of the establishment did not profess to own or control any of the shares in question, but settlements were made upon the quotations, and in the end, as invariably happens, the odds prove to be in favor of the bucket-shop and the speculator is the loser. The Dominion Parliament could not, of course, adopt any civil legislation in regard to the matter, but their well intentioned efforts to make these transactions punishable criminally furnish a good illustration of the sensitiveness of trade to interference with its established methods. Sir John Abbott, who introduced the bill in the Senate, in meeting the objections of those who thought it would interfere with the regular and legitimate usages of the Stock exchange, explained the methods of the bucket-shop keeper as follows: "The transaction is simply a wager with the bucket-shop keeper that certain stocks will rise or fall beyond a certain point. The bucket-shop keeper is personally interested that the opposite state of things from what the customer desires should take place, while the ordinary broker who buys or sells stock upon margin for a customer has no direct interest whether the stock rise or fall, but a general interest that his client should make a gain rather than a loss." Mr. Abbott said, later on, speaking of legitimate brokerage: "Where stock is bought upon margin the broker buys the stock, he receives the margin and either advances the balance himself or pledges the stock for the balance due. So there is an actual sale and purchase entirely carried out, and the stock is in the hands, for a time, and is afterwards under the control of the broker, who, under our law, is the agent of the purchaser. I call the attention of the House, therefore, to the only real difficulty in this legislation, the difficulty of establishing a clear line of distinction between the transactions that we wish to destroy and transactions some of which we may not think altogether prudent, but which we do not propose to legislate against." After passing the Senate the bill was taken charge of in the House of Commons by Sir John Thompson, the minister of justice, and although he expressed the opinion that in its originrl form, as it has passed the Senate, it could not be held to interfere with the ordinary purchase and sale of stocks upon margin, he was compelled in deference to the strongly expressed wish to that effect, to introduce a clause to remove any doubt upon the point, in these words which from part of the act as it now stands upon our Statute book: "But the foregoing provisions shall not apply to cases where the broker of the purchaser receives delivery on his behalf of such articles notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money." In the transactions under consideration the defendant, Mr. Ostigny, appears to have acted without solicitation or even suggestion on the part of the plaintiff, who proves in every case the actual purchase and delivery of the identical shares which defendant instructed him to buy, They were taken in plaintiff's name, who then pledged them to some bank as collateral for the price paid for them, charging defendant with the interest exacted by the bank, giving him credit for the amounts he advanced in cash, and the dividends received upon the shares while they were thus retained. The sales were made when ordered by defendant and were in every instance bona fide ones, the shares being actually delivered and defendant credited with the precise amount proved to have been received. For these purchases and sales the plaintiff charged a stipulated uniform commission of ¼ of 1 per cent., making no charge or profit upon the banking part of the transactions, although it involved his personal responsibility for any loss which might arise in a shrinkage upon the price advanced for the shares. Under these circumstances, however unfortunate the transactions may have been for the defendant personally, and however reprehensible such operations may be by persons without means, I see no reason why the ordinary rules of law should not be applied to the case and the defendant held liable for his misfortune, as other business men are to whom loss occurs in transactions resulting unfortunately, whether such results be within or beyond their control. The transactions were in all probability speculations on the part of the defendant, but I know of no law declaring speculation illegal. They were speculations in which the plaintiff was solely the respondent's agent, which defendant could have enforced had they proved successful and for the consequences of which he should, in my opinion, be held liable. To attempt to lay down a principle that simply because they were speculations these transactions were illegal, would disturb the whole current of trade, the life of which is mutual trust and enterprise, which is only another name for speculation.

Business men must depend upon their natural prudence, or that acquired by experience. The courts must not be depended upon to supply the lack of it. In the leading case of this nature in our own jurisprudence, that of McDougall and Demers, M.L.R. 2, Q.B. 170, it is true that this court, by a division of three against two, held that a Montreal broker could not recover for a balance due by a client on speculation by margins on wheat in the Chicago market. In that case the speculation was "on futures," as they are called, sales in May for delivery in July, and the principal item of loss arose from the broker's contracting to purchase a similar quantity of wheat for July delivery in order to protect himself or a rising market against a probable loss for which the client's deposit was not sufficient, and which margin the

client failed to increase upon application to that effect. The court held that this purchase was unauthorized by the client, against whom the broker might have had recourse by direct action for an increase of deposit, but that the remedy actually taken by the broker, though a practical one for his own protect.on, did not establish any legal lien against the client. In that case, too, there was no proof that any actual transactions took place, corresponding with the bought and sold notes, by which alone the dealings between the parties were represented. Mr. Justice Cross, who delivered the judgment of the majority of the court, remarked: "It is quite possible that McDougall Bros., through their agent at Chicago, or otherwise, may have made sales and purchases for Demers, as they claim to have done, and that there were such transactions with real purchasers and real sellers; that there was more than a mere communication of writings by them to Demers, but if so, they have failed to make proof of such transactions and have themselves to blame for not doing so." Even in that case Judges Monk and Ramsay strongly dissented from the judgment of the majority on the ground that mere speculation was not gambling, and at all events that the brokers were the agents only of the client and had a legal recourse against him for the balance of their commissions and advances made on his account. The present is a much stronger case. The transactions are proved to have been real, and although the respondent's intention may have been merely to speculate, the loss should fall upon himself and not upon the agents whom he employed and instructed to carry out his wishes. Mr. Justice Pagnuelo felt compelled in a case which came before him, about the same time as the present one, and in which a similar plea was filed, to render a judgment in a contrary sense, and that was the case of Ritchie vs. Barclay, reported 21 R.L. p. 421. But there the positions were reversed, and the client whose stock purchases had turned out better than Mr. Ostigny's was obliged to sue his broker to secure delivery of the shares, after terdering the balance due upon them. Mr. Justice Pagnuelo held the broker responsible, concluding probably that the transaction was a serious one, because the full price of the shares was eventually forthcoming and tendered. Had Mr. Ostigny's purchases turned out as he hoped, he, too, would have had no difficulty in finding someone ready to advance the necessary amount to secure the delivery of shares, upon which a profit had been definitely assured. It scarcely seems even handed justice to give the speculator the benefit of his gains and to relieve him from liability when his venture results adversely. The fact that speculation in stocks has been indulged in improperly by those who cannot afford the risk is not a sufficient reason in my opinion, for attempting to correct the abuse by exceptional interpretations of general laws. It will be admitted, I am sure, that the natural remedy, if one is to be attempted, is by legislation. That method has been tried by the two countries to which we look for example and instruction. France in 1791 passed a law condeming to two years' imprisonment anyone who trafficked in effects of which he was not at the time the absolute owner. Two years later its laws condemned to death anyone who speculated in the securities issued by the state. A constant series of legislation has been enacted from time to time since in a laudable effort to stop speculation in stocks, until in 1885 recognizing the complete failure of its efforts to make men prudent by statute and the danger of checking enterprise and driving away capital the French Legislature went to the other extreme and passed a law legalizing all kinds of agreements in shares, whether upon credit or otherwise, and whether for present or future delivery, and actually prohibited the plea of stock gambling as a defence to actions for enforcing such contracts. The English Parliament made the same experiment, passing a law in 1834 (Geo. 2, chap. 8) intituled "an act to prevent the Infamous Practice of Stock Jobbing." It was never enforced and was formally repealed by 23 and 24 Vic., chap. 28, and has never since been renewed. With these examples for our guidance, the courts should hesitate to undertake a task in which those have signally failed to whom it legitimately belongs. There is a great danger that the laudable effort to reach special cases may intimidate the use of capital and check the spirit of enterprise upon which the progress and prosperity of the country depend.

GOOD-WILL.

Rights of Surviving Partners.

(1) Upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may carry on the same line of business at the same place as was transacted the firm business, without liability to account to the legal representative of the deceased partner for the good-will of said firm, in the absence of their own agreement to the contrary.

(2) Where the legal representative of a deceased member of a partnership firm, as such, without words of limitation, joins in the sale of all the stock and fixtures of such firm to the surviving members thereof, such legal representative cannot maintain an action against such survivors for the good-will of said firm, or for any portion thereof. *Lobeck* v. *Lee*, Supreme Court of Nebraska, June 1893, 55 N.W. Rep. 650.

Government, Liability of — See Negligence 11.

GUARANTY.

COLLECTION OF NOTES.

Defendant sold plaintiffs a stock of goods and certain notes and accounts, giving a guaranty that a certain amount should be realized thereon, which was less than the face of the accounts, the contract providing that plaintiffs should "use due negligence in their collections."

Held, that the contract was a guaranty of each individual account, requiring resort to legal process to collect each before recourse on the guarantor, and that no showing of diligence was sufficient which did not include proof that the accounts had been put in judgment, and execution taken out, and returned unsatisfied. *Clark* v. *Kellogg*, Mich., 55 N.W. Rep. 667.

HOMICIDE—See Crim. Law 4—7—12.

HUSBAND AND WIFE — See Banks, etc., 8 — Domicile.

INSOLVENCY — See Bankruptcy — Banks and Bkg. 1.

INSURANCE.

FIRE.

1. CONDITIONS OF POLICY.

A clause in a policy of fire insurance, that "it is a condition of this insurance that the following improvements shall be completed within sixty days of date hereof, or policy will be null and void," does not render the policy absolutely void at the end of 60 days, upon failure to make required improvements. *Manufactures' & Merchants Mut. Ins. Co.* v. *Armstrong*, Ill., 34 N. E. Rep. 553.

2. CANCELLATION OF POLICY.

In an action on a fire insurance policy an affidavit of defence setting up cancellation of the policy, and notice thereof to the representatives of the insured was adjudged insufficient on the ground that notice of cancellation served on the brokers who procured the insurance was invalid.

Held, error, the policy having provided for notice of cancellation to the insured or his representatives, and the affidavit of defence having alleged the giving of notice to the brokers in question, and that they were the agents and representatives of the plaintiffs in all matters respecting the insurance; 53 Fed. Rep., 340 reversed. Grace v. Insurance Co., 3 Sup. Ct. Rep., 207, 109 U. S., 278, distinguished. *Royal Ins. Co.* v. *Wight*, U. S. Circuit Court of Appeals, 55 Fed. Rep., 455.

3. POLICY—DESCRIPTION OF BUILDING—REFERENCE TO PLAN—MISTAKE —FALSA DEMONSTRATIO NON NOCET.

A policy of insurance on goods described them as contained in a one and a half story building with shingled roof, occupied as a store-house; said building shewn on plan on back of application of insurance as "Feed house," situate attached to assured's dwelling. The plan referred to was drawn by the agent of the insurers, at the time he obtained the application, some miles distant from the residence of the assured, who never saw the plan—the agent telling him that he knew the situation of his buildings. The building marked "Feed house" on the plan was not attached to the assured's dwelling, and did not in any way correspond with the description in the policy, but another building marked "Woodshed" answered the description, and contained the goods intended to be insured.

Held, in an action on the policy—that the maxim *falsa demonstratio non nocet* applied, and that the false part of the description should be rejected, and the policy held to attach. Affirmed by Supreme Court of Canada 20 Can. S. C. R., 208. *Connely* v. *The Guardian Assurance Company*, 30 N. B. Rep., 316.

4. FIRE INSURANCE — FALSE REPRESENTATION AS TO OTHER INSURANCE—VERDICT AGAINST WEIGHT OF EVIDENCE—PERVERSE VERDICT—NEW TRIAL—DURESS—THREATS OF CRIMINAL PROSECUTION.

Plaintiff insured his house with the defendant against loss by fire. The policy warranted that there was no other insurance on the house, and by one of the conditions of the policy, if

there was any other insurance, the defendants should not be liable for the loss. There was a previous insurance on the house in another insurance company at the time the plaintiff insured with the defendants, the amount of which he received on the burning of his house, and the defendants soon afterwards paid him the amount insured by them—he having, in an affidavit in his proof of loss, stated that there was no other insurance on the house than the amount insured by them. Soon after this, the defendants having heard of the previous insurance, claimed a return of the money paid him, and he refunded it; but afterwards brought an action in the county court to recover it, on the ground that he paid it under threat of a criminal prosecution. He swore on the trial that before he refunded the money the defendants' agent threatened to prosecute him for perjury unless he did so. He denied any knowledge of the statement in the policy that there was no previous insurance on the house, and stated that if there was such a statement in the proof of loss which he signed after the fire, it must have been added after he had signed the paper. He was contradicted by the defendants' witnesses in both these statements, and also in his statement that he was not told that he would be arrested on a *capias* if he did not pay — the defendants' agent, to whom the money was paid, denying that there was any threat of a criminal prosecution, but that he told the plaintiff that if the money was not returned, he would be arrested on a civil process by the sheriff's officer, who was present. There was evidence that criminal proceedings were spoken of when the parties met for the purpose of settling, but it tended to show that it was a statement by the defendants' attorney to the person who advanced the money to the plaintiff to pay the defendants, made after the plaintiff had agreed to pay, that they *could* prosecute the plaintiff for perjury, and not a threat to himself that they *would* do so if the money was not refunded.

The judge directed the jury that, in his opinion, the evidence was insufficient to show that the money was repaid by the plaintiff under extortion or undue pressure; but he left it to them to find whether it was so extorted from him, stating his opinion that the plaintiff's evidence on the point was completely negatived by the defendants. The jury found a verdict for the plaintiff, which the judge set aside and granted a new trial, on the ground that it was contrary to evidence and to his charge.

Held, on appeal—1. That the verdict was not perverse, there being evidence on both sides on the question of extortion, and the case having been left to the jury on that question, and no direction to find for the defendants.

2. Per Allen, C. J., and Tuck, J., that the verdict was not such a one as the jury might reasonably find under the evidence, and that the judge was warranted in granting a new trial.

3. Per Wetmore and King, JJ., that as the jury had found for the plaintiff, it must be assumed that his evidence was true as to the threat of criminal proceedings against him if he did not refund the money; and therefore that the evidence was sufficient to make out the plaintiff's case, and the verdict should stand. *Campbell* v. *Glasgow and London Ins. Co.*, 30 N. B. Rep. 332.

5. Contract to Cut and Deliver Ice at a Certain Price—Quantity and Quality to be Determined When Shipped—Vesting of Property—Advances by Vendee—Insurance by Vendor — Ownership of Property — Material Statements in Application — Right to Recover Market Value of Ice Irrespective of Contract Price with Vendee—Insurance by Vendee to Cover Advances—Subrogation of Vendee's Rights.

By agreement between plaintiff and P., in March, 1890, plaintiff agreed to cut and secure in houses from 5,000 to 10,000 tons of ice, and to stow it on board of vessels sent by P. during the months of July, August and—or September, P. to pay plaintiff $1.25 per ton for all good, merchantable ice put on board the vessels and stowed in good condition—the quantity to be ascertained by the shipping documents of the vessels—and to advance to plaintiff

a certain sum per ton of the ice as housed and secured. The ice houses and all implements to be the property of P., who was to convey them to plaintiff on completion of the contract. The agreement was also signed by one S. At the same time, a collateral agreement was made between the plaintiff, P. and S., referring to the proceding agreement, whereby it was agreed that P. and S. should ship the ice at such times as they deemed best, and that after paying all expenses and the price of the ice, the net preceeds should be divided between the plaintiff, P. and S.

Before the ice was cut, P. obtained a lease for a year of the land on which the plaintiff had built the ice house and the sluices for shipping the ice. He also advanced to plaintiff, under the agreement, upwards of $3,000 on account of ice cut and stored, upon which he effected insurance to cover the amount of his advances; which amount he recovered after the destruction of the building and ice.

Shortly after making the agreement to cut the ice, the plaintiff gave a mortgage bill of sale of the building in which the ice was to be stored, to secure the payment of a debt of $650, and after the ice had been cut and stored, he effected insurance with the defendants on the building, the ice and the tools, to the extent of $17,000 in all.

In applications for insurance, the policies of the defendants required the applicant to answer a number of questions in writing, and at the end of the application to sign a declaration that the preceding statement was "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same were known to the applicant, and were material to the risk." One of the questions to the plaintiff was: "Does the property to be insured belong exclusively to the applicant, or is it held in trust, or on commission, or as mortgagee?" The plaintiffs answer, as stated, was: "Yes, to applicant." This answer was not written by the plaintiff, but by a clerk in the defendants' office, to whom the application was made, and who stated that the plaintiff told him that he owned the ice, but was under bonds to deliver it.

The building and ice having been destroyed by fire, the defendants, in an action on the policy, refused payment on the ground that the property insured belonged to P., and not to plaintiff. A verdict was found for the plaintiff for the full value of the ice—the jury finding, in answer to a question by the Court, that it was not material to the risk that the defendants should have known of the plaintiff's contract with P. for the ice.

Held, on motion for a new trial—1. That under the contract the property did not vest in P. until the ice had been delivered to the vessel; and that this was not affected by P.'s agreement to make advances to plaintiff.

2. That the plaintiff's statement, that he was the exclusive owner of the property insured, was not incorrect, he being the owner of the ice, but under a contract to deliver it; that he was the real and beneficial owner of the ice house, P. only holding the title to secure the fulfilment of the contract to deliver the ice; that the same principle applied to the mortgage bill of sale of the ice house.

3. That plaintiff was entitled to recover the full market value of the ice up to the amount insured, without deduction for the advance by P., and the insurers of P.'s advance, upon payment by them of his loss, would be subrogated to his rights against plaintiff.

4. That the declaration that the answers to the application were a just, full and true exposition, etc., so far as the same were known to the applicant, and were material to the risk, was not a declaration that the statements were, in fact, material to the risk; and therefore their materiality was a proper question for the jury. *McLellan v. The North British and Mercantile Ins. Co.*, 30 N. B. Rep., 363. Affirmed by Supreme Court of Canada, 21 Can. S. C. R., 288.

LIFE.

6. Substitution of Policy by another Company.

A policy of insurance issued by defendant in lieu of the policy of another insurance company pursuant to a contract between the two companies, construed in connection with that contract. *Seymour* v. *Chicago Guaranty Fund Life Co.*, Minn., 55 N. W. Rep. 907.

7. APPLICATION.

An applicant for insurance stipulated that his answers and statements should be taken as warranties, and the certificate of insurance contained a clause that it should be null and void if any of the statements in the application were false. The applicant falsely stated in his application that he had never had piles.

Held, that there could be no recovery on the certificate, although his death did not result from the piles, and although he was ignorant that he had them. *Baumgart* v. *Modern Woodmen*, Wis., 55 N.W. Rep. 713.

8. PREMIUM NOTE — ACTION ON — PAROL AGREEMENT FOR REBATE.

A parol agreement made by a mutual life insurance company with a policyholder at the time that the latter executes his premium note, payable four months after date, that the maker should have a rebate of 30 per cent. of the face of the note, is not contradictory of the written obligation, and in action by such company against the maker, an affidavit of defence setting up such parol agreement is sufficient. *Michigan Mut. Life Ins. Co.* v. *Williams*, Supreme Ct. of Pennsylvania, (Dean, J., Mitchell, J., dissenting), May 22, 1893, 26 Atl. Rep. 655 ; 32 W. N. C. 353.

9. WAGERING CONTRACT OF LIFE INSURANCE — INSURABLE INTEREST — HUSBAND AND WIFE.

A man may insure his own life, paying the premiums himself for the benefit of another, who has no insurable interest, and such a transaction is not a wagering policy : Scott v. Dickson, 108 Pa., 6, followed : Overbeck v. Overbeck, Supreme Ct. of Pennsylvania, 55 Pa., 5 ; Hill v. United Life Ins. Assn., 154 Id., 29 ; 31 W. N. C., 483.

A policy was taken out by William H. Overbeck upon his own life "payable at his death to his wife, Mary Overbeck, or to the heirs at law of said William H. Overbeck." The Mary Overbeck mentioned in the policy was not the legal wife of the assured, by reason of his prior marriage with another.

Held, that Mary Overbeck was entitled to the amount of the policy: Overbeck v. Overbeck, *supra*.

Not decided, whether a woman who marries a man, in ignorance of the fact that he had previously contracted a legal marriage with another woman who is still in full life, and from whom he had never been divorced, has an insurable interest in his life : *Ibid*.

10. DISCOVERY — PRODUCTION OF DOCUMENTS — LIFE INSURANCE APPLICATION — UNTRUE STATEMENTS — MATERIALITY—55 V., c. 39, s. 33 (O.).

It is provided by sub-s. 2 of s. 33 of the Insurance Corporations Act, 55 V., c. 39 (O.), that no untrue statement in an application for insurance shall vitiate the contract unless material thereto ; and by sub-s. 3 that the question of materiality is for the jury, or if there is no jury for the court.

Where, therefore, a benevolent and provident institution refused to recognize a certificate of membership issued to the plaintiff, under which he was entitled to certain insurance benefits, on the ground that he had untruly stated in the application that he was not and never had been subject to asthma, in an action to have it declared that the contract was a subsisting contract production by the defendants was ordered of all applications and medical examinations in which the answer as to asthma had been in the affirmative, and upon which certificates had issued. *Ferguson* v. *Provincial Provident Institution*, Ontario Ct. of Com. Pleas, June 24, 1893. (Can. L. J.)

11. TONTINE ASSIGNMENT — PAYMENT TO FIDUCIAL AGENCY.

Where ten persons take out policies of insurance on their respective lives and then execute to an agency a tontine assignment, providing for the distribution of the proceeds of the assignor's

policy among the survivors of the ten, and the appointee or legal representatives of the assignor, the agency so appointed is the only party entitled to collect the insurance money from the company. Such a payment to the agency discharges the insurance company from all liability to pay to the legal representatives or appointees of the insured. *Not decided*, whether the legal representatives of the insured could recover from the agency that collected the money from the company. *Hill* v. *United Life Ins. Ass'n*, Supreme Court of Pennsylvania, 31 W. N. C. 483; 154 Pa. 29.

MARINE.

12. MARINE INSURANCE—COLLISION CLAUSE — "SUNKEN WRECK."

By a policy of re-insurance effected by the plaintiffs with the defendant on the hull, machinery, &c., of a steamship, the risk covered was "loss or damage through collision with (*inter alia*) any...... sunken...... wreck......" —The steamship whilst entering Port Talbot ran aground, and, on the tide falling, she was found to be resting amidships on the wreck of a steamer sunk more than a year before, and the ribs of which projected about a foot above the sand. She subsequently shifted her position about her own length further forward off the wreck and on to a bank of iron ore, which, two or three years before, had formed part of the cargo of another vessel:

Held, that both the damage sustained by contact with the wreck, and by that with the iron ore, was "loss or damage through collision with sunken wreck," within the meaning of the clause in the policy. *The Munroe* [1893], P. 248.

INTOXICATING LIQUORS.

1. LICENSE — MANDAMUS.

A board upon which is imposed the duty of hearing and determining application for licenses to sell liquors will be compelled, by *mandamus*, to convene, and revoke a license granted, where the essential proceedings requisite to the granting of a lawful license have not been complied with. *State* v. *Johnson*, Neb., 55 N. W. Rep. 874.

2. TWO RECENT CYCLIST CASES — ARE CYCLISTS BONA FIDE TRAVELLERS?

At the Sale Petty Sessions the Bench said, under the circumstances there indicated, they were. The landlord of "The Pelican" Inn, Timperley, was summoned for having his house open on Sunday for the sale of liquor during prohibited hours. Amongst the men in the tap-room were several cyclists. Mr. Brown, for the prosecution, alleged that the only precaution taken by the inn-keeper to ascertain whether visitors were travellers was to ask, by his ostler, where they were from, and if Manchester or Salford, then supply them with liquor. It was contended that the door being open for a length of time, this brought the publican under the section for keeping the house open for the sale of intoxicating liquor during prohibited hours. The police found the door wide open and people going in and out, and it was their duty to prosecute unless they were satisfied every person in the house was a *bona fide* traveller. On the other hand, Mr. Hockin argued that the present case was not similar to the Northampton one, where people were supplied with liquor who were well-known to be *bona fide* travellers. Here the defendant had appointed a man of experience with instructions to be careful that only *bona fide* travellers were to be admitted, and the door was merely open for the man to sweep the dust out. The Bench took defendant's views, holding that the men were *bona fide* travellers, and that defendant had taken precautions to ascertain this. Accordingly the case was dismissed. 27 Ir. Law Times 469.

3. PUBLIC-HOUSE—BREACH OF CERTIFICATE — MASTER AND SERVANT — PUBLIC-HOUSES AMENDMENT ACT 1862 (25 AND 26 VICT., CAP. 35)—SCOTLAND.

The form of certificate provided by the Public-Houses Amendment (Scotland) Act 1862 (25 and 26 Vict., c. 35) contains, *inter alia*, a condition that the holder "do not....... sell or supply

exciseable liquor........ to persons who are in a state of intoxication."

Held, that a licence-holder was responsible for the conduct of his servant in supplying liquor to intoxicated persons, although he had frequently given general instructions not to do so. *Linton* v. *Stirling*, 30 Scot. Law Rep., 893.

LORD JUSTICE-CLERK—(*After stating the facts of the case*)—In these circumstances the question is whether the publican has committed a breach of his certificate. It forbids the sale of liquor to a person in a state of intoxication. It is sufficient to prove that liquor was sold to a person in that state; it is unnecessary to prove that the publican knew he was intoxicated, if it can be proved he was so. I am supported in that opinion by the judgment of Mr. Justice Stephen in Cundy v. Le Cocq, 13 Q.B.D. 207, who points out that while knowledge is an element in the offence in the case of certain offences under the Licensing Acts, the clause dealing with this matter says nothing about the publican's knowledge of the state of the person served.

In this case it is plain that the thing done, if done by the respondent himself, would have been a breach of certificate, and I have no hesitation in holding that if done by an employée that also would be a breach.

The question then arises, whether it makes any difference if the employée is acting contrary to instructions? I think not. It is clear that if such was the state of the law no conviction could be obtained against a licensed person for supplying drink to a drunken person, except when the supplying was by the hand of the publican himself. That is not the intention of the statute.

Another argument was that if a servant supplies liquor when he has been told not to do so, he is acting outside the scope of his authority. If sound, that argument would lead to the same result—no publican could be in breach of his certificate by the act of his servant. There may be many cases of a servant acting outside his authority and clandestinely supplying liquor for his own purposes, and in these cases it may be proper to acquit the master of responsibility for such clandestine act of his servant, not done in the service of the public-house, but using his position in the public-house to act for himself; but the master cannot be held free of responsibility for the act of his servant done in the ordinary course of his employment. The servant here did exactly what the master might have done if he had been in the premises at the time. The servant supplied more and more liquor to a man who may have been sober at first. At a certain stage the supply of liquor passed from a legal to an illegal supply. But I cannot hold that when the servant passed the line he ceased to act within the scope of his employment.

The passage quoted from Mullins v. Collins, 9 Q. B. 292, is really in favour of the appellant. It was there held that the servant in doing what he must have known to be contrary to the Act made his master liable.

There would have been no difficulty as to the result in the present case unless the Sheriff-Substitute had thought that he was barred from convicting by some decision of the Supreme Court; and he distinctly says he would have convicted but for the decision in Greenhill. That case was very peculiar in its circumstances. A publican left his house in charge of a servant on a Sunday, and gave her instructions to admit only *bona fide* travellers, and supplied a certain quantity of liquor to meet their requirements. Two persons who did not profess to be *bona fide* travellers, and indeed could not have done so, for they were lads keeping company with the servants, were admitted, and one of the girls gave them each a glass of whisky "as an obligement." Then came the difficulty of accounting for the liquor used, and the young men were willing to meet that by supplying money for that purpose. The magistrate who stated the facts had held that the servant deliberately violated the orders given to her; and the Court were therefore of opinion that in what she did she was not acting as a servant at all. That was a narrow case. If it had come before me I should not have had the

same case as the Judges who tried it had in holding it not to be a contravention. But I do not think that case applies here. Here the servant does that which the Act prohibits, and the master is responsible for the acts of the servant, and I see nothing here to justify the view that the master can escape on the ground that the servant went outwith his employment. He was supplying as for the master in the course of the master's business. And although he was acting in disobedience to his master's orders he was not doing so in any other sense than any servant who acts as his master would not wish or has forbidden. If a servant is forbidden by his master, and disobeys a bye-law which prohibits a higher speed in driving at a certain place than eight miles an hour, he is still acting within the scope of his employment if he drives too fast and causes an injury to a passenger. In this case it was the duty of the servant before supplying liquor to observe the persons who came and see whether they were in a state of intoxication. Either he did not think the men were the worse of liquor, or in breach of his master's certificate he supplied liquor to persons known to be intoxicated as the master himself might have done.

I think the Sheriff ought to have convicted, though I have sympathy with him in his difficulty after the case of Greenhill, 5 Coup. 602. I am for setting aside the acquittal. I understand the original complainer (the appellant) does not desire we should take steps which will lead to an actual conviction. He only wishes to vindicate the law and to have it ascertained that in the circumstances here complained of, although the publican was not personally to blame, he was responsible for the act of his servant. He very properly thinks it will be sufficient if he gets a delivrance that the facts stated constitute in law a breach for which the respondent should have been convicted.

Lord McLaren — In this case a young man, George Waddell, as servant of the licencee, supplied liquor to three men while they were in a state of intoxication in the licensed premises. What puts the fact of their intoxication beyond dispute is that one of the men had to be removed by the police in an ambulance waggon to the hospital in a state which is popularly known as "dead drunk," while the other two were so uproarious and quarrelsome that they were removed to the police station.

Now, the question before us is whether in this state of the facts the master, who is respondent here, has committed a breach of his certificate. The Sheriff-Substitute says that the case of Greenhill v. Stirling, 5 Couper, 602, alone prevented him from convicting, and it has been argued to us that he was right in refusing to convict.

If legislation on this subject had taken the line of making it an offence to supply liquor to a person in a state of intoxication, on account, it might be, of danger to the public or to himself, then the argument stated to us would have been relevant. We should then have had to consider whether the person charged was guilty of supplying drink to an intoxicated person, that is to say, whether he was guilty of the intention to do so, and did it knowingly.

That, however, is not the principle of legislation on this subject. The licencee is put under the conditions of a certificate, and for a breach of such certificate he is made liable to a civil action for penalties. No doubt this is enforced by the alternative of imprisonment, but that is the only thing about the process involving the suggestion of criminal proceedings.

The offence under the statute is committed by the sale of liquor in contravention of the conditions of the certificate to persons in a state of intoxication. If we examine the certificate we find it contains several conditions, some directed against acts illegal in themselves, and which might form the subject of prosecution apart from the statute, such as the use of false measures; some against acts immoral or contrary to public policy; and others again which are merely arbitrary. Examples of these are the regulations as to the days and hours during which the licence is to be effective. All those conditions, various as to their nature, are for the purposes of the Act treated

alike. The contravention of any one of them is a breach of the duty prescribed by the certificate, and though it may merely mean that the licencee had been guilty of negligence, yet the fault may subject him to the loss of his licence.

Under such a prosecution I cannot doubt that breach of the certificate by an employee is, *prima facie*, a breach by the licencee himself. It founds a civil action, and the maximum applies, *respondeat superior*. The master must be held liable for the act of his servant done within the scope of his employment, and I have no doubt that here the servant was acting within the scope of his employment.

While concurring with your Lordships in reversing the judgment, I do not mean to be taken as indicating any doubt as to the principles on which the case of Greenhill v. Stirling was decided. I am not called upon to consider the facts of that case. I assume that the facts there were such as authorised the result arrived at on the principles laid down in the opinions of the Judges. I am only concerned with the principles, and the principle there enunciated by Lord Young and Lord Craighill is, that if what the servant did was not within the scope of his employment the master is not necessarily responsible. That however was a very exceptional case, and the Judges seem in their opinions to treat it as such. This, on the contrary, is a very ordinary case, and might arise at any time merely by the mistake of not noticing that a person applying for drink was in a state of intoxication. But for the concession made by the prosecutor I would have convicted the respondent of the offence charged. But in the circumstances I think we should merely recal the judgment of the Sheriff-Substitute and state how the law really stands.

Lord Wellwood—I am of the same opinion and for the same reasons. I must say I am not surprised that the Sheriff-Substitute found it very difficult to distinguish Greenhill v. Stirling from the present case. Yet when we read the opinions of the Judge there, I think we can distinguish the cases and find the principle there such as to enable us to convict the respondent here.

The Court recalled the judgment of the Sheriff-Substitute and found that the respondent was responsible for the conduct of his servant Waddell, and ought to have been convicted. The prosecutor did not press for a conviction; but the respondent was found liable in seven guineas of expenses.

Larceny by Bailee — See Crim. Law 5.

Law Agent—See Suspension.

Lawyer—See Suspension.

LIBEL AND SLANDER.

1. Action against a Town.

An action for libel will not lie against a town for the publication of defamatory matter contained in an official report of an investigating company duly selected. *Howland* v. *Inhabitants of Town of Maynard*, Mass., 34 N. E. Rep. 515.

2. A petition for libel alleging the publication of a statement by a railroad to consignors that certain goods shipped by them remained undelivered because consignees were unable to pay the freight, that such language was calculated to injure, and that it was false and malicious, states a cause of action. *Campbell* v. *Bostick*, Tex., 22 S. W. Rep. 828.

3. Mercantile Agencies.

A petition for libel against a mercantile agency, alleging in a general way the publication of plaintiff as a dishonest man, who refused to pay debts and characterizing such publications, which were made exhibits, as false and malicious, and uttered for the purpose of injuring plaintiff, is good on general demurrer. *Brown* v. *Durham*, Tex., 22 S.W. Rep. 868.

4. Intent—Mistake in Name.

In an action against a newspaper for libel it appeared that plaintiff was a real-estate and insurance broker of South Boston, and that in an article giving an account of a person who was fined in a police court, the paper des-

cribed the prisoner as "H. P. Hanson, a real-estate and insurance broker of South Boston," while the name of the prisoner was A. P. H. Hanson, also a real-estate and insurance broker of South Boston, and that the intention was to describe the proper person, and that plaintiff's name was used by mistake.

Held, that plaintiff could not recover, for the reason that, while his name was used in the article, there was no intention to refer to him, and that in order to prove the libel it was not sufficient to show that plaintiff's name was used in the article, but it must be further shown that he was the person whom the article was intended to describe.

Holmes, Morton and Barker, JJ,, dissenting. *Hanson* v. *Globe Newspaper Co.*, Supreme Judicial Court of Mass., aune 21, 1893. 37 Cent. L. J. 197.

KNOWLTON, J.: The defendant published in its newspaper an article describing the conduct of a prisoner brought before the Municipal Court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real estate and insurance broker of South Boston. He was in fact a real estate and insurance broker of South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson, instead of H. P. Hanson. The plaintiff, H. P. Hanson, is also a real estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake. The justice of the Superior Court, before whom the case was tried without a jury, "found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant of and concerning the plaintiff;" and the only question in this case is whether this finding was erroneous, as a matter of law.

In a suit for libel or slander it is always necessary for the plaintiff to allege and prove that the words were spoken or written of and concerning the plaintiff. In Baldwin v. Hildreth, 14 Gray, 221, the declaration was adjudged bad on demurrer because this allegation was wanting. The rule is reaffirmed, and authorities are cited, in McCallum v. Lambie, 145 Mass. 234, 13 N. E. Rep. 899. The form of declaration prescribed by the practice act, in slander, uses the phrase, "words spoken of the plaintiff," and in libel, "false and malicious libel concerning the plaintiff." Pub. St. ch. 167. * 94. It has often been held that it is a question of fact for the jury whether the words were or were not spoken or written "of and concerning the plaintiff." Van Vechten v. Hopkins, 5 Johns, 211, 221; Gibson v. Williams, 4 Wend. 320; Smart v. Blanchard, 42 N. H. 137; De Armond v. Armstrong, 37 Ind. 35; Goodrich v. Davis. 11 Metc. (Mass.) 473, 480, 481, 484; Miller v. Butler, 6 Cush. 71. The defendant's meaning in regard both to the person to whom the words should be applied, and the imputations against him, is always to be ascertained. In Smart v. Blanchard, *ubi supra*, it is said that "the meaning in this respect [as to the person to whom the libel applies] is undoubtedly a question of fact for the jury." It is also said that when the meaning is ambiguous it is incumbent on the plaintiff "to show that the defendant intended to apply his remarks to the plaintiff." In De Fanu v. Malcomson, 1 H. L. Cas. 637, which was an action for libel, brought by copartners, the lord chancellor assumes that the plaintiffs must prove "that the party writing the libel did intend to allude to them." In Pub. St. ch. 167, § 94, the rule is laid down as applicable, "in actions for written and printed as well as oral slander," that if the meaning is not clear there must be *innuendoes* to make the words intelligible, "in the same sense in which they were spoken." Chenery v. Goodrich, 98 Mass. 224, 229, assumes that it must appear that plaintiff was referred to in the publication; and Young v. Cook. 144 Mass. 38, 10 N. E. Rep. 719, is of similar import. Odgers on Libel and Slander (at page 127), discusses the topic, "Certainty as to the Person Defamed." In Com. v. Kneeland, 20 Pick. 206, 216, Chief Justice Shaw says that in actions of libel and slander it is the general rule that "the language shall be construed in the sense in which the writer or speaker intended it." In Smith v. Ashley, 11 Metc, (Mass.) 367, the necessity of proving the defendant's actual intention in regard to the person referred to was affirmed much more strongly than there is any occasion to affirm it, and perhaps more strongly than we should be prepared to affirm it, in the present case. It was held that the publisher of a newspaper, containing an article which he believed to be a fictitious narrative or mere fancy sketch, was not liable to the plaintiff, although the article was libellous, and was intended by the writer to be applied to the plaintiff. The Court said that in such a case the writer alone was responsible. In every action of this kind the fundamental question is, what is the meaning of the author of the alleged libel or slander, conveyed by the words used, interpreted in the light of all the circumstances? The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who uses it. In determining the effect of a slander the questions involved are: What is the thought intended to be expressed? and how much credit should be given to him who expresses it? The essence of the wrong is the expression of what purports to be the knowledge or opinion of him who utters the defamatory words, or of some one else, whose language he repeats. His meaning, to be ascertained in a proper way, is what gives character to his act, and makes it innocent or wrongful. The damages depend chiefly upon the weight which is to be given to his expression of his meaning and all his questions relate back to the ascertainment of his meaning.

In the present case we are concerned only

with the meaning of the defendant in regard to the person to whom the language of the published article was to be applied, and the question to be decided is how may his meaning legitimately be ascertained? Obviously, in the first place, from the language used: and, in construing and applying the language, the circumstances under which it was written, and the facts to which it was written, and the facts to which it relates, are to be considered, so far as they can readily be ascertained by those who read the words, and who attempt to find out the meaning of the author in regard to the person of whom they were witten. It has often been said that the meaning of the language is not necessarily that which it may seem to have to those who read it as strangers, without knowledge of facts and circumstances which give it color and aid in its interpretation, but that which it has when read in the light of events which have relation to the utterance or publication of it. For the purposes of this case it may be assumed, in favor of the plaintiff, that if the language used in a particular case, interpreted in the light of such events and circumstances attending the publication of it as could readily be ascertained by the public is free from ambiguity in regard to the person referred to, and points clearly to a well-known person, it would be held to have been published concerning that person, although the defendant should show that, through some mistake of fact, not easily discoverable by the public, he had designated in his publication a person other than the one whom he intended to designate. It may well be held that where the language, read in connection with all the facts and circumstances which can be used in its interpretation, is free from ambiguity, the defendant will not be permitted to show that through ignorance or mistake he said something, either by way of designating the person, or making assertions about him, different from that which he intended to say; but his true meaning should be ascertained, if it can be, with the aid of such facts and circumstances of the publication as may be easily known by those of the public who wish to discover it. Whether the defendant should ever be permitted to state his undisclosed intention in regard to the person of whom the words are used may be doubtful. If language purporting to be used of only one person would refer equally to either of two different persons of the same name, and if there were nothing to indicate that one was meant, rather than the other, there is good reason for holding that the defendant's testimony in regard to the secret intention might be received, but perhaps such a case is hardly supposable. Odgers, in his book on Libel and Slander (at page 129), says: "So, if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given of both the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also any statement or declaration made by the defendant as to the person referred to." In Reg. v. Bernard, 43 J. P. 127, when it was uncertain whether the libel referred to the complainant, or not, and when the language was applicable to him, Lord Chief Justice Cockburn held the affidavit of the writer, that he did not mean him, but some one else, to be a sufficient reason for refusing process. In De Armond v. Armstrong, 37 Ind, 35, evidence was received of what the witnesses understood in regard to the person referred to. In Smart v. Blanchard, 42 N. H. 137, it is stated that extrinsic evidence is to be received "to show that the defendant intended to apply his remarks to the plaintiff," when his meaning is doubtful. Goodrick v. Davis, 11 Metc. (Mass.) 473, 480, 481, 484, and Miller v. Butler, 6 Cush. 71, are of similar purport. See, also, Barwell v. Atkins, 1 Man. & G. 807; Knapp v. Fuller, 55 Vt. 311; Com. v. Morgan, 107 Mass. 199, 201.

If the defendant's article had contained anything libelous against A. P. H. Hanson, there can be no doubt that he could have maintained an action against the defendant for this publication. The name used is not conclusive in determining the meaning of the libel in respect to the person referred to. It is but one fact to be considered with other facts upon that subject. Fictitious names are often used in libels, and names similar to that of the person intended, but differing somewhat from it. A. P. H. Hanson could have shown that the description of him by name, residence, and occupation was perfect, except the use of the initials "H. P." instead of "A. P. H."; that the article referred to an occasion on which he was present, and gave a description of conduct of a prisoner, and of proceedings in court, which was correct in its application to him, and no one else. The internal evidence, when applied to facts well known to the public, would have been ample to show that the language referred to him, and not to the person whose name was used. So, in the present suit, the court had an occasion to rely on the testimony of the writer as to the person to whom the language was intended to apply. The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name "H. P. Hanson." was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Hanson, the finding that they were not published of the plaintiff followed, of necessity. The article was of such a kind that it referred, and could refer to one person only. When that person was ascertained it might appear that the publication, as against him, was or was not libelous; and his rights, if he brought a suit, would depend upon the finding in respect to that. No one else would have a cause of action, even if, by reason of identity of name, with that used in the publication, he might suffer some harm. For illustration, suppose a libel is written concerning a person described as "John Smith, of Springfield." Suppose there are five persons in Springfield of that name. The language refers to but one. When we ascertain, by legitimate evidence, to which one the words are intended to apply, he can maintain an action. The other persons of the same

name cannot recover damages for a libel merely because of their misfortune in having a name like that of a person libeled. Or, if the defendant can justify by proving that the words were true, and published without malice, he is not guilty of a libel, even if, written of other persons of the same name, of whose existence, very likely, he was ignorant, the words would be libelous ; otherwise, one who has published that which, by its terms; can refer to but one person, and be a libel on him only, might be responsible for half a dozen libels on as many different persons, and one who has justifiably published the truth of a person might be liable to several persons of the same name of whom the language would be untrue. The law of libel has never been extended, and should not be extended, to include such case.

Whether there should be a liability founded on negligence in any case where the truth is published of one to whom the words, interpreted in the light of accompanying circumstances, easily ascertainable by those who read them, plainly apply, and when, by reason of identity of names, or similarity of names and description, a part of the public might think them applicable to another person, of whom they would be libelous, is a question which does not arise on the pleadings in this case. So far as we are aware, no action for such a cause has ever been maintained. It is ordinarily to be presumed, although it may not always be the fact, that those who are enough interested in a person to be affected by what is said about him will ascertain, if they easily can, whether libelous words, which purport to refer to one of his name, were intended to be applied to him or to some one else.

The question in this case—whether the words were published of and concerning the plaintiff—was one of fact, on all the evidence. Unless it appears that the matters stated in the report would not warrant a finding for the defendant, there must be judgment for him, even if the finding of fact might have been the other way. We are of opinion that the finding was well warranted, and there must be judgment on the finding.

Licensee — See Neg. 12.

Life Insurance—See Insur., Life.

Liquor License — See Intox. Liquors 1.

Loans — See Banks and Bkg. 5 — Bankruptcy.

MALICIOUS PROSECUTION.

Advice of Magistrate.

It is immaterial that defendant, in instituting the prosecution, acted under the advice of the magistrate issuing the warrant, although the magistrate was a practicing attorney, the advice being given not as an attorney, but as a magistrate. *Mark* v. *Hastings*, Ala., 13 South. Rep. 297.

Mandamus—See Intox. Liquors 1.

MARGARINE ACT.

Margarine Act, 1887, s. 6—Marking on Wrapper Required by the Act.

Section 6 of the Margarine Act 1887, makes it an offence, in selling margarine by retail, not to deliver the same "in or with a wrapper having printed thereon, in capital letters not less than a quarter of an inch square, 'Margarine.'"

Held, that a wrapper having the word "Margarine" printed on it in letters of the size and type required by the statute in such a way as to stand out as a word by itself, was in compliance with the above section, although there was other matter of the nature of a trade advertisement printed on other parts of the wrapper. *Fyfe* v. *McLaughlin*, 30 Scot. Law Rep. 899.

Marine Insurance — See Insur. Marine.

MASTER AND SERVANT — See also Neg. 7—Cruelty to Animals—Intox. Liquors 3.

1. Liability for Assault by Servant.

Held, that the manager of a theater is liable for an assault on an inoffensive patron made by one employed as doorkeeper and special police. *Dickson* v. *Waldron*, Supreme Court of Indiana, June, 1893, 34 N. E. Rep. 506.

2. Action for Wages.

Where plaintiff was employed by defendant for an indefinite time through the latter's manager, and continued his service after the manager himself assumed control of the work, as principal, defendant is liable for his wages if plaintiff had no notice of the change in the employment. *Tousignant* v. *Shafer Iron Co.*, Mich., 55 N. W. Rep. 681.

3. Injury to Employee.

In an action against a lumber company for personal injuries, it appeared that plaintiff had been employed as a common laborer; that he was engaged, under defendant's direction, in feeding a circular saw; that, from unskilled feeding, a piece of board was thrown against plaintiff, causing the injuries complained of. Plaintiff testified that he had but little knowledge of the machine, and no experience in the work required. He was not warned as to the dangers of the work, nor instructed how to feed the machine, so as to avoid them:

Held, that defendant was liable for the injuries complained of. *Arizona Lumber & Timber Co.* v. *Mooney*, Ariz., 33 Pac. Rep. 591.

MISTAKE—See Insur. 3—Libel 3.

MUNICIPAL CORPORATION.

1. CONTRACTS BY CITY.

A city council cannot delegate its power to sell city property to a committee. *Beal* v. *City of Roanoke*, Va. 17, S. E. Rep. 738.

2. NEGLIGENCE OF FIREMAN.

A city is not liable for the negligence of a fireman engaged in the line of duty. *Lawson* v. *City of Seattle*, Wash., 33 Pac. Rep. 347.

3. PAYMENT ON VOID CONTRACT.

Where the officers of a municipal corporation pay out its money upon a contract which the corporation has no power to make, the payment is not an act of the corporation, and it may recover the money paid. *City of Chaska* v. *Hedman*, Minn., 55 N. W. Rep. 737.

4. BILL-BOARDS—REGULATION.

Cities of the first class may regulate the erection and maintenance of structures used for advertising purposes and placed upon lots near the street line, so as to fully protect persons passing along the streets; but such regulations must be reasonable, and an ordinance providing that "no person shall erect any bill-board or other structure for advertising purposes unless the same is placed at such distance from the line of any street or sidewalk as shall exceed at least five feet the height of such bill-board or structure," and prescribing a punishment for a violation of this provision, is unreasonable and invalid. *Crawford* v. *City of Topeka*, Kan., 33 Pac. Rep. 476.

5. LICENSE.

A permit given by a city to a lot owner to construct, maintain, and use a vault under the alley in rear of his lot, and a bond given by him, conditioned upon his saving the city harmless from loss on account of such vault, and keeping the alley above it in good repair, constitute a contract, irrevocable by the city, so long as its revocation is not demanded by the public interest or convenience. *Gregsten* v. *City of Chicaga*, Ill., 34 N. E. Rep. 426.

6. WATER RATES—ORDINANCE.

Under Act April 15, 1873, authorizing municipal authorities to construct and maintain water works, and to collect from the inhabitants such rates for the use of water supplied as to such authorities shall seem expedient, a city may levy water rates that will yield a revenue in excess of the cost of operating the water-works, even though they were originally constructed by the city for the purpose of supplying water for itself and its inhabitants, and not for purposes of profit. *Wagner* v. *City of Rock Island*, Ill., 34 N. E. Rep. 545.

7. CITY COUNCIL — MINUTES OF MEETING — CORRECTION.

A vacancy having occurred in the city council, petitioner was voted for at a meeting of the remaining members, and declared elected. The minutes showed the election to have been unanimous, whereas in truth only three members — less than the required majority—voted for such election.

It was *held* that the council had power to correct such minutes at a subsequent meeting, and that, when corrected, they could not be collaterally impeached, and were a complete answer to proceedings in *mandamus* brought to compel petitioner's restoration to the office of councilman. *Mayor* v. *Davis*, 13 South. Rep. 331, Supreme Court of Alabama.

(The Court): The main question, and about the only material one, presented is whether the city council had the power at a subsequent meeting to correct the minutes of the meeting held on the 11th of May, 1892, at which Mr. Davis was elected, so as to show that his election was not "unanimous," and that in truth only three members of the council voted for his election, and, if so, what effect did the minutes, when thus corrected, have upon his claim to the office of councilman? We are of opinion that the common council was fully authorized to correct its minutes so as to make them speak the truth and this conclusion finds support in all the adjudicated cases we have been able to examine. Whether the correction shall be allowed to affect rights which have become vested in the interim presents altogether a different question. The correction can and should be made. The extent of the application of the corrected minutes must depend upon the circumstances to be affected. In the case before us no question is presented of rights acquired under or in consequence of the minutes of the meeting of May 19, 1892, as first entered upon the journal. The power of the council to correct its minutes at a subsequent meeting is discussed at length in the following authorities: 1 Dill. Mun. Corp. (3d. Ed.) § § 293-297, and notes; 15 Amer. & Eng. Enc. Law, p. 1077, § 7, and notes. The petitioner does not deny that the minutes as corrected speak the truth. On the contrary, his demurrer to the answer and return of the respondents admits that only three votes were for his election. His contention is that the council, once having declared that he was "unanimously" elected, had no power over its minutes at a subsequent council meeting, although held by the same members of the council. In this petitioner had mistaken the law. If, in point of fact, the minutes as entered of the meeting of May 19, 1892, at which time he was declared to be elected, were correct, and spoke the truth, petitioner has his remedy. By direct proceeding for that purpose he may have the minutes of the council of the 23d of September, 1892, set aside and annulled, and the minutes of May 19, 1892, restored. This would leave him a lawfully elected councilman, and, if unlawfully removed by the mayor and council, he would be entitled to to the writ of *mandamus*. The authorities are numerous to this proposition. *Ex parte* Lusk, 82 Ala. 519, 2 South. Rep. 140; Carter v. City Council of Durango (Colo. Sup.), 27 Pac. Rep. 1057; Board v. Johnson, 124 Ind. 145, 24 N. E. Rep. 148. So long as the minutes of the meeting of September 23, 1892, remain as the minutes of the council, they cannot be impeached or varied in a collateral proceeding by parol testimony, and are a complete answer to the petition for a writ of *mandamus*. The pleadings show an effort by one who was for a time a *de facto* officer by *mandamus* to compel his restoration to an office held by a *de jure* officer, and the decision of the court upon the pleadings was to the effect that this could be done. In this the court was in error. We cannot say whether petitioner desires or can amend his petition, or whether he desires to take issue upon the facts set up in the answer to his petition, and which we have held, if sustained by the proof, was sufficient in law. We will reverse and remand the case, so that it may be determined in accordance with the principles herein declared.

NEGLIGENCE—See also Mast. and Servt. 3—Mun. Corp. 2—Ships, etc., 1—Street Railways.

1. Contributory Negligence.

The fact that plaintiff passed under a scaffold erected over the sidewalk, on which defendant was engaged with tools and materials repairing a building, is not negligence contributing to his injury from a chisel dropping on him. *Dixon* v. *Pluns*, Cal., 33 Pac. Rep. 268.

2. Death of Child.

In an action against a street-railroad company for alleged negligence causing the death of plaintiff's infant child, who had gotten on defendant's car without permission, plaintiff testified that he had warned the child to keep off the cars, and had punished him on fiding that he did get on the cars, but there was no evidence that plaintiff explained the danger to the child:

Held, that it was error to charge that, if "the boy knew what his father meant when he warned him not to go on the cars, then he was not entitled to the same degree of care as an innocent child who goes upon a car without warning." *McCahill* v. *Detroit City Rly.*, Mich. 55 N.W. Rep. 668.

3. Discharge of Fireworks.

One who seeks to recover for personal injuries unintentionally inflicted in the lawful discharge of fireworks at a celebration has the burden throughout of proving negligence. *Dowell* v. *Guthrie*, Mo., 22 S.W. Rep. 893.

4. Contibutory Negligence.

That a person, in crossing a street, fails to use the best course to avoid the danger of being run over, does not show contributory negligence. *Crowley* v. *Strouse*, Cal., 33 Pac. Rep. 456.

5. Dangerous Premises.

In an action against a gas company for the death, by inhaling gas, of one while in defendant's cellar for the purpose of reading the water meter, pursuant to his duties, the facts of the presence of gas in the cellar, that the cellar was not ventilated, and that defendant knew some one would be required to enter the cellar to read the water meter were sufficient to require the question of defendant's negligence to be submitted to the jury. *Finnegan* v. *Fall River Gas Works Co.*, Mass., 34 N. E. Rep. 523.

6. TELEPHONE COMPANY—INJURIES FROM CHARGED WIRE.

Where a telephone company has permission from an electric light company to string its wires along the latter's poles when the telephone company wishes to connect a residence where it has no poles, and the telephone company disconnects a residence, and, instead of removing the wire, coils it up and hangs it on an electric light pole, the telephone company is bound to look after the wire; and if it fail to do so, and the electric light company remove the pole, and hang the wire on a telephone pole, where it becomes charged with electricity from an electric light wire, and injures a pedestrian on the sidewalk, the negligence of the telephone company is the proximate cause of the accident. *Ahern* v. *Oregon Telephone & Telegraph Co.*, Oreg., 33 Pac. Rep. 403.

7. SAINT-JOHN PUBLIC HOSPITAL—ACT 23 V., C. 61 — CHARITABLE CORPORATION — LIABILITY FOR INJURY ARISING FROM NEGLIGENCE OF SERVANTS—APPLICATION OF TRUST FUNDS TO SATISFY JUDGMENT FOR DAMAGES.

A patient who has been injured by the negligence of the servants employed by the Commissioners of the General Public Hospital in Saint-John, incorporated by Act of Assembly 23 V., c. 61, may maintain an action against the corporation therefor ; and the funds raised by rates as prescribed by the Act. or moneys given to the Hospital for the purposes of the charity, can be applied in satisfaction of a judgment for damages.

The relation of master and servant exists between the Commissioners of the Hospital and the physicians and nurses, etc., emplosed by them in the Hospital.

Per Wetmore, Palmer and Fraser, JJ. (Tuck, J., dissenting). *Donaldson* v. *Commissioners, etc.*, 30 N. B. Rep. 279.

8. INJURY TO PERSON ON RAILROAD TRACK—CONTRIBUTORY NEGLIGENCE.

Held, that where a person who is unacquainted with the locality, without license, walks into an archway under a mill, which is merely large enough to admits an ordinary box-car and through which runs a railroad switch so curved as to prevent a view of an approaching car, he is a trespasser, and guilty of such contributory negligence as precludes a recovery for his death caused by the negligence of the railroad company in running a car into the archway, although at an unlawful rate of speed. It was further held that though there are usually large numbers of people in the immediate vicinity of such switch and archway, and a four-foot walk along one side of the latter, which is used by persons passing through it, the running of a car through such archway at a high rate of speed was nothing more than negligence, in the absence of actual knowledge by the company's operatives of the presence of deceased in such archway, and was not such wilfulness as rendered the company liable, notwithstanding deceased's negligence. *Parker* v. *Pennsylvania Ry. Co.*, Sup. Ct. of Indiana, June 1893 (34 N. E. Rep. 504.)

9. NEGLIGENCE — INJURIES TO PERSON INFLICTED WHILE WALKING, AFTER BEING WRONGFULLY EJECTED FROM TRAIN.

In an action against a railroad company for the death of a passenger, who was killed while walking on the railroad track after having been wrongfully ejected from defendant's train, the Court properly instructed the jury that decedent was not guilty of contributory negligence unless he failed to get off the track at the earliest

practicable opportunity that a reasonably prudent man would have discovered and seized.

Green, J., dissented on the ground that decedent's presence on the track could only be excused by imperious necessity, which was a question for the Court. Ham v. Canal Co., 21 Atl. Rep. 1012, 142 Pa. St., 617, explained. *Ham* v. *Delaware and Hudson Canal Co.*, Supreme Court of Pennsylvania, 26 Atl. Rep., 757, 32 W. N. C. 335.

10. INJURIES TO PERSON ON RAILROAD TRACK.

An engineer is not wilfully negligent in falling to stop, while there is yet time, to examine an object which he supposes to be a dog, or something inanimate, lying on the track, but which, on closer approach, is discerned as such. *Louisville, N. O. & T. Ry. Co.* v. *Williams*, Sup. Ct. of Mississippi, 12 S. Rep. 957.

11. GOVERNMENT RAILWAY — CONTRACTOR — BLASTING — RESPONSIBILITY.

A government contractor was blasting in a cutting for a government railway with the result that an adjacent house was damaged by the vibration.

Held, that the government was responsible for that part of the damage which was the natural result of the blasting, but that the contractor was personally liable for damage caused by the defective method of blasting employed. *Min. des Trav. Pub.* v. *Conduché*, Council of State, France, 29 Nov. 1889. Dalloz, 1891, 3, 25.

12. NEGLIGENCE — PERSONAL INJURIES — PERMISSION TO EXAMINE MACHINERY — LIABILITY OF PROPRIETOR—LICENSEE.

(1) Where the president of a corporation grants a request of a teacher for permission for a class of 30 or more pupils to visit the company's power house for the purpose of viewing the machinery, such pupils are mere licensees, to whom the company owes no duty to provide against the danger of accident.

(2) Where one of such pupils, while inspecting such machinery in company with the class and teacher, stepped into an open and unprotected vat of hot water located where he was unable to see it, the company is not liable for damages for failure either to warn him of the existence and danger of the vat, or to protect it by cover or railing, or to sufficiently light the building to enable him to see it. *Benson* v. *Baltimore Traction Co.*, Court of Appeals of Maryland, June 21, 1893, 37 Cent. L. J. 216.

(THE COURT): The demurrer concedes the facts presented by the appellant's pleading, and the question for our consideration is, do the facts stated entitle the appellant to maintain his action for the recovery of damages for the alleged wrongs which he claims to have sustained? The authorities appear to have classified this subject under these heads, to-wit: (1) Bare licensees or volunteers; (2) those who are expressly invited or induced by the active conduct of the defendant to go upon the premises; (3) customers and others, who go there on business with the occupier. Each case must largely depend upon the circumstances attending the occurrence, and it is not infrequently found to be difficult to determine whether the injured party is a mere licensee, or whether he is on the premises by the implied invitation or enticement of the owner or occupier. Those who enter on business usually experience but small difficulty in defining their legal *status*. There ought to be no controversy in this case as to the object which the appellant had in seeking admission to the power house of the appellee. It certainly was not for the benefit of the appellee that the visit was made, but it clearly was a mere license from the appellee assenting to the visit of the appellant and his schoolmates to an examination of the works and machinery in the power house, for the purpose of gratifying their curiosity or of improving their knowledge of the workmanship of the machinery, and of the manner in which such power was applied in moving the cars upon the streets of the city. There could not have been, under these circumstances, any possible opportunity for misconception as to the intention of the respective parties. Where could benefit accrue to the appellee by the visit of these young men on the occasion mentioned? When the president of the appellee indorsed on the application of Mr. Savilie, "Admit the class as requested," could any reasonable inference be drawn from such indorsement that the appellee was seeking to entice, allure, or induce the plaintiff and his associates to visit the power houses in question? The building in question was not constructed or used for exhibition or display, and the permission granted could only have been intended to give to the graduating class of the manual training school an opportunity to see and observe the application of vast power, obtained through the instrumentality of machinery of unusual character, and thus supply the class with an interesting object lesson

in practical mechanics. The vat or sink in question was one of the appliances in use by the appellee at the time of the happening of the accident, for the purpose of aiding in the accomplishment of the work to be done, and was not placed there as a mantrap. That it was located in a part of the building which was insufficiently lighted to enable the appellant to see in time to prevent falling therein was not negligence fairly imputable to the appellee, but rather was it negligence on the part of the appellant to grope about in a house dedicated to the use of dangerous machinery and appliances located in an insufficiently lighted place. Take, as illustrating this view, the case of Pierce v. Whitcombe, 48 Vt. 127, where the plaintiff went at night to defendant's house to buy oats. The defendant had no oats which he wished to sell, but by reason of the plaintiff's opportunity he agreed to sell him some, and they went together to the barn, where the oats were kept. While the defendant was seeking a measure, the plaintiff walked about the barn in the dark, and fell through a hole in the floor, and was severely injured. The court held that traveling about the granary in the dark not only contributed to the injury, but was the cause of it, and that plaintiff was not liable. It has not been contended that the vat or sink was such that the appellee, in the conduct of the business, might not lawfully construct or use, nor is it claimed that the injury happened through the willful or wantom misconduct or gross negligence of the appellee. As already stated, it is oftentimes difficult to determine whether the circumstances make a case of invitation or only of mere license. "The principle," says Mr. Campbell in his treatise on Negligence, "appears to be that invitation is inferred where there is a common interest or mutual advantage, whilst a license is inferred where the object is the mere pleasure or benefit of the person using it." Section 44. Equally pointed is the language of Mr. Chief Justice Bigelow in delivering the opinion of the court in Sweeney v. Railroad Co., 10 Allan, 372, where he says: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant had left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier, or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So a licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises, in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon." Further on he adds: "A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owners or person in possession to provide against the danger of accident." In Hounsell v. Smyth, 7 C. B. (N. S.) 738, the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger, and not on the owner, and the court says: "Suppose the owner of land near the sea gives another leave to walk on the edge of the cliffs, surely it would be absurd to contend that such permission cast upon the former the burden of fencing." Substantially the same distinction is made in Barnes v. Ward, 9 C. B. 394; Hardcastle v. Railway, etc. Co., 4 Hurl. & N. 67; Bolch v. Smith, 7 Hurl. & N. 741; and Scott v. Docks Co., 11 Law T. (N. S.) 383. Mr. Justice Campbell, in Hargreaves v. Deacon, 25 Mich. 1, speaking of the existence of pitfalls in the highways and upon private property, says: "Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence on private premises could make the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort, held out as open to customers or others where lawful occasions may lead them to visit them. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." The case in the record is lacking in many elements of strength to be found in the cases which we have cited, and presents a bald case of "permission asked and leave granted." There is no priority of relationship between the parties. The appellant was

not in the power house by virtue of any right to be there. He only escapes being a trespasser because of the appellee's assent. Permission involves leave and license, but bestows no rights. Bolch v. Smith, 7 Hurl. & N. 745; Hounsell v. Smyth, *supra;* Maenner v. Carroll, 46 Md. 222.

It has been earnestly contended that by the admission of the appellant to the power house in the manner stated a duty was thereby imposed upon the appellee to guard the appellant from the dangers of said vat "by warning him of its existence, or by covering the same, so as to make his passage through said premises reasonably safe." In this we do not concur. The vat was apparently a part of the useful appliances connected with the purposes for which the power house was constructed, and was in no proper sense a mantrap. The appellee was under no obligation to take one of his employees from his work to conduct the appellant and his schoolmates and their teachers through the power house; nor was the appellee required to make alterations in the manner in which it was accustomed to conduct its business, in order that these young men might go through the building. They were under the control and direction of the teachers who accompanied them, and the appellee might have reasonably inferred that they were sufficiently cared for. Even though the guide had continued with the class, there was no reasonable guaranty that one of these 30 boys would not have fallen into the selfsame vat. The principal of the school had, doubtless, some conception of the character of the machinery and appliances contained in the power house, otherwise he would scarcely have sought admission; and if there was negligence any where, it consisted in bringing thirty-odd boys at one time to a building filled with dangerous machinery. It is doubtless true that, if the appellant had remained with his fellows, and contented himself with their more prudent course, he would not have met with the painful accident which befell him. In the case of Oil Co. v. Morton, 70 Tex. 400, 7 S. W. Rep. 756, a party called at the office of the appellant, and requested permission to see one of its employees. He was informed by some one in the office where he would likely find the person he sought, and he went into the building for the purpose of finding him, and in the search he passed through a room where a large quantity of cotton seed was being manipulated, and, stepping upon a pile of cotton seed, a foot and a half to two feet in depth, his foot sank down through the seed into a screw or endless worm under the floor, and was thus injured. The worm was concealed from view by the cotton seed, which may have been in motion, but was not seen by the appellee, who had no knowledge of the existence of the worm. The appellee's business was with the employee he sought and not with the appellant. He did not request a guide, nor was any furnished, and no warning was given him of the danger. In this state of case the court, Maltbie, J., delivering the opinion, said: "In our opinion, the facts fail to show that appellant owed appellee the duty to send a guide along to prevent him becoming entangled in the machinery and being injured for the reason he was not there on business with appellant, or by its invitation, either express or implied, because he made no request for any one to accompany him. To require the proprietor of a steamboat, a factory, or a mill, conducted in the usual manner, whenever a man should ask permission to see an employee engaged in his duties, to anticipate that such person might become involved in some dangerous machinery, hidden or open, would be to exact too high a degree of diligence; but the presumption should be indulged that the person making the inquiry is acquainted with the machinery, its construction and position, and needs no attendant, or otherwise he would have made a request to that effect." In the recent case of Ivay v. Hedges, 9 Q. B. Div. 80, the court went very far in support of the doctrine of non-liability of an owner for injuries occasioned to others while upon his premises. There a landlord let out a house to several tenants, each of whom had the privilege of using the roof for the purpose of drying their linen. The plaintiff, one of the tenants, while on the roof slipped, and the rail being out of repair (and known by the landlord to be so), fell through it into the court below. Lord Coleridge said that no liability rested upon the defendant for not keeping the rail in repair, in the absence of an absolute contract for the use of the roof, and held that "the tenant takes the premises as he finds them." The opinion of Lindley, L. J., in the case of Burchell v. Hickisson, 50 Law J. C. P. 101, is to the same effect.

In the appellants' brief there appears a quotation from the opinion of the court in Maenner v. Carroll, 46 Md. 218, which is thought to sustain his contention in this court. It reads as follows: "There is no doubt of the general proposition that an obstruction or excavation made on a party's own land, and lawfully made, may give rise to an action upon proof that such obstruction or excavation was concealed, and the plaintiff was invited or induced by the act or conduct of the defendant to pass over or near such obstruction, in ignorance of its existence, whereby injury resulted. In such case the plaintiff would have a right to rely upon the good faith of the defendant." This is, however, only a part of the paragraph, which is somewhat misleading. We complete the paragraph, which reads as follows: "And to this effect are several of the authorities relied on by the plaintiff's counsel in this case; but there is nothing shown on the face of the count under consideration to justify the conclusion that the plaintiff was in any manner invited or induced, by any act of the defendants, to pass over the lot where the accident occured." And so, in this case, we are compelled to say that there is nothing in the declaration, supplemental with the request of Mr. Saville and the assent of the appellee, to justify the conclusion that the appellant was in any manner invited or induced by any act of the appellee to visit its power house, but he went there, solely for his own personal benefit and pleasure, and he must take the consequences, unfortunate

though they may be. It follows from what we have said that the court below committed no error in sustaining the demurrer to the declaration, and the judgment must be affirmed.

NEW TRIAL—See Insur. 4.

NOVATION—See Banks, etc. 7.

OWNERSHIP—See Insur. 5.

PARTNERSHIP — SEE ALSO GOOD-WILL.

1. SURVIVING PARTNERS — ESTOPPEL.

Upon the dissolution of a partnership firm by the death of one of its members the surviving partners may carry on the same line of business at the same place as was transacted the firm business, without liability to account to the legal representative of the deceased partner for the good-will of said firm, in the absedce of their own agreement to the contrary. *Lobeck* v. *Lee*, Neb., 55 N.W. Rep. 650.

2. PARTNERSHIP MONEYS—SEQUESTRATION OF— CONTRE LETTRE — COMPENSATION — QUEBEC.

In November, 1886, G. B., by means of a contre-lettre, became interested in certain real estate transactions in the city of Montreal, effected by one P. S. M. In December, 1886, G. B. brought an action against P. S. M. to have a sale by him to one Barsalou declared faudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. In September, 1887, another action was instituted by G. B. against P. S. M., asking for an account of the real estate transactions they had conformably to the terms of the contre-lettre. The Supreme Court dismissed the first action on the ground that G. B. had no right of action, but maintained the second action, and ordered an account to be taken. P. S. M. acquiesced in the judgment of the Superior Court on the second action, and G. B. appealed from the judgment dismissing his first action; but the Court of Queen's Bench affirmed the judgment of the Superior Court. On a further appeal to the Supreme Court of Canada, it was

Held, reversing the judgment of the Court below, that the plea of compensation was unfounded, the appellant having the right to put an end to the respondent's mandate by a direct action, and therefore, until the second action of account was finally disposed of, the moneys should remain in the hands of the sequestrator appointed with the consent of the parties. *Bury* v. *Murphy*, Sup. Ct. of Can. May 1, 1893.

Appeal allowed with costs.

Barnard, Q.C., for the appellant.

Monk, Q.C., for the respondent.

PAYMENT—See Negligence 11—Mun. Corp. 3.

PHOTOGRAPH — See Copyright 1—Crim. Law 11.

PLEDGE—SEE ALSO BANKS ETC. 8 - GAMBLING TRANSACTIONS 2.

LEFT SECURED.

On borrowing money from a bank, the borrower deposited stock as collateral security, and gave a demand note providing that if he should come under any liability, or enter into any other engagement with said bank, the net proceeds of the sale of the pledged stock should be applied, either on this note or any of his other liabilities.

Held, that only future liabilities were contemplated by the parties, and that the stock could not be held as security for a responsibility which had accrued nearly five months before making the pledge. *Franklin Bank* v. *Harris*, Ct. of Appeals of Maryland, 26 Atl. Rep., 523.

POISON—See Crim. Law 8.

PRINCIPAL AND AGENT.

1. INSTRUCTIONS.

In an action to foreclose a trust deed given to secure a note, where it appeared that the debtor had paid the note to W. as plaintiff's agent, who had possession of the deed and note, and after payment discharged the same, on the question whether W. was in fact agent for plaintiff, evidence that W. had acted as agent for plaintiff in making other loans is admissible. *Texas Land & Loan Co.* v. *Watson*, Tex., 22 S.W. Rep. 873.

2. CONTRACTS BY AGENT.

Defendant transportation company adopted a resolution that F. "is hereby authorized to take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest."

Held, that F. was authorized to appoint a local agent with power to hire a barge for defendant, and agree that, if not returned in as good condition as when hired, defendant would pay the agreed value of the barge, as upon a purchase. *Tennessee River Trans. Co.* v. *Kavanaugh*, Ala., 13 South. Rep. 283.

3. UNKNOWN PRINCIPAL—EMPLOYMENT BY AGENT OF SUB-AGENT — AGENT REPRESENTED TO BE PRINCIPAL — MONEY RECEIVED BY SUB-AGENT — RIGHT OF SUB-AGENT TO SET OFF AGAINST DEBT DUE TO HIM BY AGENT —ESTOPPEL.

Appeal by the plaintiffs against the judgment of Day, J., in favour of the defendants. The plaintiffs, bankers in London, claimed from the defendants, who were shipbrokers in London, 53*l.* 3*s.* (less commission), which had been collected by the defendants from underwriters on two policies of marine insurance on goods. The policies were taken out in the name of Beyts, Craig & Co., who were merchants in London, and the Bank of Antwerp received instructions from the owners of the goods to collect the moneys from the underwriters in England in respect of a general average loss, and the bank wrote to the plaintiffs, their correspondents in London, enclosing the policies and directing them to collect the insurance moneys. The plaintiffs forwarded the documents to Beyts, Craig & Co., and the latter, not being brokers forwarded them to the defendants who were brokers, at Lloyd's to collect the moneys. The defendants did not know, and had no reason to believe that Beyts, Craig & Co. were acting otherwise than as principals in the transaction. The defendants having collected the moneys, the plaintiffs gave them notice not to part with the moneys, to Beyts, Craig & Co., who had in the meantime become bankrupt. The defendant claimed to retain the moneys as against a debt due to them by Beyts, Craig & Co.

The Court (Lord Esher, M.R., and Bowen and Kay, L.J.J.) dismissed the appeal.

LORD ESHER, M.R., said that the defendants did not know, and had no reason for supposing, that Beyts & Craig were not acting as principals in the matter. The principle of such cases as Rabone v. Williams (7 T. R. 360, n.); George v. Clagett, (2 S. L. C. 9th edit., p. 130); and Fish v. Kempton (7 C. B. 687), applied. The latter case was that of goods placed in the hands of a factor for sale under circumstances calculated to induce, and which did induce, the purchaser to believe that the factor was dealing with his own goods, and it was held that the factor's principal could not prevent the purchaser from setting off against the price of the goods a debt due to him from the factor. The same principle applied to the present case.

BOWEN, L. J., said that the case was governed by the principle of George v. Clagett, and by the law of estoppel also. If A. employed B. to make a contract, and B. employed C. to make the contract, and B. was a person who might reasonably be supposed to be acting as a principal, A. could not, if C. had no notice that B. was not a principal, make a demand on C. without the latter being entitled to stand in the same position as if B. had really been the principal. If A. allowed his agent to appear in the character of principal, he must take the consequences.

Kay, L.J., concurred.

Montagu v. *Forwood*, C. A. (England) 1893, W. N. 136.

PRIVILIGED COMMUNICATIONS—See Evidence.

PROBABLE CAUSE—See False arrest.

PROPERTY—See Insur. 5 — Sale of Goods 1.

PROMISSORY NOTES—See Bills and Notes.

PROSTITUTION—See Crim. Law 6.

PUBLIC POLICY—See Contracts 1,

RAILROADS — SEE ALSO CARRIERS 1. 3. 4. 5. 7—NEGLIGENCE.

1. STREET CROSSING — CHANGE OF GRADE.

In enforcing against a railway company the duty imposed by its charter, to construct, when necessary, on a street or highway crossing its tracks, a bridge or viaduct, with the approaches, the court has power to establish the grade therefor, though that involves a change in the grade previously established for the street or highway. *Parker* v. *Truesdale*, Minn., 55 N. W. Rep. 901.

2 KILLING LIVE STOCK—DAMAGES.

In an action against a railroad company for the alleged killing of plaintiff's bull, evidence of the blood and excellence of the sire and dam of the animal killed are admissible, but cannot fix its market value. *Richmond & D. R. Co.* v. *Chandler*, Miss., 13 South. Rep. 267.

RESTRAINT OF TRADE.

COMBINATIONS IN RESTRAINT OF TRADE—CONSTRUCTION OF THE PROVISIONS OF THE ACT OF CONGRESS, JULY, 1890, DECLARING ILLEGAL COMBINATIONS, CONTRACTS OR CONSPIRACIES IN RESTRAINT OF INTERSTATE TRADE.

The holding of the court is that an action to recover damages alleged to have been caused by acts done in violation of the statute prohibiting monopolies and combinations in restraint of trade (26 Stat. 209) cannot be maintained when the complaint fails to show that plaintiff is engaged in interstate commerce, and no such showing is made by an averment that plaintiff is engaged in "manufacturing watch cases throughout all the States of the United States and in foreign countries," and that an agreement by a number of manufacturers and dealers in watch cases to fix an arbitrary price on their goods, and not to sell the same to any persons buying watch cases of plaintiff, is not in violation of the statute; and a complaint which, on the last analysis, avers only these facts, without averring the absorption or the intention to absorb or control the entire market, or a large part thereof, states no cause of action. *Dueber Watch Case Manufacturing Co.* v. *E. Howard Watch & Clock Co.*, 55 Fed. Rep. 851, United States Circuit Court for the Southern District of New York. 37 Cent. L. J. 162.

(THE COURT): An examination of the complaint, in the light of the provisions of the act of July 2, 1890, and the decisions construing that act, leads to the conclusion that the complaint, in its present form at least, cannot be sustained. The statute makes it illegal to enter into a contract or conspiracy in restraint of interstate trade and also to monopolize, or attempt to monopolize, or combine or conspire with others to monopolize, such trade. There is no allegation in the complaint that the plaintiff is engaged, or has at any time, since the passage of the act, been engaged in interstate trade and commerce. There is an allegation that the plaintiff is engaged in the business of manufacturing watch cases throughout all the States of the United States and in foreign countries. This allegation is probably a mistake of the pleader, but if it where true it would not be a compliance with the requisites of the law. A corporation may have an operating manufactory in every State of the Union and yet not be engaged in interstate commerce. There is no allegation that the defendants are, or that any of them is, or was, engaged in interstate trade, or that the articles made by them are used in such trade, or that the rights of the general public have been invaded, or interstate commerce injuriously affected by any of the acts of the defendants as described in the complaint. There is no allegation that the defendant absorbed or intended to absorb the entire trade in watch cases, or that they controlled the market, or any considerable part thereof, or that they were even a majority of the watch manufacturers of the United States, or that the prices fixed by them were more than the goods were worth or in any respect unfair. There is no statement that the goods made by the defendants were made by them exclusively, or that such goods were indispensable to plaintiff's customers; *non constat*, such goods could have been furnished by the plaintiff or dealers other than the defendants.

What, then, is the accusation? When analyzed it will be found that the illegal acts charged against the defendants are, first, that they agreed to maintain an arbitrary fixed price for their goods; second, that they agreed not to sell their goods to plaintiff's customers; and, third, that they notified plaintiff's customers of their determination. It is only necessary to examine the first and second of these allegations, for it is manifest that if the agreements made by the dtfendants were lawful it could not be unlawful to notify the world of their existence. Both of the alleged agreements were made before July 2, 1890, the result being that the plain-

tiff, before the passage of the act, lost its customers. The only acts of the defendants which by any possibility can be construed as a violation of the statute were the ratification and renewal of these agreements after its passage. The complaint alleges that but for such renewal the plaintiff would have regained all its old customers.

The first question then is, does it constitute a violation of the statute for two or more dealers to fix an arbitrary price for their goods? No authority has gone to the extent of holding that such a transaction, in the absence of other facts, is illegal.

The second question is: Is it an illegal act, within the provisions of the law in question, for two or more traders to agree among themselves that they will not deal with those who purchase the goods of another designated trader in the same business? Many perfectly legitimate reasons might be suggested for such an agreement. It is not a combination to monopolize; at least there is no statement of facts tending to show that it produced a monopoly in the present case. Indeed, it would seem that it must have had a contrary effect. There was surely nothing to prevent the plaintiff from supplying its customers with those things which the defendants declined to sell them, and thus enlarge its trade and stimulate competition. The plaintiff was perfectly free to engage in every branch of the watchmaking business. So were all others. The plaintiff's customers were free to purchase of the plaintiff, of the defendants, or of any other manufacturer. The contract of 1887 was not one in restraint of trade within any of the definitions or authorities which have been examined, and it is thought that the defendants' acts are not reached by any section of the law in question. The construction contended for by the plaintiff would render each of the defendants liable not only to an indictment, but would make unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits. It would extend to every agreement where A and B agree that they will not sell goods to those who buy of C. It would strike at all agreements by which honest enterprise attempts to protect against ruinous and dishonest competition.

It is thought that these views are in conformity with the decisions of the courts construing the act of 1890. *In re* Greene, 52 Fred. Rep. 104; U. S. v. Nelson, *Id.* 646; U. S. v. Trans-Missouri Freight Association, 53 Fed. Rep. 440; *In re* Corning, 31 Fed. Rep. 205; *In re* Terrell, *Id.* 213. The demurrer is sustained.

RIPARIAN PROPRIETORS.

OBSTRUCTION OF NAVIGABLE STREAM — RIGHT TO DAMAGES — RIGHTS OF PUBLIC IN PRIVATE CANAL.

The owner of land near, but not adjoining, a navigable stream cannot maintain an action for damages for the obstruction of the stream by a viaduct unless he has sustained some special damage thereby, distinct from the public at large.

Where such owner alleges that his lands are suitable for purposes of manufacturing, docking, etc., but it is problematical whether there will ever be a demand for them for such purposes, his damages for such obstruction are purely speculative.

A canal constructed and maintained at private expense is like a private highway, over which the public is permitted to travel, but in which it obtains no vested rights. *Potter* v. *Indiana & L. M. Ry. Co.*, Sup. Ct. of Michigan, 54 N. W. Rep. 956.

SALE OF GOODS.

1. SCALES ERECTED ON REALTY.

Where platform scales were sold as personal property by the assignee of the insolvent land-owner, without objection by any one in interest, one who purchases the realty afterward with notice of such sale cannot claim the scales. *Keeney* v. *Whitlock*, Ind., 34 N. E. Rep. 502.

2. WARRANTY.

Damages for personal injuries received by the buyer of a horse that ran away are not recoverable in an action for breach of a warranty that the horse was gentle, where it is not shown that the seller knew or had reason to believe that the horse was vicious or unsafe, or that the affirmation of the horse's gentleness was of such reckless character as to be equivalent to bad faith. *Jones* v. *Ross*, Ala., 13 South. Rep. 319.

3. WHEN TITLE PASSES—DELIVERY TO CARRIER.

Held, that under a valid contract for the manufacture and sale of goods, with instructions by the purchaser to the vendor to send them to the purchaser, the delivery of the goods to a common carrier to be forwarded was a delivery to the purchaser, and the title passed to such purchaser, subject only to the vendor's right of stoppage *in transitu*. *Kelsea* v. *Ramsey & Gore Mfg. Co.*, Court of Errors and Appeals of New Jersey, June 1893.

SEQUESTRATION—See Partnership 6.

SHARES—See Banks etc. 8.

SHIPS AND SHIPPING.

1. NEGLIGENCE—STEVEDORE.

A ship is liable in damages to a stevedore's employee who is injured through the insufficiency of the tackle provided by the ship for hoisting cargo. *The Para*, U. S. D. C. (La.), 56 Fed. Rep. 241.

2. DAMAGE TO CARGO — CATTLE SHIP.

The mere fact that a very unusal number of cattle died while in transit to Europe, from no apparent cause, is not of itself sufficient proof of defective ventilation, as against the fact that the ship was provided with so many air spaces as to lead all the inspectors and experts to pronounce the ventilation sufficient, and the further fact that both before and after the voyage she had carried a greater number of cattle with scarcely any mortality. *The Mondego*, U.S., D.C. (Md.), 56 Fed. Rep. 268.

3. CHARTERPARTY—BREACH—CONDITION PRECEDENT OR WARRANTY—WAIVER.

A charterparty, dated March 29, between the plaintiff, a shipowner, and the Defendants, described the ship as "now sailed or about to sail from a pitch pine port to the United Kingdom," and provided that the ship should, after discharging homeward cargo, proceed to Quebec, and there load a cargo of timber, and being so loaded should therewith proceed to Greenock, Barrow or Liverpool, as ordered on signing bill of lading, and deliver the same on being paid freight. At the date of the charterparty both parties knew that the ship was, or had just been, at Mobile, in America, loading a cargo of timber, which she was to carry to Greenock. She did not, in fact, sail from Mobile until April 23. On May 16, the defendants were aware of the date of the sailing, and they then wrote to the plaintiff's brokers, asking if they had any proposal respecting the charter. No proposal was made by the plaintiff, and on June 5 the ship arrived at Greenock. Further correspondence took place, and ultimately the defendants, on June 16, wrote to the plaintiff's brokers, "If you send the ship to load under our charterparty we shall protest against loading and difference of freight and insurance upon goods then shipped."—The ship sailed from Greenock on June 18, and after she had arrived at Quebec, the defendants refused to load her.

Held, that the description of the ship as "now sailed or about to sail," was of the substance of the contract; that it was a condition precedent and not a mere warranty; and that on breach of the condition the defendants would have been entitled to repudiate the contract.

But, *held*, that the conduct of the defendants, and in particular the letter of June 16, amounted to a waiver of such right to repudiate the contract, and that they were liable for the freight under the charterparty, but were entitled as against the plaintiff to such damages as they could prove that they had sustained by reason of the breach of the condition. *Bentsen* v. *Taylor, Sons & Co.*, C. A. [1893] 2 Q. B. 274.

STATUTE OF FRAUDS.

PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.

Defendant's contract for the erection of an opera house provided that, if the contractors failed to furnish material, defendant could supply the material, and deduct the cost from the price. Plaintiffs, after furnishing certain material on the contractors' credit, refused to furnish more, and an arrangement was made whereby, on the contractors' written order to defendant, the architect was to make the estimates and payments directly to plaintiffs.

Held, that the agreement was not within the Statute of Frauds, as it was not a promise to pay plaintiffs' debt, but to benefit defendant, by the immediate acquisition of materials for the building; Calkins v. Chandler, 36 Mich., 324, followed: *Brice* v. *Marquette Opera House Building Co.*,

Supreme Court of Michigan, 55 N. W. Rep., 382.

STATUTE OF LIMITATIONS—See Bills and Notes, 6.

STEVEDORE—See Ships, etc., 1.

STREET RAILWAYS — SEE ALSO CARRIERS, 2, 6.

NEGLIGENCE.

The granting of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the street railway company from liability for injuries caused by its negligence, whether such negligence consists in the improper and careless management of its property, or in the character of the motive power employed in propelling its cars. *Lincoln Rapid Transit Co.* v. *Nichols*, Neb., 55 N. W. Rep., 872.

STOCK SPECULATIONS—See Gambling Transactions, 1, 2.

SUNKEN WRECK—See Insur. Marine, 12.

SUSPENSION.

LAW AGENT — MISCONDUCT — LAW AGENTS (SCOTLAND) ACT 1873 (36 AND 37 VICT. C. 63), SEC. 22.

In May 1887 a divorce suit was pending in the English Courts at the instance of M., a domiciled Englishman, against his wife and a co-respondent C., which did not seem likely to result in decree in favour of the plaintiff. C. wishing to marry Mrs. M., with whom he was then living in adultery at Ayr, consulted L., a procurator in Glasgow, as to the possibility of having the lawsuit dropped in England and an action instituted in Scotland. M. consented to this being done provided his whole expenses were paid by C. L., who throughout acted for the three parties, received an opinion of counsel upon an A B case that decree could only be obtained by a careful suppression of facts. He thereupon took an office in Glasgow for M., who never entered it, and only came to Glasgow over the end of two weeks. L., to avoid C. being recognised, also arranged that he and Mrs. M. should live together in Glasgow under the name of Mr. and Mrs. R. for the purpose of establishing adultery against them there, and of there serving the summons upon Mrs. M. The summons designed M. as a tea merchant in Glasgow, referred to C. under the name of R., and contained no allusion to England or the English suit. O., the Edinburgh agent, through whom the opinion in the A B case had been obtained, and with whose office L. communicated throughout the summer and autumn of 1887, became aware of the real facts of the case at least in November 1887, when he protested against adultery being arranged. Nevertheless he allowed the case to remain in his office, where the final summons, after four drafts, was prepared. The correspondence in connection with the case, although signed by him, was left to his principal clerk, and he handed over the summons for signature and calling to another agent, but he himself arranged for the pursuer going to the Parliament House to take the oath of calumny, and his clerk attended the proof, which resulted in decree in favour of the pursuer.

The Court *held* that both L. and O. had been guilty of misconduct as law-agents under the 22nd section of the Law Agents Act 1873, and *suspended* them from practising as law-agents for one year. *Society of Solicitors in the Supreme Courts of Scotland* v. *Officer. Faculty ef Procurators of Glasgow* v. *Lang*, 30 Scot. Law Rep., 926.

TAXATION—SEE ALSO CONSTITUTIONAL LAW.

1. OF CORPORATIONS—ASSESSMENT.

In determining the capital of a corporation for the purpose of general taxation, the true value of its corporate assets, less its debts, and not the market value of the shares, is to be considered. *People* v. *Wemple*, N. Y., 4 N. E. Rep. 386.

2. BOARD OF REVIEW—COLLATERAL ATTACK.

Act March 6, 1891, makes it the duty of the county board of review to equalize the valuation of property in the

county for taxation, and gives it power to change or set aside assessments.

Held, that the action of the board in reducing the assessments on real estate 50 per cent., and leaving assessments on personal property unchanged, cannot be reviewed in proceedings to recover taxes alleged to have been unlawfully collected. *Biggs* v. *Board of Com'rs of Lake County*, Ind., 34 N. E. Rep. 500.

3. Tax—What is—Water Rent.

Water rent, established and collected by a board of water commissioners, directed by the act under which it was incorporated, to establish a scale of rents called water rents, payable in advance, and authorized to cut off the supply of water if such rents are not paid, is not a tax. *Silkman* v. *Board of Water Commissions*, Supreme Ct., New York, July Term., 1893, 71 Hun. 37.

Telegraph Company—See Neg. 6.

Theft—See Crim. Law. 3.

Threatening Crim. Prosecution—See Insur. 4.

Time Table—See Copyright.

Ultra Vires—See Banks etc. 4.

Usufruct—See Wills 1.

Usage—See Custom and Usage—Gambling Transactions.

Warranty—See Guaranty.

Wages—See Mast. and Servt. 2.

Water-rates—See Taxation.

WATERS

1. Surface Water—Obstruction.

An owner of land, who builds an embankment thereon which obstructs the flow of surface water that falls and accumulates upon his neighbor's land, does not become liable for the injury arising therefrom, unless the passage way through which it flows is such as to constitute a water-course. *Chicago K. & N. Ry. Co.* v. *Steck*, Kan., 33 Pac. Rep. 601.

2. Easements—Water Rights.

Plaintiff, with defendant's consent, conducted water to a tank on his lot from a spring on defendant's lot. Thereupon he took possession of another lot, owned by defendant, and conducted water to the latter lot from the tank. Having used the water about eight years, he surrendered possession of the lot to which he had no title, and about a year thereafter purchased the same with its appurtenances, and sold the lot on which was the tank. In the conveyance to plaintiff no mention was made of the right to use the spring but there was evidence that it was understood that he might use it so long as defendant did not need it.

Held, that plaintiff had no water rights in the spring appurtenant to the lot. *Bell* v. *Sausalito Land & Ferry Co.*, Cal., 33 Pac. Rep. 449.

Wager—See Ships, etc. 3.

WILLS.

1. In this case a bequest of real property was made to three ladies, "conjointly and in equal shares, to be enjoyed by them during their natural life, and after their decease to their children respectively," and, if two of the three persons should die without children the property was to go and belong to the child or children of the survivor in full and entire property. One only of the usufructuaries (the last survivor) was married and had a child. The court unanimously affirmed the judgment of the court below which held that there was accretion among the usufructuaries, and that the heir was excluded from the usufruct as long as any of the usufructuaries survived. The contract in question was not void, there being no error in fact or in law in respect thereof, and in any case error to be a cause of nullity in a contract must be absolute and unquestionable. *De Hertel* v. *Roe*, Montreal, Oct. 2, 1893, Queen Bench.

2. Charities—Public Library.

A bequest "for the erection, creation, maintenance, and endowment of a free public library" in a large city is a charitable bequest, and therefore not subject to the rule against perpetuities. *Crerar* v. *Williams*, Ill., 34 N. E. Rep. 467.

3. VALIDITY—UNDUE INFLUENCE.

Where a will is drawn by a person standing in a confidential relation to the testatrix, and who takes a considerable benefit under it, it is not necessary to prove that the will was read to testatrix, or that she gave instructions for its drawing, but the court must be satisfied that the will expresses the real intentions of the testatrix. *Garrett* v. *Heflin*, Ala., 13 South. Rep. 326.

4. CONSTRUCTION OF—DIVISION OF ESTATE—RIGHT TO POSPONE—QUEBEC.

T. F. F., who in partnership with his brother J. F. carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision.

" But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself in copartnership under the name and firm of Fogarty & Brother. Should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogrrty, and in the event of the death of either of them, then the whole to go to the survivor."

T. F. F. died on the 29th April, 1889.

On the 30th April, 1889, a statement of the affairs of the firm was made up by the bookkeeper, and J. F. and M. W. F., having agreed upon such statement, the balance shown was equally divided between the parties, viz., $24,-146.34 being carried to the credit of M. W. F. in trust, and $24'146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the statement a memo. dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them.

On the 6th March, 1890, M. W. F. brought an action against J. F. claiming that he was entitled to $24,146.34, with interest from the date of the division and distribution, viz., 30th April, 1889. J. F. pleaded that under the will he was entitled to postpone payment until five years from the testator's death, and that the action was premature.

Held, affirming the judgment of the court below, that J. F. was entitled under the will to five years to make the division contemplated and that he had not renounced such right by signing the statement showing the amount due on the 30th April, 1889.

Appeal dismissed with costs. *Fogarty* v. *Fogarty*, Supreme Court of Canada, May 1st, 1893.

Carter, Q. C., and *Geoffrion*, Q. C., for the appellant.

Macmaster, Q. C., and *Greenshields*, Q. C., for respondent.

5. SUCCESSION—SETTLEMENT—CONSTRUCTION — " SURVIVORS."

A testator, after providing for the payment of certain annuities, directed that the residue of the income of his estate should be paid equally among his children in liferent, and that upon the death of any of his children, leaving lawful issue, the share liferented by such child should be paid to and among his or her issue equally, upon their attaining majority or being married, declaring that in the event of any child dying without issue, " his or her share of the liferent of my means and estate shall thereafter be divisible and payable equally among my surviving children and their issue in liferent and fee respectively, in the same manner, and subject to the same restrictions as are specified in regard to the provisions in favour of my children and their issue generally."

Held (aff. Lord Low), that upon the death of a child without issue the share liferented by him fell to be divided equally among the surviving children and their issue in liferent and fee respectively, and that the issue of predeceasing children had no right to

participate therein. Forrest's Trustees v. Rae, etc., December 20, 1884, 12 R. 389, followed. *Morrison's Trustees* v. *Ward and others*, 30 Scot. Law Rep. 823.

Lord Kinnear.—(After reading clause of settlement.)—If the words of the clause I have read are to be construed literally, there can be no question as to their meaning. The word "surviving" must refer to the event on which devolution to survivors is to take place, and the accrescing shares must be given in liferent to those of the testator's children who may survive the predeceasing liferenters, and in fee to the issue of such surviving children. Passing from the form of the expression and going on to the substance of the bequest, it is certain the children who are to take an accrescing share must be those alone who are still in life when accretion takes place, because the interest they are to take is "for their liferent use allenarly," and a gift in liferent to certain persons upon the determination of a predeceasing interest cannot possibly be read except in favour of those persons who are still alive. So far, therefore, as the immediate children of the testator are concerned, the word "surviving" certainly does not admit of construction. It can bear no other meaning than that found by the Lord Ordinary. It is a difficult question whether their issue may not receive a wider interpretation, but here again, if the clause is to be read according to the plain grammatical construction of the words in their sequence, there can be no question. The fee of an accrescing share is given to the issue of those surviving children who are to take the liferent. If the clause is to be taken by itself, it seems to me to raise no implication of any intention to benefit the issue of predeceasing children.

But we have been referred to a series of decisions in England in which it has been held that very similar expressions ought to receive a wider interpretation than the literal meaning of the specific words would bear, and on these it is maintained that "surviving children" means "surviving *stirpes*," so that the grandchildren of the deceased must take the same share of the fee whether their parents have survived to take the corresponding liferent or not. The reasoning on which the cases of Wake v. Varah, L. R. 2 Ch. Div. 348; Waite v. Littlewood, L. R. 8 Ch. App. 70, were decided appears to me, if I may say so, to be very convincing, and if it were applicable to the will we are construing I should have no difficulty in following these decisions. But in these cases the Court inferred from the whole tenor of the will that a literal interpretation of specific words would not effectuate the testator's intention. In the present case there is nothing in the will to throw any light upon the clause in question except the language which the testator has used in the clause itself. We are asked to disregard the language he has used because it imports a provision which is said to be capricious, and because in certain possible events it may result in a partial intestacy. These considerations have been thought to be very material in construing a will, which, elsewhere than in the clause immediately under construction, which is supposed to raise the difficulty, expresses clear intention to distribute the testator's estates in all possible contingencies, and to preserve entire equality in the ultimate distribution. Taken by themselves in the present case, I am not sure that they are very weighty considerations. The argument in regard to a possible intestacy loses its force when we find that there is no gift over in the event of all the liferenters dying without issue, and therefore on a possible contingency there might be total intestacy—a contingency no doubt which is to be provided for, and I am not satisfied that, taken by itself, there is anything so capricious in an intention to benefit the immediate children of the testator rather than the issue of predeceasing children, as to justify the Court in refusing to accept the plain meaning of words which indicate such an intention. What is probably more material is, that both of these criticisms of the result of a literal interpretation of this clause are entirely negative. They might be of great importance if they could be taken in connection with any positive expression of intention in an opposite direction. But taken by themselves they will not justify the Court in refusing to give effect to the plain meaning of the words which the testator has used. In the case of Wake v. Varah (March 17, 1876, L. R. 2 Ch. Div. 348). Lord Justice Baggally gives the general principle on which he proposes to construe the will there under consideration in this way:—After pointing out the inconsistencies of a very similar kind, indeed altogather similar with those I have referred to, which existed between the presumed intention of the testator and a literal interpretation of the clause of accretion, he goes on to say. "But neither the consideration that a literal interpretation of the language used would lead to intestacy in particular events, nor the consideration that such an interpretation would lead to a construction which, if really intended by the testator, would have been capricious, would justify the Court in attributing to the language used by the testator other than its literal interpretation, unless satisfied, upon a consideration of the whole contents of the will, not only that the language used was insufficient to effect his full intention, but that the will itself afforded sufficient evidence of what his intention was," and therefore the ground of construction is, that when the particular clause is subjected to a literal interpretation, it appears to the Court to be imperfect or inadequate as an expression of the testator's will, because they find in other parts of the deed clear indications that he intended to do something different or something more than the clause in question does. In order, therefore, to bring these decisions into operation it is necessary in the first place to find from the indications in the will, apart from the clause immediately under construction, some reason for holding that the literal language of that clause is insufficient, and then to find in the will some clear indication of the intention to do something different from what a literal interpretation of the clause

would infer. Now Lord Justice Baggallay goes on to examine other parts of the will, and shows that both these conditions are satisfied, but I find nothing in the present case which enables me to say that either is satisfied, and therefore it appears to me that the decision, which is much more directly in point than either of the two English cases to which I have referred, is that of Forrest's Trustees v. Rae, 12 R. 389. I think we ought to follow that decision, from which I am really unable to distinguish the present case, and I am therefore of opinion that the Lord Ordinary's judgment is right.

The Lord President and Lord Adams concurred.

WINDING-UP—See Companies 4.

FRENCH INSURANCE CASES.

INSURANCE — FIRE — REPRESENTATIONS OF INSURED — FALSITY — FORFEITURE.

Where the insured failed to disclose his real position in an application for insurance, but it was proved that he had no interest, as regards the risk, in dissimulating it, and the company's agent who took the risk knew of his real position.

Held, not to void the policy. *Viry* v. *Cie. d'Assur. l'Urbaine*, Ct. of Appeal, Paris, 1889. Dalloz, 1890. — 2. — 55.

INSURANCE—FIRE — CONDITIONS OF POLICY — FORFEITURE — NEW INSURANCE.

Where a policy contains a clause of forfeiture on condition that the insured fails to disclose any new insurance he may contract.

Held, not to apply where the object and the risk covered by the new insurance are different from the former. *Cie d'assur. La Mutuelle de Valence* v. *Thébaud*. Ct. of Cassation, France, 1890. Dalloz, 1890. — 1. — 356.

INSURANCE — POLICY — PRINTED CLAUSES — MANUSCRIPT CLAUSES — DIVERGENCY BETWEEN.

Where there is a divergency between a general printed clause in a policy and a particular manuscript clause, the intention of the parties must be sought in the latter. *Cie. l'Industrie National* v. *Barbero*. Ct. of Appeal, Paris. Dalloz, 1890. — 2. — 192.

THE WRONG TRAIN.

A curious action was heard by Sir Horatio Lloyd, at Chester. Mr. John Edward Fox, registrar of the Croydon County Court, sought to receive damages from the London and North Western Railway Company for misdirecting. Plaintiff was travelling from London to Penmarpool, in Wales, but at Crewe he was put by a railway official in the wrong train, and found himself at Warrington. To obviate a delay of eight or ten hours he took a special train to Chester, where he caught a connection, which landed him at his destination just two and a-half hours late. He paid £4 8s. for the special. His Honor held that the company had been guilty of negligence but that the circumstances did not justify the employment of a special train, and he gave Mr. Fox judgment for two guineas and costs.—*Law Times.*