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VALIDITY OF BAILEE RECEIPTS RECEIVED BY BANKS.

The case of *The Merchants' Bank* v. *McGrail*, decided by the Court of Review, at Montreal, on the 30th ultimo, deserves special notice, the question involved being one of great importance to banks and to the produce trade of the country. It arose upon the effect of an instrument known as a bailee receipt, given to the Bank by one Henry Parker, a factor and commission merchant, for goods pledged to the Bank at its agency in St. Thomas, Ontario, by Scott, Yorke & Co., of Aylmer, as security for a draft drawn by that firm upon Parker, and accepted by him. On the arrival of the goods at Montreal, the Bank, being desirous of realising thereon, entrusted them to Parker for sale, subject to its order; and received from him a receipt in the following form :

"Received from the Merchants' Bank of Canada, B. L. for 1284 hams, 100 shoulders, and 10 pcs. bacon; and I hereby undertake to sell the property therein specified for account of the said bank, and collect the proceeds of the sale or sales thereof, and deposit the same in the said bank, at Montreal, to the credit of acceptance No.2414, due July 11, hereby acknowledging myself to be bailee of the said property for the said bank.

"Dated at Montreal, the 22nd May, A.D. 1877.

"Signed, HENRY PARKER."

Parker having become insolvent, his assignee (intervening party in the case) claimed that by entrusting the goods to Parker for sale, under the foregoing receipt, the Bank lost all lien on them, and all right to recover possession of them.

The use of these bailee receipts has for a long time past become practically universal in the trade at Montreal, and seems to be both convenient and just; but considerable doubt has been felt as to their validity, as, in the cases in which they are generally made use of, the persons entrusted with the possession of the goods for sale under such receipts are usually the purchasers of them.

There was no difficulty about the facts of the case in question, which may be stated shortly as follows :

On the 9th May, 1877, the Merchants' Bank, at its St. Thomas agency, discounted a draft for Scott, Yorke & Co., of Aylmer, drawn by that firm upon Henry Parker, at Montreal, and at the time of such discount received, as collateral security for its due acceptance and payment, a bill of lading of the goods mentioned in the bailee receipt already referred to, as being shipped by that firm to the Bank or its order at Montreal. By the delivery of this bill of lading, the Bank, under sections 46, 47, & 49, of the Banking Act, 34 Vict., chap. 5 (1871), became vested with the goods, and had a right to retain them till the draft so discounted, which is referred to in the bailee receipt as No. 2414, should be accepted and paid.

As already stated, upon the arrival of the goods at Montreal, Parker accepted the draft so drawn on him, and the Bank entrusted them to him for sale under the terms of the bailee receipt.

Parker accordingly proceeded with the sale of the goods; but afterwards the Bank, having learned that he was in financial difficulties, requested him to deliver to them the balance of the goods in his hands, and, upon his refusal, they attached them by process of revendication.

Parker becoming insolvent, his assignee intervened, and claimed the goods attached as belonging to Parker's estate, relying mainly upon the proposition that Parker, having purchased the goods, they were his property, and that the Bank, being only pledgees, had lost their privilege by surrendering the goods to him, under article 1970 of the Civil Code, which enacts that the privilege subsists only while the thing pawned remains in the name of the creditor, or of the person appointed by the parties to hold it.

On its part, the Bank submitted and argued the following propositions:

1. The firm of Scott, Yorke & Co, and not Mr. Parker, were the pledgors of the goods to the Bank, and the latter could validly entrust the goods for sale to Parker as their factor or agent. His possession was the possession of the Bank, in accordance with the well-known

principle of law that the possession of the agent is the possession of the principal.

2. The mere fact of the Bank having been informed that Parker had an ultimate interest in the goods cannot affect the validity of the bank's lien, or *droit de rétention*. The assignee's endeavour to wrest in his favour the principle of law, that the pledgor cannot at once pledge his goods and retain possession of them, cannot be successful. Parker was not the pledgor, nor was he the proprietor of the goods; because he could not become proprietor without paying off the Bank's lien.

3. The goods did not pass, under the attachment in insolvency, to the assignee; Parker having been merely the holder of them for the Bank in a representative capacity.

4. Should any doubt exist as respects the right of the Bank to revendicate the goods *quoad* third persons, creditors of Parker, there can be no doubt they would have had that right as against Parker, and consequently they have it as against the assignee, who stands in the place of Parker, and can have no greater right in the goods than he had (*vide* section 16 of the Insolvent Act of 1875).

The judgment of the Superior Court in the first instance was rendered by Mr. Justice Mackay, who held that although Parker had bought the hams and pork referred to, he having accepted the drafts drawn upon him and consented that the Bank should have the property to secure his (Parker's) acceptance, and he (Parker) having bound himself as expressed in the bailee receipt, the Bank had a right to the possession of the property at the time of the attachment made in the cause, and that as the Bank stood possessed before Parker's bankruptcy so it stood possessed afterwards.

The judgment of the Court of Review (Justices Torrance, Dorion and Rainville,) confirming this judgment, was delivered by Mr. Justice Torrance, who remarked: "We have no difficulty in disposing of this case. The Bank got control of the goods when they discounted the draft. The advance was to the drawers, Scott, Yorke & Co., of Aylmer, and their position could not be changed without their consent. The agreement with Parker under the bailee receipt did not change that position. On the contrary, it carefully preserved their right. The agreement was law to the parties, and perfectly binding upon Parker. The Superior Court, by its judgment of 18th February, 1878, so held by maintaining the attachment of the Bank, and we confirm the judgment."

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, April 30, 1878.

TORRANCE, DORION, RAINVILLE, JJ.

LEFEBVRE v. BRANCHAUD.

[From C. C. Beauharnois.

Sale—Registration—Hypothec.

Held, that until the purchaser of real estate has registered his title, the creditors of the vendor may, subsequently to the sale, obtain a valid legal or judicial hypothec on such property, sale without registration having no effect as regards third parties.

The plaintiff bought an immoveable on the 28th November, 1876, and registered his title on the 5th December following. In the interval, on the 30th November, the defendant, having obtained a judgment against the vendor, registered it against the immoveable in question as being still in the vendor's possession, the purchaser not having registered his title. The plaintiff in the present case sought to have the hypothec cancelled, as having been obtained against a property which at the time the judgment was rendered did not belong to the debtor.

In the Court below, the demand was maintained, and the hypothec declared null. In Review,

DORION, J., who rendered the judgment, remarked that the case presented a pure question of law, there being no difficulty as to the facts. Does an unregistered sale divest the vendor of possession with respect to third parties, so that the latter cannot acquire a legal or judicial hypothec on the property sold? His Honor held that it did not. On the other side, art. 2026 C. C. was relied on. This article declares that judicial hypothec affects only immoveables which belong to the debtor, and the sale being perfect by the consent of the parties under art. 1472, it followed that when the judgment was obtained and registered the debtor was no longer proprietor, and his creditors could not acquire a hypothec on the property sold. This pretension, in his Honor's

opinion, was erroneous. Art. 1472 is governed by 1027, which says that in contracts for the alienation of immoveables the sale is perfect by the mere consent of the parties, even as to third parties, but subject to the dispositions relative to the registration of real rights on such immoveables. Recourse must therefore be had to the law respecting registration. His Honor cited articles 2082, 2083, and 2098, and held that if an unregistered purchaser cannot confer any right (2098) it is because he is not proprietor as to third persons. The vendor, therefore, remained proprietor, and the creditor who obtains a judicial hypothec must have a privilege. This doctrine was followed in France, 24 Demolombe, no. 450, and in *Chesner* v. *Jamieson*, 19 L. C. Jurist, 190, the Court of Appeal unanimously maintained a registered conventional hypothec against an unregistered sale, made six years before. There was no reason why a distinction should be drawn between a conventional and a legal or judicial hypothec. The judgment setting aside the hypothec must therefore be reversed.

Judgment reversed.

Duranceau for the plaintiff.

Branchaud for the defendant.

GRENIER v. LEROUX.

[From S. C. Montreal.

Donation—Revocation—Sheriff's Sale—Bidding.

Held, 1. That a stipulation for the benefit of a third party made in a deed of donation may be revoked by the donor, even without the consent of the donee, if he has no interest in its fulfilment; so long as the person intended to be benefited has not expressed his intention of accepting it.

2. An agreement between two persons that one of them shall bid up a property at Sheriff's sale to a certain figure, and then re-sell it to the other, is perfectly legitimate.

Oliver Grenier, the father, made a donation *entre vifs* of an immoveable to his minor son on condition of paying 1500 livres to each of his brothers and sisters on their coming of age. This donation was accepted by the grandfather of the donee. Some months afterwards the donor revoked this donation with the concurrence of the grandfather who had accepted on behalf of the minor. But when the latter attained his majority, he formally signified his acceptance of the donation. At this date, the immoveable was under seizure at the suit of creditors of the donor. The donee then filed an opposition to annul the seizure, claiming the property as his. This opposition suspended the sale, but an arrangement was come to between the donee and the creditors, by which the former in effect renounced his acceptance of the donation.

The present action was brought by one of the brothers of the donee, against the purchaser at sheriff's sale, claiming a hypothec on the property for his 1500 livres.

DORION, J., for the Court, held that the rights of the brothers and sisters, who had never accepted the donation in any way, were completely extinguished by the donee's renunciation of his acceptance. Even if the plaintiff had a hypothecary claim, it was purged by the sheriff's sale, and the plaintiff could only be collocated on the proceeds. It was pretended that the sale was a nullity because the purchaser agreed to bid the property up to a certain amount, in order to sell it back to the donee. But the plaintiff had no right to complain of this. The judgment maintaining his claim must be reversed, and the action dismissed.

Judgment reversed.

Doutre, Doutre & Robidoux for plaintiff.

Geoffrion, Rinfret & Dorion for defendant.

TORRANCE, DORION, PAPINEAU, J. J.

THE MERCHANTS' BANK OF CANADA v. MCGRAIL, and LAJOIE, Assignee, intervening.

[From S. C. Montreal.

Bailee—Receipt—Revendication.

TORRANCE, J. The question submitted is as to the privilege of the Bank on goods revendicated. On the 9th of May, 1877, the plaintiffs at the agency of their Bank at St. Thomas, Ontario, discounted a draft for the firm of Scott, York & Co., of Aylmer, drawn by that firm upon Henry Parker, represented in the present case by his assignee, Louis Joseph Lajoie, and at the time of such discount received as collateral security for its acceptance and payment, a bill of lading of the goods as being shipped by that firm to the plaintiffs or order at Montreal. The plaintiffs say that by the delivery of this bill of lading, the bank, under sections 46, 47, and 49, of the Banking Act, 34 Vict. Chapter 5 (1871), became vested with the goods mentioned in the bill of lading, and had a right to retain them

until the draft so discounted should have been accepted and paid. On the arrival of the goods in Montreal, the Bank being desirous of realizing them, entrusted them to Parker for sale subject to its order; and received from him a receipt in the following form: "Received from the Merchants Bank of Canada B. L. for 1284 hams, 100 shoulders and 10 pcs bacon, and I hereby undertake to sell the property therein specified for account of the bank, and collect the proceeds of the sale or sales thereof, and deposit the same in the said bank, at Montreal, to the credit of acceptance 2414, due July 11th, hereby acknowledging myself to be bailee of the said property for the said Bank. Dated at Montreal, the 22nd May, 1877. (Signed) Henry Parker." The draft after being discounted by the Bank was presented to Parker for acceptance and by him accepted. Parker subsequently became insolvent, and his assignee, the intervening party, claims that the Bank by entrusting the goods to Parker, the real owner, for sale under the foregoing receipt, lost all lien upon them and all right to recover possession. We have no difficulty in disposing of this case. The Bank got control of the goods when they discounted the draft. Their advance was to the drawers, Scott, York & Co., of Aylmer, and their position could not be changed without their consent. The agreement with Parker under the bailee receipt did not change that position. On the contrary, it carefully preserved their rights. The agreement was a law to the parties, and perfectly binding upon Parker. The Superior Court by its judgment of 18th February, 1878, so held by maintaining the attachment of the Bank, and we confirm the judgment.

Archambault for intervener.

Tait for plaintiffs.

Montreal, March 30, 1878.

MACKAY, DORION, RAINVILLE, JJ.

[From S. C. Montreal.

PREVOST v. WILSON, and RODGERS et al., opposants.

Wages—Tools—Privilege.

Held, that laborers working in a quarry have no privilege on the tools used in quarrying, nor on the stone extracted therefrom, especially when the tools and the quarry are not the property of the person who engaged the laborers.

The plaintiff, one of a number of laborers who worked in a quarry at St. Genevieve, obtained judgment against Wilson for wages due for his labor. The action was accompanied by a *saisie-arrêt* before judgment, under which the plaintiff caused all the stone on the place to be seized, together with the machinery and tools used for quarrying. The opposants came in, claiming to be proprietors of the effects seized, and the principal question raised in the Court below was whether the laborers had a lien on the effects for their wages. The Superior Court held that they had such lien.

In Review,

DORION, J., remarked that there could be no doubt the quarry belonged to the opposants, who bought it in 1876. The defendant (who had left the country) was only a sub-contractor, who did not own the quarry or the machinery. In support of the privilege claimed on behalf of the workmen, reference was made to C. C. 434, 1993, 2001 and 2006. The first three did not apply here, and art. 2006 gives servants a privilege for wages on things belonging to the debtor. This article did not meet the case.

Judgment reversed.

Girouard for plaintiff.

Abbott & Co. for opposants.

SUPERIOR COURT.

Montreal, April 30, 1878.

JOHNSON, J.

AYLMER v. MAHER et al.

Sale—Fraudulent Collusion—Power of Attorney—Revocation.

JOHNSON, J. The plaintiff is General Aylmer living at Bath, in England, and brings the present action alleging himself to be the owner and proprietor of some lands in the Townships of Melbourne, Brompton and Cleveland, described as consisting of different lots and parts of lots, some with improvements and some without; and his object is to get a deed of sale of the 21st of January, 1875, cancelled and set aside as fraudulent and made without authority. Henry Aylmer, Junior, one of the defendants, had a general power of attorney from the plaintiff, who, I believe, is his grand uncle. This power appears to have been revoked by the subsequent appointment of other attorneys in November, 1874; but it is not quite clear that the revocation was known to the defend-

ant, Aylmer. However this may be, he assumed to act under this old power, and to sell to Maher, the other defendant, by the deed now in question. The plaintiff contends that even under the first power of attorney, supposing it to have been subsisting at the date of the deed (21st January, 1875), there never was any authority conferred on the agent to sell his uncle's real estate; and further, that the terms and conditions of the bargain sufficiently reveal that both the parties to it—the present defendants—perfectly well knew that they were endeavoring for their own ends to despoil the plaintiff of his property. On behalf of Maher it is pleaded that he purchased in good faith, paying the full contract price as mentioned in the deed, and thinking that the agent had the power to sell. Aylmer, junior, the other defendant, pleads that he had authority at the time and used it in good faith, applying the price to pay the plaintiff's debts. The questions seem to be: What was the extent of the power under the first instrument, and if it was in itself sufficient, what is the evidence of the knowledge of the parties as to its revocation, and as to their right, the one of them to sell, and the other to acquire all this property, incontestibly belonging to another person, in the manner in which they did so. Looking at the first power of attorney, it is in general terms, no doubt, and a power to sell—that is, a power of some kind is given. As to the precise extent of that power, and as to whether it was ever contemplated that the greater part of the principal's estate might be disposed of at one time by the agent, even for a valid consideration, paid to the vendor, is quite another question, and one which I should say ought, on the general principles applicable to such instruments, to be decided in the negative. Then, as to the revocation, and the knowledge of revocation, either by the agent, or by the other defendant, the rule of law cannot be more concisely stated than it is by Story, No. 470: "If known to the agent, as against his principal, his rights are gone; but as to third persons ignorant of the revocation, his acts bind both himself and his principal." This rule is reproduced in our own code, No. 1758, and supposing ignorance of the revocation on the part of the purchaser, might apply if the act was within the scope of the authority originally given, and if the purchaser was in good faith; but in the present case, the circumstances are such as to dispel at once any idea of good faith either by the agent or the buyer. Whether the agent was formally made aware of the revocation or not, I have previously said is not made absolutely clear. From Mr. Browning's evidence it would appear at least probable that he was aware of it; but the other party to this transaction, Maher, may, I think, fairly be said not to have known that there had been any formal revocation, and to have contracted with Aylmer, the agent, as if the first power of attorney, whatever authority it might have given, had been still in force. Both parties, however, must be held to have known what was the extent of the power of the agent, supposing it even to have been unrevoked; and certainly the facts, as they come out in evidence, seem to show plainly enough that both of them knew they were doing wrong. Aylmer must have known that he was not really selling, and Maher that he was not really buying; that the whole thing was at bottom a sham; and as far as the interests of the principal were concerned, an injury and a fraud; that the price which was acknowledged to have been paid in hand, by the terms of the deed, was in reality no price to the principal at all, but merely a settlement of the agent's debt to the pretended purchaser; and that even if the agent had had power to sell at all, there could be no pretence of selling for such an object without raising at once the suspicions of any honest man. All this is painfully clear from the evidence of the parties themselves, and it is not my intention to dilate further on so plain a case. The reasons or motives of the judgment will appear fully by the record; and the result is that the deed in question must be set aside. Apart from the question of power or no power at the time, there certainly never was any at any time, to sell without a price; and it is obviously no sale at all, so far as the principal is concerned, if the agent merely executes a form of conveyance to get a discharge from his own liabilities, and with the entire knowledge of the purchaser. Costs jointly and severally against the defendants.

Ritchie & Borlase for plaintiff.

Dorion & Co., and *Trenholme & Maclaren* for defendants.

AGENCY.—A SUMMARY OF RECENT DECISIONS RELATING TO RIGHTS AND LIABILITIES ARISING OUT OF THE CONTRACT.

[By Wm. Evans, in London *Law Times*.]

The following recent cases illustrate the rights and liabilities arising out of the contract of agency:

In all the cases in which an agent has been held personally liable for misrepresentation, it will be found that there was a misrepresentation in point of fact as to the agent having power to bind his principal, and there appears to be no doubt, in the words of Lord Justice Mellish (Beattie *v.* Lord Ebury, 27 L. T. Rep. N. S., 398; L. Rep. 7 Ch., 777; 41 L. J., 804, Ch.), that "it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not; under these circumstances I have no doubt that it would be held that the agent is not liable." Hence, when three directors of a railway company, by a letter to the company's bankers, requested them to honor the cheques of the company, signed by two of the directors and countersigned by the secretary of the company, and cheques were accordingly drawn signed in the above manner, and were paid by the bank, the court held that the letter did not amount to a representation that the directors had more than the ordinary authority of railway directors: Ib.

The next case illustrates the liability of agents upon their contracts. In Weidner *v.* Hoggett (1 C. P. Div. 533), which was decided in 1876, the plaintiff had refused to sign a charter-party without an undertaking from the charterers that there should be no undue detention of his ship. The defendant, who was a clerk employed to arrange the terms for loading, accordingly gave the following undertaking: "I undertake to load the ship in ten colliery working days, on account of Bebside Colliery. W. S. Hoggett." Upon a claim being made by the captain for demurrage, the defendant denied liability, but offered a sum in satisfaction. The jury found that the contract was between the captain and the defendant, that there was sufficient consideration for it, and that the contract was with the defendant personally. The court held that the admission and contract fully sustained the findings of the jury.

A surveyor of highways, appointed by the vestry of a parish, may be liable for accidents due to the condition of such highways: Pendlebury *v.* Greenhalgh, 1 Q. B. Div., 36. Apparently, the 56th section of 5 & 6 Vict., c. 50, which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, and allows it to remain there at night without proper precautions, does not apply to cases where the road itself is dangerous and not the materials.—Ib.

A cab proprietor is liable for the acts of the driver, while the latter is acting within the scope of the purpose for which the cab is intrusted to him.—Venables *v.* Smith, 2 Q. B. Div., 270.

Premiums paid in respect of an illegal insurance cannot be recovered back, for the whole transaction is void, and the law will not aid any of the parties.—Allkins *v.* Jupe, 2 C. P. Div., 375.

In an action for negligence, negligence must be proved. In Pearson *v.* Cox, 2 C. P. Div., 369, decided in 1877, the defendants were builders and contractors, who, after the outside of a house was finished, had removed the outer boarding, and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor shook a plank which caused a tool to fall out of a window of the house, and the tool in falling injured the plaintiff who was passing along the highway. The jury found that the boarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public. The court held that the defendants were entitled to judgment, as there was no negligence.

The principle of Great Western Insurance Company *v.* Cunliffe, L. Rep., 9 Ch., 525, was applied in 1877 to the case of Baring *v.* Stanton, 3 Ch. Div., 502; 35 L. T. Rep., N. S., 652; 35 W. R., 237, and the custom was held binding upon a foreigner. The Court of Appeal again

affirmed the rule, that if a person employs another to do certain work for him as his agent with other persons, and does not choose to inquire what the amount is, he must know the ordinary amount which agents are in the habit of charging. There a shipowner, who for ten years had employed a firm to effect insurances on his ships, and from time to time had settled accounts without inquiring as to the custom, was held not to be entitled to call upon the firm for an account of deductions made to the firm, viz.: 5 per cent. brokerage, and 10 per cent. discount for cash, payments which had been allowed by the underwriters on each transaction.

A solicitor had been originally employed by H. to take proceedings in respect of certain shares in a company of which he was a director. In consequence of those proceedings the solicitor obtained certain checks from the liquidator of the company in exchange for shares. H. had deposited the certificates with the solicitor as a security for costs, none of which had been paid, and subsequently transferred his shares, with notice of the solicitor's lien, to the plaintiffs. The retainer was continued by the plaintiffs, who now claimed the checks free from any lien for charges due from H. The court held that the solicitor was entitled to a lien upon them for his costs of all proceedings against the company in respect of the shares: The General Share Trust Company *v.* Chapman, 1 C. P. Div., 771.

Articles of association state the arrangement between the members; they are an agreement *inter socios*, and do not constitute a contract between the company and third parties. Hence, when articles contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company, and should not be removed from his office except for misconduct, it was held that the plaintiff could not bring an action against the company for breach of contract in not employing him as solicitor: Eley *v.* The Positive &c. Assurance Company, 1 Ex. Div., 20, 88. In the Court of Appeal, Lord Cairns reserved his judgment as to whether such a clause is obnoxious to the principles by which the court are governed in deciding on questions of public policy, but observed that it was a grave question whether such a contract is one that the courts would enforce. It is probable, too, that the contract alleged by the plaintiff did not satisfy the Statute of Frauds. A question of some novelty was raised in Hingston *v.* Wendt, 1 Q. B. Div., 367, which was decided in 1876, viz: whether a ship captain and his agent, who made an extraordinary expenditure for the purpose of saving a cargo, and which did save the cargo, had a right to detain the whole of the cargo, if it belonged to one owner, till the whole was paid or secured; or, if the cargo belonged to several owners, to detain each part of the goods so saved till the contribution in respect of that part was paid or secured. The court answered this question in the affirmative, although the charges were incurred without express authority from the owner.

An indorsement of a check, *per procuration*, or as agent, is an endorsement purporting to be by the payee within 16 & 17 Vict., c. 59, s. 19, so as to protect the banker paying it, though the person making the endorsement has no authority to endorse: Charles *v.* Blackwell, 2 C. P. Div., 151; 46 L. J., 368, C. P.

The agent of a foreign government is not liable as such to any action, nor will a plaintiff be allowed to sue a foreign government indirectly by making its agents in this country defendants, and alleging that they have money of the government which they ought to apply in satisfaction of the plaintiff's claim: Twycross *v.* Dreyfus, 5 Ch. Div., 605; 46 L. J., 510, Ch.; 36 L. T. Rep., N. S., 752.

Where a solicitor employed by the trustee for sale of an estate, his duty being to receive the purchase moneys and pay them into the trustee's banking account, received large sums and died insolvent, having paid such sums into his private account, and his banking account at his death showed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate, the Court of Appeal held that those specific sums would be followed by the trustee, and there could not be a set-off alleged in respect of sums alleged to have been paid such solicitor on account of the trust estate.

The promoters of a company, who make representations in a prospectus, and invite the confidence of the persons to whom it is addressed, contract fiduciary relations with such per-

sons, and if they have bargained to retain part of the money subscribed, they must disclose that fact: Bagnell *v.* Carleton, 36 L. T. Rep., N.S., 653; 6 Ch. Div., 371.

An auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance; but, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required. Where the deposit is of large amount, he may be made a defendant, unless he has paid it into court before action brought: Earl of Egmont *v.* Smith, 6 Ch. Div., 469. A solicitor is entitled to retain, as his own property, letters addressed to him by his client, and copies contained in his letter book of his own letters to the client: *Re* Wheatcroft, 6 Ch. Div., 97. A purchase may be protected under 6 Geo. 4, c. 94, s. 4, although money does not actually pass. The action applies equally where the goods are transferred in consideration of an antecedent debt: Thackerah *v.* Fergusson; 25 W. R., 307.

Where a drainage board had delegated its powers to a committee under the Land Drainage Act, 1861, schedule 2, r. 6, that committee cannot delegate its powers to one of the members.

DIGEST OF ENGLISH DECISIONS.

[Continued from p. 228.]

Common Carrier.—See *Railway; Stoppage in Transitu.*

Company.—1. The articles of a limited company provided that each member should have one vote for every ten shares, but should not have more than 100 in all, and that no member should vote except on shares which he had possessed three months. *Held*, that the vote of a shareholder whose name had been on the register three months should not be rejected on the ground that the shares represented by him were transferred to him by other large shareholders, for the purpose of increasing their own influence at the meeting, and that a shareholder was entitled to an injunction to restrain the directors from acting, on the ground that such vote was void.—*Pender* v. *Lushington*, 6 Ch. D. 70.

2. A company, organized under the Companies Act, 1862, obtained a lease from the plaintiff, and afterwards proceeded to wind up. The company had assets. *Held*, that under § 158 of the Act, providing that "all claims against the company, present or future, certain or contingent, . . . shall be admissible to proof," the plaintiff was entitled to have set apart and invested in consols such a sum as, with consols at their present price, would be sufficient, with semi-annual rests at three per cent., to yield the amount of the rent.—*Oppenheimer* v. *British & Foreign Exchange & Investment Bank*, 6 Ch. D. 774.

3. Holders of debentures in a joint-stock company, which debentures pass from hand to hand by delivery, must produce them at or before a meeting called to vote upon a reconstruction scheme, in order to be entitled to vote at such meeting.—*In re Wedgewood Coal & Iron Co.*, 6 Ch. D. 627.

4. By the Companies Act, 1867, § 25, it is required that shares allotted shall be fully paid for in cash. P. & G., newspaper proprietors, contracted with an insurance company to print a series of advertisements for the company, in consideration of one hundred fully paid up shares. The shares were allotted to them, and the advertising subsequently done according to the contract. On the winding up of the Company, *held*, that P. & G. must be put on the list of contributories, the shares not having been paid for in cash within the sense of the Act.—*In re Church and Empire Fire Ins. Co. Pagin & Gill's Case*, 6 Ch. D. 681.

5. 30 & 31 Vict. c. 131, § 38, provides that "every prospectus of a company . . . shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus, . . . whether subject to adoption by the directors of the company or otherwise; and any prospectus . . . not specifying the same shall be deemed fraudulent on the part of the founders, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." The plaintiff took shares in the L. S. T. Co., in the prospectus of which the defendants, promoters of the company, had failed to insert two contracts, one between the defendants as promoters and the Duke de Saldanha, concerning the purchase of some con-

cessions from a foreign government, and the other between the defendants, C. & P., as promoters, and the defendant G., by which the former were to pay the latter a certain sum if he would procure them a certain contract with the company to be formed. The jury found these contracts material to be made known, that the plaintiff would not have bought the shares had they been inserted in the prospectus, and that the defendants acted in good faith in not inserting them, under the impression that it was not legally necessary to set them forth. *Held*, that the plaintiff could recover from the defendants, and the measure of damages was the sum paid for the shares.—*Twycross* v. *Grant et al.*, 2 C. P. D. 469.

6. B., wishing to sell his colliery, had it valued in 1871. The valuers' estimate was £300,000; and B. promised them a commission of £60,000 if they sold the property at that figure. B. died in 1872; and his representatives offered his and their solicitors, D. & L., £1,500 if they would find a purchaser. In pursuance thereof, D. & L. saw R., a financial agent, who introduced them to C.; and an agreement was made between D. & L., representing the owners, and C., by which C. was to get up a company, with a capital of £300,000, to buy the colliery for £290,370, part cash and part bonds. If C. succeeded, he was to receive £85,000; if he failed, he was to forfeit £20,000. C., G., and R. made an agreement, unknown to the vendors and D. & L., by which G. should undertake all the risk of getting up the company, and should receive $65,000, and C. should have £20,000, and therefrom pay R. £10.000. Subsequently, an agreement of purchase was executed between the vendors and G. B., as trustee for the proposed company, for the property at £290,370. At the same time an agreement was made between C. and the vendors, by which C. was to carry through the project for a company, which should take the property according to the agreement with G. B., and to receive from the vendors £85,000 therefor. The company was formed, R. procuring the directors. The prospectus and articles, drawn by D. & L., as solicitors of the company, referred only to the agreement between the vendors and G. B., as trustee for the company. This agreement was carried out, the vendors receiving the purchase money, out of which they paid C. £85,000, of which he gave G. £65,000, R. £7,500, and kept £12,500 himself. Some time afterwards, the directors learned for the first time of these transactions, and brought suit against the vendors, R., C., G., and D. & L., to compel rescission of the sale, or payment to the company of the £85,000, less reasonable charges and commissions in getting up the company. The vendors compromised for £31,000, and the prayer for rescission was withdrawn. *Held*, that R., C., and G. were in a fiduciary relation to the company, and could not be allowed to profit from the agreement made without the knowledge of the company; that they should be allowed the proper expenses incurred in bringing out the company, but that commission was allowed them because the plaintiff had offered it in the bill, and not otherwise; that the compromise with the vendors in no way affected the case as against R., C., and G.; and that as against D. & L. the suit be dismissed, without their costs to the time of the compromise, and with their costs since that time.—*Bagnall* v. *Carlton*, 6 Ch. D. 371.

7. The memorandum of a company formed under the Companies Act, 1856, with a capital of 16,000 shares of £10 each, stated the company to be limited. The articles stated that a debt of £30,000 existed, for which six shareholders had made themselves liable; and if the funds of the company became insufficient to pay this debt and interest, each shareholder should pay the company a proportionate amount of the debt, "according to the number of shares held by" him. Only about 12,000 shares were ever taken. On an order to wind up the company, *held*, that the agreement to contribute was valid under the Act, in respect of fully paid-up shares, in spite of the declaration of limitation of liability that the amount to be paid in respect of each share was to be fixed according to the number of shares actually allotted, and not according to the whole number authorized; and if any shareholders were insolvent and unable to pay, the solvent ones were not liable for their proportion.—*In re Maria Anna & Steinbank Coal & Coke Co. McKewan's case*, 6 Ch. D. 447.

Concealment.—See *Company*, 6.

Condition.—See *Railway.*

Consideration.—See *Husband and Wife*, 2.

Contract.—Prior to November, 1871, B. & Co., colliery owners, had been in the habit of supplying coal to the M. Co., at varying prices, without any formal contract. In that month, pursuant to a suggestion of B. & Co. for a contract, a draft agreement was drawn up, providing for the delivery of coal on terms stated, from Jan. 1, 1872, for two years, subject to termination on two months' notice. The M. Co. prepared this draft agreement, and sent it to B., the senior of the three partners of B. & Co., who left the date blank as he found it, inserted the names of himself and his partners in the blank left for that purpose, filled in the blank in the arbitration clause with a name, made two or three not very important alterations, wrote "approved" at the end, appended his individual signature, and returned the document to the M. Co. The latter laid it away, and nothing further was done with it. Coal was furnished according to the terms of this document, and correspondence was had, in which reference was often make to the "contract," and complaints made of violation of it and excuses given therefor. In December, 1873, B. & Co. refused to deliver more coal. In an action for damages, they denied the existence of any contract. *Held*, that these facts furnished evidence of the existence of a contract, and that B. & Co. were liable for a breach thereof.—*Brogden* v. *Met. Railway Co.*, 2 App. Cas. 666.

Contributory.—See *Company*, 4, 7.

Conveyance.—See *Fraud.*

Criminal Process.—See *Injunction*, 1.

Damages.—See *Ancient Lights; Mine*, 1; *Specific Performance*, 1.

Debt.—See *Will.*

Devise. — A testatrix gave property to her daughter and her husband for their lives, and after the death of the survivor to the children of her said daughter who should be living at the testatrix's decease; but provided that, in case any of the children should die "without leaving lawful issue," the portion of those so dying should go to the surviving grandchildren of the testatrix that should "leave such lawful issue." *Held*, that the words "without leaving lawful issue" applied to the period of distribution; that is, the decease of the surviving tenant for life.—*Besant* v. *Cox*, 6 Ch. D. 604.

Director.—See *Company* 1.

Embezzlement.—See *Jurisdiction.*

Evidence.—See *Contract; Presumption.*

Executor and Administrator.—An executor or administrator stands in the relation of gratuitous bailee, and is not to be charged, either at law or in equity, for loss of goods, except through his wilful default.—*Job* v. *Job*, 6 Ch. D. 562.

Fiduciary Relation.—See *Company*, 6.

Foreign Ship.—See *Jurisdiction*, 1, 2.

Forfeiture.—Claim of forfeiture of the British ship A. for violation of the Merchant Shipping Act, 1854, § 103, sub § 2, in that the owner, on July 18, 1874, falsely represented that said ship had been sold to foreigners, in consequence of which representation she was stricken from the registry. A foreigner entered an appearance, and set up that, on July 6, he became the *bona fide* owner of said ship, without having any knowledge of the transactions alleged in the complaint. *Held*, that the forfeiture was immediate upon the false statement of July 18th, 1874, and a demurrer to the foreigner's statement of defence was sustained.—*The Annandale*, 2 P. D. 218; s. c, 2 P. D. 179.

Fraud.—S., the defendant, sold the plaintiffs a lot of land as freehold. It turned out, after the purchase-money had been paid, that almost the entire lot was copy-hold and not freehold. S. alleged that his statement that the land was freehold was *bona fide*. *Held*, that the sale must be set aside, and the purchase-money refunded with interest, and the plaintiff paid the expenses he had incurred in consequence of the misrepresentation. The defendant had committed a "legal fraud."—*Hart* v. *Swaine*, 7 Ch. D. 42.

Frauds, Statute of.—1. Defendants wrote and signed an offer for the lease of a theatre, which offer was attested by the owner's agent. The owner's name did not appear in the writing, which was addressed to "Sir," without more. The offer was accepted by the agent, by a letter signed by himself, but in which the names of the defendants did not appear. *Held*, that there was not a valid agreement within the Statute of Frauds, and the proposed lessees were not bound to specific performance. — *Williams* v. *Jordan*, 6 Ch. D. 517.

2. A party entitled to declare a trust on certain land wrote to the mother of her infant grandchild a letter, signed with the writer's initials, and inclosed in the envelope another

paper, headed "Supplement," beginning, "I quite omitted to tell you," &c., and unsigned. There was no reference in the letter proper to the "Supplement." *Held*, that the unsigned document was not a sufficient declaration of trust under the Statute of Frauds.—*Kronheim* v. *Johnson*, 7 Ch. D. 60.

See *Lease; Specific Performance*, 1.

Guarantee.—See *Husband and Wife*, 2.

Husband and Wife.—1. A husband and wife, married since the Married Woman's Property Act, 1870, gave a joint and several promissory note. The husband took the money, and afterwards became bankrupt. *Held*, that the wife's separate property was liable on the note, and there was no necessity to make the trustees of her estate parties.—*Davies* v. *Jenkins*, 6 Ch. D. 728.

2. The wife of C., a retail trader, who was possessed of separate estate in her own right, without restraint to anticipate, gave a guarantee in writing to the plaintiff, a dealer with whom C. traded, as follows: "in consideration of you, M., having at my request agreed to supply and furnish goods to C., I do hereby guarantee to you, the said M., the sum of £500. This guarantee is to continue in force for a period of six years, and no longer." C. had previously dealt with M., and at the time of the guarantee a bill of exchange drawn by M. on C. for a balance had been dishonoured, and another bill was soon coming due. *Held*, that the guarantee applied to any moneys to the extent of £500 which should be due during six years, including the dishonoured bill; that the fact that goods were furnished subsequently created a good consideration to the wife for the guarantee; and that the separate estate of the wife was liable for any balance due M. from C., to the extent of £500. *Morrell* v. *Cowan*, 6 Ch. D. 166.

Injunction.—1. Where a statutory board has power to recover a penalty by criminal proceedings for violation of a statute regulation, a court of equity will not interfere by injunction to restrain those proceedings.—*Kerr* v. *Corporation of Preston*, 6 Ch. D. 463.

2. W. sold S. land adjoining other land of W., under which there were mines. S. purchased the land for the purpose of erecting heavy buildings for an iron foundry thereon, and W. was aware of this fact. Subsequently W. leased the mines to H. & Co., who began mining. S. having begun to build on his land, applied for an injunction against W. and H. & Co., to restrain the working of the mines in a manner to endanger the support of his buildings. *Held*, that S. was entitled to an injunction.—*Siddons et al.* v. *Short et al.*, 2 C. P. D., 572.

Innkeeper.—By 26 & 27 Vict. c. 41, § 1, no innkeeper is liable for loss of the goods of a guest beyond £30, except where such goods shall have been lost through the wilful neglect of such innkeeper, or any servant in his employ. Section 3 requires every innkeeper to keep section 1 posted in a conspicuous place in his inn, in order to entitle him to the benefit therof. The defendant had what purported to be section 1 posted properly in his inn; but by an unintentional misprint, it read thus: "Through the wilful default or neglect of such innkeeper, or any servant in his employ." *Held*, that the misprint was material, and the innkeeper was not entitled to the benefit of the statute.—*Spice* v. *Bacon*, 2 Ex. D. 463.

Jurisdiction.—The court declined jurisdiction where a foreigner brought an action for co-ownership against a foreign vessel, and another foreigner appeared to have the petition dismissed, and the consul of the State where the ship was registered declined to interfere.—*The Agincourt*, 2 P. D. 239.

2. Suit between two foreigners over a foreign vessel, where the court, under the circumstances, assumed jurisdiction for a particular purpose.—*The Evangelistria*, 2 P. D. 241.

3. A clerk employed to collect money, and remit it at once to his employers, collected several sums at a place in Yorkshire, subsequently wrote two letters to his employers in Middlesex, without mentioning the above collections, and afterwards, a letter, intended, as found by the jury, to lead his employers to think that he had collected no money in Yorkshire. *Held*, that he could be tried for embezzlement in Middlesex, where the letters were received.—*The Queen* v. *Rogers*, 3 Q. B. D. 28.

Lease.—Written agreement by the defendant with the plaintiff, duly signed by both, for the lease of a house for a certain term and price named. It was recited that "this agreement is made subject to the preparation and approval of a formal contract;" but no other contract was ever made. *Held*, that the agreement was only preliminary, and the defendant was not bound

to specific performance.—*Winn* v. *Bull*, 7 Ch. D. 29.

Libel and Slander.—An editor had been convicted of stealing feathers, and had been sentenced to twelve months' penal labour as a felon, which sentence he had duly served out. Afterwards, a brother editor called him a "felon editor," and justified by asserting the above facts. Replication, that as he, the convict, had served out his sentence, he was no longer "felon." On demurrer, *held*, a good reply.—*Leyman* v. *Latimer*, 3 Ex. D. 15.

Lien.—See *Attorney and Client.*

Mine.—1. Defendant, a mine-owner, diverted the natural course of a stream for his own purposes; and, in an unusually heavy rain which followed, the water overflowed the new channel, and caused damage to an adjoining mine, belonging to the plaintiff. *Held*, that defendant might be liable therefor, although if the injury had happened in the ordinary course of working the mine, from a sudden and unusual natural cause not to be foreseen by a prudent person, no liability would have arisen.—*Fletcher* v. *Smith*, 2 App. Cas. 781.

[To be continued.]

GENERAL NOTES.

Mr. Chitty relates an anecdote of a young attorney who had been carrying on a correspondence with a young lady, in which he had always, as he thought, expressed the greatest caution. Finding, however, that he did not perform what he had led the lady to believe that he would, she brought an action for breach of promise of marriage against him. When his letters were produced on the trial, it appeared that he had always concluded—"this, *without prejudice*, yours faithfully, C. D.' The judge facetiously left it to the jury to determine whether these concluding words, being from an attorney, did not mean that he did not intend to prejudice the lady; and the jury found accordingly.

Married or Not Married?—A curious question has arisen as to Lord Rosebury's marriage. The *Solicitors' Journal* points out that if, after the marriage at the Registrar's, they were described in the parish register of the Episcopal Church, where the marriage was repeated, as bachelor and spinster, there is a false entry. A nobleman was indicted in 1850 for having, on a similar re-marriage with a lady, described himself as a widower and his wife a widow. But the judge said it was difficult to say that it was 'wilfully and corruptly,' and the jury found a verdict of 'not guilty.'

Mexican Litigation.—Few nations are so fond of litigation as the Mexicans; and there is a story which pertinently illustrates the propensity of the Dons for going to law with each other. Don Rafael has been suing Don Esteban for at least ten years in all the courts of the Republic. Over and over again he has lost his cause, and as often has he appealed from the court below to the court above. One day the plaintiff meets the defendant in the Calle San Francisco, Mexico. Th eadversaries bow stiffly to one another. "How is it, Don Rafael," asks Don Esteban, "that you have not yet carried before the Supreme Court your appeal against the Court of Guadalajara, which, if you remember, was adverse to you?" "Of a truth," replies Don Rafael, "I shall appeal no more, and abandon my claim. I am sick and tired of the whole affair; and, moreover, I have not a single dollar left to pay costs withal." "Is that so, *caballero?*" quickly returns Don Esteban, pulling out his purse. "Pray do me the honour to accept the loan of fifty dollars, and give notice of appeal at once. It would be a shame and a scandal to let such a fine lawsuit die."

The Petty Jury System.—At Ballinakill quarter sessions Ellen Moore was indicted for having stolen a shawl. Evidence sustaining the charge having been given, his worship charged the jury, who retired. After a considerable lapse of time one of the jurors came out of the room and was leaving the court. His worship observed the man, and directed the Deputy Clerk of the Peace to ask if he was a juror. Juror.—Yes, sir. Deputy Clerk of the Peace.—Where are you going? The Juror—Ah, begor, I wouldn't stay there; they're all boxin' and fightin' inside. (Laughter). The juror was then ordered back to the room, and a constable placed on the door. The prisoner was found guilty, and on the jury being discharged, one of them was heard to say, 'Only I threatened to lick him he'd never agree.'