Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [x] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [ ] Quality of print varies/ Qualité inegale de l'impression
- [x] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [ ] Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
							✓				

MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. APRIL, 1892. No. 4.

ABANDONMENT OF RIGHT OF WAY—See Railroad Companies 4. 10.

ABSENCE OF ACTUAL MALICE—See Libel and Slander 6.

ACCEPTANCE OF STREET—See Municipal Corporation 10.

ACCEPTANCE OF DRAFT—See Banks and Banking 2. 4.

ACCIDENT INSURANCE — See Insurance 1.

ACCIDENT AT PRIVATE CROSSING—See Railroad Companies 6.

ACCUSATIONS OF THEFT—See Malicious Prosecution 2.

ACTION AGAINST MUNICIPAL CORPORATION FOR DELAY IN GRADING STREET—See Mun. Corp. 11.

ACTION AGAINST PUBLISHER OF NEWSPAPER—See Libel and Slander 3.

ACTION FOR PRICE OF GOODS—See Sale 7.

ACTION FOR CALL OF $1,000 — See Appeal 2.

ACTION BY INDIVIDUAL BONDHOLDERS—See Corporations 6.

ACTION ON POLICY — See Insurance 10.

ACTION ON BILL OF EXCHANGE—See Bills and Notes 3.

ACTION FOR BODILY INJURIES.

ART. 1056 C. C. — ACTION UNDER ART. 2262 C. C.—ART. 433 C. C. P.—DESCRIPTION.

Held, (1) Art. 1056 C. C., gives the widow, or other relatives therein mentioned, a right of action only when at the death of the injured person there was a subsisting right of action which, had death not ensued, he might have exercised. Therefore if the injured person's claim was prescribed before his death the widow has no action under Art. 1056.

(2) That actions for quasi offences causing bodily injuries are prescribed by one year.

(3) That where the allegations of the plaintiff are not sufficient in law to sustain his pretensions, the Court may render judgment in favor of the defendant, notwithstanding that the verdict of the jury is upon matters of fact in favour of the plaintiff. *Can. Pac. Ry. Co.* v. *Robinson*, Supreme Ct. of Canada, June 22, 1891.

ACTUAL MALICE — See Municipal Corporations 17.

ADDITIONAL INSURANCE—See Insurance 8.

ADULTERATION.

MILK.

Statute 1886, c. 318, § 2, (Mass.) which imposes a fine on whoever, by himself or his servant, sells milk during May or June containing less than 12 per centum of milk solids, applies to the sale of a glass of milk in a *café*, to be drunk on the premises, made by a servant in the ordinary course of his employment, though the master was not present, and did not know of the particular sale. *Commonwealth* v. *Veith*, Mass., 29 N. E. Rep. 578.

ADULTERY—See Trial.

ADVANCES—See Carriers 1.

ADVERSE POSSESSION — See Municipal Corporation 10.

AGENCY.

PROMISSORY NOTE—PAYMENT.

In an action to cancel a note, the money having been repaid to the agent through whom it was borrowed, the note being in the hands of the principal:

Held, agency and scope of agency are facts to be proved like other facts. When an agency is shown to exist, the presumption is that the authority is general rather than limited. The principle that a party who pays money due on a written security to an agent who has not the security in his possession, pays at his risk, is not applicable where such payment can be justified, as in this case, by similar repeated acts of the agent, long continued and acquiesced in by the principal. *Sharp* v. *Knox*, Missouri Ct. of App., April, 1892.

AGENT—See Principal and Agent.

AGREEMENT TO PAY WHEN ABLE—See Contract 2.

ALLEGATION OF TERMINI — See Carriers 8.

ALTERATION OF GRADE—See Municipal Corporation 12.

ALTERATION OF NOTE—See Bills and Notes 6.

AMENDMENT—See Pleading.

ANIMALS.

VICIOUS ANIMALS — PUBLIC OFFICERS.

The directors of an almshouse are not liable for damages occasioned by a dog kept by the steward upon the premises, and left there after his removal from the county farm, there being no evidence that the directors authorized or acquiesced in the animal's presence. *Sproat* v. *Directors of Poor, etc., of Greene County, Penn.*, 23 Atl. Rep., 380.

APPEALS—See also EMINENT DOMAIN—PRINCIPAL AND SURETY.

1. APPEAL BOND—APPEAL TO THE SUPREME COURT OF CANADA—PARTIES TO BOND—APPELLANT A PARTY—NON-EXECUTION BY APPELLANT—CONDITION OF BOND—COSTS AWARDED BY JUDGMENT APPEALED FROM.

In an appeal to the Supreme Court of Canada it is not necessary that the appellant should be a party to the appeal bond; but if the appellant is made a party and does not execute the bond, the respondent is entitled to have it disallowed; for it is unreasonable to ask the respondent to accept a bond to which the sureties may hereafter attempt, whether successfully or not, to raise the defence that they only executed it upon the faith that the appellant would be one of the obligees.

In an appeal bond, where the object was not only to secure payment of the costs which might be awarded by the Supreme Court of Canada under s. 46 of R. S. C. c. 135, but also under s. 47 (*e*), to procure a stay of execution of the judgment appealed from as to the costs thereby awarded against the appellant, the condition was, "shall effectually prosecute the said appeal and pay such costs and damages as may be awarded against the appellant by the Supreme Court of Canada, and shall pay the amount by the said mentioned judgment directed to be paid, either as a debt or for damages or costs," etc.

Held, that this did not cover the costs awarded against the appellant by the judgment appealed from. *Robinson* v. *Harris*, Ontario. Supreme Ct. of Jud. In Chambers, Jan. 1892. (Can. L. T.

2. ACTION FOR CALL OF $1,000—FUTURE RIGHTS—R. S. C. SEC. 29, SUBSEC. (*b*) OF THE SUPREME AND EXCHEQUER COURTS ACT.

The company sued the defendant B. for $1000, being a call of ten per cent on 100 shares of $100 each alleged to have been subscribed by B. in the capital stock of the company, and prayed that the defendant be condemned to pay the said sum of $1000 with costs. The defendant denied any liability, and alleged that he was not a shareholder, and the company's action was dismissed.

On appeal to the Supreme Court of Canada by the company,

Held, that the appeal would not lie.

the amount being under $2,000, and there being no such future rights as specified in sub-section (b) of sec. 29, which might be bound by the judgment. Gilbert & Gilman 16 Canada, S. C. R. 189, appeal quashed without costs. *Dominion Salvage & Wrecking Co.* v. *Brown*, Supreme Ct. of Canada, March 9, 1892.

APPLICATION FOR INSURANCE—See Insurance 26.

APPRAISEMENT AND PROOF OF LOSS—See Insurance 10. 19.

ARBITRATION OF LOSS—See Insurance 15.

ARGUMENT OF COUNSEL—See Crim. Law, 15. 17.

ASSAULT—See Crim. Law 10.

ASSESSMENT OF DAMAGES—See Sale of Goods 8.

ASSIGNMENT—See Sale of Goods 7.

ASSIGNMENT OF NOTES—See Bills and Notes 7.

ASSIGNMENT OF POLICY—See Insurance 12. 22.

ASSIGNMENT FOR BENEFIT OF CREDITORS—See Corporations 13.

ATTORNEY AND CLIENT.

COMPENSATION—CONTRACT.

Plaintiff, an attorney, was interested with his brother in certain business furnished by defendant. The brother was not a lawyer, and had no interest in plaintiff's legal business.

Held, that an agreement by the brother that plaintiff should undertake certain litigation for defendant on a contingent fee was unauthorized and void. Jan. 20, 1892. *Leavitt* v. *Chase*, 13 N. Y. Supp. 883, affirmed, N. Y. Ct. of App.

ATTORNEYS—See Champerty 1. 2.—Counties 2.—Stipulation by Attorney.

AUCTIONEER, RESPONSIBILITY OF, FOR PLANT IN HIS EMPLOYER'S PREMISES—See Neg. 15.

AUTHORITY OF AGENT TO WARRANT—See Sale of Goods 8.

AVERMENTS OF DECLARATION—See Carriers 8.

BANK ACT—See Warehouse Receipts.

BANKS AND BANKING.

1. COLLECTIONS — PROOF OF HAND WRITING.

(1) To relieve a bank from liability to refund money paid to it for the account of its principal through fraud or mistake, it must have actually paid over the same to the principal, and the giving the principal credit for the amount on the bank's books is not sufficient.

(2) A draft for $12.50, drawn on plaintiff by a correspondent, was raised to $5,000, and as so raised, cashed by plaintiff upon defendant's presenting it endorsed for collection. *Held*, that upon discovery of the fraud, plaintiff could recover from defendant the amount paid to it less $12.50 unless the signature of the drawer was also a forgery; and that the fact that the genuine signature of the drawer had been touched up a little with a brush or quill, but not essentially altered, did not constitute it a forgery.

(3) The testimony upon the part of defendant to show that the signature of the drawer of a draft was a forgery was that of experts, who were unfamiliar with the signature, and who only testified from scientific tests, and a comparison of the signature with those acknowledged to be genuine, and from the appearance of the signature of the draft in question. On the other hand, the drawer himself, and various persons who had seen him write, and were familiar with his signature, all swore that in their opinion the signature was genuine. *Held*, that a finding in favor of the genuineness of the signature would not be disturbed, and that the fact that the drawer had written a letter in reference to his signature, in which he did not express himself in as positive terms as he did as a witness, in no way discredited his testimony. December 22, 1891. *United States Nat. Bank* v. *Nat. Park Bank of New York*, 13 N.Y. Supp., 411, affirmed without opinion. N.Y. Ct. of App., Alb. L. J.

2. DRAFT—ACCEPTANCE—REVOCATION.

A bill of exchange drawn on defendant, was sent by plaintiff to a bank for collection, and the bill, on presentation to defendant, was accepted by its treasurer, and re-delivered to the bank. On the same day defendant's treasurer learned that the drawer of the bill had failed two days before. On the next day defendant's treasurer applied to the bank's cashier for leave to revoke the acceptance and erase the indorsement, which the cashier declined to do, and notice was thereupon given the bank to refuse payment of the bill. At the time of the acceptance the drawer had no funds in defendant's hands, nor was he indebted to it. No fraud was shown on plaintiff's part.

Held, that defendant was bound by its acceptance. N. J. Supreme Ct., *Trent Tile Co.* v. *Ft. Dearborn Nat. Bank*, 23 Atl. Rep. 423.

3. Drafts—Collection.

Where time drafts were left with a bank for collection, with bills of lading attached, the burden is on the drawer to show that the bank was instructed to hold the bills of lading until the drafts should be paid. *Second Nat. Bank of Columbia* v. *Cummings*, Tenn. 18 S. W. Rep. 115.

4. Collections — Acceptance of Draft.

In the absence of instruction the collecting agent was authorized to infer that the warehouse receipts were annexed to the draft to secure its acceptance, and were to be surrendered on acceptance. *Moore* v. *Louisiana Nat. Bank*, La. 10 South Rep. 407.

5. Deposits for Collection—Time Drafts—Bills of Lading.

Defendants left with the plaintiff bank time drafts on a person in another city, entering them on a deposit ticket as a cash item, and stamping on them the indorsement, "For deposit only to credit of" defendants. The drafts were not discounted by plaintiff, nor credited to defendants, but were entered as having been received for collection only. There was evidence that prior to this transaction plaintiff, to secure defendants' business, agreed to receive checks and sight drafts and credit them as cash, but the agreement did not extend to time paper, and there was no proof that such paper was ever credited except as collected. *Held*, that the drafts, when received by plaintiff, did not become its property, but were taken for collection only.

Where time drafts were left with a bank for collection, with bills of lading attached, the burden is on the drawer to show that the bank was instructed to hold the bills of lading until the drafts should be paid.

Where bills of lading attached to time drafts left with a bank for collection are taken to the order of the vendor and drawer instead of the vendee and drawee, such fact is, when not rebutted by evidence to the contrary, almost conclusive to show that the bills were not to be surrendered to the vendee until the drafts should be paid, and is sufficient to require the bank to hold the bills until such payment.

A bank to which are sent by another bank, for collection, time drafts, with bills of lading attached, which bills are taken to the order of the vendor and drawer instead of the drawee and vendee, is a special agent of the transmitting bank, authorized to deliver the bills of lading only upon payment of the drafts, and cannot bind the transmitting bank by a delivery of the bills without such payment.

In such case, when the bills of lading are without authority delivered to the drawee and vendee before payment, and the drafts are not paid, he acquires no title to the goods as against the the drawer and vendor, and *bona fide* purchasers from him, in the regular course of business, are chargeable with constructive notice, and acquire no better title than he has.

Defendants left with the plaintiff bank for collection time drafts on T. at the city of A., to which were attached bills of lading taken to defendants' instead of T.'s order, and indorsed by defendants to the order of plaintiff. Defendants themselves designated a bank at A. through which the drafts should be collected, but gave no further instructions. Plaintiff sent the drafts

to the bank at A., without special directions, and that bank, instead of holding the bills of lading until the drafts should be paid, surrendered them on acceptance by T., who got the merchandise from the carrier, and, becoming insolvent, failed to pay the drafts. Plaintiff did not assign the bills of lading to the bank at A. *Held* that, though the bank at A. was negligent in surrendering the bills, it was defendants' agent, as well as plaintiff's, and that plaintiff was not liable for such negligence; defendants' remedy being against the bank at A., or by suit to recover the merchandise if it could be traced, or by an action against the carrier for delivering the merchandise to T., when the bills of lading showed the title to be in plaintiff, to whose order defendants had indorsed the bills as their agent.—*Second Nat. Bank* v. *Cummings*, 18 S. W. Rep. 115. Tenn. Sup. Ct.

6. LIABILITY OF DIRECTORS—GROSS NEGLIGENCE.

A director of a bank, whose services are gratuitous, and whose duties are to attend the bank once or twice a week to assist in discounting paper, to see how much money there is to loan, and once or twice a year to count the cash on hand, and examine the bills receivable and securities to see whether they correspond with the statement furnished by the officers, does not owe the creditors of the bank such care as a reasonably prudent man exercises in his own business, but is amenable only for fraud, or for such gross negligence as amounts to fraud.

A bank president, abetted by the cashier and several clerks, embezzled almost all the funds of the bank, and concealed the fraud by false entries in the books. His statements to the directors from time to time showed the bank to be in good condition. No fraud was discoverable in any of the books except the individual ledger, which, by a rule of the bank conforming to a custom largely prevalent, the directors were not allowed to see. The directors were among the heaviest stockholders, and at the first suspension they raised nearly $300,000 on their individual credit to enable the bank to resume payment.

Held, that the directors were not guilty of gross negligence. *Swentzel* v. *Penn. Bank*, 23 Atl. Rep. 405, Pa. Supreme Court.

7 POWERS OF DIRECTORS — MISAPPROPRIATION — DIRECTORS' MEETINGS—SUIT BY STOCKHOLDER.

A complaint for an injunction to restrain the misappropriation of money alleged that plaintiff and defendants were stockholders of a bank corporation; that defendant C. was a director and the president, and at a meeting of himself and two other directors voted to appropriate to himself a salary of $400 per month, and also a loan of $40,000 of the bank funds, and gave his unsecured demand note at 4 per cent, for the money received; that at a subsequent meeting he voted to loan another stockholder the sum of $45,000 for one year on an unsecured note; that his loan was made for the benefit of C., whose demand note was thereupon cancelled, and the difference between the two notes immediately turned over to him and used for his own purpose.

Held, that the complaint stated a cause of action, under Civil Code, s. 2229, which provides that no trustee shall use the trust property for his own profit, and for purposes unconnected with the trust.

In the absence of an agreement that the directors, before their election as such should receive such salary, a resolution to pay C. $400 per month was unauthorized.

A regular meeting of the directors was had on January 14th, and an adjournment taken until February 14th. On January 20th C. and two other defendants held a meeting, at which such $45,000 loan was made and such salary voted to C. *Held*, that the action taken at such a meeting was not binding on the stockholders.

Where the resignation of one of defendants as a director had been accepted at the meeting on January 14th, he could not take part in such meeting.

Plaintiff's allegations in reference to actions brought by another stock-

holder and himself to determine the rights of certain of defendants to hold the offices of directors were not separate causes of action in behalf of plaintiff, but were immaterial, and did not vitiate the cause of action alleged.

The facts alleged in the complaint were sufficient to obviate the necessity of making any previous demand on the corporation or defendants that they institute an action to secure the relief which plaintiff sought.

Where plaintiff had the right to bring the action in his own name and for his individual account, as well as on behalf of the other stockholders, if his allegations were not sufficient to entitle the action to be considered as brought in behalf of others than himself, its sufficiency as an action in his own behalf was not impaired by his averment that he brought it for them as well as for himself. *Wickersham* v. *Crittenden*, 28 Pac. Rep. 788, Cal. Sup. Ct.

8. Savings Banks — Special or General Deposit.

Plaintiff delivered money to a banker, her representative stating to him that she wished to leave it with him until he could invest it. He made out a savings deposit ticket in her representative's presence, and gave her a pass-book, containing rules and regulations, showing the opening of an account between herself and the bank; and the transaction was entered in his books as other savings accounts.

Held, that the deposit was a general and not a specific one. *Wetherell* v. *O'Brien*, 29 N. E. Rep. 904 Ill. Sup. Ct.

9. Savings Banks—Pass-Books — Payment to Wrong Person — Evidence.

A savings bank by-law declaring that while the bank will endeavor to prevent fraud and imposition, yet all payments made to persons presenting pass-books shall be valid, does not release the bank from the obligation of exercising care and diligence in ascertaining the authority of persons presenting pass-books belonging to others. Kummel v. Bank, (N. Y. App.) 22 N. E. Rep. 398, followed.

Where a deposit made by a wife in a savings bank is marked "Special," and she testifies that she told the officer to pay it to no one but herself, the fact that the bank subsequently paid the money to her husband, who was without authority from her, merely upon his presenting her pass-book with the assurance that he was her authorized agent, is sufficient to warrant the jury in finding that proper diligence was not used by the bank in protecting her interests.

The bank, having paid the money to the husband on the assumption that he was his wife's authorized agent, is not entitled to show that in fact he himself was the owner thereof. *Carl* v. *Saugerties Sav. Bank*, N. Y. Sup. Ct. Dec. 1891.

Bankruptcy—See Contracts 1—Insolvency.

Beneficiary, Rights of — See Insurance 29.

Bequest to Creditor — See Insurance 29.

Bill Held by a Bank as Agents—See Bills and Notes 3.

Bill of Exchange—See Bills and Notes 2. 3. 4.

Bill of Lading — See Banks 5—Ships and Shipping 3.

BILLS AND NOTES—See also Agency.

1. Draft — Equities of Acceptor —Evidence.

Defendants purchased goods of A. & Co., Staffordshire, Eng., and the A. Exchange accepted a draft drawn by A. & Co., on it at ninety days for the value of the goods, and defendants accepted a draft drawn on them by the A. Exchange for an equivalent amount, maturing twenty days before A. & Co.'s draft, in order to enable it to meet that draft. The intervention of the A. Exchange was merely to enable defendants to obtain credit with A. & Co., and it received a commission on the transaction.

Held, that plaintiff having taken the draft as collateral security from the A. Exchange, it was subject in her hands

to defendants' equities arising out of the subsequent insolvency of the A. Exchange, and its failure to pay A. & Co.'s draft, whereby defendants were left liable as vendees of A. & Co.'s goods. Coddington v. Bay, 20 Johns., 637, Jan. 20, 1892. *Leslie* v. *Bassett*, 14 N. Y. Supp., 380, reversed, N. Y. Ct. of App., Alb. L. J.

2. Bill of Exchange — Conflict of Laws.

The payee of a bill of exchange, who discounts the same, and pays out the proceeds to the order of the drawer, and then forwards it to the drawee for payment, does not "negotiate" it, within the meaning of the law merchant, and therefore does not come within 1 Rev. Stat. Mo., p. 84, § 533, providing that the preceding sections, which declare void all acceptances not made in writing, do not apply to "any person to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill."

An agreement made in Missouri by a resident of Illinois to accept and pay drafts at his place of business in Illinois, is governed by the law of the latter State, to the exclusion of the Missouri statutes.

In Illinois, a parol promise upon sufficient consideration to accept a bill of exchange is binding upon the acceptor. *Hall* v. *Cordell*, Supreme Ct. United States.

3. Pleading—Bill of Exchange—Action on — Declaration — Necessary Averments—Bill Held by a Bank as Agents.

This was an action on a bill of exchange. The declaration set forth that the plaintiffs drew their bill of exchange upon the defendant, requesting him to pay to the order of the Bank of Montreal ten days after sight $150.27, which bill of exchange, it was averred, the defendant accepted on the 19th January, 1891, and which bill was duly presented for payment at maturity and was dishonored, and that the defendant had paid $10 on account of the said bill, "and the amount of $140.27 of said bill is still due and unpaid, and the said bill of exchange is still held by the plaintiffs." The defendant demurred to this declaration and contended that there was not a sufficient averment of facts to shew a title in the plaintiffs to the bill of exchange declared on; that there should have been an averment that the Bank of Montreal had after dishonor of the bill returned it to the plaintiffs by indorsement or otherwise.

Held, that the declaration did not allege that the bill had been transferred to the bank so as to show that the property in the bill passed to the bank. The bank was merely the agent of the plaintiffs to procure the acceptance and to demand and receive payment of the money, and the statement "and said bill of exchange is still held by the plaintiffs" legally imports that they had always from the making of the bill been the holders of it, and being the holders were entitled upon its non-payment to sue the acceptor.

Held, also, that the defendant by his demurrer admitted that the bill of exchange was held by the plaintiffs, and that impliedly admitted the redelivery of the bill to them, if it were necessary to aver a return of the bill. Judgment for plaintiffs on the demurrer. *Richards* v. *Bowes*, Supreme Ct. of New Brunswick, Feb. 1892, (Can. L. T.)

4. Estoppel—Bill of Exchange.

In an action against the acceptor of a bill of exchange, where the declaration merely charges defendant with having accepted the bill on condition that the amount thereof should be found to be due from him to the drawer, plaintiff cannot show that, by subsequent declarations, defendant is estopped to deny a sufficient indebtedness to the drawer, since estoppel must be specially pleaded. *Gooding* v. *Underwood*, Mich. 50 N. W. Rep. 818.

5. Indorsement.

Where C, a stranger to a promissory note, takes the same from H, one of two makers, with an indorsement plainly written thereon; "Paid by H. this September 5 1882, [which is the date of maturity], and transferred to C. without recourse, H." and there is

no mistake or fraud in the transaction H. is relieved from liability on the note to C. or to his assignee. *Cross* v. *Hollister*, *Kan.*, 28 Pac. Rep. 693.

6. ALTERATION OF NOTE — DISCHARGE OF SURETY—RATIFICATION.

The surety of a promissory note, having a right to insist upon his discharge because of a material alteration of the note by the addition, without his consent, of the signature of a new surety, may renew his liability without any new consideration by consenting to the alteration with full knowledge of all the facts. *Owens* v. *Tague*, Ind. 29 N. E. Rep. 784.

7. ESTOPPEL—ASSIGNMENT OF NOTE.

Where the maker of a note, believing that the payee is the holder thereof, pays the latter without requiring the surrender of the note or inquiring whether it had been negotiated, and there is no evidence that the holder caused such belief, the holder is not estopped on showing that the payee was not authorized to receive payment of the note. *Jenkins* v. *Shinn*, Ark. 18, S. W. Rep. 240.

8. FORGERY—EVIDENCE.

In an action upon a note, claimed by defendant to be forged, it is not competent for him to introduce evidence tending to prove that the payee had, at other times, and unconnected with the note in suit, negotiated paper alleged to be forged. *Monitor Plow-Works* v. *Boon*, Neb. 51, N. W., Rep. 129.

9. PAYMENT.

Where the creditor, at the time of taking a joint promissory note, said to one of the makers that he would take in payment thereof a tract of land belonging to another one of the makers, the meaning was that he would take the land if it was offered to him; and, unless it be so offered, the agreement will be no discharge of the note as to any of the makers. *Chamblee* v. *Davie*, Ga. 14 S. E. Rep. 195.

10. FAILURE OF CONSIDERATION.

The consideration for which a negotiable promissory note was given was a jack; warranted by the seller to be a sure foal getter. In an action upon the note by an indorsee, who purchased the paper before due, in the ordinary course of business, for value, having knowledge of the contract of warranty, but neither he nor the makers of the note having any knowledge that the warranty had failed until long after the transfer of the paper, *held*, that the defence of breach of warranty was not available against the plaintiff. *Rublee* v. *Davis*, Neb. 51, N. W. Rep., 135.

11. ESTOPPEL—PARTNERSHIP.

In an action on a note alleged to have been given by defendant firm, the answer denied the making of the note and alleged payment. Plaintiff's evidence showed that the note was given by one M, whom plaintiff claimed to be a member of the firm and that the money was used by the firm. Defendants denied that he was a member or authorized to give the note. *Held*, that it was error to charge that, if the money was actually used by the firm, defendants were estopped to deny the authority of M to borrow the money. *Eggleston* v. *Mason*, Iowa, 51 N. W. Rep., 1.

12. FRAUD—CONSIDERATION.

A party who, before maturity, has become the holder of a promissory note in good faith and without notice of any objection, for valuable consideration, is entitled to recover the amount thereof from the person whose signature appears on the note as maker, even where it is proved that the signature was obtained by artifice and fraud and without any consideration being received by the promissor. *Banque Jacques-Cartier* v. *Leblanc*, Court of Queen's Bench, Montreal Jan. 18, 1892.

13. INDORSEMENT — GUARANTY — TRUST FOR PAYMENT OF DEBTS — EVIDENCE.

L., being indebted to R., gave him his promissory note for $326.57, payable three months after date to R.'s order. Some years afterward L. conveyed his farm to his son J. L. on an undertaking or verbal agreement between them that J. L. should pay L.'s

debts, including this note. After the conveyance, on R. pressing L. for security, J. L. wrote his name on the back of the note, it not having been indorsed by R., the parties supposing that J. L. thereby rendered himself liable; and J. L. subsequently paid R. $50 on account. No notice of the arrangement between L. and J. L. was communicated to R., nor was any agreement made releasing L. from liability and substituting J. L. as debtor; and it appeared that R. had always considered L.'s liability as subsisting, and in this action sued him as maker and J. L. as indorser.

Held, that J. L. was in no way liable; it was admitted that he was not liable as an endorser; and he could not be treated as a guarantor nor as a trustee of the property conveyed and so liable to account to the plaintiff for the amount of the note. *Robertson* v. *Lonsdale*, Ontario Common Pleas, Feb. 1892, (Can. L. T.)

14. ENDORSERS FOR ACCOMMODATION — NOTICE OF PROTEST — WARRANTORS — ART. 2311, C. C. — R. S. CAN. C. 123, S. 5.

Held, (1) An accommodation endorser of a promissory note is entitled to notice of protest for non-payment, and is discharged by the absence of it.

(2) Where a person has placed his name on the back of a note below the endorsement of the payee, the fact that he did so solely for the accommodation of the maker and to give him credit with the party discounting, without having received any consideration, and without ever having been the holder of the note, is not sufficient to destroy the presumption arising from the position of the names on the back of the note, and to make him liable as warrantor.

(3) Notice of protest is not sufficiently given to an endorser, when such notice is sent to an erroneous address of such endorser, given by the maker at the time he got the note discounted. *Merchants Bank of Canada* v. *Cunningham*, Montreal, Jan. 1892, Q. B.

BONDS—SEE ALSO INTEREST.

OFFICIAL—WITHDRAWAL OF SURETY.

(1) Notice of withdrawal by a surety upon a deputy sheriff's bond does not discharge such surety until a reasonable time has elapsed to enable the sheriff to secure a new bond for such deputy. Bostwick v. Van Voorhis, 91 N. Y. 363; Barnard v. Darling, 11 Wend. 29; Andrus v. Bealls, 9 Cow. 693; Hart v. Brady, 1 Sandf. 626; Hunt v. Roberts, 45 N. Y. 696; Burgess v. Eve, L. R. 13 Eq. 450; Hough v. Warr, 1 Carr. and P. 151; Hassell v. Long, 2 Maule and S. 363, 370; Calvert v. Gordon, 3 Man. and R., 124; De Col. Guar. (2d ed.), 346; Fell Guar. (2d ed.) 530.

(2) One month after such notice is not, as matter of law, an unreasonable length of time to allow a sheriff in which to secure a new bond. Feb. 9, 1892. *Reilly* v. *Dodge*. Opinion by O'Brien, J., Gray, J., dissenting, 14 N. Y. Supp. 129, affirmed. N. Y. Ct. of App. Alb. L. J.

BOOKS OF ACCOUNT—See Evidence 6—Partnership 1.

BREACH OF CONTRACT—See Carriers 2—Contracts 3.

BREACH OF WARRANTY—See Sale of Goods 2, 5, 8.

BURGH—See Negligence 16.

BY-LAW—See Taxation 4.

CANCELLATION OF POLICY—See Insurance 9, 20.

CARRIERS—SEE ALSO EVIDENCE 3.

OF GOODS.

1. CONNECTING LINES — ADVANCES.

Defendant, a steamship company, entered into a bill of lading with other carriers which provided that it should not be liable "for loss or damage on any article or property whatever, by fire or other casualty, while in transit, or while in deposit, or places of transhipment, or at depots or landings at all points of delivery." Plaintiff, as the last of five connecting carriers, had paid all charges on a consignment of cotton, and placed it on a wharf preparatory to delivery to defendant, but before such delivery the cotton was destroyed by fire. *Held*, in an

action by plaintiff to recover freight charges advanced by it, and its own charges, from defendant, that there was no liability upon defendant, under the bill of lading, to pay said advances and charges.

EVIDENCE OF CUSTOM—No liability arose until the cotton was on board defendant's steamer, in the absence of evidence from which a contract to pay the same from usage or a settled course of dealing between the parties might be implied. 14 N. Y. Supp., 253, reaffirmed, N. Y. Supreme Ct., *New-York L. E. & W. R. Co.* v. *National S. S. Co.*, (*Limited*), 17 N. Y. Supp., 28.

2. BREACH OF CONTRACT—LIABILITY AS INSURER—DAMAGES.

A common carrier, having contracted to carry goods from Havre, France, by a certain steamer, to London, forwarded them to Southampton, and thence by rail to London. *Held*, that by such deviation the carrier became an insurer, and could not invoke the benefit of any exceptions made in its behalf in the contract.

In such a case, the measure of damages for injury is their value at the place of destination, at the time they should have been delivered pursuant to the contract, and in the condition the carrier undertook to deliver them, less the price to be paid for his services; but where the injury to the goods is lessened by the action of the plaintiff, the carrier should only be charged with actual loss, and plaintiff should be allowed for expenses incurred in so doing. *Robertson* v. *National S.S.Co.*, (*Limited*), 17 N.Y. Supp., 459, N. Y. Superior Ct.

3. DELAY IN DELIVERY OF GOODS—ERROR IN WAY-BILL.

Held:—That a carrier who receives goods *en route* from another carrier, is not responsible for delay in the delivery of the goods, where such delay is caused by an error in the way-bill of a previous carrier, delivered to the succeeding carrier with the goods, which way-bill stated a place of destination which was erroneous. *Tester* v. *Canadian Pacific R. Co.*, Montreal, Jan. 1892, Q. B.

4. LIVE-STOCK SHIPMENTS — LIMITING LIABILITY—PALACE HORSE CARS.

A contract for the shipment of live-stock, wherein the shipper stipulates that he has examined the car and accepts it as suitable and sufficient, does not estop him from recovering for injuries to an animal caused by a defect in the car, since a carrier cannot limit its common-law liability so as to exempt itself from the consequences of its own negligence in furnishing an unsafe vehicle.

The fact that the animal was shipped in a palace horse car owned by an independent company, which was paid for its use by the shipper, will not exempt the railroad company which ran the car and with which the contract was made, from liability for injuries sustained from a defect in the car, as a carrier cannot escape responsibility by carrying its freight in cars furnished or owned by another company. *Louisville & N. R. Co.* v. *Dies*, 18 S. W. Rep. 266, Tenn. Sup. Ct.

5. LIABILITIES FOR INJURIES TO GOODS—CONNECTING LINES — IMPERFECT PACKING—EVIDENCE— INSTRUCTIONS.

Where in an action against a carrier for damages to goods in transit, plaintiff introduces in evidence a way-bill of a prior connecting road, with the exception of a sentence written in lead pencil, reciting that the goods, when received, were in a badly damaged condition, it is error to exclude that sentence when subsequently offered by defendant; it not appearing that the sentence was written subsequently to the making of the way-bill.

Where the allegations of the complaint that the goods were damaged while in transit over defendant's line were unsupported by evidence, defendant was entitled to an instruction to that effect. Carriers are liable for injuries to goods arising from insecure or imperfect packing or boxing. A carrier who delivers goods in a damaged condition, is not liable therefor, when they were received in the same condition.

Where there was evidence that at

station on the connecting line between the starting point and the point where the goods were received by defendant the barrels were leaking, the boxes were stained, and the glass therein rattling, an instruction that the goods should not be presumed to be in a worse condition at the point where they were received by defendant than at the starting point was inapplicable and incorrect. *Goodman* v. *Oregon Ry. & Nav. Co.*, 28 Pac Rep. 894, Oregon Supreme Ct.

OF PASSENGERS

6. Ejection of Passengers.

Where a conductor ejects a passenger from a street car, and, in reply to an inquiry by a policeman, states that the passenger was disorderly, and the latter is then unlawfully taken into custody by the policeman, and it is not shown that it was within the scope of the conductor's authority to cause the passenger's arrest, the carrier is not liable therefor. *Cunningham* v. *Seattle Electric Railway & Power Co.* Wash. 28 Pac. Rep. 745.

7. Ejection of Passenger—Knowledge of Rules of Company.

Passengers are not presumed to know the regulations of railroad companies made for the guidance of conductors of trains in relation to stop-over privileges, and unless the passenger has actual knowledge thereof, or the face of his ticket shows the rule requiring a stop-over check, he is entitled to rely upon the representation of the ticket seller as to what is necessary to entitle him to such privilege.

Plaintiff purchased of defendant's ticket agent at Boston an unlimited ticket for Chicago, paying an extra compensation to stop over at Olean, the ticket agent telling him to speak to the conductor about it. The conductor punched the proper coupon between Binghampton and Salamanca, telling him it was sufficient to permit him to stop over at Olean. But on plaintiff's again resuming his ride to Chicago from Olean he was ejected for failing to pay his fare to Salamanca, or to present a proper stop-over check which the rules of the company required a passenger intending to stop-over to obtain from the conductor.

Held, plaintiff was justified in relying upon the representations of the ticket agent and of the conductor who punched his ticket as to what was required to entitle him to the stop-over privilege, and could recover for the ejection from the train, it not appearing that plaintiff had any notice or knowledge of the rule of the company requiring a stop-over check. *New York L. E. & W. R. Co.* v. *Winter*, United States, Supreme Court Feb. 1892, 11 R. R. & Corp. L. J., 146.

Notes.

1. It is shown by the evidence that Olean was a station at which stop-over privileges were allowed. Under such circumstances it was entirely proper for the passenger to make inquiries of the ticket agent, and to rely upon what the latter told him with respect to his stopping over at Olean. *Hufford* v. *Railroad Co.*, 64 Mich. 631; *Palmer* v. *Railroad Co.*, 3 S. C. 580; *Burnham* v. *Railroad Co.*, 63 Me. 299; *Murdock* v. *Railroad Co.*, 137 Mass., 293; *Arnold* v. *Railroad Co.*, 115 Pa. St. 135, 8 Atl. Rep. 213.

2. If plaintiff was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that, under such circumstances, he was put off the train, was of itself a good cause of action against the company, irrespective of any physical injury he may have received at that time, or which was caused thereby. *English* v. *Canal Co.*, 66 N. Y. 454; *Brown* v. *Railroad Co.*, 7 Fed. Rep. 51; *Railroad Co* v. *Rice*, 61 Md. 63, 21 Atl. Rep. 97.

8. Injuries—Relation of Passenger and Common Carrier—Averments of Declaration—Allegation of Termini.

Where the plaintiff's right consists in an obligation on the defendant to observe some particular duty, the declaration must state the nature of such duty, and the plaintiff must prove such duty as laid, and a variance will be fatal. So, where plaintiff in his declaration alleged a contract of carriage from Kirksville to Glenwood Junction, and the ticket offered in evidence read from Moberly to Ottumwa, the variance was fatal.

Plaintiff was permitted on the trial to introduce evidence that he was

receiving compensation as a traveling salesman of $3,000 per annum. The declaration contained no allegation of any special contract of the plaintiff with any person under which he might earn money for his services. *Held*, that the evidence offered was not admissible under the declaration. Special damages must be set out in the declaration. *Wabash & Western Ry.* v. *Friedman*, Supreme Court of Illinois, March 24, 1892; 24 Chicago L. N. 243.

Notes.

1 When the plaintiff's right consists in an obligation on the defendant to observe some particular duty, the declaration must state the nature of such duty which we have seen may be founded either upon a contract between the parties, or on the obligation of law arising out of defendants' particular character or situation, and the defendant must prove such duty as laid, and a variance will, as in actions on contract, be fatal. Chitty on Pleading, p. 382.

2 In an action on the case founded on an express or implied contract, as against an attorney, agent, carrier, innkeeper or other bailee, for negligence, etc., the declaration must correctly state the contract or the particular duty or consideration from which the liability results, and on which it is founded, and a variance in the description of a contract, though in an action *ex delicto*, may be fatal as in an action *ex contractu*. The declaration in such case usually begins with a statement of the particular profession or situation of the defendant and his retainer, and consequent duty or liability. The declaration will be defective if it does not show that by express contract or by implication of law in respect to the defendant's particular character or situation, etc.: stated by the plaintiff, the defendant was bound to do or to omit the act in reference to which he is charged. Chitty on Pleading, 384.

3. In general, every allegation in an inducement, which is material and not impertinent and foreign to the cause, and which, consequently, can not be rejected as surplusage, must be proved as alleged, and a variance would be fatal; and consequently great attention to the facts is necessary in framing the inducement, and care must be taken not to insert any unnecessary allegation. Chitty on Pleading 292.

4. It is also a rule that if a necessary inducement of the plaintiff's right, etc., even in actions for *torts*, relate to and describe and be founded on a matter of contract, it is necessary to be strictly correct in stating such contract, it being matter of description. Thus, even in case against a carrier, if the termini of the journey which was to be undertaken be misstated, the variance will be fatal. Here the allegation in the inducement relates to the matter of description. Chitty on Pleading, p. 385.

5. In *Tucker* v. *Cracklin*, 2 Starkie, 385, and in *Railroad and Banking Co.* v. *Tucker*, 79 Ga., actions were brought against carriers for the loss of goods, and in each case it was held that a variance between the proof and allegation as to the termini of the carriage, was fatal.

6. As a general rule a party is required to prove the averments of his pleadings as he makes them. He may aver more than is required, but as a general rule, he must prove them although unnecessarily made. *Bell* v. *Senneff*, 83 Ill., 125.

7. Every averment which the pleadings make material as a descriptive part of a cause of action, must be proved as alleged: and any variance which destroys the legal identity of the matter or thing averred with the matter or thing proved, is fatal. *Derrings* v. *Rutland*, 58 Vermont, 128.

8. It is a most general rule, that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge can ever be rejected. *State* v. *Kopp*, 15 N. H., 212. See also Phillips on Evid. Vol. 1, p. 705; Stephen on Pleading, p. 124, Appendix.

9. Where plaintiff was injured by means of a defective highway, and his allegation was that he was thereby "prevented from transacting his ordinary business," it was held, that under such allegation he could not show that he was earning $100 a month in carting and sawing timber. *Tomlinson* v. *Derby*, 43 Conn. 562.

10. Under a similar allegation, it was held that the plaintiff could not show that she was a button maker, and what wages she earned in that business. *Taylor* v. *Munroe*, 43 Conn. 36.

11. Where plaintiff brought suit for an injury caused by the falling of a portion of the brick and plastering in the common council chamber in the city. The allegation in the declaration was, that "the plaintiff, who was pursuing his occupation as journalist, was injured," etc., "and thereby the plaintiff as lawyer, lecturer, and journalist, became and was sick, sore and incapacitated from attending to his business, and so continued for a long time, to wit; for two months; and as regards plaintiff's profession as a lecturer, he has been almost wholly, ever since, disabled from pursuing it," it was held that under these allegations, the plaintiff could not give in evidence the fact of a particular engagement to lecture in Virginia and the probable gains thereof. *City of Chicago* v. *O'Brennan*, 65 Ill. 160.

CHAMPERTY.

1. While a champertous agreement between a plaintiff and his attorney for the prosecution of a certain suit is against public policy and void, it does not affect the right of the plaintiff to prosecute his action against the defendant, in the suit for the prosecution of which the champertous agreement was

made. *Pennsylvania Co.* v. *Lombardo*, Ohio, 29 N. E. Rep. 573.

2. CHAMPERTOUS AGREEMENT—ATTORNEYS.

A *bona fide* agreement by a third person to supply funds to carry on a suit and receive therefor a portion of the proceeds of such suit, is not invalid, either on the grounds of champerty, as now understood, or because opposed to public policy. *Brown* v. *Bigne*, 28 Pac. Rep. 11.

Notes.

1. A contract to support a pending litigation, in consideration of having a stipulated part of the money or thing recovered, is not void *per se*, as against public policy. *Coondoo* v. *Mookerjee*, L. R. 2 App. Cas. 186.

2. It is not, nor ever was intended, to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it. 1 Add. Cont. 392; *Stolsenburg* v. *Marks*, 79 Ind. 193.

3. But agreements of the kind above suggested should be carefully watched and closely scrutinized, when called in question, and if found to have been made, not with a *bona fide* object of assisting a claim believed to be just, but for the purpose of injuring and oppressing others by aiding in unrighteous suits, or for the purpo ' of gambling in litigation, or to be so exortionate or unconscionable as to be inequitable against the party, effect ought not to be given to them (opinion of the Court).

CHANGE OF BENEFICIARY—See Insurance 27.

CHANGE OF BY-LAWS — See Insurance 29.

CHANGE OF TITLE—See Insurance 12.

CHARGE OF DISHONESTY AGAINST A BODY OF WORKMEN — See Libel and Slander 5.

CHARGE OF JUDGE MISUNDERSTOOD OR DISREGARDED BY JURY—See Libel and Slander 3.

CHARTERS—See Corporations 12.

CHARTER-PARTY — See Ships and Shipping 3.

CHEQUES INDORSED IN BLANK—See Wife's Separate Estate.

CHILD ON TRACK—See Negligence 10.

CITY COUNCIL—See Municipal Corporations 2.

CLUBS.

FURNISHING LIQUORS TO MEMBERS.

A social club that dispenses intoxicating liquors among its members, and receives for each drink money with which to replenish the supply, no profit being made, is not within Gen. St. c. 55, s. 1731, providing that "it shall be unlawful for any person or persons to sell such liquors without a license so to do."

Such club requires no liquor license, notwithstanding a city ordinance providing that "all clubs or associations where liquor is disposed of for cash, checks or otherwise shall be required to take the regular liquor license," since Gen. St. c. 55, s. 1736, merely provides that municipal corporations shall have power to grant licenses to "retail" spirituous liquors "to keepers of drinking-saloons and eating-houses, apart from taverns." S. C. Supreme Ct., *State ex rel. Columbia Club* v. *McMaster*, 14 S. E. Rep. 290.

COLLATERAL ACTION—See Taxation 3.

COLLECTIONS—See Banks and Banking 1. 3. 4. 5.

COLLISION WITH VEHICLES — See Negligence 3. 8.

COLLOCATION—See Insolvency 1.

COMMISSIONS—See Real Estate Agent 1. 2.

COMMUTING AND REMITTING SENTENCES—See Constit. Law 4.

CONDITIONS OF POLICY—See Insurance 1. 7. 8. 12. 13. 14. 18.

CONDITION LIMITING RESPONSIBILITY OF COMPANY—See Telegraph Companies 5.

CONDITION PRECEDENT—See Money Entrusted for Investment.

CONDITION SUBSEQUENT—See Railroad Companies 10.

CONDUCTOR AND BRAKEMAN — See Master and Servant 6.

CONFLICT OF LAWS—See Bills and Notes 2.

CONNECTING LINES — See Carriers 1. 5.

CONSIDERATION—See Bills and Notes 12—Contracts 1.—Insurance 22.

CONSTITUTIONAL LAW.

1. R. S. O. c. 61, s. 9—INTRA VIRES—CRIMINAL PROCEDURE — OFFENCES AGAINST PROVINCIAL ENACTMENTS—EVIDENCE OF DEFENDANT.

Notwithstanding the reservation to the Dominion Parliament of the power to legislate with regard to criminal procedure, a Provincial Legislature has power to regulate and provide for the course of trial and adjudication of offences against its own lawful enactments, even though such offences may be termed crimes. The Ontario Legislature, therefore, has power to regulate the giving of evidence by defendants in such cases, and s. 9 of R. S. O. c. 61 is *intra vires*.

An offence against the Ontario Liquor License Act is a crime within the meaning of s. 9; and the defendant is neither a competent nor a compellable witness upon his trial for such an offence. *Regina* v. *Bittle*, Ontario, Commer. Pleas Feb. 1892 (Can. L. T.)

2. R. S. O. 61, s. 9. — OFFENCE AGAINST ONTARIO LIQUOR LICENSE ACT—EVIDENCE OF DEFENDANT.

On the trial of a person for an offence against the Ontario Liquor License Act, the giving of evidence is governed by Ontario legislation, and under s. 9 of R. S. O. c. 61 the defendant is neither a competent nor compellable witness.

The Dominion and Ontario legislation on the subject considered. *Regina* v. *Rowe*, *Ontario Common. Pleas.* Feb. 1892, (Can. L. T.)

3. CUSTOMS ACT—POWERS OF DOMINION PARLIAMENT TO IMPOSE TAXATION—53 V., c. 20—"EX POST FACTO LEGISLATION—"PROPERTY AND CIVIL RIGHTS" — RIGHT OF PARLIAMENT TO IMPOSE AN ADDITIONAL TAX AFTER GOODS ARE TAKEN OUT OF WAREHOUSE.

This was an action to recover certain duties on whiskey. On the 16th May, 1890, the Parliament of Canada passed the Act 53 V., c. 20, imposing additional duties on whiskey, by which it was declared that the Act should be held to have come into force on the 28th March previous. The defendants had taken a quantity of whiskey out of warehouse between those dates and had paid all duties then demanded by the customs officers. After the passage of the Act, the customs officers demanded the additional duties imposed on the goods so taken out, which the defendants refused to pay. A verdict was recovered by the plaintiff, which was now moved against by the defendants. The questions raised were:—(1) Whether the Act 53 V., c. 20, was beyond the powers of the Parliament of Canada; (2) Whether section 19 of that Act was beyond the powers of the Parliament of Canada because, it affected "property and civil rights in the Province," upon which subject the exclusive right to legislate was expressly given to the Provincial Legislatures by s. 92 of the B. N. A. Act: (3) Whether s. 19 of 53 V., c. 20 was applicable in this case, where the duties were paid according to the Customs Act then in force, and the goods taken out of the warehouse nearly a month before the new Act received the Governor-General's assent.

Held, per Allen, C.J., King, Fraser, and Tuck, JJ.; Palmer, J., dissenting: that the courts of this country had no right to question the power of the Dominion Parliament to pass the present Act, even though they might consider the provisions of the 19th section unreasonable or unjust. It related to one of the subjects over which the Imperial Parliament had given the Dominion Parliament exclusive authority by the 91st section of the B. N. A. Act.

Held, also, that whatever construction might be given to the words "property and civil rights" in some cases, they could not apply in the present case, because full force and effect must be given to the 91st section, which vests the Dominion Parliament with the exclusive right to regulate trade and commerce, which, to use the language of Ritchie, C.J., must involve full power over the matter to be regulated and exclude the interference of all other bodies that may attempt to meddle with the same matter.

Held, further, that it is impossible to

give effect to s. 85 of R. S. C. c. 32, that goods taken out of warehouse shall be subject to the duties to which they would have been subject if then imported, and also at the same time to give effect to s. 19 of 53 V. c. 20, which imposes a higher duty on goods imported and taken out of warehouse after a certain day. When two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, the earlier one is repealed by implication. *Attorney General for Canada* v. *Foster*, Supreme Ct. of New-Brunswick, Feb. 1892, (Can. L. T.)

4. CONSTITUTIONAL LAW—VALIDITY OF 51 V., C. 5 (O.)—ROYAL PREROGATIVE — POWER OF PARDON — COMMUTING AND REMITTING SENTENCES—POWERS OF LIEUTENANT-GOVERNORS.

The Act 51 V., c. 5 (O.), which declares that in matters within the jurisdiction of the legislature of the province all powers, etc., which were vested in or exercisable by the governors or lieutenant-governors of the several provinces before Confederation, shall be vested in and exercisable by the lieutenant-governor of this province, is valid and within the power of the provincial legislature to enact.

The power of commuting and remitting sentences for offences against the laws of this province or offences over which the legislative authority of the province extends, which by the terms of the Act is included in the powers above mentioned, does not affect offences against the criminal laws of this province, which are the subject of Dominion legislation, but refers only to offences within the jurisdiction of the provincial legislature, and in that sense this enactment is *intra vires* the provincial legislature. Judgment of the chancery division Court 20 O. R. 222; affirmed. *Attorney-General for Canada* v. *Attorney-General for Ontario*. Ontario Court of Appeal, Jan. 1892, (Can. L. T.)

CONSTRUCTION — See Contracts 3 — Corporations 2. 6. — Railroad Companies 1—Ships & Shipping 3 —Statute —Wills 1. 2. 3. 4. 5. 6.

CONTAGIOUS DISEASE—See Railroad Companies 7.

CONTEST BY STOCKHOLDERS — See Corporations 1.

CONTRACT—SEE ALSO ATTORNEY AND CLIENT – CORPORATION 12 — DAMAGES—MUNICIPAL CORPORATIONS 3. 4. 5. 15—SALE 9.

1. BANKRUPTY—CONSIDERATION.

When a person has been discharged in bankrupt proceedings, and afterwards gives his note to a creditor for a claim on his schedule, the moral obligation to pay is a sufficient consideration for the note. Succession of Andrieu, La. 10 South, Rep. 388.

2. AGREEMENT TO PAY WHEN ABLE —PAROL EVIDENCE.

(1) In settlement of an action by plaintiffs against defendant and another for a balance due on a joint account of the latter, to which they had interposed a defence, and of an account between plaintiffs and defendant individually, on which a balance was due to him, the accounts were liquidated, and a balance against him was stated, which he promised to pay "when I shall be able to do so."

Held, that an action for such balance was not an action on an account stated, but an action on the conditional promise of defendant, which promise was founded on a valuable consideration, and that in order to recover plaintiffs must show some change for the better in defendant's circumstances after the promise was made.

(2) The only evidence as to the defendant's ability to pay was that at the time of making the promise, and since then, he received a salary as judge, monthly, out of which he saved nothing, and it was not shown that in any respect his circumstances had improved. *Held*, that ability to pay within the meaning of his promise was not proved.

(3) One of the letters written by defendant to plaintiffs, and relied on by them as containing the agreement between the parties, referred to defendant's promise to pay him when able as "in accordance with our agreement on Saturday last." *Held*, that parol evidence tending to prove what was the entire agreement was admissible.

(4) It being essential to plaintiffs' cause of action that they should show defendant's ability to pay, evidence was not admissible to show what he could have paid from his salary after defraying his personal expenses, or why he did not devote any portion of the difference between his salary and his individual expenses to pay plaintiff's claim. Dec. 23, 1891. *Work* v. *Beach*, 13 N. Y. Supp. 678, affirmed, without opinion, N. Y. Ct. of App. Alb. L. J.

3. TELEPHONE SERVICE—TRANSMISSION OF MESSAGES—CONSTRUCTION OF TERM—BREACH.

The Bell Telephone Company sold to the Electric Despatch Company all its messenger, cab, etc., business in Toronto and the good-will thereof, and agreed, among other things, that they would in no manner, during the continuance of the agreement, transmit or give, directly or indirectly, any messenger, cab, etc., orders to any person or persons, company or corporation, except the Electric Despatch Company. An action was brought for breach of this agreement, such alleged breach consisting of the Bell Telephone Company allowing their wires to be used by their lessees for the purpose of sending orders for messengers, cabs, etc.

Held, affirming the judgment of the Court of Appeal, 17 A. R. 292, and of a Divisional Ct., 17 O. R. 495, Ritchie, C.J., doubting, that the telephone company could not restrict the use of the wires by their lessees; that being ignorant of the nature of communications made over the wires by persons using them, the company could not be said to "transmit" the messages within the meaning of the agreement, and that they were under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all messages sent over the wires and prevent any being sent relating to messenger, cab, etc., orders. *Electric Despatch Co.* v. *Bell Telephone Co.*, Supreme Court of Canada, Nov. 16, 1891.

CONTRACTS BEFORE ORGANIZATION—See Corporations 4.

CONTROL OVER STREETS—See Municipal Corporations 12.

CONTRIBUTORY NEGLIGENCE—See Municip. Corporations 12—Negligence 3, 5, 11, 12, 13—Telegraph Companies 1.

COPYRIGHT.

PHOTOGRAPHS.

A photograph of a woman and child, with the child's fingers in its mouth, taken by the photographer after arranging them in positions best calculated, in his judgment, to produce an artistic effect, is subject to copyright. *Falk* v. *Brett Lithographing Co.*, U. S. C. C. (N. Y.) 48 Fed. Rep. 678.

CORPORATIONS — SEE ALSO LIMITATION OF ACTIONS.

1. SALE OF PROPERTY ON EXECUTION—CONTEST BY STOCKHOLDERS.

A petition to have a sheriff's sale of a corporation's property set aside, alleged that petitioner was a stockholder of the corporation, and that he appeared for himself and other stockholders, but it did not allege when he or they became stockholders, or how much stock they owned, nor did it allege any collusion between the corporation and the execution creditor, or that it was unable to act in the premises by reason of any misconduct of its authorized agent.

Held, that it did not allege facts sufficient to enable a stockholder to contest the sale. Pa. Supreme Ct., *South-West Natural Gas Co.* v. *Fayette Fuel Gas Co.*, 23 Atl. Rep., 224.

2. MORTGAGE BONDS — CONSTRUCTION—ACTION BY INDIVIDUAL BONDHOLDERS.

Certain mortgage bonds of a corporation provided that, "upon default in the payment of the interest coupons attached to this bond..... the principal sum of this bond shall become due in the manner and with the effect provided in the said trust deed or mortgage." The latter provided that on default in the payment of such coupons, "then and thereupon the principal of all said bonds hereby secured shall be and become immediately due and payable," and that the trustee, "upon the written request of the holders of a majority of the said

bonds then outstanding, shall proceed to collect both principal and interest.... by foreclosure and sale of said property or otherwise, as herein provided."

Held, that on default in the payment of such coupons an individual bondholder could not sue on his bond, as the remedy at the suit of the trustee on the request of a majority of the bondholders was exclusive. Finch and Gray, JJ., dissenting. 14 N. Y. Supp., 306, affirmed. *Batchelder* v. *Council Grove Water Co.*, 29 N. E. Rep., 801. N. Y. Ct. of Appeal.

3. Stockholders — Liability for Unpaid Assessments.

Where stock of a corporation has been transferred for labor done, and the good faith of the transaction is not impeached, nor a failure of consideration shown, the holder is not liable personally on the grounds that said stock is unpaid capital stock, and that the unpaid assessments are a trust fund for the payment of the corporation indebtedness. U. S. Cir. Ct. E. D. Pa., *Holly Manuf. Co.* v. *New Chester Water Co.*, 48 Fed. Rep. 879.

4. Liabilities—Contracts before Organization—Ratification — Statute of Frauds.

While a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after it is organized, make such engagements its contracts by adopting them as its own; and this it may do in the same manner as it might make similar original contracts. Battelle v. Pavement Co., 33 N. W. Rep. 327, 37 Minn 89, followed.

The act of the corporation in adopting such engagements is not a ratification, which relates back to the date of the making of the contract by the promoter, but is, in legal effect, the making of a contract as of the date of the adoption.

Hence, although the contract made in behalf of the contemplated corporation was, by its terms, not to be performed within one year from the date of making thereof by the promoter, it is not within the statute of frauds if it be performed within one year from the date of its adoption by the corporation after its organization. *McArthur* v. *Times Printing Co.*, Minnesota, Sup. Ct. Feb. 1892.

5. Contract Between Creditor and Stockholder.

A contract between the creditor of a corporation and some of its stockholders, whereby the latter agree that, if the creditor will return to the corporation certain notes held by it as collateral security for the debt of the corporation, such notes shall be replaced with others, or the "company's debt" paid, and binding themselves to perform such contract, does not cancel the debt of the company.

Conceding such contract to be an original promise, the stockholders are nevertheless sureties for the corporation, since a corporation and its members are not one, and would be released by an authorized extension of the debt of the company. *Home Nat. Bank of Chicago* v. *Waterman*, 29 N. E. Rep. 503, Ill. Sup. Ct.

6. Mortgage Bonds. — Construction—Action by Individual Bondholders.

Certain mortgage bonds of a corporation provided that "upon default in the payment of the interest coupons attached to this bond....., the principal sum of this bond shall become due in the manner and with the effect provided in the said trust-deed or mortgage." The latter provided that on default in payment of such coupons, "then and thereupon the principal of all of said bonds hereby secured shall be and become immediately due and payable," and the trustee, "upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest....., by foreclosure and sale of said property, or otherwise, as herein provided."

Held, that on default in the payment of such coupons an individual bondholder could not sue on his bond, as the remedy at the suit of the trustee on the request of a majority of the bondholders was exclusive. *Batchelder* v. *Council Grove Water Co.* 14 N. Y.

Supp. 306, affirmed, N. Y. Ct. of Appeals, Jan. 26, 1892.

7. STOCKHOLDERS.

While the affairs of an insolvent corporation are in the hands of a receiver, a creditor may not maintain an action in his own behalf against a stockholder to recover for stock held by the latter, but never paid for. *Merchants' Nat. Bank of Chicago* v. *Northwestern Manuf'g & Car Co.*, Minn, 51 N. W. Rep. 119.

8. OFFICERS.—SALARY.

An officer of a corporation, in order to recover compensation for his services must show that he is an officer *de jure*. *Waterman* v. *Chicago & I. R. Co. Ill.*, 29 N. E. Rep. 689.

9. POWERS OF DIRECTORS.

When the board of directors sells the property of the corporation to one of the members of the board to pay debts, it must appear that there was a necessity for the sale; that the property was bought by the director in open market, at a fair price, without any undue advantage over the corporation, in good faith, and without the slightest unfairness. *Crescent City Brewing Co.* v. *Flanner, La.*, 10 South, Rep. 384.

10. OFFICER.

An officer of a corporation, in order to recover compensation for his services, must show that he is an officer *de jure*, 34 Ill. App. 268 affirmed. *Waterman* v. *Chicago & I. R. Co.* 29 N. E. Rep. 689.

11. RIGHT OF STOCK-HOLDER TO INSPECT BOOKS—MANDAMUS.

On an application for a peremptory *mandamus* to compel defendant to permit plaintiff to inspect the records and books of account of defendant, the affidavit of defendant's officer merely averred that affiant had been advised that applicant was not the owner of certain shares mentioned in applicant's affidavit, but nowhere in terms denied that such shares were in fact the property of applicant.

Held, insufficient to put in issue applicant's right of inspection. Laws N. Y. 1875, c. 611, s. 16, which requires the directors of a company to keep correct books of account, and that all stockholders of the company should have the right to inspect the same at all times, carries with it the right to make memoranda and extracts from such books. *Martin* v. *W. J. Johnson Co. Ltd.* Supreme Ct. of New York, Dec. 1891.

12. ACTS OF DIRECTORS—RIGHTS OF STOCKHOLDERS — CHARTERS — CONTRACTS—'ULTRA VIRES'—RESTRAINT OF TRADE.

Individual stockholders cannot question, in judicial proceedings, the corporate acts of directors, if the same are within the powers of the corporation, and in furtherance of its purposes, are not unlawful or against good morals, and are done in good faith, and in the exercise of an honest judgment. Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests — are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. Park v. Locomotive Works, 40 N. J. Eq., 114; 3 Atl. Rep. 162, affirmed 45 N. J. Eq., 244; 19 Atl. Rep. 621. Elkins v. Railway Co., 36 N. J. Eq. 241. Rutland, etc. Co. v. Proctor, 29 Vt. 93; Mor. Priv. Corp., s. 243; Beach, Corp., p. 388.

The courts will, as a general rule, presume that contracts made by a corporation, which appear to be designed to promote its legitimate and profitable operation, are within the limits of its powers, and, if their validity be assailed will require the assailant to assume the burden of demonstrating their invalidity. Elkins v. Camden, 36 N. J. Eq., 241-242.

The general corporation act gives general powers to all corporations organized under the laws of New Jersey. The certificate of incorporation required by that act is the charter of the company, and the equivalent of a special act of the legislature before the amendments to the constitution.

Corporations organized under the general law are vested with the powers

conferred by the general act, and those contemplated by the certificate, and such incidental powers, with respect to the general and special powers, as are necessary, in the sense of convenient, reasonable, and proper.

While the act permits incorporation for "any lawful business or purpose whatsoever," and the law gives all powers necessary thereto, it does not recognize, as embraced therein, powers to do those things which would deprive the corporation of its ability to carry out the objects for which it was formed, or discharge any duties which it might under its charter owe to the public, or which are contrary to the policy of the law. Oregon Ry. & Nav. Co. v. Oregonian *Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409.

The doctrine of *ultra vires* ought to be reasonably, and not unreasonably, understood and applied; and whatever may be fairly regarded as incidental to and consequential upon those things which are authorized by the charter of the company ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*. Railway Co. v. Attorney-General, L. R. 5, App. Cas. 473.

A corporation having power to take and dispose of the securities of another corporation may guarantee their payment, if it disposes of them to another party in payment of its own debt. If it buys property subject to a mortgage securing bonds, it may guarantee the payment thereof, if said guarantee is taken as payment *pro tanto* of its debt. The two transactions are the same in result, and mere routine of action cannot affect validity. Railroad Co. v. Howard, 7 Wall., 392; Rogers L. & M. Works v. Southern R. Ass'n, 34 Fed. Rep., 278; Low v. Railroad Co., 52 Cal. 53; Opdyke v. Railroad Co., 3 Dill. 55; Arnot v. Railroad Co., 5 Hun. 608; Madison v. Society, 24 Ind., 457.

Contracts for the compromise of suits and for non-competition are within the exercise of powers incident to corporate management and business.

Contracts which impose an unreasonable restraint upon the exercise of a business, trade or profession are void; but contracts in reasonable restraint thereof are valid.

The test to be applied in determining whether a restraint is reasonable or not is to consider whether the restraint is only such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public.

A covenant by parties selling the plant and business of stock yards, not to engage in the business for a certain numbers of years nor in the place where they are located, or within 200 miles thereof, is not unreasonable and not an illegal restraint of trade. *Ellerman* v. *Chicago Junction Railway and Union Stock Yards Co. et al.*, Ct. of Chancery of New Jersey, Dec. 1891, 11 R. R. and Corp. L. J. 97.

13. LIABILITIES OF STOCKHOLDERS—ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—POWERS OF DIRECTORS.

The judgment creditor of a corporation sued its stockholders to enforce their liability for unpaid subscriptions for stock. During the pendency of the suit, three of the directors, without any notice to the other two directors, privately met and passed a resolution authorizing the president and secretary to assign all its property for the benefit of its creditors; and in pursuance thereof a deed of assignment was executed. *Held*, that the assignment was void.

It was no excuse that the three directors voted for the resolution, and that the presence of the other two directors could not have changed the result.

Where such meeting was a special one, the provisions o Hill's Code, s. 3227, that the powers vested in the directors might be exercised by a majority of them, did not excuse them from notifying the other directors.

The fact that one of the absent directors was beneficially interested in the judgment on which the suit was based, and was the principal creditor of the corporation, did not excuse the failure to notify him.

Where defendants relied solely on the assignment as a defence to the suit, the burden of proof was on them to show an assignment valid on its

face; and the illegality of the meeting, being affirmatively shown, constituted a failure of such proof. *Doernbecher* v. *Columbia City Lumber Co.*, Supreme Ct. of Oregon, Feb. 1892, 11 R. R. and Corp. L. J. 153.

Notes.

1. The right to deliberate, and by their advice and counsel convince their associates, if possible, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority. *Com.* v *Cullen*, 13 Pa. St. 133.

2. While it may not be the duty of every director to be present at every meeting of the board, yet it is certainly the intention of the shareholders that every director shall have a right to be present at every meeting, in order to acquire full information concerning the affairs of the corporation, and to give the other directors the benefit of his judgment and advice. If meetings could be held by a bare quorum without notifying the other directors, the majority might virtually exclude the minority from all participation in the management of the company. Mor. Priv. Corp. s. 532.

3. Where the meeting is a general or stated one, provided for in some resolution or by-law, notice of the time and place of the meeting is, perhaps, in the absence of a different provision in the charter or by-laws of the company, not necessary. *State* v. *Bonnell*, 35 Ohio St. 10; *Merritt* v. *Farris*, 22 Ill. 303; *Warner* v. *Mower*, 11 Vt., 385.

4. If the meeting be a special one, personal notice, if practicable, is necessary to each member, unless all are present, and participate in the proceedings; and such notice is essential to the power of the board to do any act which will bind the corporation, and without such notice or the presence of all the directors, its acts are void. This is the general rule under all the authorities; the few cases of dissent, or apparent dissent (*Bank* v. *Flour*, 41 Ohio St. 552; *Edgerly* v. *Emerson*, 23 N. H. 555) being borne down by the great weight of authority. Beach Priv. Corp. s. 279; *Com.* v. *Cullen*, 13 Pa. St. 133; *State* v. *Ferguson*, 31 N. J. Law, 107; *Harding* v. *Vandewater*, 40 Cal. 77; *Gordon* v. *Preston*, 1 Watts, 385; *People* v. *Batchellor*, 22 N. Y. 128; *Pike Co.* v. *Rowland*, 94 Pa. St. 238; *Insurance Co.* v. *Westcott*, 14 Gray, 440; *Covert* v. *Rogers*, 38 Mich. 363; *Doyle* v. *Mizner*, 42 Mich. 332, 3 N. W. Rep. 968; *Baldwin* v. *Canfield*, 26 Minn. 43, 1 N. W. Rep. 261; *D'Arcy* v. *Railway Co.*, L. R. 2 Exch. 158; *Stowe* v. *Wyse*, 7 Conn. 214, 18 Am. Dec. 99, and note; Ang. & A. Corp. s. 488; Green, Brice's *Ultra Vires*, 438; Field, Sawy. Briefs, s. 205; *In re St. Helen's Mill Co.*, 3 Sawy, 88.

5. It is clear that the creditors as well as the stockholders can impeach the transfer of property by the corporation for want of previous action of the board of directors; but it is sometimes said this cannot be done collaterally, but only by a direct proceeding brought for that purpose. *Eno* v. *Crooke*, 10 N. Y. 60; *Castle* v. *Lewis*, 78 N. Y. 131.

COSTS — See also Appeal 1 — Eminent Domain—Mun. Corp. 17.

Taxation—Experts.

Expenses incurred by a party to a suit in the employment of experts are not taxable as costs. *McDonald* v. *Burk*, Idaho, 28 Pac. Rep. 440.

Counter-Claim — See Sale of Goods 7. 8.

COUNTIES.

1. Liability for Injuries Caused by Negligence.

A county is not liable for injuries caused by its neglect to provide a railing around a veranda on the second floor of the court-house, where no liability is imposed by statute. *Ky. Ct. of App.*, *Shepard* v. *Pulaski County*, 18 S. W. Rep. 15.

2. Implied Contract—Employment of Attorney.

In order to bind a county on an implied contract to pay for services rendered by attorneys in a suit against the county, it must appear that the board of supervisors, acting officially, knew that plaintiffs were performing services in the suit, expecting compensation therefor, and that the board permitted plaintiffs to proceed without objection. The fact that some or all of the members had such knowledge obtained from sources outside the board, would not be sufficient to bind the county. *Fouke* v. *Jackson County*, Iowa 51. N. W. Rep. 71.

CRIMINAL LAW. — See also Constitutional Law. 1.

1. Forgery.

Where one passes a forged note, representing himself to be the payee, such representation is sufficient without other evidence to indicate a knowledge of the forgery. *State* v. *Beasley*, Iowa. 50 N. W. Rep. 570.

2. Forgery.

It is not necessary to show, upon the face of an indictment for forgery, how or in what manner a person is to be defrauded. That is a matter of evidence at the trial. All that is necessary

in the indictment is to show an instrument which on its face is capable of being used to create a liability, and to aver that it was made with intent to defraud. *Mead* v. *State*, N. J. 23 Atl. Rep. 264.

3. FORGERY.

Where all the evidence against defendant on trial for forgery was given by an expert on handwriting, who by a comparison with the genuine writing of defendant testified that in his opinion the face of the cheque was written by defendant, such evidence is insufficient to sustain a conviction, even if the words "face of the cheque" included the signature. *People* v. *Mitchell*, Cal. 28 Pac. Rep. 597.

4. NEW TRIAL.

A new trial will not be granted on the ground of newly discovered evidence when such evidence must have been known to defendant during the first trial, and is also in conflict wtth the evidence there given. *People* v. *Freeman*, Cal., 28 Pac. Rep., 261.

5. JURORS.

It is reversible error to refuse the defendant's counsel permission to examine the jurors on their *voir dire* for the purpose of deciding upon the advisability of exercising his right of peremptory challenge. *Donavan* v. *People*, Ill., 28 N. E. Rep., 964.

6. MURDER—JOINT DEFENDANTS.

When two persons are jointly tried for murder and one is acquitted, while the other is convicted, a new trial must be granted to the latter in order to obtain the testimony of the former, when the former makes affidavit showing in full what his testimony will be, and that it is material. *Gibbs* v. *State*, Tex., 18 S.W. Rep., 88.

7. PRESUMPTION OF INNOCENCE.

It is the duty of the court in a criminal prosecution to inform the jury that the law presumes every man innocent until proven guilty, and this duty obtains in cases of misdemeanor where intent is not an element of the crime, as well as in all other cases. *People* v. *Potter*, Mich. 50 N. W. Rep., 994.

8. INSTRUCTIONS.

(1) A charge in a murder trial, referring to the facts only for illustration and in order to apply the law, and stating that they were solely for the consideration of the jury, is not erroneous, as being a charge on the evidence.

(2) The Court, in stating the law on a certain subject to the jury, may read the doctrine from a reported case. *People* v. *Minnaugh*, N. Y. Ct. of Appeals, Jan. 20, 1892.

9. MALICIOUS MISCHIEF—EVIDENCE.

Upon a trial for the unlawful and wilful destruction of property, it was proved that the property in question (a boat) had been destroyed by defendant in order to keep it off from a pond belonging to his father; that the father had repeatedly removed the boat from the pond, whereupon it had each time been put back by the owner of the boat; and that defendant had been placed in charge of the pond by his father, and directed to keep the boat from trespassing on the pond.

Held, that the question whether defendant had any reasonable cause for the destruction of the boat should have been left to the jury. *People* v. *Kane*. Opinion by Gray, J., Earl, C. J., and O'Brien, J., dissenting, 15 N. Y. Supp. 612, reversed. Feb. 9, 1892.

10. ASSAULT—DEADLY WEAPON.

In a trial for an assault by striking with a pistol, the allegation in the information that the pistol was "a deadly weapon" must be proved, as the question whether the pistol is a deadly weapon, when used to strike with, depends on its size and weight and other circumstances. *Jenkins* v. *State*, Tex., 17 S. W. Rep. 938.

11. EVIDENCE OF OTHER CRIMES.

On a joint trial of two persons for murder, committed in a shooting affray participated in by themselves and another on one side and by several persons on the other, it was shown that the three, acting sometimes together and sometimes separately, had committed five separate robberies during the twenty days preceding the shooting, the last one being on the day before it. Evidence of these crimes

was fully gone into, and was admitted on the theory that the party of the murdered man was attempting to arrest defendants; but it did not appear that any of that party knew of more than one of the previous robberies. In the instructions the court said, "Now, it becomes necessary to remind you of what figure these other crimes that have been proven cut in this case," and after naming the last two robberies, stated that this evidence should be considered only with reference to the right to arrest and the identity of the parties to be arrested. The other robberies were not mentioned by name, or referred to except by a repetition of the words, "these other crimes."

Held, that the evidence as to them was erroneously admitted, and that the error was not cured by the charge. *Boyd* v. *United States*. Opinion by Harlan, J; U. S. Supreme Ct. Jan. 4, 1892.

PROCEDURE.

12. Evidence — Receiving stolen Goods.

On a trial for receiving stolen goods, the admissions of the thief, not made in defendant's presence, are inadmissible in the absence of testimony, other than that of the witness, that the defendant had conspired with the latter to commit the crime. *Dye* v. *State*, Ind. 29 N. E. Rep. 771.

13. Evidence—Homicide.

For the purpose of showing malice on the part of defendant, it may be shown in a general way that he and deceased had previous difficulties, although such difficulties cannot be examined in detail, for the purpose of seeing which party was in the wrong. *People* v. *Thompson*, Cal., 28 Pac. Rep. 589.

14. Practice—Impossible Date.

A complaint charging an unlicensed sale of liquors, the jurat to which is sworn to six days prior to the time of the commission of the offence as alleged therein, is insufficient to support an information. *Jennings* v. *State*, Tex. 18 S. W. Rep. 90.

15. Trial—Arguments of Counsel.

In a prosecution for burglary, where the prosecutor said to the jury: "The defendant is entitled to the reasonableness of every doubt; but if I had any belief or doubt that was reasonable, in the face of this testimony, as your prosecutor, I would tell you so," it was error to refuse to instruct the jury that "they must not consider the belief of the prosecuting attorney, or his impression of the testimony." *People* v. *McGuire*, Mich., 50 N. W. Rep., 786.

16. Trial—Evidence.

One convicted of manslaughter applied for a new trial, alleging suprise, in that a certain witness who had pretended ignorance testified against him in a matter material to his defense. It appeared that this witness was directly contradicted on every point by three witnesses besides defendant: *Held*, that a new trial could not be had on the ground of newly discovered evidence to contradict such witness, as this would be merely cumulative. *Maurer* v. *State*, Ind., 29 N. E. Rep., 392.

17. Trial—Arguments of Counsel.

Where counsel for the people, by remarks during a trial for murder, and by statements to the jury not founded on the evidence, imputes to defendants a character for violence, even though the court instruct the jury to disregard any statement of fact not warranted by the evidence, a verdict of guilty will be reversed. *People* v. *Ah Len*. Cal. 28 Pac. Rep., 286.

Crown Lands—See Taxation 4.

Customs Act — See Constitutional Law 3.

DAMAGES—See also Carriers 2—Interest—Mun. Cor. 6. 14. 17—Negligence 4. 8—Telegraph Companies 3—Water Courses 2.

Contract not to Carry on Business.

In an action for breach of a contract not to carry on a mercantile business within a fixed territory, evidence of the injury actually sustained is ad-

missible, where the damages as liquidated in the contract are reasonable. *Kelso* v. *Reid*. Penn. 23 Atl. Rep. 323.

DANGEROUS STRUCTURES IN STREET—See Mun. Cor. 7.

DATE OF SHIPMENT SPECIFIED—See Sale of Goods 9.

DEADLY WEAPON—See Crim. Law 10.

DECLARATION—See Bills and Notes 3—Evid. 2.

DECLARATION OF AGENT—See Evidence 4.

DECLARATION OF ONE OF SEVERAL DEFENDANTS—See Evidence 5.

DEDICATION OF STREET—See Mun. Cor. 10.

DEFECTIVE APPLIANCES—See Master and Servant 4.

DEFECTIVE CONSTRUCTION, LIABILITY FOR—See Turnpike Company.

DEFECTIVE BRIDGE—See Railroad Companies 5.

DEFECTIVE DRAINAGE—See Mun. Cor. 5. 6.

DEFECTIVE SIDEWALKS—See Mun. Cor. 8. 14.

DEFECTIVE STREETS—See Mun. Cor. 9.

DEFECTS IN QUALITY—See Sale of Goods 1.

DEFENCE OF "FAIR COMMENT"—See Libel and Slander 3.

DELAY IN DELIVERY OF GOODS—See Carriers 3.

DELIVERY — See Principal and Surety.

DEMURRAGE—See Ships and Shipping 3.

DEMURRER TO PLEA IN PART—See Pleading.

DEPOSITS FOR COLLECTION — See Banks and Banking 5.

DEPOSIT OF SECURITY — See Elections 2.

DEPOSIT WITH BANKS AFTER SUSPENSION—See Insolvency 2.

DIRECTORS, LIABILITY OF — See Banks and Banking 6.

DIRECTORS, POWERS OF—See Banks and Banking 7—Corporations 9. 13.

DIRECTORS' MEETING — See Banks and Banking 7.

DIRECTORS, ACTS OF — See Corporations 12.

DIRECTING VERDICT — See Mun. Corp. 5.

DISCHARGE OF SURETY — See Bills and Notes 6.

DISCHARGE—See Master and Servant 1.

DISCONTINUANCE—See Pleading.

DISTRIBUTION OF ASSETS — See Insolvency 2.

DOMICILE—See Foreign Law—Jurisdiction.

DOMINION CONTROVERTED ELECTIONS—See Election 1. 2. 3. 4.

DOUBLE INSURANCE—See Insurance 7.

DRAFT—See Banks and Banking 2. 3. 4. 5.—Bills and Notes 1.

DUTIES OF CARRIERS — See Negligence 7.

EJECTION OF PASSENGERS—See Carriers 6. 7.

ELECTIONS.

1. DOMINION CONTROVERTED ELECTIONS — ELECTION PETITION — STATUS OF PETITIONER—ONUS PROBANDI.

The election petition was served upon the appellant on the 12th of May, 1891, and on the 16th of May the appellant filed preliminary objections, the first objection being as to the status of petitioners. When the parties were heard upon the merits of the preliminary objections, no evidence was given as to the status of the petitioners and the Court dismissed the preliminary objections. On appeal to the Supreme Court it was

Held, reversing the judgment of the Court below and following the decision of this Court in the *Stanstead election*, (1, M. L. D. & R. 87), that the onus was

on the petitioner to prove his status as a voter (Gwynne, J., dissenting). Appeal allowed and petition dismissed. Bellechasse Election Case, *Amyot* v. *Labrecque*, Supreme Ct. of Canada, Feb. 16, 1892.

2. DOMINION CONTROVERTED ELECTIONS — ELECTION PETITION — PRELIMINARY OBJECTIONS — DEPOSIT OF SECURITY — R. S. C., CH. 9 SEC. 9 (F).

The preliminary objection in the case was that the security and deposit receipt was illegal, null and void, the written receipt signed by the prothonotary of the Court being as follows: "that the security required by law has "been given on behalf of the petitioners by a sum of $1000, in a Dominion "note, to wit, a note of $1000 (Dominion of Canada) bearing the number "2914, deposited in our hands by the "said petitioners, constituting a legal "tender under the statute now in "force." The deposit was in fact a Dominion note of $1000.

Held, affirming the judgment of the Court below, that the deposit and receipt complied sufficiently with section 9 (*f*) of the Dominion Controverted Elections Act. Appeal dismissed with costs. *Argenteuil Election Case, Christie* v. *Morrison*, Supreme Court of Canada, Feb. 16, 1892.

3. DOMINION CONTROVERTED ELECTIONS — ELECTION PETITION — STATUS OF PETITIONER — WHEN TO BE DETERMINED — R. S. C., C. 9, SS. 12 & 13.

In this case the respondent by preliminary objection objected to the status of the petitioner, and the case being at issue, copies of the voters' lists for the electoral district were filed, but no other evidence was offered, and the Court set aside the preliminary objection without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition. No appeal was taken from this decision, and the case went on to trial, when the objection was renewed, but the Court overruled the objection, holding they had no right to entertain it, and on the merits allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court on the ground that the onus was on the respondent to prove the status, and that the status had not been proved.

Held, affirming the judgment of the Court below, that the objection raising the question of the qualification of the petitioner must be raised by preliminary objection and disposed of in a summary manner, and if the decision of the Court thereon is not appealed from, the Court will not entertain such preliminary objection at the trial. R. S. C. c. 9, ss. 12 & 13. Appeal dismissed with costs. *Prescott Election Case, Proulx* v. *Fraser*, Supreme Ct. of Canada, Feb. 18, 1892.

4. ELECTION PETITION — PRELIMINARY EXAMINATION OF RESPONDENT — ORDER TO POSTPONE UNTIL AFTER SESSION OF PARLIAMENT — EFFECT OF — SIX MONTHS' LIMIT — R. S. C., C. 9, S. 32.

On the 23rd April, 1891, after the petition in this case was at issue, the petitioner moved to have the respondent examined prior to the trial so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case, it would not "be possible for him to appear, answer the interrogatories, and to attend to the case, in which his presence was necessary, before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in court to attend to the present election petition," and that it was not possible "for him to attend to the present case, for which his presence is necessary, before the closing of the session." The court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over an application was made to fix a day for the trial, and it was fixed for the 10th December, 1891, and the respondent was examined in the interval. On the 10th December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition, and the objection was maintained.

Held, reversing the judgment of the court below, that as it appeared by the proceedings in the case and the affidavit of the respondent that the respondent's presence at the trial was necessary, in the computation of time for the commencement of the trial, the time occupied by the session of Parliament should not be included: R. S. C., c. 9, s. 32. *In re Laprairie Election Petition, Gibeault* v. *Pelletier*, Supreme Ct. of Canada, Feb. 16, 1892.

ELECTRIC RAILWAY—See Mun. Corp. 13.

EMINENT DOMAIN—SEE ALSO RAILROAD COMPANIES, 8.

OPENING STREET ACROSS RAILWAY—TENDER OF DAMAGES ASSESSED—APPEAL—COSTS.

A grant of authority to a city to appropriate lands for the purpose of a street will authorize the construction of a street across a railway.

In a proceeding for laying out a street, damages were awarded the land-owner and he, instead of relying upon the fact that no tender of the damages had been made, and resorting to proceedings to prevent the opening of the street, appealed from the decision of the commissioners. *Held*, that the land-owner could not raise an objection, in such case, in the appellate court for want of tender of the damages assessed.

The provision of the laws of Indiana that costs shall be taxed to the appellee, on appeal to the district court, where the judgment in favor of the appellant is increased, has no application where, on appeal by a land-owner from the decision of commissionors awarding $25 damages for the opening of a street, and assessing benefits to the land-owner at the same sum, the judgment is increased to $45, but the benefits also are increased to the same amount, *Erie & W. R. Co.* v *City of Kokomo*, 29 N. E. Rep. 780. Ind. Sup. Ct.

Note.

See also 1 M. L. D. & R. 165.

ENDORSEMENT—See Indorsement.

EQUITIES OF ACCEPTOR—See Bills and Notes 1.

ERECTION AND MAINTENANCE OF STATION—See *Mandamus*.

ERROR IN TRANSMISSION OF DESPATCH—See Telegraph Companies 5.

ERROR IN WAY-BILL—See Carriers 3.

ESTOPPEL—See Bills and Notes 4. 7. 11—Insurance 12—Mun. Cor. 15.

EVIDENCE—SEE ALSO BANKS 9—BILLS AND NOTES 1. 8. 13—CARRIERS 5—CONSTIT. LAW 1. 2—CRIM. LAW 9. 11. 12. 13. 16—INSURANCE 2. 6. 10. 19. 20. 21—LIBEL AND SLANDER 6—MUN. COR. 10. 14—NEGLIGENCE 12—PARTNERSHIP 1—TRIAL 1—WATER COURSES 1—CONTRACTS 2.

1. HANDWRITING.

On an issue whether a signature purporting to be that of defendant was forged, the court, having only the signature of defendant to the answer in evidence for comparison by experts, refused to admit signatures of defendant on loose scraps of paper which she swore were made by her, one about the time of the alleged forged signature and the others seven years before such time.

Held, error. It cannot be said that the exclusion of this evidence was harmless. It was rendered competent by the act, chapter 36, Laws of 1880, as amended by the act, chapter 555, Laws of 1888, and whatever the views of the trial judge may have been as to its value or safety, he should have received it. Jan. 20, 1892. *Mutual Life Ins. Co. of New-York* v. *Suiter*. Opinion by Earl, J. 14 N. Y. Supp. 404, affirmed. N. Y. Ct. of App.

2. DECLARATION—"RES GESTÆ."

In an action to recover for killing plaintiff's dog, the declaration of defendant's wife just before the killing that the dog snapped at her, is not part of the *res gestæ*. *Erhlinger* v. *Douglas*, 50 N. W. Rep. 1011. Supreme Court, Wisconsin, 31 Cent. L. J. 253.

3. NEGLIGENCE—CARRIERS—PASSENGERS.

In an action against a railroad company to recover injuries caused by jumping from a train to avoid a

threatened injury by collision from the rear, evidence of what other passengers said and did under the excitement of the moment is admissible, as showing the situation of plaintiff, and that he acted prudently in jumping from the train. *St. Louis etc. R. Co.* v. *Murray*, Ark., 18 S. W. Rep. 50.

4. Declaration of Agent.

In an action by a servant against his master for injury caused by the negligence of a fellow servant, a declaration by defendant's foreman, made after the alleged injury, to the effect that the culpable servant "was a careless man before that, and they knew it, and that the company ought not to have kept him as long as it did", is not admissible to prove defendant's negligence. *Beasley* v. *San Jose Fruit Packing Co.*, Cal., 28 Pac. Rep. 485.

5. Declarations of One of Several Defendants.

In an action against several defendants for malicious prosecution, statements made by one of them, in the absence of his co-defendants, and after the plaintiff's acquittal in the criminal prosecution, to the effect that his own testimony therein was false, and that he was hired to testify, are admissible against himself only, and not against his co-defendants. *Roberts* v. *Kendall*, Ind., 29 N. E. Rep. 487.

6. Notice to Produce—Books of Account.

Service of and compliance with a notice to produce, followed by inspection, do not render the object produced and inspected evidence.

Books of accounting relating to cash transactions are not admissible in favor of the party keeping them under the rule admitting shop books. *Smith* v. *Rentz*, N. Y. Ct. of Appeals. 45 Alb. L. J. 213, Feb. 1892.

Notes.

1. The English rule has not been uniform. Lord Kenyon, in *Sayer* v. *Kitchen*, 1 Esp. 209, held that a production of a paper on notice did not make it evidence. The rule seems to have been held otherwise by Lord Denman, in *Calvert* v. *Flower*, 7 Car. & P. 386, and in two or three other *nisi prius* cases, but without any special examination.

2. The courts of Pennsylvania and New Hampshire held the view that production and inspection alone do not make the paper evidence. *Withers* v. *Gillespy*, 7 Ser. & R. 10; *Austin* v. *Thomson*, 45 N. H., 113.

3. The courts of Massachusetts, Maine and Delaware seem to have followed the supposed English rule on the subject. It was said in the earliest case in Massachusetts on the subject (*Com.* v. *Davidson*, 1 Cush. 33, that it was a mooted point whether calling for the books of the opposite party and inspecting them, and doing nothing more, makes the books evidence; but in *Clark* v. *Fletcher* 1 Allen, 53, the point was decided. In Maine (*Blake* v. *Russ*, 53 Me. 300) the question was decided without assigning any reasons, and the ruling in the Delaware case (*Randall* v. *Chesapeake Co.*, 1 Har. 284) was made on the trial, and so far as appears, without any examination.

7. Foreign Commission—Application to Suppress—Irregularity—Waiver.

This was an application to reverse an order made by Taylor, C. J., on appeal from an order of the Referee in Chambers, and directing the suppression of a commission to take evidence at St. Paul, Minnesota, and the depositions taken under it, thus reversing the order of the Referee, who had dismissed the application.

Objections were taken:

(1) That this was an interpleader issue, in which, as it was claimed, no commission evidence could be taken or used.

(2) That the order for the commission was silent as to the mode of examination, while the commission itself directed an examination upon *viva voce* questions, and the examination was held as directed by the commission. *Held*, that the first point did not appear to be one which should be raised upon an application of this kind. The time to object to the issuing of the commission is when the order is applied for. The objection ought to be considered wholly as an objection to the receipt of such evidence and one that can be raised only at the trial.

(3) That the conduct of the defendant's attorney at the time of the taking of the examination under the commission constituted a waiver of the irregularity, for he virtually agreed that the examination should be a *viva voce* one, and apart from any question as to the terms of the order, he was estopped from taking the objection.

Application granted, and order of the Referee restored. *Thompson* v. *Seguin*, Manitoba, Queen's Bench, (Can. L. T.) Feb. 1892.

EXCESSIVE DAMAGES — See Mun. Corp. 17—Telegraph Companies 2.

EXECUTION—See Partnership 5.

EXECUTORY CONTRACT FOR PURCHASE OF FIRE ENGINE — See Mun. Corp. 16.

EXPERTS—See Costs.

EX POST FACTO LEGISLATION — See Constit. Law 3.

FAILURE OF CONSIDERATION — See Bills and Notes 10.

FAILURE TO DELIVER MESSAGE—See Telegraph Companies 2. 3. 4.

FALSE WARRANTIES—See Insurance 4.

FALSITY OF SLANDER—See Libel and Slander 6.

FAULT—See Negligence 15.

FELLOW SERVANTS—See Master and Servant 6.

FIRE INSURANCE — See Insurance—Fire.

FOREIGN CORPORATION — See Jurisdiction.

FOREIGN COMMISSION—See Evidence 7.

FOREIGN LAW.

PROOF — DOMICILE — MARRIAGE — PROCEDURE—OBLIGATIONS.

Held, that the respective rights of husband and wife are governed by the law of their domicile at the time of marriage, and the declaration of this law by one of the parties to the action, without contradiction by the other party, should be accepted by the Court. This law is binding upon the parties in the terms of plaintiff's allegation, which have not been contradicted, and cannot be modified by particular provisions of the Canadian law. *Voght et al.* v. *Richter*, 21 Rev. Lég., 81.

FORFEITURE OF POLICY—See Insurance 21. 28.

FORGERY — See Bills and Notes 8 — Crim. Law 1. 2. 3.

FRAUD — SEE ALSO BILLS AND NOTES 12—MUN. CORP. 15.

1. PAYMENT—INSOLVENCY.

Held : That a verbal agreement whereby a debtor promises to pay his creditor, out of the first moneys he receives from one of his debtors, does not authorize the former, when he is insolvent and his insolvency is known to his creditor, to pay to the latter such moneys, to the prejudice of his other creditors. *Caldwell* v. *Robertson*, 21 Rev. Lég. 500.

2. FRAUDULENT CONVEYANCE — ACTION TO SET ASIDE—LANDS IN FOREIGN COUNTRY—JURISDICTION.

In an action by a judgment creditor to declare a conveyance made by a debtor, of property situate in a foreign country, fraudulent and void, where both the debtor and his grantee resided within the jurisdiction, the Court allowed a demurrer to the statement of claim.

Per BOYD, C.—A provincial Court is not justified in intermeddling with territorial rights acquired or subsisting in a foreign county. Here is no case of contract or obligation *inter partes* : no fraud of a personal character in regard to specific property claimed ; no personal equity attaching to the defendants in respect of the lands which the Court could lay hold of ; but only a right sought of having execution against alleged foreign assets held in fraud of creditors, which right *in rem* can only be effectually persued in the *forum* of the site of the land. All questions as to the burdens and liabilities of real estate situate in a foreign country, in the absence of any trust or personal contract, depend simply upon the law of the country where the real estate exists. Harrison v. Harrison, L. R. 8 Ch. 346, followed. *Burns* v. *Davidson*, Ontario Chancery Div. Jan. 1892, (Can. L. T.)

FRAUDULENT CONVEYENCE — See Fraud 2.

FURNISHING LIQUOR TO MEMBERS—See Clubs.

GIFTS TO HUSBAND—See Wife's Separate Estate.

GOODS IN TRANSIT—See Warehouse Receipt.

GROSS NEGLIGENCE—See Banks and Banking 6.

GUARANTY—See Bills and Notes 13—Principal and Surety.

HACKS, RIGHT TO EXCLUDE FROM DEPOT—See Railroad Companies 3.

HANDWRITING—See Evidence 1—Insurance 20.

HOMICIDE—See Crim. Law 13.

HORSE—See Sale of Goods 2.

IMPERFECT PACKING—See Carriers 5.

IMPLIED CONTRACT—See Counties 2.

IMPOSSIBLE DATE—See Crim. Law 14.

IMPUTED NEGLIGENCE—See Negligence 6—Railroad Companies 6.

INCREASE OF INDEBTEDNESS—See Mun. Corp. 1.

INDEPENDENT CONTRACTOR—See Master and Servant 5.

INDORSEMENT—See Bills and Notes 5. 13.

INDORSERS FOR ACCOMMODATION—See Bills and Notes 14.

INFANTS—See Stipulation by Attorney.

INJUNCTION—See Mun. Corp. 13.

INJURIES—See Carriers 8—Mun. Corp. 8—Negligence.

INJURY TO CHILD ON TRACK—See Negligence 10.

INJURY TO PASSENGERS—See Negligence 9.

INJURY FROM FREIGHT—See Negligence 14.

INJURY TO WIFE—See Marriage—Negligence 5.

INNUENDO—See Libel and Slander 2. 3.

INSOLVENCY—SEE ALSO FRAUD.

1. CLAIM AGAINST INSOLVENT—NOTES HELD AS COLLATERAL SECURITY—COLLOCATION—JOINT AND SEVERAL LIABILITY.

Held, affirming the judgment of the Court below, M. L. R., 5 Q. B. 425, that a creditor who, by way of security for his debt, holds a portion of the assets of his debtor, consisting of certain goods and promissory notes indorsed over to him, is not entitled, until fully paid, to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sums of money he may have received from other parties liable upon such notes or which he may have realized upon the goods, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made.

Fournier, J., dissenting on the ground that the notes having been indorsed over to the creditor, as additional security, all the parties thereto became jointly and severally liable, and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of the co-debtors for the full amount of his claim until he has been paid in full, without being obliged to deduct therefrom any sum from the estates of the co-debtors jointly and severally liable therefor.

Gwynne, J., dissenting on the ground that there being no insolvency law in force, the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment of Feb. 1882, to collocate the appellants upon the whole of their claim as secured by the deed. *Benning* v. *Thibaudeau*, Supreme Ct. of Canada. Nov. 17, 1891.

2. JOINT AND SEVERAL DEBTORS—DISTRIBUTION OF ASSETS—PRIVILEGE—WINDING-UP ACT, R. S. C., c. 129, s. 62—DEPOSIT WITH BANK AFTER SUSPENSION.

Held, affirming the judgment of the Court below, Strong and Fournier, JJ., dissenting, per Ritchie, C. J., and Taschereau, J., that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors, jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim

the amount previously received from the estates of other persons jointly and severally liable therefor.

Per Gwynne and Patterson, JJ., that a person who has realized a portion of his debt upon the insolvent estate of one of his co-debtors, cannot be allowed to rank upon the estate, in liquidation under the Winding-up Act, of his other co-debtor, jointly and severally liable, without first deducting the amount he has previously received from the other estate: R. S. C., c. 129, s. 62, the Winding-up Act.

Affirming the judgment of the Court below, that a person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit. *Ontario Bank* v. *Chaplin*, Sup. Ct. of Canada, 17 Nov. 1891.

INSPECTION—See Ships and Shipping 1.

INSTRUCTIONS — See Carriers 5 — Crim. Law 8—Insurance 10. 19.

INSURABLE INTEREST — See Insurance 16. 29.

INSURANCE.

ACCIDENT.

1. CONDITIONS OF POLICY.

In an action on an accident policy, which provided for payment for death only when the death occurred 90 days after the accident, it was shown that the death occurred on June 26th, and the accident occurred either on March 23d or March 30th. Before the insured's death, his wife, who was the beneficiary under the policy, had written to the company to claim indemnity for loss of time. In this letter she stated that the accident occurred on March 23d. The accident did not incapacitate the insured from labor until fully a week after it occurred.

Held, that the letter did not preclude the beneficiary from showing that the accident occurred on March 30th.

Notice of Injury.

An accident insurance policy provided that a failure to give immediate written notice of an accidental injury or death to the company at its home office should invalidate the policy. The beneficiary went to the office of the local agent to notify him, and left word with his clerk, whereupon the local agent notified the home office in writing. The home office thereupon had the case investigated by its officers, and its surgeon attended the *post mortem* examination of the insured. The notice to the local agent was given in May, and, although the accident occurred in March, it did not appear to be serious until April.

Held, proper to submit to the jury the question whether written notice had been given within a reasonable time, and whether the company had waived such notice.

Waiver of Proof of Death.

The policy provided that no action should be brought on it until proofs of death should be received at the home office of the company. The evidence showed that the beneficiary had written three times to the home office, requesting blank forms for proof of death, and that at each time the company had refused to act unless the beneficiary would sign an agreement admitting that she had failed to give immediate notice of the injury.

Held, proper to submit to the jury the question whether the company had waived proof of death. *American Acc. Ins. Co.* v. *Norment*, 18 S. W. Rep. 395 Tenn. Supreme Ct.

FIRE.

2. ACTION ON POLICY—EVIDENCE.

In an action on a policy the testimony tended to show that the application was filled out by the company's agent who solicited the risk; that the insured was unable to read, and not accustomed to transacting much business; that some of the answers in the application were untrue, but there was a conflict in the testimony as to their being read to the insured before the application was signed. It also appeared that after the loss the company sent an adjusting agent, who estimated the loss at a special sum, for which sum a draft

was sent to the insured in full of all demands, which he refused to receive. *Held*, that the testimony supported the verdict, and that the company was liable for the loss. *Dwelling-House Ins. Co.* v. *Weikel*, 50 N.W. Rep., 949. Neb. Sup. Ct.

3. TOTAL LOSS.

Where a building is so injured by fire as to lose its specific character as a building, it is a total loss, within the terms of an insurance policy, notwithstanding the fact that some of the walls are standing and some of the material is not destroyed.

Where a city ordinance forbids the repair or rebuilding of any wooden building within the fire limits, destroyed by fire to the extent of one-third of its value, a building within the fire limits injured to that extent is a total loss, within the terms of an insurance policy. *Hamburg-Bremen Fire Ins. Co.* v. *Garlington*, 18 S.W. Rep., 337, Tex. Sup. Ct.

4. FALSE WARRANTIES—RECOVERY OF PREMIUM PAID.

Where an insurance policy on lumber contains a warranty that a continuous clear space of 150 feet should be maintained between the lumber and the saw mill, and such warranty is untrue when made, and when the property is destroyed by fire communicated from the saw mill within the space provided for, no risk ever attached on the policy, and, in the absence of any intentional fraud by the insured, he is entitled to a return of the premiums paid. *James* v. *Ins. Co. of Amer.*, 18 S.W. Rep., 260, Tenn. Sup. Ct.

5. PROOFS OF LOSS—WAIVER.

The usual stipulations that the insured shall furnish certain preliminary proofs of loss, when loss has been sustained, are conditions precedent to the insurer's right to recover; but such conditions may be waived, or the insurer be estopped from setting them up.

And everything said or done by the insurer or by his proper agents upon which the insured may reasonably rely, which might fairly induce him to conclude that such proofs of loss have in his case been dispensed with or excused, and he is thereby influenced to act in good faith in accordance with such conduct, may amount to a waiver of such formal stipulation. *Peninsular Land &c. Co.* v. *Franklin Ins. Co.*, 11 S. E. Rep. 237, W. Va. Sup. Ct.

6. EVIDENCE OF WAIVER OF CONDITIONS.

In an action on a policy, it appeared that defendant's agent took part in the adjustment of the loss with the representatives of other companies, and examined the books, and determined the amount of the loss, and the damage to the property saved, and pratically agreed to the discount which should be made on the stock of goods.

Held, that, under these circumstances, the question whether defendant waived its right under the policy to call for an examination of plaintiff, and of her books, and for the appraisal of the property by appraisers selected by the parties, was properly submitted to the jury, and their verdict should not be disturbed on appeal. *Robertson* v. *New Hampshire Ins. Co.*, 16 N. Y. Supp. 842, N. Y. Superior Ct. (Buffalo).

7. CONDITIONS — DOUBLE INSURANCE.

Where a policy provides for insurance upon certain property, and other policies provide for insurance upon the same as well as other property, and there is nothing to show how much of the latter policies is applicable to the property embraced by the former, this is not a case of double insurance within the meaning of a provision of the former limiting the liability of the company to the proportion of loss which the amount thereby insured shall bear to the whole insurance. Sloat v. Insurance Co., 49 Pa. St. H. followed. Ogdon v. Insurance Co., 3 N. Y. 388, disapproved and distinguished. *Clarke* v. *Western Assur. Co.*, 23 Atl. Rep. 248, Pa. Sup. Ct.

8. CONDITIONS OF POLICY—ADDITIONAL INSURANCE WAIVER.

The conditions of an insurance policy rendered it void if the insured obtained additional insurance in excess of $18,000, and provided that, in case

of loss, copies should be given of the written portions of all policies for additional insurance. The proof of loss showed $24,000 additional insurance, but stated there had been no violations of the conditions of the policy. Defendant received information of the excess from its agent, and required plaintiffs to furnish additional proofs, giving copies of the written portions of all other policies on the property, which he did, at an expense of $25.

Held, that this did not bring the case within the rule that if an insurance company, during transactions or negotiations after knowledge of forfeiture, recognizes the policy as valid and subsisting, and requires the insured to incur trouble or expense, it thereby waives the forfeiture. *Antes* v. *Western Assur. Co.*, 51 N. W. Rep. 7. Iowa Sup. Ct.

9. PAYMENT OF PREMIUMS — CANCELLATION OF POLICY — WAIVER OF CONDITIONS.

A policy of fire insurance provided that the company would not be liable while a premium note was due and unpaid. The insured gave five notes—the first due December 1, 1887, and one due February 1st in each succeeding four years. The first note was paid in February, 1888, when the insured wrote the company that it was impossible for him to have paid it sooner, and asked for terms on cancellation. February 7th the company wrote that if he found it burdensome to pay at maturity, the company would endeavor to make it easy for him, if he would notify it in advance of maturity. The second note was not paid until May 1888. The third note became due and was unpaid, and he did not notify the company before its maturity that he could not pay it, and April 1, 1889, the property was destroyed by fire.

Held, that the letter of February 7th was not a waiver of the conditions of the policy. *Morrow* v. *Des Moines Ins. Co.*, 51 N. W. Rep. 3. Iowa Sup. Ct.

10. ACTION ON POLICY—APPRAISEMENT AND PROOF OF LOSS—WAIVER—INSTRUCTIONS—EVIDENCE.

In an action on a fire insurance policy, the fact that the loss had not been appraised in accordance with the provisions of the policy was relied on as a defence. There was evidence tending to show that the insurer's appraiser had refused to agree on a "disinterested umpire," and had nominated persons who were unknown to the appraiser selected by the assured, and who had been frequently employed as appraisers and umpires by the insurer.

Held, that the court properly refused an instruction that the insurer's appraiser did not represent it in the conduct of the appraisal, and that he was not bound by what he had done or failed to do in the selection of an umpire.

A provision in a fire insurance policy that proof of loss should be furnished within a certain time is waived where, after the expiration of such time, a written agreement is made to submit the amount of loss to appraisal, notwithstanding a provision that the insurer "shall not be held to have waived any provision or condition of this policy..... by any requirement, act, or proceeding on its part relative to the appraisal." *Bishop* v. *Agricultural Ins. Co.*, 29 N. E. Rep. 844. N. Y. Ct. of App.

11. POWERS OF AGENT—PAYMENT OF PREMIUM.

On May 12th plaintiffs, desiring to insure their premises, applied to one N., who had possession of blanks issued by defendant company, but no written appointment from it; and N. made out the application, and forwarded it to defendant's agent in a neighboring town, who acknowledged the receipt, and stated that he would advise N. as soon as he heard from the company; that the risk was a special one, which he could not accept without the company's approval. About May 18th, defendant's agent was notified that the company declined the risk, but omitted to so inform N. until after a loss, which occurred on June 6th. The premium for the insurance had been previously paid to N. by plaintiff, but N. had not remitted to defendant's agent. At that time N. informed plaintiffs that the policy would be all right.

Held, that defendant was not liable.

As N. had no power to bind the company, as plaintiffs knew, the payment of the premium to him did not render defendant liable, 10 N. Y. Supp. 44, reversed. N. Y. Ct. of App., *More* v. *New York Bowery Fire Ins. Co.*, 29 N. E. Rep. 757.

12. CONDITIONS OF POLICY—CHANGE OF TITLE—ASSIGNMENT—ESTOPPEL.

Where by the terms of an insurance policy on personal property the loss is payable to a mortgagee thereof, as his interest may appear, and the amount of the mortgage exceeds that of the policy, an assignment of the property by the mortgagor to a trustee, under an order of court in bankruptcy proceedings, does not avoid the policy under a condition therein that it shall be void if any change in the title or possession takes place by legal process or judicial decree, since the title to mortgaged personal property is in the mortgagee, and the assignment by the mortgagor could not vest it in the trustee. *Appleton Iron Co.* v. *British Am. Assur. Co.*, 50 N. W. Rep. 1100, Wis. Supreme Ct.

13. CONDITIONS OF POLICY.

A policy of insurance on a canning house and its contents from April 10, 1889, to October 10, 1889, provided that it should be void if the premises were occupied for any purpose other than storage. The place was operated as a canning factory during the canning season and up to October 10th, when the work was shut down, and all hands were discharged except two or three. On that day the policy was renewed for six months. On October 15th the premises were cleared up and cleaned, and a fire was built in the furnace under the engine upon the premises, for the purpose of blowing out the water from the pipes and boilers. The premises were destroyed by fire that night.

Held, that the work done on October 15th was not a violation of the condition of the policy. *Krug* v. *German Fire Ins. Co.*, 23 Atl. Rep. 572, Penn. Sup. Ct.

14. CONDITIONS AGAINST INCUMBERING PROPERTY.

Defendant insured a house and barn and certain personal property therein and on the premises, the policy containing a provision that, "if the property shall hereafter become mortgaged or incumbered, the policy shall be null and void."

Held, that the words "the property" meant all the insured property, and that a mortgage of a part thereof was not a violation of the conditions of the policy. *Phœnix Ins. Co. of Brooklyn* v. *Lorenz*, Appellate Ct. of Indiana, Jan. 1892.

15. PAYABLE TO MORTGAGEE—ARBITRATION OF LOSS.

Where a fire insurance company, by the direction of the insured, indorses on his policy an agreement that it will pay the loss, if any, to the mortgagee of the property, and the policy provides that at the request of either party the loss shall be fixed by arbitrators, and the amount so fixed shall be binding on the parties, the mortgagee is not bound by the result of an arbitration entered into between the insured and the company. *Bergman* v. *Commercial Union Assur. Co.*, Ky. Ct. of App., Jan. 1892, 11 R. R. & Corp. L. J., 109.

16. INSURABLE INTEREST—RIGHTS OF MORTGAGEE.

R., after mortgaging realty to plaintiff, conveyed all his property to another in trust to pay his debts out of the same, and convey back the residue, if any, to R. Subsequently plaintiff obtained a judgment of foreclosure. Before any sale under the judgment, and after R.'s death, plaintiff procured the property mortgaged to be insured in the name of "estate of R." loss, if any, payable to plaintiff as mortgagee, the policy providing that it should be void if the interest of the insured, other than absolute and sole ownership, was not stated therein.

Held, that plaintiff had an insurable interest as mortgagee, which it would be presumed the parties intended to insure, the words "estate of R." being used as words of description. *Weed* v. *Insurance Co.* (Sup.) 15 N. Y. Supp. 429, followed. *Weed* v. *Fire Ass'n of*

Philadelphia, 17 N. Y. Supp. 206. N. Y. Supreme Ct.

17. MORTGAGE.

When, by reason of a sale and conveyance of the insured premises, without the consent of the insurer, a fire insurance policy has become void as to a mortgagor owner and his successor in interest, but, by the terms of the instrument, is still in force as to the mortgagee, and in it the company has been expressly authorized, in a case of loss, to pay the whole amount of the debt to the mortgagee, and take a transfer and assignment thereof, and of all securities held for its payment, the mortgagor or his successsor have no beneficial interest in the policy, and cannot compel an application on the debt of the amount due upon a loss. *Sterling Fire Ins. Co.* v. *Beffrey*. Minn. 50 N. W. Rep. 922.

18. MORTGAGE — SUBROGATION — CONDITIONS OF POLICY—VACANT PROPERTY.

An insurance policy provided that the loss, if any, should be payable to the mortgagee; that, as to the mortgagee, the policy should not be invalidated by the act or neglect of the mortgagor; and that, if the insurance company paid the amount of the insurance to the mortgagee, claiming that, as to the mortgagor, no liability existed, it should, to the extent of such payment, be subrogated to the rights of the mortgagee.

Held, that the insurance company, on payment to the mortgagee, did not become subrogated to his rights unless it was in fact not liable on the policy as against the mortgagor.

A building insured as a dwelling house was occupied by a tenant. On March 15th he moved out, and the house was burned down on May 5th. During the interval, the owner, who lived just across the street, was frequently in the house during the day with some of her family, and her servant slept there at night.

Held, that the house was not unoccupied, within the meaning of a provision in the policy that the premises should not be allowed to become vacant or unoccupied, nor cease to be occupied as a dwelling house. 31 Ill. App. 625, affirmed. *Traders' Ins. Co.* v. *Race*, 29 N. E. Rep. 846. Ill. Sup. Ct.

19. APPRAISEMENT AND PROOF OF LOSS—WAIVER—INSTRUCTIONS—EVIDENCE.

(1) In an action on a fire insurance policy there was evidence that the insurer's appraiser had refused to agree on a "disinterested umpire," and had nominated persons who were unknown to the appraiser selected by the assured, and who had been frequently employed as appraisers and umpires by the insurer. *Held*, that the court properly refused an instruction that the insurer's appraiser did not represent it in the conduct of the appraisal, and that it was not bound by what he had done or failed to do in the selection of an umpire.

(2) A provision in a fire insurance policy that proof of loss should be furnished within a certain time is waived, where after the expiration of such time a written agreement is made to submit the amount of loss to appraisal, notwithstanding a provision that the insurer "shall not be held to have waived any provision or condition of this policy..... by any requirement, act or proceeding on its part relative to the appraisal."

(3) In an action on a fire insurance policy, the assured and his wife testified that the insurer's general agent and appraiser said the proof of loss need not be furnished. This the general agent denied. The insured also testified, over the local agent's denial, that the latter told him that proof of loss was unnecessary. *Held*, that whether proof of loss had been waived was properly submitted to the jury. Second Division. *Bishop* v. *Agricultural Ins. Co.* 9 N. Y. Supp. 350, affirmed. N. Y. Ct of App. Jan. 20, 1892. Alb. L. J.

20. CANCELLATION OF POLICY — EVIDENCE—PROOF OF HANDWRITING —WAIVER OF CONDITIONS.

Where, in an action on a fire insurance policy which contained a provision that it could be cancelled only on five days' notice to the assured, defendant

pleaded due notice and cancellation, and it appeared that effective cancellation depended largely on the acts of defendant's agents in reference thereto, plaintiff was properly allowed to show such agents' acts and declarations in the premises.

Where the insured surrenders her policy to defendant's agent, understanding that it might be cancelled, and to enable the agent to reinsure in case of cancellation, such agent does not become plaintiff's agent, and notice to him of cancellation is not sufficient.

Where an expert testified that the signature to an insurance application was in the same hand as the body thereof and the policy issued thereon, and upon cross-examination it appeared that before coming into court he compared the signature with a policy not in the case, but in the same handwriting and issued to plaintiff by the same company, through the same agency, which policy was produced in court and identified, and, when asked if he based his testimony on an examination of the policy in the suit or the other policy, replied, "I base it on the writing," the court properly refused to strike out his testimony.

Where an insurance policy contains a provision that it will become void for non-payment of premium when due, and the person who solicitod the insurance, and whose duty it was to collect the premium, made no demand for payment, and, when the assured offered to pay, told her to let the matter rest until the company finally concluded whether it would cancel the policy, there was an indefinite extension, and the policy did not lapse. *Mallory* v. *Ohio Farmers' Ins. Co.*, 51 N. W. Rep. 188, Mich. Sup. Ct.

21. FIRE—FORFEITURE—WAIVER—EVIDENCE.

A fire insurance policy payable to a mortgagee, provided that it should be void if the mortgage should be foreclosed without the company's consent. The mortgagee incurred a forfeiture by proceeding to foreclose, shortly after which he wrote to the company, saying that the suit was begun in ignorance of the condition, and asking consent, to which letter the company made no reply. A decree of foreclosure was obtained, and a few days after the premises were destroyed by fire. The assured declined to make proofs of loss, and those furnished by the mortgagee were rejected because not executed by the assured as required by the policy.

Held, that neither the failure to reply to the letter of the mortgagee nor the implied demand for more authentic proofs constituted a waiver of the forfeiture. The failure to reply to the plaintiff's letter, or as was said by the General Term, "the neglect to refuse the consent as promptly as the occasion demanded," raised no inference that the defendant consented to the foreclosure action. Walsh v. Ins. Co., 73 N.Y., 5. The rule is now establishe[illegible]however, that if, in any negotiation or transaction with the assured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured to do some act, or incur some trouble or expense, the forfeiture is waived. Titus v. Ins. Co., 81 N.Y., 410; Roby v. Ins. Co., 120 id. 510; Pratt v. Ins. Co. (N.Y.App.), 29 N.E.Rep., 115. While the later decisions all hold that such waiver need not be based upon a technical estoppel, in all the cases where this question is presented, where there has been no express waiver, the fact is recognized that there exist the elements of an estoppel. Brink v. Ins. Co., 80 N.Y. 108-112; Goodwin v. Ins. Co., 73 id. 480; Prentice v. Ins. Co., 7[illegible] id. 483. The plaintiff must have been misled to his harm, or the company must have done something which could be done only by virtue of the policy, or has required something from the assured which he was bound to do only at the request of the company, and which request could only be made under a valid policy. But none of these elements exist here. The plaintiff was not misled, not has his claim been prejudiced by any act of the defendant, and that which he was required to do was essential, under the contract, to the assertion of any cause of action upon the policy. The conclusion that under the circumstances disclosed in this case there was no waiver is in accordance with the

authorities. Ins. Co. v. Stevenson (Ky. Ct. App.), 8 Ins. Law J., 922; Fitzpatrick v. Ins. Co., 53 Iowa, 335, are directly in point. Desilver v. Ins. Co. 38 Penn. St. 130; Devens v. Ins. Co. 83 N.Y. 168-173; Putnam Tool Co. v. Fitchburg Mut. Fire Ins. Co., 145, Mass. 265. *Armstrong* v. *Agricultural Ins. Co. of Watertown*, N. Y. Supp. 873, reversed. N. Y. Ct. of App., Jan. 26, 1892. (Alb. L. J.)

GENERAL.

22. Policies — Assignment — Consideration—Powers of Officers of Corporation.

A transfer of an insurance policy with the assent of the insurance company as security for a debt, "as its interest may appear," is valid, and the lien created thereby is superior to that by garnishment of a subsequent creditor.

Where the articles incorporating a company provide that all commercial paper and other written instruments shall be signed or indorsed by, and all contracts made by or with, the president or secretary, acting jointly or separately, and in no other manner, a transfer of insurance policies by the president of such company will be presumed to have been made by authority

A pre-existing debt is a sufficent consideration for an assignment of insurance policies after loss of the property insured. *Glover* v. *Wells*, Supreme Ct. of Illinois, Jan. 1892, 11 R. R. & Corp. L. J. 125.

Notes.

1. There are cases holding that a stockholder in an incorporated company has an insurable interest in the corporate property. *Seamen* v. *Insurance Co.*, 18 Fed. Rep. 250; *Same* v. *Same*, 21 Fed. Rep. 718; *Warren* v. *Insurance Co.*, 31 Iowa, 464.

2. As a general rule, corporations act through their president, an act done through the president must be presumed to be authorized, unless shown to be otherwise. Mor. Corp. s. 538; *Smith* v. *Smith*, 62 Ill. 493; *Mitchell* v. *Deeds*, 49 Ill. 424; *Kraft* v. Ass'n, 87 N. Y. 828.

3. In Iowa, the state where this transaction occurred, the supreme court held that a pre-existing debt is a valid consideration to support the assignment of a chose in action. *Moore* v. *Lowrey*, 25 Iowa, 336.

LIFE.

23. Laws of Association—Suicide.

Where a person who is a charter member of a benefit association has his attention called to the constitution and laws of the association, and especially to a section which declares that no benefits shall be paid upon the death of a member who shall commit suicide, and some weeks afterwards a certificate of insurance is issued to him upon condition that he comply with all the laws of the association, the said section as to suicide must be considered a part of the contract between him and the association.

A life insurance policy which is to become void if the assured commits suicide, sane or insane, does not cover a death by suicide which is the result of insanity, unless the assured is unconscious of the natural consequences of the act which caused death; and the fact that he had sufficient intelligence to employ a rope, and adjust it so as to hang himself, shows that he was not unconscious of the consequences. Streeter v. Society, 31 N. W. Rep. 779, 65 Mich. 199, followed. *Sabin* v. *Senate of the National Union*, 51 N. W. Rep. 202, Mich. Supreme Court.

24. Waiver of Conditions as to Payment of Premiums.

Where a life policy, conditioned to become void in case the premiums are not paid as they accrue, further provides that this condition shall not be waived except by an agreement in writing, signed either by the president or secretary of the company, an oral agreement between the secretary and the insured, extending the time of payment of overdue premiums, even if regarded as a valid waiver of the condition, is revocable by a reasonable notice from the company to the assured, contained in a letter notifying him that his premium note was overdue, his policy lapsed and cancelled, and requesting him to notify the company at once if he wished it restored.

While such oral waiver by the secretary would operate to annul the forfeiture and reinstate the policy, if made at the company's office, it will

not have that effect, if made by the secretary in a foreign state, while making a periodical visit to the several agents of the company. The doctrine on this point laid down in Dilleber v. Knickerbocker Life Ins. Co., 76 N. Y. 567, is not to be extended.

It is a presumption of law that a letter or other paper duly directed and mailed was received in the regular course of the mail, and the burden is upon him who alleges the contrary to prove that it was not received. *Hastings* v. *Brooklyn Life Ins. Co.*, N. Y. Supreme Ct., Oct. 1891, 11 R. R. and Corp. L. J. 110.

MARINE.

25. INTERPRETATION OF POLICY.

An indorsement on a policy of reinsurance provided that the reinsurance should cover "one-half of the value of all cargoes shipped" by one T. A later indorsement provided that the reinsurance should be "to the extent of one-half of the amount of each and every risk which equals or exceeds in value the sum of $15,000," on cargoes insured by the reassured under open policies to T. and certain other persons, and "on cargoes of the value of $50,000 and upwards this policy is to cover the excess of $25,000, not exceeding the sum of $50,000 on any one cargo." The policy to the assured provided that he should "enter for insurance all goods at the full value thereof."

Held, that construing the indorsements together as *in pari materia* with the terms of the policy of insurance, the word "risk" did not mean "loss," nor did it mean the arbitrary value of the cargoes as fixed in the policies, but rather the actual liability assumed which was the real, and not the estimated, value of the cargoes insured. N. Y. Supreme Ct. *Continental Ins. Co.* v. *Ætna Ins. Co.*, 17 N. Y. Supp. 106.

26. APPLICATION—PROMISSORY REPRESENTATION.

An application for insurance on a vessel in a foreign port, in answer to the questions: Where is the vessel? When to sail? contained the following: was at "Buenos Ayres or near port 3rd February bound up river; would tow up and back." The vessel was damaged in coming down the river not in tow. On the trial of an action on the policy it was admitted that towing up and down the river was a matter material to the risk.

Held, affirming the judgment below, that the words "would tow up and back" in the application did not express a mere expectation or belief on the part of the assured but amounted to a promissory representation that the vessel would be towed up and down, and this representation not having been carried out the policy was void. *Bailey* v. *The Ocean Mutual Marine Ins. Co.*, 19 Can. Supreme Court Rep., 153.

MUTUAL BENEFIT.

27. CHANGE OF BENEFICIARY—RELATIVES.

The constitution of a lodge provided that any member might change his beneficiary by authorizing such change in writing on the back of his certificate in a prescribed form, attested by the recorder under the seal of the lodge, but that no change could be valid until it had been reported to the grand recorder, and the certificate filed with him, and he had issued a new certificate.

Held, that a new certificate issued in conformity with such provision was valid, in the absence of fraud, although the recorder had signed and sealed the attestation without in fact witnessing the execution of the order to change the beneficiary.

A son is a relative of his step-father after his own mother's death, within the meaning of Acts 21st Gen. Assem. c. 65, s. 7, providing that "no corporation or association organized..... under this act shall issue any certificate of membership or policy to any person ..... unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir, or legatee of such insured member." Iowa Supreme Ct., *Simcoe* v. *Grand Lodge A. O. U. W. of Iowa*, 51 N. W. Rep. 8.

28. FORFEITURE—NOTICE—WAIVER.

The receipt of dues from a member of a mutual benefit association after the expiration of the time limited for their payment, and a letter from the association to him informing him that the association has reinstated him provided he was in usual good health when the dues were paid, does not amount to a waiver of a forfeiture of the policy, where the insured was in fact fatally ill at the time of payment.

A policy of a mutual benefit association required notice of annual dues to be sent to the addresses of members as they appeared upon the association books, and provided for forfeiture in case of non-payment 60 days after such notice.

Held, that the association could not avoid liability on the policy to a member whose name was not upon the books, and to whom no notice was sent on the ground of non-payment of annual dues, although notice was sent to her husband, who was also a member, and with whom she lived. *Garbutt* v. *Citizens' Life & Endowment Ass'n*, 51 N. W. Rep. 148, Iowa Supreme Ct.

29. CHANGE OF BY-LAWS — RIGHTS OF BENEFICIARY—BEQUEST TO CREDITOR—INSURANCE INTEREST.

Where the by-laws of a mutual benefit association provide that assured shall not substitute a new beneficiary, except "with the consent of the beneficiary," but the constitution declares all by-laws subject to amendment, and subsequently said by-law is amended so that a new beneficiary may be substituted without the first beneficiary's consent, the beneficiary of a certificate issued before the amendment, who is not a party to the contract, has no vested rights therein, and cannot complain if the assured, without his consent, selects a new beneficiary.

A benefit certificate, payable to the assured, is subject to bequest by him.

The rule that a beneficiary can receive only the amount of his insurable interest in the insured does not apply to a bequest of insurance by a debtor to a creditor, since in such cases the beneficiary takes by the will, and not by virtue of an insurable interest. *Catholic Knights of America* v. *Kuhn*, 18 S. W. Rep. 385. Tenn. Sup. Ct.

INTEREST.

ON BOND—DAMAGES.

In an action upon a bond with condition annexed, if it appears that the condition has been broken, and that the sum really due thereon, or the damage actually sustained by such breach, exceeds the penalty of the bond, the plaintiff may recover the penalty as a debt, and damages for its detention in the shape of interest thereon from the time the penalty ought to have been paid, but not exceeding in the whole the sum really due or the damage actually sustained. *Gloucester City* v. *Eschbach*, N. J. Sup. Ct., Jan. 1892.

Note.

The modern English decisions seem adverse to this view. The weight of American authority is decidedly in its favor. *Ives* v. *Bank*, 12 How. 159; *Beers* v. *Shannon*, 73 N. Y. 292; *White* v. *French*, 15 Gray 339; *Bank* v. *Smith*, 12 Allen 243; *Olmsted* v. *Olmsted*, 38 Conn. 309; *Wyman* v. *Robinson*, 73 Me. 384; *Levy* v. *Taylor*, 24 Md. 282; *Tyson* v. *Sanderson*, 45 Ala. 364; *U. S.* v. *Meeker*, 9 Phila. 470.

INTERPRETATION OF POLICY — See Insurance 25.

INVESTMENT OF FUNDS — See Principal and Surety.

IRREGULAR ASSESSMENT—See Taxation 3.

JOINT AND SEVERAL LIABILITY—See Insolvency 1.

JOINT AND SEVERAL DEBTORS—See Insolvency 2.

JOINT DEFENDANTS—See Crim. Law 6.

JURISDICTION — SEE ALSO FRAUD 2.

FOREIGN CORPORATION — DOMICILE SERVICE—ART. 27 C. C.—ARTS. 34, 61, 64 C. P. C.

Held, (1) The principal establishment within the Province of Quebec, of a foreign corporation doing business in the province, is its domicile within the meaning of Art. 34 C. P., though its head office may be in another country.

(2) Service at such domicile, upon the manager of the corporation, is equivalent to personal service within the meaning of said Act 34 C. C. P. *Bk. of British North America* v. *Stewart*, Montreal, Q. B., Jan. 1892.

JURORS—See Crim. Law 5.

JUSTIFICATION NOT PLEADED — See Libel and Slander 6.

LANDS IN FOREIGN COUNTRIES—See Fraud 2.

LAWS OF ASSOCIATION — See Insurance 23.

LEGAL MALICE—See Mun. Corp. 17.

LIBEL AND SLANDER.

1. LIBEL—RAILROAD COMPANIES.

Language which charges a railroad company with such incapacity or neglect in the conduct of its business that belief in its truth would prevent persons from employing it as a common carrier is actionable without proof of special damage. *Ohio & M. Ry. Co.* v. *Press. Pub. Co.*, U. S. C. C. (N. Y.) 48 Fed. Rep. 206.

2. LIBEL—REPARATION—INNUENDO.

A letter published in a newspaper, after calling attention to the fact that the reports of schools under a certain school board had not been published, and hinting that the reports were in some cases so bad that the board were ashamed to publish them, continued—"I wonder if it is the case, as it is rumoured, that the Ballachulish school is at the bottom of the poll this year again; if so, how long is this state of matters to be allowed to go on? Are the interests of the public to be sacrificed for the sake of providing a house and salary for a teacher?"

In an action by the teacher of the Ballachulish school, *held*, that the language was capable of bearing the innuendo that the pursuer was unfit for his post as a teacher of a public school, and that it was the duty of the school board to dismiss him. *McKerchar* v. *Cameron*, 29 Scot. Law. Rep. 320.

3. LIBEL — ACTION AGAINST PUBLISHERS OF NEWSPAPER — INNUENDO — DEFENCE OF FAIR COMMENT — CHARGE OF JUDGE MISUNDERSTOOD OR DISREGARDED BY JURY—NEW TRIAL.

Action for libel. The declaration alleged that the defendant company falsely and maliciously printed and published of the plaintiff certain defamatory matter, meaning, as the *innuendo* alleged, that, at the instance of the plaintiff, who was then Her Majesty's Attorney-General for the Province of Manitoba, provision was made in the contract between the Provincial Government and the N. P. & M. R. Co. for raising a large sum of money by the company, "a portion of which was to be dishonestly and corruptly received by the plaintiff, for his own use and benefit, to the great detriment of the Province." To this declaration the defendants pleaded the general issue and a plea setting up that the words complained of, and the whole of the article of which they formed a part, were fair comment on matters of public interest, and were published *bona fide* for the public benefit.

The case was tried before Killam, J., and a special jury, when a verdict was entered for the defendants.

When the jury returned into Court and the foreman announced that they had found a verdict for the defendants, the judge, before the verdict was recorded, asked them if they had anything to say as to any of the questions he had submitted to them, and added, "Do you find whether the publication had the meaning ascribed to it by the plaintiff?" The foreman replied, "We did not consider that at all; we found that the article complained of was fair comment on a matter of public interest, but the jury, while giving their verdict, desire to state that it would have been better if more temperate language had been used."

The learned judge then said, "If it imputed a specific act of misconduct to him (the plaintiff) it could not be fair comment. You understand that, do you?"

To this the reply of the foreman was, "I think we understood your lordship's directions thoroughly."

The plaintiff then moved to set aside the verdict and for a new trial on the

ground, amongst others, that the jury did not consider the question as to whether the words complained of bore the meaning alleged in the *innuendo*.

Held, Dubuc, J., dissenting, that there should be a new trial, on the ground that the jury misunderstood or disregarded the charge of the judge, and did not consider the question it was essential for them to consider and pass judgment upon before they could find a verdict for the defendants.

Per Taylor, C. J.—If a defendant charged with libel shows the communication to be a privileged one, he can stop there, and need not go on to prove his belief in the truth of what was said. In such a case malice must be proved to entitle the plaintiff to a verdict. But where the defence is fair comment, then what is commented on must be facts admitted or proved to be true.

While in a case of privileged communication the truth of the fact asserted is not important, in the case of fair comment the truth or falsity is important. Under a plea of fair comment, the truth of what is commented on may be proved.

Per Bain, J.—If a writer brings an unfounded charge of dishonesty or specific misconduct against a public man in connection with a matter of public interest, such charges are libellous, no matter how sincere and honest may be the belief of the writer that they are true; a defendant cannot rely on a plea of fair comment as an excuse for such a charge, as it is not comment at all to allege specific misconduct. And it is clear that it is not competent to a defendant relying only on such a plea, and without a plea of justification, to adduce evidence to shew that the charges of specific misconduct or dishonesty he had made were true; a defendant, relying on this plea, may always prove, if he can, that the matters or facts on which he commented are true, that is, that they are or were actual facts or occurrences, and not merely imaginings or inventions. *Martin* v. *Manitoba Free Press Co.*, Manitoba, Q. B. Feb. 1892. (Can. L. T.)

4. LIBEL—PROVISIONS OF ACT RELATING TO NEWSPAPERS—COMPLIANCE WITH — SPECIAL DAMAGES — LOSS OF CUSTOM— 50 V., cc. 22 & 23 (MAN.)

By s. 13 of 50 V., c. 22 (Man.), the Libel Act, no person is entitled to the benefit thereof, unless he has complied with the provisions of 50 V., c. 23, "An Act respecting newspapers and other like publications." By s. 1 of the latter act no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published.

By section 2 such affidavit or affirmation shall set forth the real and true names, etc., of the printer or publisher of the newspaper and of all the proprietors; and by section 6 if the number of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; section 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Held, affirming the decision of the Court of Queen's Bench (6 Man. L. R. 578), (1) That 50 V., c. 23, contemplates and its provisions apply to the case of a corporation being the sole publisher and proprietor of a newspaper.

(2) That section 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne, J., dissenting.

(3) That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

(4) That in every proceeding under sec. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

(5) That if an affidavit or affirmation purports to have been taken before a commissioner, his authority will be presumed, and need not be proved in the first place.

By sec. 11 of the Libel Act, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed.

Held, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per Strong, J.—Damages by loss of custom must be specifically alleged and the names of the customers given, otherwise evidence of such damages is inadmissible. Appeal dismissed with costs. *Ashdown* v. *Manitoba Free Press Co.*, Canada Supreme Ct., Nov. 16, 1891.

5. LIBEL — REPARATION — CHARGE OF DISHONESTY AGAINST A BODY OF WORKMEN — MALICE — PRIVILEGE — RELEVANCY.

A firm of shipowners sent an account and a letter to certain shipwrights demanding payment for six bottles of whiskey abstracted by their men while working in the hold of a ship belonging to the firm. Thereafter each of the workmen who had been in the hold — four in number — brought an action of damages for slander against the shipowners, on the ground that he had been represented by them as dishonest and as having stolen six bottles of whiskey. There was no averment of malice on the part of the defenders in having written as they had done.

Held, (Lord Rutherford Clark *dub.*) that no charge of dishonesty had been made against any particular individual, that the defenders were entitled by way of privilege to acquaint the shipwrights with the fact of the whiskey having been stolen by their workmen, that no averment of malice had been put upon record, and that accordingly the action fell to be *dismissed* as irrelevant. *McFadyen* v. *Spencer & Co.*, 29 Scot. Law Rep. 295.

6. SLANDER—PRIVILEGED OCCASION — QUALIFIED PRIVILEGE — ABSENCE OF ACTUAL MALICE—EVIDENCE—ADMISSIBILITY OF—FALSITY OF SLANDER —JUSTIFICATION NOT PLEADED.

The defendant, who was the superintendent of a public asylum, said to T., a man who had formerly been a servant at the asylum, that the plaintiff, a maid-servant at the asylum, who was engaged to be married to T., was "a contemptible thief." Justification was not pleaded. The evidence shewed that the defendant honestly believed in the truth of the words spoken and that he had reasonable grounds for his belief.

Held, that the occasion on which the words were spoken was one of qualified privilege, and that the plaintiff could not recover in slander without proof of actual malice, the burden of which lay on the plaintiff. On the evidence, the plaintiff failed to shew actual malice; and the use of the qualifying adjective, "contemptible," did not afford evidence of actual malice. The case should, therefore, have been withdrawn from the jury. Coxhead v. Richards, 2 C. B. 569; Whiteley v. Adams, 15 C. B. N. S. 392; and Stuart v. Bell, [1891] 2 Q. B. 341, followed.

Semble, *per* Falconbridge, J., that the defendant had not such a recognized interest in T.'s welfare as to justify as privileged the communication made to him, without any request on T.'s part.

Semble, also, *per* Falconbridge, J., that evidence of the falsity of the slander given on the plaintiff's examination in chief should not have been received. *Ross* v. *Bucke*, Ontario Q. B., Feb. 1892. (Can. L. T.)

LICENSE TO FLOOD HIGHWAY — See Watercourses 2.

LIEN ON DOCUMENTS—See Solicitor.

LIFE INSURANCE — See Insurance, Life.

LIMITATION OF ACTIONS.

CORPORATIONS—STOCKHOLDERS.

For five years previous to the suspension of an insolvent bank its president had managed its affairs with little assistance from the directors. Upon its suspension, without being

authorized by the directors, he issued scrip to the creditors, payable in three years, and secured by a mortgage on his own property. Without any objection by the directors, he wound up the bank's affairs, collecting the assets, and applied them to the payment of the scrip until the remaining assets were levied upon under execution. The stockholders had not fully paid up their subscriptions, the remainder of which was payable upon calls by the directors which the latter had never made.

Held, that although upon the bank's suspension a cause of action arose in favour of creditors against the stockholders for their unpaid subscriptions, the running of the statute of limitations was postponed three years by the issuing of said scrip, since the bank was bound thereby. *Washington Sav. Bank* v. *Butchers' & Drovers' Bank*, Supreme Court of Missouri, 34 Cent. L.J., 113.

LIMITED PARTNERSHIP — See Partnership 1.

LIMITING LIABILITY—See Carriers 4.

LIQUOR LICINSE ACT ONTARIO—See Constitutional Law 2.

LIVE STOCK SHIPMENTS — See Carriers 4.

LOAN TO SHIP'S HUSBAND—See Ships and Shipping 2.

LOSS OF CUSTOM — See Libel and Slander 4.

LOSS OF WAGES—See Marriage.

MALICE — See Libel and Slander 5—Malicious Prosecution 1.

MALICIOUS MISCHIEF — See Crim. Law 9.

MALICIOUS PROSECUTION.

1. PROBABLE CAUSE — MALICE REBUTTED.

Public policy and the demands of public justice will not permit a jury to punish a prosecutor under circumstances shown in this case. The prosecutor was arrested by the police under a general investigation begun by the police as to systematic robberies of property on railroads.

The public purpose of discovery of the criminals and vindication of justice is apparent on the face of the whole proceeding, and a jury ought not to be permitted to infer malice from the mere want of probable cause, where by other circumstances, it is disproved. *Madison* v. *Pennsylvania R. R. Co.*, Supreme Ct. of Pennsylvania, March 1892, 24 Chicago L. N. 244.

2. ACCUSATION OF THEFT—REASONABLE AND PROBABLE CAUSE.

Held:—That to justify a defence of reasonable and probable cause, the circumstances must be such as would produce on the mind of a cautious and prudent man, an honest conviction of the guilt of the party he accuses. Where an employer, on receipt of an anonymous letter, and without corroboration, caused his foreman to be arrested on a charge of theft, and opposed the liberation of the accused on bail, and it was not established that any theft whatever had been committed, it was held that the employer had acted without reasonable and probable cause and with malice. *Parker* v. *Langbridge*, Montreal, Q. B., Jan. 1892.

MANDAMUS — SEE ALSO CORPORATIONS 11.

MANDAMUS TO RAILROAD COMPANY —COMPELLING ERECTION AND MAINTENANCE OF STATION.

A writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings or in running its trains can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

A *mandamus* to compel a railroad company to erect and maintain a station at a certain place, and stop its trains there for the accommodation of the public, founded upon an alleged breach of public duty required of it by law, is properly brought in the name of the state at the relation of the prosecuting attorney of the county in which the place is located.

Defendant railroad company, having a discretion as to the location at the route of its road, constructed its road

through Y., an established county-seat, and the largest and most prosperous town in the county and along the line of the road for many miles, and stopped its trains there, but did not build a station. After completing its road four miles further, to North Y., a town laid out on unimproved lands of its own, it there erected a station, and ceased to stop its trains at Y., which resulted in a rapid increase in size of North Y. at the expense of Y., which as rapidly dwindled. On an application for a *mandamus* to compel defendant to erect and maintain a station at Y., and stop its trains there, it appeared that North Y. had become by far the most important town in the county, and that the surrounding community were better accommodated by a station at that place; that a station at Y. would not pay expenses; that there were other stations on the road furnishing sufficient facilities for the country south of North Y., and that North Y. had been made the county-seat by act of the legislature.

Held, *mandamus* being predicated upon the facts existing at the time of rendering judgment, that it was erroneously issued, the facts not bringing the case within the power of the court to grant relief. Justices Brewer, Field, and Harlan, dissenting. 13 Pac. Rep. 604, reversed. *Northern Pac. Ry. Co.* v. *Territory of Washington, ex rel., Dustin*, United States Supreme Court, Jan. 1892.

Notes.

1. If the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by *mandamus* to complete or to maintain its road to that point when it would not be remunerative. *Railway Co.* v. *Queen*, 1 El. & Bl. 858; *Id.* 874; *Com.* v. *Railroad*, 12 Gray, 180; *State* v. *Railroad*, 18 Minn. 40 (Gil. 21).

2. A railway company was held by Lord Chancellor Selborne, Lord Chief Justice Coleridge and Lord Justice Brett, in the English court of appeal, to be under no obligation to establish stations at any particular place or places unless it thought fit to do so, and was held bound to afford improved facilities for receiving, forwarding and delivering passengers and goods at a station once established and used for the purpose of traffic only so far as it had been ordered to afford them by the railway commissioners, within powers expressly conferred by act of parliament. *R. R. Co.* v. *Commissioners*, 6 Q. B. Div. 586, 592.

3. The company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations must manifestly rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point. *Mobile & Ohio R. R. Co.* v. *People*, 132 Ill. 559-571.

4. The question whether a *mandamus* should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in Railway Co. v. Queen, already cited, "there is a very great difference between an indictment for not fulfilling a public duty, and a *mandamus* commanding the party liable to fulfil it." 1 El. & Bl. 878. The court will never order a railroad station to be built or maintained contrary to the public interest. *Marshall* v. *Railway Co.*, 136 U. S. 393, 10 Sup. Ct. Rep., 846.

5. A railroad corporation has a public duty to perform as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the State of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but, in the absence of a specific direction from the legislature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts. *Diss. Opinion Mr. Justice Brewer.* Mr. Justice Field and M. Justice Harlan concured in this dissent.

MARINE INSURANCE—See Insurance, Marine.

MARRIAGE—See also FOREIGN LAW.

INJURY TO WIFE—LOSS OF WAGES.

Under the laws of 1884, chapter 381, which declares that a married woman may contract to the same extent as

if unmarried, whether such contracts relate to her separate estate or not, but that this enlargement of her rights shall not extend to any contract with her husband, a woman who works in her husband's shop, and receives regular wages, which she applies to the support of the family, is not entitled to recover, in an action for personal injuries, damages for loss of wages, because notwithstanding the statute, her services still belong to her husband, and must be recovered by him in a separate action in his own name. *Blaechinska* v. *Howard Mission and Home for Little Wanderers*, N. Y. Ct. of Appeals, Jan. 1892. 45 Alb. L. J. 255, *Notes.*

1. The husband's right to the services of his wife is not limited to those performed for him in his house, for when she works for him out of doors upon his farm she is entitled to no pecuniary compensation, and his written promise to pay her therefor is without consideration. *Whitaker* v. *Whitaker*, 52 N. Y. 368, 371.

2 When she works with her husband for another, and their joint earnings are used to support the family, if there is no special contract that she is to receive the avails of her labor, they belong to him and he is entitled to recover their value. *Birkbeck* v. *Ackroyd*, 74 N. Y. 356 ; 11 Hun, 365 ; *Beau* v. *Kiah*, 4 id. 171.

3. In *Filer* v. *Railroad Co.*, 40 N. Y. 47, a leading case upon the subject, it was held that a wife, not engaged in business, or in performing labor on her sole and separate account, when injured by the wrongful act of another, could not recover consequential damages resulting from her inability to labor.

MARRIED WOMAN.

PROMISSORY NOTES—OBLIGATION.

Held : That a negotiable promissory note, made by a married woman separate as to property, for a debt of her husband, in contravention of art. 1301 of the Civil Code, is void in the hands of an innocent holder for value.

(Parsons, vol. 1, p. 275 ; Daniel, vol. 1, sect. 806 and 807). *La Banque Nationale* v. *Guy*, 21 Revue Légale, 506.

MASTER AND SERVANT.

1. DISCHARGE.

The discharge of a foreman in a shoe factory, employed by the year, is justified by his failure to perform his duties for seven weeks, though caused by sickness. *Johnson* v. *Walker*, Mass., 29 N. E. Rep. 522.

2. TORTS OF SERVANT — SCOPE OF AUTHORITY.

Defendant's ticket agent, acting under a notice given him by police officials to look out for a five-dollar counterfeit, and describing three men passing the same, supposing a bill presented at his window by plaintiff in payment for tickets to be one of the counterfeits, and supposing plaintiff and his companion to be the persons described, after giving plaintiff his tickets and change sent for a police officer and directed their arrest, while they were seated on the station platform waiting to take the next train. The officer stated that he knew the two men as reputable men, and that there must have been a mistake, but the agent insisted upon their arrest for passing counterfeit money, and they were arrested but were after an hour discharged, the bill passed being pronounced genuine.

Held, that the agent was acting outside his duty in taking the bill which he supposed to be counterfeit, and causing the arrest, and it not appearing that the plaintiff was at the time of his arrest in the agent's custody, or under his protection, with respect to the execution of the contract of transportation, defendant could not be made liable for his conduct. 14 N. Y. Supp. 456, reversed. *Mulligan* v. *New York and R. B. Ry. Co.*, N. Y. Ct. of Appeals, Jan. 1892, 45 Alb. L. J. 274.

3. NEGLIGENCE.

In an action against a corporation for personal injuries to an employee, testimony as to the residence of its stockholders is admissible to show that defendant's business at the place where plaintiff was injured, was in charge of persons who were not stockholders, members, or officers of the company, and to charge defendant with the acts of such persons as its agents. *Fox* v. *Spring Lake Iron Co.*, Mich., 50 N. W. Rep. 872.

4. DEFECTIVE APPLIANCES.

It is not negligence *per se* for a rail-

road company to adopt a device for coupling cars, not before in use on its road, without discarding those already in use by it, although the use of the two together may be more hazardous than would the use of either alone.

That the railroad company may exercise this right is a risk incidental to the service of one who is engaged in coupling cars; and, if the sole cause of an injury to one so engaged be the concurrent use of the two devices, it imposes no obligation on the railroad company to compensate him therefor. *Pittsburgh & L. E. R. Co.* v. *Henly*, Supreme Ct. of Ohio, Dec. 1891.

Notes.

It is generally held that a railroad company is not bound to provide the best or most approved appliances, but may use such as are reasonably fit for the purpose, or that may be in general use on well-managed railroads. 2 Thomp. Neg. 989, note 6; Patt. Ry. Acc. Law, 301; *Railway Co.* v. *Gildersleeve*, 33 Mich. 133; *Whitwam* v. *Railroad Co.*, 58 Wis. 408, 17 N. W. Rep. 124.

5. INDEPENDENT CONTRACTOR.

In an action for personal injuries, it appeared that B & Co., were subcontractors of A. T. & I. Co., in constructing defendant's railroad; that plaintiff was injured while a passenger on a pass issued by B. & Co., over a portion of the road yet in their possession and under their control, on a train furnished by defendant to B. & Co., and A. T. & I. Co., as a construction train, through the negligence of an engineer employed by and under control of the latter company; *Held*, that defendant was not liable. *Scarbrough* v. *Alabama Midland Ry. Co.*, Ala. 10 South Rep. 316.

6. FELLOW-SERVANTS — CONDUCTOR AND BRAKEMAN.

Where the determination of the sufficiency of appliances for holding defendant's railroad train in descending a grade was left to its conductor, the decision of the conductor was the decision of defendant, and defendant was liable for the death of a brakeman on such train, caused by the insufficiency of the appliances used.

Province of Jury.

Where it appears in such case that, at the time of the accident, the brakemen were performing their duty in trying to set the brakes, the question of defendant's negligence should have been submitted to the jury. *Wooden* v. *Western N.Y. & P. R. Co.*, 16 N. Y. Supp., 849; N.Y. Superior Ct.

7. NEGLIGENCE.

While plaintiff, a stone-mason, was dressing a stone furnished by defendant, his employer, there was an explosion, which shattered the stone and injured plaintiff. The stone had been blasted with dynamite from defendant's quarry, and there was evidence that, notwithstanding defendant's precautions at the quarry, unexploded dynamite had been found in the drill holes of stones taken out; *Held*, that the question whether defendant had exercised reasonable care in discovering and removing unexploded dynamite from the stone before delivery to the plaintiff was for the jury. *Neren* v. *Sears*, Mass., 29 N. E. Rep., 472.

MEASURE OF DAMAGES — See Negligence 9. 10—Telegraph Companies 4.

MILK—See Adulteration.

MISAPPROPRIATION—See Banks and Banking 7.

MISDIRECTION—See Mun. Corp. 17.

MISTAKE—See Teleg. Companies 1.

MONEYS ENTRUSTED FOR INVESTMENT.

CONDITION PRECEDENT—PRESCRIPTION—ART. 2262—TRANSFER—PRÊTE NOM.

H. having funds belonging to one T. J. C. for investment, agreed to invest them with M. of Winnipeg in a certain land speculation, and after correspondence accepted and paid M.'s draft for $2,375, mentioning in the letter notifying M. of the acceptance of the draft, the understanding H. had as to the share he was to get and adding: "I also assume that the lands are properly conveyed, and the full conditions of the prospectus carried out, and if not, that money will be at once refunded."

The lands were never properly conveyed and the conditions of the prospectus never carried out. T. C. J. trans-

ferred *sous seing privé* this claim to the plaintiff who brought an action against M. for the amount of the draft.

Held, affirming the judgment of the court below,

(1) That the action being for the recovery of a sum of money entrusted to the defendant for a special purpose, the prescription of two years did not apply. Art. 2262 C. C.

(2) That the conditions upon which the money had been advanced were conditions precedent and not having been fulfilled, M. was bound to refund the money.

(3) That the transfer *sous seing privé* of the claim to plaintiff had been admitted by M., and the plaintiff, even if considered as a *prête-nom*, had a sufficient legal interest to bring the action. *Moodie* v. *Jones*, 19 Can. Sup. Ct. Repts. 266.

MONTREAL—See Taxation 1.

MORTGAGE — See Insurance 15. 16. 17. 18.

MORTGAGE BOND—See Corporations 2. 6.

MOVING HOUSE THROUGH STREETS—See Mun. Corp. 13.

MUD-HEAPS—See Negligence 16.

MUNICIPAL CORPORATIONS

—SEE ALSO NEGLIGENCE 16.

1. INCREASE OF INDEBTEDNESS.

A city, indebted up to the limit fixed by the constitution, cannot increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant, and, such indebtedness being forbidden, the contract out of which it arises, although executory, is also forbidden. *Spilman* v. *City of Parkersburg* W. Va. 14 S. E. Rep. 279.

2. CITY COUNCIL.

When the record of a special meeting kept by the clerk shows that the meeting was called for the purpose of transacting the very business which was transacted, and that every member of the council was present and participated in the proceedings, the presumption is, in the absence of evidence to the contrary, that the meeting was a legal meeting, duly and regularly called. *City of Greely* v. *Hamman*, Colo. 28 Pac. Rep. 460.

3. TIME OF PERFORMANCE.

Plaintiff contracted in writing to erect a building for defendant city, to commence work on such a day as the park commissioners should designate, and complete the same within three months, and to forfeit $20 for each day's delay thereafter. The park commissioners did not designate any day for commencing the work. Plaintiff was delayed for a long time by the neglect of the board of health to give the necessary permit, and also by inclement weather, and, deducting the time lost through such causes, completed the work within the three months.

Held, that, as defendant was in default plaintiff could not be held to a strict performance, and defendant could not recover the penalty. *Deeves* v. *Mayor, etc.*, of New York, 17 N. Y. Supp. 460, N. Y. Superior Ct.

4. CONTRACT WITH WATER COMPANY.

(1) After the granting by town authorities of an application for the privilege of supplying the town and its inhabitants with pure and wholesome water, the water company, duly incorporated, entered into a contract with the town to erect water-works, and lay in the principal streets twenty-three miles of pipe, "for the purpose of supplying the town and its inhabitants with pure and wholesome water," to erect two hundred fire hydrants, to be used only for fire purposes, and to erect two pumps of a certain capacity, fixing a maximum rate for private consumption. *Held*, that such contract should be construed as one to furnish a supply of water, and not as one for the erection of water-works merely, and was valid.

(2) The fact that the commissioners of highways, who signed the contract on the part of the town, were to be paid by the company for their services in directing and supervising the laying of the pipes, it not appearing that such agreement had any influence in procuring the contract or in the method

of its execution, the terms being fair and just on both sides, and the compensation reasonable, and such services not being required of them by law, will not vitiate the contract. *Nicoll* v. *Sands*, 14 N. Y. Supp. 448, affirmed, N. Y. Ct. of App., Jan. 20,1892, Alb. L. J.

5. Defective Drainage — Directing Verdict.

In an action against defendant city for damages for overflowing plaintiff's premises the complaint alleged that defendant unlawfully dug alongside plaintiff's house, in a public alley, a hole, and caused to be drained therein the water falling and flowing upon said alley, without providing any outlet therefor, thereby causing said hole to fill up with water, and overflow plaintiff's cellar, etc. *Held*, that the complaint sufficiently showed that the city was engaged in a municipal undertaking from which the alleged injury resulted.

The work was done according to the terms of the contract, and the imperfection was in the plan, and not in its execution. *Held*, that the city was answerable. *City of New Albany* v. *Ray*, 29 N. E. Rep., 611; Ind. App. Ct.

6. Defective Drains and Sewers—Liabilities for Damages.

Where a city grants permission to a person, and appropriates money to aid him, to alter, under the supervision of the city engineer, the course of a sewer over which it has assumed control, and such alteration is negligently made, so as to cause the water and excrement to back up and flow into a private cellar, the city is liable for the damages resulting therefrom.

In such case, the fact that the state may have originally constructed the sewer is immaterial.

A sewer controlled by a city, which is so constructed that it causes the water and excrement to flow into the cellar of a private person, is a nuisance, and if the city fails to abate it when notified to do so it is liable for the damages caused thereby. Lacy, J., dissenting. *Chalkley* v. *City of Richmond*, 14 S. E. Rep., 339; Va. Ct. of App.

7. Dangerous Structures in Streets.

Where a city permitted the maintenance of a water tank in a defective condition in a public street, and plaintiff's decedent, being lawfully engaged at work in such street, stepped under the defective structure for a few minutes—there being no apparent danger—and was killed by the falling of the tank, the questions of the city's negligence, and as to whether the deceased was guilty of contributory negligence, are for the jury.

In such case the city is chargeable with notice of, and is liable for injury resulting from, such defects in the structure as ordinary care and reasonable diligence would discover. *Nesbit* v. *City of Greenville*, 10 So. Rep. 452, Miss. Supreme Ct.

8. Defective Sidewalks — Injuries.

If a municipal corporation knowingly permits a way or walk constructed upon one of the streets by a private person, and designed for the use of the pedestrians, to remain, and be so used, the authorities by their official acts inviting and inducing such use, the duty devolves upon the corporation to keep the way in proper repair as a sidewalk; and it is of no consequence that such way or walk was built of earth, instead of the usual materials. *Graham* v. *City of Albert Lea*, Minn., 50 N. W. Rep. 1108.

9. Defective Streets.

Where a horse, while being driven along a street, is so frightened by a pile of stones on one side of the road as to pass out of the driver's control, and bring the vehicle in contact with another pile of stones, on the opposite side of the road, and, becoming more frightened at the sound of the wheel grating against the stones, he trots fast a short distance, and then breaks into a run, and while attempting to turn a corner 428 feet from the stone-pile, in order to get to his stable, upsets the vehicle, it is proper to submit to the jury the question whether the grating of the wheel against the stones was the direct cause of the accident.

Bowes v. *City of Boston*, Mass., 29 N. E. Rep. 633.

10. DEDICATION OF STREETS — ACCEPTANCE — ADVERSE POSSESSION — EVIDENCE.

W., being the owner of the land, surveyed, laid out and plotted the same into lots, streets and alleys, as and for a town; made a map thereof, and sold the lots with reference to said map, and as designated and numbered thereon; such map being afterwards duly admitted to record, and the town as laid out being established and named by act of the legislature.

Held, such acts and conduct on the part of such owner constitute *prima facie* evidence of the intent on his part to dedicate such streets to public use.

An acceptance of such dedication must be by the proper local authorities, but may be implied as well as expressed; such as the recognition or naming of it as a street of the town by ordinance of the town council, or by any actual appropriation of the property for the use designed.

One who claims to own and hold a definite part of such street must prove an adversary possession thereof for ten years, the period prescribed by the law of this state; such adversary possession being made up of all the essential elements. *Taylor* v. *Town of Phillippi*, 14 S. E. Rep. 130, W. Va. Sup. Ct.

11. ACTION AGAINST FOR DELAY IN GRADING STREET.

In an action for damage for delay in the execution of a contract to grade and fill defendant city's street; plaintiff alleged that in the performance of the contract according to the specification the embankment extended beyond the street line, and upon private property, and that they were delayed in the execution by an injunction by one of the adjacent property owners; that by the contract defendant assumed to have the right, as against such adjacent property owners, to make such improvement, and was responsible for the delay. It appeared that plaintiff finally completed the work, and received pay in full. It was *held*, that plaintiffs could not recover, since it was their duty, as well as that of defendant, before entering upon the contract, to ascertain the right of the city to rest a portion of the embankment on the abutting premises without the consent of the owners. The fact that the board of public works requested plaintiffs to desist from work on any portion of the street pending the injunction suit by one of the adjacent owners did not make defendant liable for the delay, since such request by such board was *ultra vires* and void. *Mathewson* v. *City of Grand Rapids*, 50 N. W. Rep., 651; S. C. Michigan, 34 Cent. L. J., 210.

12. STATUTORY POWERS—CONTROL OVER STREETS — ALTERATION OF GRADE — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.

The act of incorporation of the town of Portland 34 V., c. 11 (N. B.) which remained in force when the town was incorporated as a city by 45 V., c. 61 (N. B.), empowered the corporation to open, lay out, regulate, repair, amend and clean the roads, streets, etc.

Held, that the corporation had authority, under this act, to alter the level of a street if the public convenience required it.

W. was owner and occupant of a house in Portland situate several feet back from the street with steps in front. The corporation caused the street in front of the house to be cut down, in doing which the steps were removed and the house left some six feet above the road. To get down to the street. W. placed two small planks from a platform in front of the house and his wife in going down these planks in the necessary course of her daily avocations slipped and fell, receiving severe injuries. She had used the planks before and knew that it was dangerous to walk up or down them. In an action against the city in consequence of the injuries so received:

Held, affirming the judgment of the court below, that the corporation having authority to do the work, and it not being shown, that it was negligently or improperly done, the city was not liable.

Held also, that the wife of W. was

guilty of contributory negligence in using the planks as she did knowing that such use was dangerous. *Williams* v. *The City of Portland*, 19 Can. Sup. Ct. Repts. 159.

13. MOVING HOUSE THROUGH STREET —INJUNCTION—ELECTRIC RY.

The act for incorporation of cities giving the common council exclusive jurisdiction over the streets does not take from the courts the authority to decide controversies concerning property rights, and where such council fails to prevent persons from moving a building along a street, and thereby interfering with the operation of an electric street railway by cutting down its wires and poles, such interference may be restrained by injunction. *Williams* v. *Citizen's Ry. Co.*, Supreme Court of Indiana, Dec. 1891, 45 Alb. L. J. 182.

Note.

Interesting discussions of the general subject will be found in the cases of *Gaslight Co.* v. *Hart*, 40 La. Ann. 474; *Taggart* v. *Railway Co.*, (R. I.). 19 Atl. Rep. 326; *Williams* v. *Railway Co.*, 41 Fed. Rep. 556; *Potter* v. *Railway Co.* (Mich.) 47 N. W. Rep. 217.

14. DEFECTIVE SIDEWALKS—NOTICE TO CITY—EVIDENCE—DAMAGES.

In an action for injuries received by falling into a hole in a sidewalk, evidence as to the general condition of the sidewalk is admissible to show the knowledge of the defect by the city.

Evidence of conversations with the city sidewalk commissioner, before the accident, relative to the condition of the walk, is admissible.

Notice to one employed by a city to look after the repairs of the sidewalks of a defect in a walk is notice to the city.

Evidence that another person had fallen at the same place is admissible as tending to show the defect.

Evidence that the defective sidewalk was on a public street is sufficient to show that the city had assumed control of it, in the absence of evidence to the contrary.

Where plaintiff was confined to his house two months by a dislocated ankle and broken leg, and his medical expenses were $75, a verdict for $1,400 is not excessive. *Smith* v. *City of Des Moines*, 51 N. W. Rep. 77, Iowa Sup Ct.

15. CONTRACT WITH CITY — FRAUD — EVIDENCE — MUNICIPAL CORPORATION—ESTOPPEL.

The facts that a bidder for a contract to furnish materials to a city secured the same, as the lowest bidder, by putting in an unbalanced bid; that the city officers, exercising the option given them by the contract, only called for those materials the price for which was in excess of the fair price, and in greatly increased quantities; and that the advertised estimated amount of some of such materials was greatly less than the amount actually needed at the time—are sufficient to show fraud and collusion in the letting of the contract. A contract to furnish a city with certain materials, fraudulently let to one who was apparently, but not in fact, the lowest bidder, cannot be made binding on the city by acceptance of the materials, or by ratification by an officer or otherwise, except in the form prescribed by law.

In an action to recover on a contract with defendant city, let to plaintiff as the lowest bidder, the only question considered at the trial was fraud in the making of the contract. *Held*, on appeal, that plaintiff could not claim to recover the value of the materials furnished under the contract, which was found at the trial to be fraudulent and void.

The auditing of a claim by the board of audit of New York City, for the amount due on a contract with the city, does not estop the city from denying liability on the ground of fraud in the making of the contract.

To prove the inaccuracy of estimates of materials delivered by plaintiff under contract with defendant city, plaintiff's books, though containing other items, are admissible in evidence on testimony of employees of plaintiff in charge of such deliveries, and who kept the record in such books, that the entries were made at the time of the deliveries, and statements of such employees, based on such books, are also admissible. *Nelson* v. *Mayor, &c.*, 5 N. Y. Supp., 688, affirmed, 29 N. E. Rep., 814; N. Y. Ct. of App.

16. EXECUTORY CONTRACT FOR PURCHASE OF FIRE-ENGINE — NECESSITY FOR BY-LAW—CONTRACT UNDER SEAL —R. S. O. c. 184, ss. 282, 480.

Section 282 of the Municipal Act. R. S. O. c. 184, enacts that the powers of municipal councils shall be exercised by by-law when not otherwise authorized or provided for. Section 480 of the Act authorizes the council to purchase fire apparatus, etc., but says nothing about passing a by-law for the purpose.

The plaintiffs here sued upon an alleged contract for the sale by them to the defendants, the corporation of the town of Palmerston, of a fire engine and hose. The alleged contract was signed by the mayor of the town and by the clerk of the council, and the seal of the corporation was attached. No by-law was, however, passed authorizing the purchase. The engine was sent by the plaintiffs to Palmerston, but was not accepted by the defendants.

Held, that the want of a by-law was fatal, and the instrument under the seal of the corporation invalid. Judgment of the Chancery Divisional Court, 20, O. R. 411. *Waterous Engine Co.* v. *Town of Palmerston*, Ontario Court of Appeal, Jan. 1892, (Can. L. T.).

17. WRONGFUL DISMISSAL OF OFFICER OF CORPORATION—LEGAL MALICE —ACTUAL MALICE—WANT OF REASONABLE AND PROBABLE CAUSE — MISDIRECTION—DAMAGES—PUNITIVE DAMAGES—COSTS—EXCESSIVE DAMAGES.

This was an action for damages for the malicious dismissal of the plaintiff, by the council of the defendants, from the office of county valuator, and for maliciously preventing him from discharging his duties as such valuator. The jury found a verdict for the plaintiff for $1,120.30, of which $363.30 was for damages for the costs of proceedings in getting rid of the order dismissing the plaintiff from office, $300 represented the amount which the plaintiff would have earned had he been allowed to act, and $457 was awarded as punitive damages.

Held, on the evidence, that there was very clearly a determination on the part of the council to act wrongfully to the detriment of the plaintiff; that they were actuated throughout the whole proceeding by what amounted to legal malice towards the plaintiff; and when it was considered that the defendants did not attempt to rebut any inference of malice or shew that there was any reasonable or probable cause for what they did, the conclusion was irresistible that the order for the dismissal of the plaintiff was maliciously made, and the subsequent acts by which he was prevented from discharging the duties of his office were also done from malicious motives; for all of which the defendants were liable.

Held, also, that it was misdirection to tell the jury that malice in fact was not necessary to sustain the action for malicious dismissal; but that malice to sustain the action might be inferred from a want of reasonable and probable cause.

Held, also, that the damages should be reduced by deducting from the $363.30 the sum of $45, the costs of *quo warranto* proceedings taken by the plaintiff against E. K., whom the council had appointed valuator in his stead; for these costs, if recoverable, could only be so when awarded in the *quo warranto* proceeding and against the person who was ordered to pay them.

Held, also, that the $457 allowed as punitive damages was not unreasonable or excessive. *Gallagher* v. *County of Westmoreland*, Supreme Ct. of New Brunswick, Feb. 1892. (Can. L. T.)

MURDER—See Crim. Law 6.

NECESSARY AVERMENTS—See Bills and Notes 3.

NEGLIGENCE—SEE ALSO EVIDENCE 3—MASTER AND SERVT. 3. 7—MUN. CORP. 12—PHYSICIANS AND SURGEONS—RAILROAD COMPANIES 9.

1. MOVING STREET CAR.

It is not, as a matter of law, held to be negligence for a passenger to attempt to enter a street car while the same is moving, irrespective of the rate of speed or other qualifying circumstances. It is presumptively negligent to

do so if the car is moving at its ordinary rate of speed, or with accelerated speed, and especially if the attempt is made between cars, or at the front instead of the rear of a car. It is ordinarily a question for the jury depending upon the circumstances of each case. *Sahlgaard* v. *St. Paul City Ry. Co.*, Minn. 51 N. W. Rep. 111. (See 1 M. L. D. & R. 176 Contrib. Neg.)

2. Boarding Moving Street Car.

The only evidence to support plaintiff's claim of negligence in an action for injuries caused while attempting to board defendant's horse car was his own testimony, as follows: "I signaled the driver to stop. He stopped the car. By the time it came to me it had a little speed, but was moving so little that it would not be noticed. I placed my left hand on the hand rail and my right foot on the step, when I heard the brake go off; and before I had a firm footing the car moved, pulled me along, and broke my arm. I was dragged a short distance."

Held, that he was properly nonsuited. *Picard* v. *Ridge Ave. Pass. Ry. Co.*, 23 Atl. Rep. 566, Pa. Supreme Court.

3. Street Railways — Collision with Vehicles — Contributory Negligence.

Where a driver of a wagon reaches a street along which run electric cars, and drives directly on the tracks without stopping or looking for a car, and his wagon is at once struck by an approaching car and the horses injured, he is guilty of contributory negligence. *Carson* v. *Federal St. & P. V. P. Ry. Co.*, Sup. Ct. of Penn., Jan. 1892.

4. Street Railways — Child on Track—Damages for Death.

The duty of watchfulness rests upon the driver of a street car approaching a street crossing where he has reason to suppose that young children may be engaged in coasting or sliding down a neighboring hill, and across the car track, although such conduct on the part of the children is unlawful.

Verdict: *Held* justified to the effect that the parents of a child about six years old were not chargeable with negligence in allowing him to go out the house to play within their own premises fronting on a public street; also as to the amount of the verdict for an act of negligence causing the death of such a child. *Strutzel* v. *St. Paul City Ry. Co.*, S. C., Minnesota, Dec. 1891.

Note.

See our article on Contributory Negligence 1 M. L. D. & R., p. 183.

5. Injury to Wife — Contributory Negligence of Husband.

A wife, free from negligence, was riding with her husband over a railroad crossing, and was injured by the negligence of the railroad company. Her husband was guilty of contributory negligence. *Held*, that the husband's negligence could not be imputed to the wife. *Louisville N. A. & C. Ry. Co.* v. *Creek*, Supreme Ct., Indiana, 31 Cent. L. J., 248.

6. Imputed Negligence.

A wife, entirely free from negligence, was riding with her husband over a railroad crossing, and was injured by the negligence of the railroad company. Her husband was guilty of contributory negligence. *Held*, that the husband's negligence could not be imputed to the wife. *Louisville N. A. & C. Ry. Co.* v. *Creek*, 29 N. E. Rep., 481.

7. Unloading Freight-cars — Duties of Carriers.

Plaintiff railroad company delivered to defendant on a side track a flat car loaded with lumber. Defendant unloaded part of the lumber and left the balance overnight without replacing the cross-pieces to hold it on the car, and during a heavy wind storm it blew off, and obstructing plaintiff's main tracks derailed its train, causing serious injury thereto. Plaintiff had no watchman at the place.

Held, that plaintiff owed no duty to defendant to watch and take care of the car, and was entitled to act upon the assumption that defendant would perform its duty in properly securing the lumber, and for its negligence in such particular was entitled to recover. *New York L. E. & W. R. Co.* v. *Atlantic Refining Co.*, 13 N. Y.

Supp. 466 reversed. N. Y. Court of Appeals, Jan. 20, 1892, Alb. L. J.

8. COLLISION—QUESTION FOR JURY—DAMAGES.

In an action for personal injury sustained in a collision between plaintiff's wagon and defendant's street car, it appeared that plaintiff was a police officer in charge of a patrol wagon carrying an injured man on a stretcher, and, while on defendant's track, his wagon was struck by the car coming from the opposite direction. Plaintiff's driver gave evidence, which was corroborated, that he saw the car, and tried to pull off of the track, doing so slowly, on account of the injured man; that, when about 60 feet from the car he hallooed as loud as he could to stop the car; that the car driver was looking behind his car and did not attempt to slacken the speed before the collision.

Held, that defendant's motion for a nonsuit was properly denied, as driving a wagon on a street car track is not negligence *per se*, and the evidence was sufficient to show the car driver negligent in not looking ahead to observe whether the track was clear.

If, by reason of inattention, carelessness or incompetency the car driver failed to avoid the collision, defendant was liable, if there was no contributory negligence on the part of plaintiff or his driver.

In such case the statement in an instruction that "street cars are easily and readily stopped" could not have prejudiced defendant, since the fact is one of common knowledge, which the jury might consider without evidence of its existence.

In actions for personal injury, fixing the amount of damage is within the discretion of the jury, and a verdict approved by the trial court will not be disturbed on appeal on the ground of being excessive, except in a plain case of abuse of discretion. *Swain* v. *Fourteenth St. R. Co.*, 28 Pac. Rep. 829, Cal. Sup. Ct.

9. INJURY TO PASSENGERS—PROXIMATE CAUSE—MEASURE OF DAMAGES.

If the negligence of a carrier places a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought.

A passenger injured by negligence of the carrier is entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury. *Purcell* v. *St. Paul City Ry. Co.* Supreme Ct. of Minnesota, Jan. 1892.

10. INJURY TO CHILD ON TRACK—MEASURE OF DAMAGES—VERDICT.

In an action by the father against a railway company for injuries to his 2½ year-old child that strayed on the track and was run over, defendant pleaded that the injury resulted from plaintiff's negligence in allowing the child to be on the track, and the court charged that, in order to establish a cause of action or defense founded on a charge of negligence, negligence must be proven, and, if the child was too young to appreciate danger, then plaintiff must show that he and his wife were not guilty of ordinary negligence in allowing the child to get on the track, or that defendant, after discovering the child, inflicted the injuries recklessly, etc.

Held, that the charge was not erroneous.

Where the child is crippled for life, the value of the services of the child during its minority, less the expense of feeding and clothing it, is not the true measure of damages, as the expense of the care of the child in such case may be greatly increased.

The fact that the child, in another action, has recovered damages for its reduced capacity to earn money during its minority, is no reason why the parent should not recover for the same incapacity, since the judgment in the other case was an improper one.

Where the jury returned a verdict for larger damages than plaintiff alleged or proved, it should be set aside. *Texas & Pac. R'y. Co.* v. *Morin*, 18 S. W. Rep. 345. Tex. Sup. Ct.

11. CONTRIBUTORY NEGLIGENCE.

A traveller who, in reliance upon the usual custom of a railroad in the order of running its trains, only looks in one direction before driving upon a crossing, and is injured by a train coming from the opposite direction, which he would have avoided had he looked in that direction, cannot recover, though the usual crossing signals were not given. *Nixon* v. *Chicago R. I. & P. Ry. Co.*, 51 N.W. Rep., 157, Iowa Sup. Ct.

12. CONTRIBUTORY NEGLIGENCE — EVIDENCE.

Where a passenger on defendant's excursion train secures a seat for himself, but afterwards resigns it to a lady, and, after remaining in the aisle of the car for a time, goes out on the platform intending to enter another car, but, finding that full, remains on the platform, from which he falls or is thrown off, he is guilty of contributory negligence, since he was not compelled to stand on the platform.

Where there was nothing in the record to show that the train was improperly operated, on account of a lack of brakemen, it was error for the court to submit to the jury, on the question of negligence in operating the train, the fact that there were but two brakemen on it. *Worthington* v. *Central Vermont Ry. Co.*, 23 Atl. Rep., 590, Vt. Sup. Ct.

13. CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company to recover for personal injuries, plaintiff's evidence showed that when the train was approaching the station at which plaintiff desired to get off, the conductor told plaintiff that he must hurry off, as the train did not have time to stop; that the train was running three or four miles an hour; and that plaintiff received certain injuries in attempting to pass from the car in which he was sitting to the baggage-car to get his baggage, preparatory to getting off, as ordered by the conductor.

Held, that, as the fact did not disclose negligence *per se* in plaintiff, it was a question for the jury whether plaintiff was guilty of contributory negligence.

Whether, in such case, there was apparent danger in attempting to obey the conductor, was also a question for the jury.

In such case a statement of plaintiff that he knew it was dangerous to obey the conductor is not conclusive of the question, as it was for the jury to say whether in fact it was apparent that there was danger. *Davis* v. *Louisville, N. O. & T. Ry. Co.*, 10 So. Rep. 456, Miss. Supreme Court.

14. INJURIES FROM FRIGHT.

A complaint alleging that in a collision on defendant's railroad the cars were thrown off the track, and fell on plaintiff's premises and against her dwelling, whereby plaintiff was subjected to great fright, nervous excitement, and distress, and her life endangered, states no cause of action. *Ewing* v. *Pittsburgh, C., C. & St. Louis Ry. Co.* S. C. Pennsylvania 34 Cent. L. J. 236.

Notes.

1. Negligence constitutes no cause of action unless it expresses or establishes some breach of duty. Add. Torts, § 1338.

2. A contractor of a railroad was blasting rocks within the right of way of the road. The blast blew rocks upon the plaintiff's land, and, in addition to the damage to the land, plaintiff claimed damages for fright, caused by the apprehension of personal injury. *Held*, that he could not recover. *Wyman* v. *Leavitt*, 71 Me. 227.

3. Mental pain or anxiety the law cannot value and does not pretend to redress, when the unlawful act complained of causes that alone." Lord Wensleydale in *Lynch* v. *Knight*, 9 H. L Cas. 577.

15. REPARATION—PERSONAL INJURY — RESPONSIBILITY OF AUCTIONEER FOR PLANT IN HIS EMPLOYER'S PREMISES—FAULT—RELEVANCY.

A firm of auctioneers who had been engaged to sell some bankrupt stock employed a workman to raise the goods to the upper story of the bankrupts' premises, where the sale was to take place, by a hoist which was on the premises. When the workman was lowering some of the goods after the sale, the hoist came down with a run and injured him severely. He brought an action against the auctioneers and the purchaser of the goods which were being lowered when the accident occurred, averring (1) that

the accident would not have happened but for the faulty construction of the hoist, which was not furnished with a brake, and that his employers, the auctioneers, were responsible for its insufficiency; and (2) that the accident would not have happened unless the hoist had been overloaded; that this had been done under the superintendence of the purchaser; and that though he knew the load was too heavy for the appliance used by the pursuer as a brake, he had given him the order to lower it.

Held, that the pursuer had not stated a relevant case against either of the defenders. *Nelson* v. *Scott Croall & Sons*, 29 Scot. Law Rep. 354.

16. REPARATION—BURGH—POLICE COMMISSIONERS — STREET — NEGLIGENCE — MAN INJURED BY STUMBLING OVER MUD-HEAP — GENERAL POLICE ACT 1862 (25-26 V., c. 101).

The general police (Scotland) act 1862 provides that the commissioners shall cleanse the streets and remove the sweepings "at such convenient hours and times as they shall consider proper."

The commissioners of police of a burgh employed a servant to clear the streets of mud and collect it in heaps for removal by a contractor. The mud on a certain street had been brushed to the side, and on the following morning the commissioners' servant attempted to collect it in heaps, but owing to its watery state he could only gather it together in liquid accumulations. He had to stop work owing to a dense fog. The day was frosty and the mud became partially frozen. The contractor's men were on their way to remove the mud, but had to return on account of the fog, which continued all day. In the afternoon, a carter, while leading his horse and cart along the side of the road to avoid the traffic, tripped over the mud and fell and was injured.

In an action for damages at his instance, *held*, that the commissioners were not liable, as the mud had been collected according to a reasonable custom, and as the accumulations were of ordinary size, and had not been removed because of the fog; and that the contractor was not liable, as his duty was to remove the mud when prepared for removal; that owing to the fog the mud was not so prepared, and that his duty had not begun at the time of the accident. *Barton* v. *Kinning Park Commissioners and others*, 29 Scot. Law Rep., 329.

NEWSPAPERS—See Libel and Slander 3. 4.

NEW TRIAL—Crim. Law 4—Libel and Slander 3.

NOTES HELD AS COLLATERAL SECURITY—See Insolvency 1.

NOTICE—See Insurance 28.

NOTICE TO CITY—See Mun. Cor. 14.

NOTICE OF DISSOLUTION—See Partnership 2.

NOTICE OF PROTEST—See Bills and Notes 14.

NOTICE TO PRODUCE—See Evidence 6.

OBLIGATIONS—See Foreign Law—Married Woman.

OFFENCES AGAINST PROVINCIAL ENACTMENTS—See Constit. Law 1.

OFFICERS—See Corporations 8. 10—Insurance 22—Partnership 3.

OFFICIAL BONDS—See Bonds.

"ONUS PROBANDI"—See Elections 1.

OPENING STREET ACROSS RAILWAY—See Eminent Domain.

PALACE HORSE CARS—See Carriers 4.

PARLIAMENT, RIGHT OF TO IMPOSE ADDITIONAL TAX AFTER GOODS ARE TAKEN OUT OF WAREHOUSE — See Constit. Law 3.

PAROL EVIDENCE—See Contracts 2.

PARTNERSHIP — SEE ALSO BILLS AND NOTES 11.

1. LIMITED—EVIDENCE—BOOKS OF ACCOUNT.

Entries made in partnership books before the formation of a limited partnership by the former partners and another entering as a special partner, of which the latter is not shown to have knowledge, are inadmissible in

evidence against him to show that the special partner had not paid his contribution in cash. It is the general rule that entries in partnership books made in the ordinary course of business are admissible in actions between the partners, and that they are also competent in favor of third persons in actions against the partners, as in the nature of admissions by the partners of the facts stated. Lindl. Partn. 404; Bates Partn., § 978; 1 Phil. Ev. 449; 2 Whart. Ev., § 1132. But the books of the prior firm were, as to Lindenmeyr, *res inter alios acta*. They were not competent against him on the principle of agency, or on the ground that he is presumed to have known their contents. Jan. 20, 1892. *Kohler* v. *Lindenmeyr*, 12 N. Y. Supp., 738, reversed. N. Y. Ct. of App., Alb. L. J.

2. Notice of Dissolution.

Where a partnership has been dissolved, constructive or implied notice of the dissolution will be sufficient as to those who have had no previous dealings with the firm, but as to those who have had previous dealings it is requisite that actual notice be given, or that such steps be taken as to warrant the inference that notice was received. *Joseph* v. *Southwark Foundry & Mach. Co.*, Ala. 10 South. Rep., 327.

3. Officers.

A member of a limited partnership, who by its articles was to be superintendent, tendered his resignation, to take effect not later than a certain day, but no action was taken on it by the stockholders for about a month thereafter, when they accepted it, but in the meantime he had withdrawn it. *Held*, that there being no resignation before them at the time, their action did not relieve him from office. *Jennings, Beale & Co.* v. *Beale*, Penn. 23 Atl. Rep., 225.

4. Prescription.

Held, that a contract of partnership entered into for the construction of a railroad, is a civil contract, and a demand for an accounting is not subject to the five years' prescription. *Macrae* v. *Macfarlane*, 21 Rev. Lég. 508.

5. Partnership Property — Exemption — Levy after Dissolution on Allotted Share.

Execution on a judgment against a partnership was issued and placed in the hands of on officer prior to a dissolution of the partnership and division of the property thereof between the two partners. After such dissolution and division the execution was levied on the share of the property allotted to one of the partners.

Held, that such partner was not entitled to claim the same as exempt from levy under the execution in question. *State* v. *Day*, App. Ct. of Indiana. Dec. 9, 1891, 34 Cent. L. J. 137.

Note.

There is an irreconcilable conflict of opinion upon the question whether one partner can claim any part of the property of an existing partnership as exempt from sale upon execution against him, or against the partnership, though the weight of authority is undoubtedly in accord with the principal case denying such claim. (See 34 Cent. L. J. 139 and cases there cited.

Pass Books—See Banks and Banking 9.

Passengers—See Evidence 3—Ships and Shipping 1.

Payment—See Agency — Bills and Notes 9—Fraud—Banks 9.

Payment of Premiums—See Insurance 9. 11.

Payment to Wrong Person—See Banks and Banking 9.

Performance of Contract—See Sale of Goods 9.

Photographs—See Copyright.

PHYSICIANS AND SURGEONS.

Negligence.

Where in an action for services for surgical operations on the defendant's wife, the defendant seeks to hold plaintiff responsible for the negligence of nurses in the hospital where defendant's wife was attended after the operation, it is competent to show that the plaintiff had no control over the hospital, and that it was in charge of others. *Baker* v. *Wentworth*, Mass., 31 N. E. Rep. 589.

PLEADING—See also Bills and Notes 3.

Demurrer to Plea in Part—Discontinuance—Amendment.

The plaintiff sued the defendant on several counts, of which three were on special agreements to pay, in different ways, a promissory note of the defendant in favour of the plaintiff.

Among other defences, the defendant pleaded to these three counts that the promise in each of the counts set up was in writing and in certain words set out in the plea. The plaintiff then demurred to the plea, in so far as it was pleaded to two of the counts.

The demurrer was allowed by Bain, J.

The defendant appealed, contending that the plaintiff could not properly thus demur to the plea in part, and that the doing so worked a discontinuance which entitled the defendant to judgment upon the demurrer.

Held, that the plea, if bad as not being an answer to the two counts, was wholly bad. The demurrer should have been to the plea as a whole. This point was not raised on the original argument. The plaintiff should be allowed to amend his demurrer without costs, and the judgment allowing the demurrer should be affirmed. The defendant to be at liberty, if he had not already done so, to plead the general issue to the three counts. *Sparham* v. *Carley*, Man. Q. B. March, 1892. (Can. L. T.)

Policies—See Insurance 22.

Powers of Officers of Corporations—See Insurance 22.

Powers of Agents—See Insurance 11.

Powers of Dominion Parliament to Impose Taxation—Constit. Law 3.

Powers of Lieutenant Governors—See Constit. Law 4.

Power of Pardon — See Constit. Law 4.

Preliminary Objections—See Elections 2.

Preliminary Examination of Respondent—See Elections 4.

Prescription — Action for Bodily Injuries — Moneys Entrusted for Investment—Partnership 4.

Presumption of Innocence — See Crim. Law 7.

PRINCIPAL AND AGENT.

Investment of Funds.

Where one received money from another for investment, in the absence of proof of a breach of the contract, the former's estate was not liable for the loss of the investment, there being no guaranty as to the security. *Kennedy* v. *McCain*, Penn. 23 Atl. Rep. 522.

PRINCIPAL AND SURETY.

Appeal Bond—Delivery.

The delivery of a statutory bond may (in the absence of affirmative statutory words in effect declaring the unapproved instrument a nullity) be sufficiently complete without the official approval to bind the sureties, where the officer has entered upon the discharge of his duties to the public, or where the obligee has, in words or by conduct, indicated his satisfaction therewith, and through reliance thereon has placed himself in a less favorable attitude. *Erwin* v. *Crook*, Colo., 28 Pac. Rep. 549.

Privilege—See Insolvency 2.

Privileged Communication — See Libel and Slander 5. 6.—Witness.

Procedure—See Foreign Law.

Probable Cause — See Malicious Prosecution 1.

Promissory Note — See Married Woman—Bills and Notes.

Promissory Representation—See Insurance 26.

Promise to Transfer Warehouse Receipts—See Warehouse Receipt.

Proof—See Foreign Law.

Proof of Handwriting—See Banks and Banking 1.

Proof of Loss—See Insurance 5.

Property and Civil Rights—See Constit. Law 3.

Proximate Cause—See Negligence 9.

PUBLIC IMPROVEMENTS — See Taxation 3.

PUBLIC OFFICERS—See Animals.

PUNITIVE DAMAGES — See Mun. Corp. 17.

QUALIFIED PRIVILEGE — See Libel and Slander 6.

QUESTION FOR JURY — See Negligence 8.

RAILROAD COMPANIES—SEE ALSO LIBEL AND SLANDER 1 — MANDAMUS.

1. RELEASE OF RIGHT OF WAY — CONSTRUCTION AND EFFECT.

A release to a railroad company of a right of way, in which the company is discharged also from all damages incurred, or to be incurred, by the location, construction, or operation of the road, does not cover injuries resulting from the negligence of the company in constructing or operating the road. Hoffeditz v. Railway Co., 18 Atl. Rep. 125, 129 Pa. St. 264, and Updegrove v. Railroad Co., 19 Atl. Rep. 283, 132 Pa. St. 540, distinguished. Pa. Supreme Ct., *McMinn* v. *Pittsburg M. & Y. R. Co.*, 23 Atl. Rep. 325.

3. RIGHT TO EXCLUDE HACKS FROM DEPOT—EXCLUSIVE PRIVILEGE.

A railroad company cannot, by granting to one person the exclusive privilege of standing hacks at the platform at its depot, prevent other persons from bringing their hacks into the depot grounds, and soliciting for the carriage of passengers from the depot, so long as they do not interfere with the company's business. *McConnell* v. *Pedigo*, Kentucky Ct. of App., Jan. 1892.

4. ABANDONMENT OF RIGHT OF WAY.

The mere non-user of a right of way granted to a railroad company will not extinguish the right in the absence of adverse possession by the servient owner, or of such acts on the part of the railroad company as evince a clear intention to abandon the right of way. *Roanoke Investment Co.* v. *Kansas City & S. E. R. Co.*, Mo. 17 S. W. Rep. 1000.

5. DEFECTIVE BRIDGE.

Whether a railroad company is or is not released from its obligation to maintain and keep in repair a bridge over a ditch at a farm crossing, under a contract with the farm owner, by a sale and conveyance of the farm, if thereafter it continue the crossing, and allow it to remain in such a condition as to invite its use as a crossing, it is bound to use ordinary care to see that it is kept in a safe condition; and this rule will apply in such case, though the contract might be construed as requiring the company only to construct, and not to maintain the bridge. *Stewart* v. *Cincinnati W. & M. Ry. Co.*, Mich. 50 N. W. R. 852.

6. ACCIDENT AT PRIVATE CROSSING—IMPUTED NEGLIGENCE—SIGNALS.

Persons lawfully using a private crossing in the vicinity of a public crossing are entitled to the benefit of signals which they know it is the duty and custom of the railroad to give at the public crossing; and, for failure to give such signals, negligence as to such persons will be imputed to the railroad company. *Cahill* v. *Cincinnati, N. O. & T. P. Ry. Co.*, Ky. 18 S. W. Rep. 2.

7. CONTAGIOUS DISEASES — TICKET AGENT.

Where a railroad company's ticket-agent at a station is afflicted with a contagious disease, and another person comes in contact with him in purchasing at the station a railroad ticket, and thereby contracts the disease, the railroad company is not liable in damages therefor, if neither the company nor any of its superior officers had any knowledge that the ticket-agent had such disease. *Long* v. *Chicago K. & W. R. Co.*, Kan. Sup. Ct. Feb. 1892.

8. EMINENT DOMAIN.

A railroad to be built solely for the private use of the controlling stockholder in conveying tan-bark from a certain tract of lands to his mills is not entitled to exercise the right of eminent domain, though the company is organized under Act Pa. April 4, 1868, which provides for the formation and regulation of public railroad cor-

panies. *Weidenfeld* v. *Sugar Run. R. Co.* U. S. C. C. (Pa.), 48 Fed. Rep. 615.

9. NEGLIGENCE.

Railroad companies are not held to the same degree of care in maintaining their side tracks as their main tracks, and are not liable for injuries caused by defects in their construction, unless it appear that they are guilty of gross carelessness in handling their cars. *O'Donnell* v. *Duluth, etc., Ry. Co.* Mich. 50 N. W. Rep. 801.

10. ABANDONMENT OF RIGHT OF WAY —CONDITION SUBSEQUENT.

The mere non-user of a right of way granted to a railroad company will not extinguish the right in the absence of adverse possession by the servient owner, or of such acts on the part of the railroad company as evince a clear intention to abandon the right of way.

The grantor of a right of way for railroad purposes testified as to the terms of the conveyance, the deed having been lost, that the railroad company was to build two double track bridges "across that cut, (on grantor's land.).....That was the words of the contract.....It was part of the contract that they were to build these bridges immediately after the road bed was finished."

Held, that the portion of the contract relating to the bridges was not a condition subsequent failure to perform which would forfeit the grant.

Land for a right of way was conveyed to a railroad company " and its assigns forever, so long as the said land hereby conveyed shall be used for railroad purposes, " and the road bed was graded on it. Afterwards the successor of the grantee company completed the road by a new route, and refused to construct it on the land so conveyed on the ground that the grade was too heavy. The owner of the tract through which the right of way was conveyed occupied the right of way for five years after the completion of the road by the new route, and put valuable improvements on it without objection from the railroad company.

Held, that the right of way was abandoned, and reverted to the owner of the tract of which it was originally a part. *Roanoke Investment Co.* v. *Kansas City, & S. E Ry. Co.* 17 S. W. Rep. 1000, Mo. Sup. Ct.

RATIFICATION — See Bills and Notes 6—Corporation 4.

REAL ESTATE—See Taxation 2.

REAL ESTATE AGENTS.

1. COMMISSIONS.

A real estate agent, who procures a purchaser ready, able and willing to purchase at the price and on the terms directed by the owners, is entitled to his commission, though the land has been sold by the owner several days before, but without notice thereof to the agent. *Woodall* v. *Foster* Tenn, 18 S.W. Rep. 241.

2. RIGHT TO COMMISSION—BROKER.

Where the evidence shows that defendant made plaintiff his agent to sell land, but did not preclude himself from selling it in person, and plaintiff informs one T. of the land being for sale, but does not disclose the owner's name, and afterwards T. learning — but not through plaintiff — that defendant is the owner, purchases directly from him, without the latter knowing that plaintiff has had any connection with the sale, plaintiff was not the procuring cause of the sale and cannot recover commissions. *Anderson* v. *Smyth*, Colorado Ct. of Appeals, Dec. 1891. 34 Cent. L. J., 179.

Notes.

The authorities support the principal case in holding that, in order for the broker to recover his commissions, two things are necessary: 1st. an employment either in the outset or by adoption of the acts of the broker: *Earp* v. *Cummins*, 54 Penn. St. 394; *Keys* v. *Johnson*, 68 Penn. St. 42; *Chilton* v. *Butler*, 1 E. D. Smith, 150; article "Real Estate Broker," 26 Cent. L. J. 75. 2nd. the broker must be the procuring or moving cause of sale, or must actually have sold: "Real Estate Broker's Compensation," 20 Cent. L. J. 466, *Doonan* v. *Ives*, 73 Ga., 295; *Pratt* v. *The Bank*, 12 Phila. (Pa.), 378; *Wylie* v. *Marine Nat. Bk.*, 61 N. Y., 415; *Lloyds* v. *Matthews*, 51 N. Y., 124; *Armstrong* v. *Wann*, 29 Minn., 126; "Real Estate Brokers" 26 Cent. L. J., 75; *Keys* v. *Johnson*, *supra*; *Chilton* v. *Butler*, *supra*. (Notes to case in 34 Cent. L. J., 180).

REASONABLE AND PROBABLE CAUSE —See Malicious Prosec. 2.

RECEIVING STOLEN GOODS — See Crim. Law 12.

RECOVERY OF PREMIUM PAID—See Insurance 4.

RELATIVES—See Insurance 27.

REPARATION—See Libel and Slander 2. 5.—Negligence 15. 16.

RELEASE OF RIGHT OF WAY — See Railroad Companies 1.

RELEVANCY—See Libel and Slander 5—Negligence 15.

"RES GESTÆ"—See Evidence 2.

RESCISSION—See Sale of Goods 1. 4.

RES JUDICATA.

Where defendant pleads a former judgment which may have proceeded on either or any of two or more facts, and he fails to show affirmatively that it was decided on the particular fact involved in the subsequent suit, the plea will not stand. *Dygert* v. *Dygert*, Ind., 29 N. E. Rep. 490.

RESTRAINT OF TRADE—SEE ALSO CORPORATION 12.

STENOGRAPHERS.

An association of stenographers, formed to establish and maintain uniform rates of charges, and to prevent competition among its members under certain penalties, is illegal, as in restraint of trade and against public policy, and one member cannot maintain an action against another for damages occasioned by the latter underbidding the former, in violation of the rules of the association. *More* v. *Bennett*, S. C. Illinois, Jan. 1892.

REV. STATS. CAN. SUPREME AND EXCHEQUER CT. ACTS—See Appeals 2.

REV. STATS. CAN., C. 9, S. 9 (*f*)—See Elections 2.

REV. STATS. CAN., C. 9, S. 12-13—See Elections 3.

REV. STATS. CAN., C. 9, S. 32 — See Elections 4.

REV. STATS. CAN., C. 129, S. 62—See Insolvency 2.

REV. STATS. ONTARIO, C. 61, S. 9—See Constit. Law 1. 2.

REV. STATS. ONTARIO, C. 184, S. 282-480—See Mun. Corp. 16.

REVOCATION OF ACCEPTANCE — See Banks and Banking 2.

RIGHTS OF BENEFICIARY — See Insurance 29.

RIPARIAN PROPRIETORS, RIGHTS AND LIABILITIES OF FOR DAMAGE — See Water Courses.

ROYAL PREROGATIVE—See Constit. Law 4.

RULES OF COMPANY, KNOWLEDGE OF—See Carriers 7.

SALE OF GOODS.

1. RESCISSION—DEFECTS IN QUALITY—RIGHT OF SELLER TO REPLACE.

A retail dealer, after an examination of certain goods which he had bought, returned part to the seller, stating that the entire lot was of inferior quality, and that he would prefer also to return the balance than to accept them, even at a reduction. The seller replied that the buyer might return such goods as were not satisfactory, and that he would replace them with first-class goods. The buyer thereupon returned the balance of the goods, asking that he be credited with the amount, but without a suggestion that they were not returned in accordance with the seller's offer.

Held, that this was not a rescission, and that the seller was entitled to replace the goods with new goods. Bradley, J., dissenting, on the ground that it was a question of fact, which should have been submitted to the jury. Second Division, Jan. 20, 1892. *Mason* v. *Smith*, 8 N. Y. Supp. 301 affirmed. N. Y. Ct. of App. Alb. L. J.

2. SALE OF HORSE — BREACH OF WARRANTY.

Where the purchaser of a horse returns him the next day, because not kind, as warranted, and the horse dies two days later, and, in an action by the purchaser to recover the price paid, it is shown that the horse was not kind, the burden of proof is on the seller to show that the horse died from injuries received while in the purchaser's possession. *McKnight* v. *Nichols*, Pa. 23 Atl. Rep. 399.

3. WARRANTY.

A warranty that a cotton press will press "at the rate of 60 bales per hour," is not a warranty that it will press at that rate for a day of 10 hours, but only for a limited time. *Hazlehurst Compress & Manuf'g Co.* v. *Boomer & Boschert Compress Co.*, U. S. C. C. of App. 48 Fed. Rep. 803.

4. RESCISSION.

The purchasers of certain lumber, being unable to pay for it, gave the sellers a writing whereby they agreed. "to return the same" and "to hold for them in our yard and mill, subject to their order," whereupon the sellers marked their names, upon the same. *Held*, that as against judgment creditors of the purchasers, the lumber became the property of the sellers. *Ayers* v. *McCandless*, Penn. 23 Atl. Rep. 344.

5. BREACH OF WARRANTY.

Where lumber sold is of such a quality as to justify the purchasers in refusing to pay the contract price, and they notify the seller of this, and refuse to take it except at a price named by them, their subsequent use of it, on not hearing from the seller, renders them liable for at least its market value. *Brown* v. *Peters*, Ala. 10 South Rep. 261.

6. WHEN TITLE PASSES.

A person agreed to "sell" the entire crop of hops growing upon his farm. The contract stipulated that he should complete the cultivation of the said hops, and bale and deliver them, the hops to be of strictly choice quality. The buyer was to pay a certain sum upon execution of the contract, make certain advances as the cultivation progressed, and pay the balance upon acceptance and delivery. The seller was to keep the hops insured for the buyer's benefit in an amount equal to the advances; *Held*, that title did not pass to the buyer upon the execution of the contract, but only upon acceptance and payment of the entire price. *Meeker* v. *Johnson*, Wash. 28 Pac. Rep. 542.

7. WARRANTY — ACTION FOR PRICE —COUNTER CLAIM—ASSIGNMENT.

(1) By agreeing to sell and deliver 30,000 tons of "Powelton coal, of same quality and kind as funished you during the past year," the seller warrants that the coal to be furnished shall be equal to that furnished during the preceding year.

(2) Acceptance of the coal does not preclude the purchaser from recovering damages for breach of the warranty. Kent v. Friedman, 101 N. Y. 616; Brigg v. Hilton, 99 id. 517; Gurney v. Railroad Co., 58 id. 358. The cases of Iron Co. v. Pope, 108 id. 232; Studer v. Bleistein, 115 id. 316; Pierson v. Crooks, id. 539, and other cases of like character, are clearly distinguishable, inasmuch as one is a contract concerning a sale by sample, and the others were executory contracts for the manufacture and sale or delivery of goods of a particular description. In cases of the latter character, where the quality of goods is capable of discovery upon inspection, and where, after full opportunity for such inspection, the goods are accepted, and no warranty attends the sale, the vendee is precluded from recovering damages for any variation between the goods delivered and those described in the contract.

(3) Where the seller has assigned his contract after partly executing it, and the assignee attempts to complete the contract, the purchaser, when sued by the assignee for coal delivered by him, may counter-claim the damages arising from the inferior quality of the coal furnished by the seller. Feb. 2, 1892. *Zabriskie* v. *Central Vt. Ry. Co.* 13 N. Y. Supp. 735, affirmed, N. Y. Ct of Appeal. Alb. L. J.

8. COUNTER-CLAIM FOR DAMAGES FOR BREACH OF WARRANTY—AUTHORITY OF AGENT TO WARRANT—ASSESSMENT OF DAMAGES.

This was an action upon a promissory note given as part payment of the price of a horse, and the defendanls filed a counter-claim for damages for breach of a warranty, alleged to have been given on the sale.

At the trial the Judge found the plaintiff entitled to a verdict for the

amount of the note, $375, and he found the defendants entitled to $100 damages upon the counter-claim ; so a verdict was entered in their favour for $225.

The plaintiff then moved to set aside the finding on the counter-claim or to reduce the amount, to enter a verdict for the plaintiff, or for a new trial.

The plaintiff, the owner of the horse, lived in Ontario ; he gave the horse into the custody of one Mitchell, who was engaged in the business of bringing horses to Manitoba for sale, to bring it to this Province and sell it here. Mitchell placed it in a livery stable and sold it to the defendants for $750, taking in his own name two promissory notes of $375 each ; these he transferred to the plaintiff. The plaintiff gave Mitchell no authority to warrant the horse, but he handed him the pedigree, leaving the selling and price in his hands. The defendants dealt with Mitchell as the owner.

The horse was sold for breeding purposes and the warranty alleged to have been given was that he was an imported Clydesdale and a good worker. That a warranty was given was found in favour of the defendants. Mitchell had no express authority to warrant, and the question was, had he, under the circumstances, an implied authority, so that the warranty he was found to have given would bind the plaintiff.

Held, that the plaintiff by his conduct had clothed Mitchell with the apparent ownership of the horse ; his powers as to fixing price and terms of sale were unlimited ; by so acting he authorized Mitchell to make all such warranties as are usual in the ordinary course of the business of selling horses, to do all that was necessary and usual to be done to obtain a purchaser.

The plaintiff had adopted the contract made by Mitchell, and was suing upon one of the notes given in pursuance of that contract.

The horse was sold for $750. There was evidence that he was useless for breeding purposes, and that as an ordinary working horse he might be worth $250. The trial Judge allowed as damages the difference, $500, to which he added $100, apparently for loss of the season and for the expense of his keep before it was ascertained that he was useless for the special purpose for which he was bought. There was no evidence of any warranty that the horse was a good breeder, only that he was an imported Clydesdale.

Held, that the damages under the counter-claim were estimated upon a wrong basis. The item of $100 could not be sustained when there was no warranty that the horse was fit for breeding purposes.

The plaintiff was entitled to a verdict for the amount of the note, $375, with interest $72.60, or $447.60, and the defendants were entitled to a verdict on their counter-claim for $375. The verdict in favour of the defendants should therefore be set aside and a verdict for $72.60 entered in favour of the plaintiff, with costs of the motion in term. *Taylor* v. *Gardiner*, Manitoba Queen's Bench, March, 1892, (Can. L. T.)

9. CONTRACT OF SALE — DATE OF SHIPMENT SPECIFIED—PERFORMANCE.

K, in St. Louis, Mo., on the 22nd March, sold one thousand barrels of flour to M., in Montreal, " shipment 15th " meaning 15th April. The flour was shipped March 30th, and M. objected to this shipment as premature. The flour was held in Montreal, and tendered again to M. on April 18.

Held, that this was a good tender under the contract. The proper construction of the contract was not that the flour must be shipped on the 15th April and on no other day, but that the date of shipment was mentioned to fix approximatively the time for delivery. *Magor* v. *Kehoe*, Montreal, Jan. 1892, Q. B.

10. WARRANTY.

Where goods or chattels are sold by description, there is an implied condition that the goods or chattels delivered shall correspond to that description. By some authorities this is treated as a condition precedent: by others, as an implied warranty. When the sale becomes in part executed or consummated the same facts which before constituted conditions precedent then become warranties. In the sale of goods or chattels by description,

when the buyer has not inspected the goods, there is, in addition to the condition precedent that the goods or chattels shall answer the description, an implied warranty that they shall be fit for the particular purpose to which they are to be applied, when that purpose is known to the vendor. When a dealer undertakes to supply goods or chattels in which he deals that are to be applied to a particular purpose, and the buyer necessarily trusts to the judgment of the dealer, there is an implied warranty that they shall be reasonably fit for the purpose for which they are intended. *Morse* v. *Union Stock Yard Co.* 28 Pac. Rep. 2 Supreme Ct. of Oregon, 34 Cent. L. J. 153.

Notes.

1. Every person who sells goods of a certain denomination or description undertakes, as a part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the kind, species, and quality thus expressed in the contract of sale: the rule being that, upon a sale of goods by a written memorandum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described. This rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold. *Winsor* v. *Lombard*, 18 Pick 60, see also *Powell* v. *Horton*, 2 Bing. N. C. 668; *Barr* v. *Gibson*, 3 Mees & W. 390; *Chanter* v. *Hopkins*, 4 Mees & W. 399; *Nichol* v. *Godts*, 10 Exch. 191; *Gomperty* v. *Bartlett*, 2 El. & Bl. 849.

2. Where the contract of sale was for "fat cattle," to be shipped for the market at a future day, he will be bound to pasture them so that they will, at the time agreed on for delivery, be in a suitable condition for sale as "fat cattle" in the market. While, therefore, in the sale of an existing chattel, the law does not, in the absence of fraud, imply a warranty of the quality or condition, yet where the sale is of a chattel, as being of a particular description, it does imply a warranty that the article sold is of that description. *Foos* v. *Sabin*, 84 Ill. 564. See also *Hoyins* v. *Plympton*, 11 Pick 97. *Bradford* v. *Manly*, 13 Mass 139; *Hyatt* v. *Boyle*, 5 Gill & J. 110.

3. Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be saleable or merchantable under that description. *Jones* v. *Just*, L. R. 3 Q. B. 197.

4. There is an implied warranty in the sale of hogs purchased for the market that they are fit for that purpose, when the vendee, having no opportunity of inspection, trusts to the judgment of the vendor to select them, and both parties understand for what they are intended. *Best* v. *Flint*, 58 Vt., 543, 5 Atl. Rep. 192. See also *Beals* v. *Ormstead*, 24 Vt. 114; *Street* v. *Chapman*, 29 Ind. 142; *Howard* v. *Hoey*, 23 Wend. 350; *Hanger* v. *Evans*, 38 Ark. 334; *Gammell* v. *Gunby*, 52 Ga., 504.

5. While this rule applies with particular force where the vendors are the manufacturers, it is not limited to them, but is extended to cases where one merchant or dealer contracts to supply goods of a specific description to another merchant or dealer. *Jones* v. *Just*, L. R., 3 Q. B., 197; *Lewis* v. *Rountree*, 78 N. C., 323; *Hanks* v. *McKee*, 2 Litt. (Ky.), 227; *Ketchum* v. *Wells*, 19 Wis., 34; *Whitaker* v. *McCormick*, 6 Mo. App., 114; *Flint* v. *Lyon*, 4 Cal., 17; *Packing, etc., Co.* v. *Tilton*, 87 Ill., 547; *Messenger* v. *Pratt*, 3 Lans., 234.

6. Where a buyer buys a specific article, the maxim *caveat emptor* applies; but where the buyer orders goods which shall be applicable for the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose. *Bigge* v. *Parkinson*, 7 Hurl. & N. *955.

SALE OF PROPERTY ON EXECUTION—See Corporations 1.

SAVINGS BANKS — See Banks and Banking 8. 9.

SCOPE OF AUTHORITY — See Master and Servant 2.

SERVICE—See Jurisdiction.

SEWERS—See Taxation 1.

SHIPS AND SHIPPING.

1. INSPECTION—PASSENGERS.

Where the wife and neighbors of a tug-owner go upon the tug during a trial trip, merely to witness the test of her machinery, they are not passengers within the meaning of the Federal statute requiring passenger boats to be inspected and licensed. *United States* v. *Guess*, 48 Fed. Rep. 587.

2. LOAN TO SHIP'S HUSBAND—LIABILITY OF OWNERS.

A part owner of a vessel is not legally responsible for the payment of money borrowed by the ship's husband, when the vessel is out of commission, to pay an old indebtedness contracted for the benefit of the vessel. Second Division, Jan. 26, 1892. *Chase* v. *McLean*, 8 N. Y. Supp. 903, reversed, N. Y. Ct. of App.

3. CHARTER-PARTY—BILL OF LAD-

ING — CONSTRUCTION — LAY - DAYS — PART OF DAY—DEMURRAGE.

The charter-party of a steamship provided, "the cargo to be brought and taken from alongside the steamer at freighter's expense and risk..... Eleven running-days (Sundays excepted) are to be allowed the said freighters for loading and unloading..... The 1885 bill of lading to be used under this charter, and its terms to be considered part thereof."

Five and a-half days were occupied in loading the ship.

The Bill of lading was headed "Bill of Lading 1885," and provided. "All conditions as per charter-party ..... *Five and a-half*, (5½) laying-days remain for discharging the whole cargo." It was a printed document with blanks, and the words in italics were filled in by the master.

The steamship arrived at her port of delivery on the 26th December, and on the same day the agents for the owners at that port wrote to the consignee, the indorsee of the bill of lading, in these terms. "As advised, ss. 'Archdruid' is now lying at foot of M'Alpine Street, where she will be ready to commence discharging at 6 A. M. to-morrow morning, and lay-days will commence then." Discharging commenced 7 A. M. on the 27th December, and ended at 2 A. M. on the 6th January. Sundays were excepted by the charter-party; Thursday, January 1st, was of consent treated as a non-working day; and during a certain portion of the time one of the steamer's winches broke down.

The owners brought an action against the consignee for three days' demurrage from 12 P. M. on the 2nd January.

Held, (1) that the defender had five and a-half days for unloading, as by the charter-party the owners had directly empowered the master to fix the number;

(2) That in terms of the letter written by the agents for the ship-owners, these fell to be reckoned as periods of twenty-four hours from 6 A. M. on 27th December;

(3) That an allowance of one day fell to be made for the break down of the winch, which extended the laying day into Monday the 5th, and that only one day's demurrage was due. *Allan and others* v. *Johnstone*, 29 Scot. Law Rep. 3.

SIGNALS—See Railroad Companies 6.

SLANDER—See Libel and Slander 6.

SOLICITOR.

LIEN ON DOCUMENTS — CHANGE OF SOLICITOR — PERSONS INTERESTED — DELIVERY UP.

After decree in a partition action (the plaintiff and defendant being entitled in moieties to the property) an inquiry as to incumbrances having been directed, the plaintiff changed her solicitors. The discharged solicitors claimed a lien for costs.

Held, that they were bound to deliver up to the new solicitors, subject to their lien, such documents as had come to their hands since the commencement of or for the purposes of the action. *Boden* v. *Hensby*, 61 L. J. Rep. Ch. D. 174.

SPECIAL DAMAGES — See Libel and Slander 4.

SPECIAL OR GENERAL DEPOSIT—See Banks and Banking 8.

STATUTE OF FRAUDS—See Corporations 4.

STATUTE.

CONSTRUCTION OF STATUTE—TRANSFER OF PERSONAL PROPERTY—PREFERENCE BY—PRESSURE—INTENT.

By the Manitoba Act, 49 Vict. c. 45, s. 3, "every gift, conveyance etc, of "goods, chattels or effects made by a "person at a time when he is in in- "solvent circumstances with intent to "defeat, delay or prejudice his credi- "tors, or to give to any one or more "of them, a preference over his other "creditors or over any one or more "of them, or which has such effect, "shall as against them be utterly "void."

Held, reversing the judgment of the Court of Queen's Bench (6 Man. L. R. 496) Paterson, J. dissenting, that the meaning of the word "preference" in this act is that which has always

been given to the expression when used in bankuptcy and insolvency statutes; it imports a voluntary preference, and does not apply to a case where the transfer has been induced by the pressure of the creditor.

Held, further, that a mere demand by the creditor without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference.

The words "or which has such effect" in the act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. Molsons Bank v. Halter (18 Can. S. C. R. 88) approved and followed.

Held, per Patterson, J., that any transfer by an insolvent debter which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the statute, whether or not it is the voluntary act of the debtor or given as the result of pressure. Appeal allowed with costs. *Stephens* v. *McArthur*, Supreme Ct. of Canada, Nov. 17, 1891.

STATUTORY POWERS—See Mun. Cor. 12.

STATUTES—See also Revised Statutes.

STATUTES 50 VIC. (MAN.) C. 22, 23—See Libel and Slander 4.

STATUTES 51 VIC. DOM. C. 5—See Constitutional Law 2.

STATUTES 53 VIC. DOM. C. 20—See Constitutional Law 4.

STENOGRAPHER — See Restraint of Trade.

STIPULATION BY ATTORNEY.

EFFECT ON INFANT CLIENTS.

A stipulation by an attorney that the action shall abide the event of another action pending, binds his adult clients, unless it be improvidently, fraudulently, or collusively made. But such stipulation does not bind an infant party unless approved and ratified by the court upon a showing that it is for the interest, or, at least not prejudicial to the interest of the infant. It must appear that the matters in controversy in the two actions, so far as affected the infant, are precisely the same, and that he is represented in the two actions by the same guardian *ad litem*. *Carroll* v. *Campbell*, 17 S. W. Rep. S. C. Missouri, 34 Cent. L. J. 170.

STOCKHOLDERS—See Corporations 3. 7. 12. 13 — Limitation of Actions—Banks 7.

STOCKHOLDERS, RIGHT OF TO INSPECT BOOKS—See Corporations 11.

STREET CAR, BOARDING MOVING—See Negligence 1. 2.

STREET RAILWAYS—See Negligence 3. 4.

SUBROGATION—See Insurance 18.

SUICIDE—See Insurance 23.

SUPREME AND EXCHEQUER COURT ACTS—See Appeal 2.

SURETY, WITHDRAWAL OF — See Bonds.

TAXATION—See also Costs.

1. CITY OF MONTREAL—SEWERS.

Held:—That the city of Montreal has no right of action against a proprietor, before the opening of a street, for the cost of constructing a sewer therein. *City of Montreal* v. *Lacroix*, 21 Rev. Lég. 485.

2. REAL ESTATE—WATER WORKS.

The building and machinery of a water-works company, located on land under a lease to continue as long as the water-works should operate, are, for purposes of taxation, real estate, and the whole plant, with the appurtenant mains, pipes, hydrant, etc., is assessable as an entirety in the township where the main works are located *Oskaloosa Water Co.* v. *Board of Equalization of City of Oskaloosa*, Iowa, 51 N. W. Rep. 18.

Note.

See *Capital City Gas-Light Co.* v. *Charter Oaks Ins. Co.*, 1 M. L. D. and R. 169 and notes thereto.

3. PUBLIC IMPROVEMENTS—ILLEGAL ASSESSMENTS—COLLATERAL ATTACK.

(1) A city charter provided that the common council should fix the amount of local assessments for street improvements, that the board of assessors should assess the whole amount on the parcels of land benefited in proportion to such benefit; and that unless the contrary was made to appear it should be presumed that every assessment made was valid and regular.

Held, that where an assessment was in excess of the proportionate benefits, but there was no claim that any land benefited was not assessed, nor that there was any fraud in making the assessment, it could not be attacked by suit to restrain its collection.

(2) Though the evidence would justify the inference that the assessors proceeded with corrupt purpose, or on erroneous rules of estimate, in making the assessment, yet where the case did not require such conclusion, it presented no question for consideration on appeal in a collateral action.

(3) That the assessors, in finally determining the amounts to be assessed for benefits, fixed such amounts without regard to the value for the buildings, for the reason that the amount of benefits was not affected by the improvements was not in violation of any principle.

(4) Though the assessment was erroneous, yet where it was not illegal it did not come within chapter 358 of Laws of 1865, which referred only to actions based on illegal assessments. Second Division, Jan. 20, 1892. *Hoffeld* v. *City of Buffalo*, 9 N. Y. Supp. 948 affirmed, N. Y. Ct. of Appeals, Alb. L. J.

4. IRREGULAR ASSESSMENT — BY-LAW—VALIDATING ACTS—EFFECT OF —CROWN LANDS.

In 1879 lands were purchased from the Dominion Government, but the patent did not issue until April, 1881. The patentee conveyed the lands, which in May, 1882, were mortgaged to R. In 1880 and 1881 the lands were taxed by the municipality in which they were situate, and the taxes not having been paid, they were, in March, 1882, sold for unpaid taxes. The purchaser at the tax sale received a deed in March, 1883, and by conveyances from him the lands were transferred to W., who applied for a certificate of title thereto. R. filed a caveat against the granting of such certificate.

By the statutes under which the lands were taxed the municipal council must, after the final revision of the assessment roll in every year, pass a by-law for levying a rate on all real and personal property assessed by such roll. No such by-law was passed in either of the years 1880 or 1881.

45 V., c. 16, s. 7, makes all deeds executed in pursuance of a sale for taxes valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from the date of their execution, and 51 V., c. 101, s. 58, provides that "all assessments made and rates heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby.

Held, affirming the decision of the Court of Queen's Bench, 6 Man. L. R., 565, Paterson, J., dissenting, that the assessments for the years 1880 and 1881 were illegal for want of a by-law and the sale made for unpaid taxes thereunder was void.

Held, *per* Strong and Gwynne, JJ., Paterson, J., *contra*:

(1) That the Acts 45 V., c. 16, s. 7, and 51 V., c. 101, s. 58, only cure irregularities but will not make good a deed that was absolutely void, as in this case.

(2) That until the patent was issued by the Dominion Government, these lands were exempt from taxation. The patent did not issue until April, 1881. Hence the taxes for which the lands were sold accrued due while they were vested in the Crown.

Held, *per* Strong, J., following McKay v. Chrysler, 3 S. C. R., 436, and O'Brien v. Cogswell, 17 S. C. R., 420, that the defects cured by 45 V., c. 16,

s. 7, are only irregularities in the proceedings connected with the sale, as distinguished from informalities in the assessment and levying of the taxes. *Whelan* v. *Ryan*, Supreme Court of Canada, Nov. 17, 1891.

TELEGRAPH COMPANIES.

1. MISTAKE—CONTRIBUTORY NEGLIGENCE.

Where a message is received which reads as if sent from South Carolina, instead of from Staten Island, and plaintiff though in expectation of a message from the latter place, without making inquiry of any of defendant's agents, goes to South Carolina, he is not guilty of contributory negligence. *Tobin* v. *Western Union Tel. Co.*, Penn., 23 Atl. Rep. 324.

2. FAILURE TO DELIVER MESSAGE—EXCESSIVE DAMAGES.

Where a telegram is sent over defendant's wires to plaintiff in care of "Mr. B.," and there is no person by the name of "B." in the place to which the message is sent, and defendant makes no effort to find plaintiff in order to deliver it to him, defendant is liable in damages.

In an action for failing to deliver to plaintiff a telegram from his wife informing him that a sick child of theirs was worse, a verdict for $4,500.25 is excessive. *West Union Tel. Co.* v. *Houghton*, Texas, Supreme Ct. Dec. 1891, 11 R. R. and Corp. L. J. 112.

3. FAILURE TO DELIVER MESSAGE—DAMAGES.

In an action against a telegraph company for delay in delivering a message, where it appeared that plaintiff, who was constructing a building, went to C. for materials, leaving the plans with his workmen; that afterwards he telegraphed that the plans be sent to C., but the message was not delivered; that while at C. he agreed on the materials and prices, but could not conclude contracts for the material, in the absence of the plans; that afterwards the price of the material advanced—an instruction that plaintiff's measure of damage was "the amount he paid for the message, the value of plaintiff's time lost, and the difference he had to pay by reason of the advance in the price of material" was properly given.

The refusal to instruct the jury that it was plaintiff's duty to use reasonable efforts to avoid or lessen his damage, and if a reasonably prudent business man would have sent another telegram for the plans, and if such telegram had been sent the plans would have reached plaintiff in time to have consummated his contract, then plaintiff is only entitled to compensation for the value of his time and expense during the extra time he would have been kept at C. on account of the delay, was error.

Defendant is not relieved from liability for special damage resulting from such delay, by the fact that at the time the message was sent it had no notice of the contracts plaintiff was about to enter into, or the damages liable to arise from such delay. *Gulf, C. & S. F. Ry. Co.* v. *Loonie*, 18 S. W. Rep. 221, Tex. Sup. Ct.

4. NON-DELIVERY OF MESSAGE — MEASURE OF DAMAGES.

Plaintiff, anticipating a heavy decline in the market price of certain corporate stock, and desiring to speculate in the same by selling on the exchange before the decline began, and thereafter purchasing at a lower figure, delivered to defendant telegraph company, in Columbus, Miss., a message to his brokers in New York city to sell a certain number of shares. The message was not delivered to the brokers until eight days later, during which time the stock had dropped from $73 to $55 per share. Plaintiff in fact had no stock to sell, but kept with his brokers securities, on the strength of which they would have sold the stock on the exchange, and bought again at plaintiff's order.

Held, in an action against the telegraph company to recover the difference in price between the stock at the time the message should have been delivered and the time it actually was delivered, that the damages were too remote, uncertain and speculative, and there could be no recovery therefor. 46 Fed. Rep. 40, affirmed. *Cahn* v. *Western Union Tel. Co.*, U. S. C. C. of App. Dec. 1891, 11 R. R. and Corp. L. J. 133.

Note.

We think the case at bar falls within the principle of the case of *Telegraph Co.* v. *Hall*, 124 U. S. 444, and much authority is cited in line with that decision, so we do not see why that should not be taken as settled law; at least the case is binding upon us. (Opinion of the Court.)

5. ERROR IN TRANSMISSION OF DESPATCH—CONDITION LIMITING RESPONSIBILITY OF COMPANY — ARTS. 989, 990, 1676 C. C.

Held, where there is evidence of negligence on the part of a telegraph company, or its employees, in the transmission of a despatch, the company will not be protected from the consequence of such negligence by the fact that the blank form, used for writing the message, contained a printed condition to the effect that the company would not be liable for damages arising from any error in the transmission of an unrepeated telegram. *Great North Western Telegraph Company* v. *Laurance*, Montreal, Jan., 1892, Q. B.

Notes.

In *Bell* v. *Dominion Telegraph Co.*, 3 Leg. News, 405, Johnson, J., Superior Court, *held* that a telegraph company is responsible to the person to whom a message is directed, for negligence in failing to deliver a telegram; the fact that the sender did not repeat the message does not affect the right of the person to whom the message is addressed. In *Watson* v. *Telegraph Co.*, 5 Legal News, 87, Jetté J., Circuit Court. Montreal, *held*, that a telegraph company is responsible to the receiver of a telegram, for damages caused to him by an error arising from the negligence of an employee of the company in the transmission of an unrepeated message; even where the sender of the telegram writes it on a blank form on which is printed a condition that the company will not be responsible for mistakes in the transmission of messages which are not printed.

TELEPHONE SETVICE—See Contracts 3.

TENDER OF DAMAGES ASSESSED—See Eminent Domain.

TIME DRAFTS—See Banks and Banking 5.

TICKET AGENT—See Railroad Companies 7.

TITLE—See Sale of Goods 6.

TORTS OF SERVANT—See Master and Servant 2.

TOTAL LOSS—See Insurance 3.

TRADE, RESTRAINT OF — See Restraint of Trade.

TRAIN SERVICE, REGULATIONS AS TO —See Railroad Companies 2.

TRANSMISSION OF MESSAGES — See Contracts 3.

TRANSFER OF PERSONAL PROPERTY —See Statute.

TRIAL—SEE ALSO CONSTITUTIONAL LAW 15. 16. 17.

EVIDENCE — CONCLUSIONS OF THE WITNESS—ADULTERY.

Where a witness has testified that where at an hotel he overheard a conversation at night between a man and a woman in an adjoining room, and heard various sounds and noises in the room, he may, after repeating the conversation and describing the sounds, state that his conclusion from what he heard was that an act of adultery was being committed. *Carter* v. *Carter*, Supreme Ct. of Illinois, 34 Cent. L. J., 114.

TRUSTS FOR PAYMENT OF DEBTS—See Bills and Notes 13.

TURNPIKE COMPANY.

LIABILITY FOR DEFECTIVE CONSTRUCTION.

Defendants, owning land on which was a turnpike road, by agreement or license from the turnpike company altered the grade of the road and removed a fence at the side thereof, so that the road was on a level with and 15 feet from a pond, its travelled part being 27 feet therefrom.

Held, that defendants, by making such alterations, assumed the duty of the company, but they were not liable by reason of the unfenced condition of the road, for injuries sustained by plaintiff from a horse driven by him becoming frightened from some unknown cause while proceeding along the road at night and running into the pond. Sterrett, J., dissenting. *Horstick* v. *Dunkle*, 23 Atl. Rep. 378, Pennsylvania Supreme Court.

ULTRA VIRES — See Corporations 12.

UNLOADING FREIGHT CARS — See Negligence 7.

VACANT PROPERTY—See Insurance 18.

VERDICT—See Negligence 10.

VICIOUS ANIMALS—See Animals.

WAIVER—See Evidence 7. — Insurance 5. 8. 9. 10. 19. 20. 21. 24. 28.

WAREHOUSE RECEIPTS.

BANK ACT—PROMISE TO TRANSFER WAREHOUSE RECEIPTS — GOODS IN TRANSIT.

Christie, Kerr, & Co. entered into an agreement with Peter Christie whereby the latter agreed to make advances to the firm for the purpose of enabling them to get out logs from the woods, the firm agreeing that Peter Christie should have security upon the logs and the lumber to be manufactured therefrom. Peter Christie borrowed the money from the Federal Bank, assigned the agreement to the bank, and advanced the money to the firm as agreed. The defendants subsequently arranged with Christie, Kerr, & Co. and Peter Christie to advance the money to pay off the Federal Bank; the firm and Peter Christie on their part giving to the defendants as security a document in the form of a warehouse receipt on the logs, which were then in course of transit to the mill, and further promising to give warehouse receipts on the lumber when manufactured from the logs. Warehouse receipts were given to the defendants upon the manufactured lumber stored in the firm's yard. The firm became insolvent, the defendants seized the lumber, and this action was brought by the firm's assignee for the benefit of creditors for the alleged wrongful seizure and conversion.

Held, Burton, J. A., dissenting, that the promise made to the bank supported the subsequent transfer to them of the warehouse receipts for the manufactured lumber, under s. 53, s-s. 4, of the Bank Act, R. S. C. c. 120, and they were consequently valid.

The document given to the defendants at the time of the arrangement with them was not a valid warehouse receipt within the meaning of the Act, as the logs were then in transit.

Judgment of Boyd, C., of the 4th June, 1890, affirmed. *Tennant* v. *Union Bank*, Ontario Ct. of Appeal, Jan. 1892 (Can. L. T.)

WARRANTY—See Sales 3. 7. 9.

WATER COMPANY.

REGULATIONS.

A rule of a water company which requires water-rates to be paid quarterly, adds a penalty of 5 per cent, in case of default of payment for 10 days, and provides that after a default for 15 days the water shall be shut off from the premises, is a reasonable regulation. *Tacoma Hotel Co.* v. *Tacoma Light & Water Co.*, Wash. 28 Pac. Rep. 516.

WATER COURSES.

1. DIVERSION—EVIDENCE.

The owners of a mill receiving part of its power from water, and part from steam, sued for loss of water-power, and were allowed to show the cost of furnishing an equivalent in steam-power for the water-power taken by defendants. Defendants were then allowed to show the cost of superseding plaintiff's engine with one large enough to supply all the power required.

Held, that the admission of defendants' evidence was proper to aid the jury to correctly determine the diminution of the market value of the property. *Howe* v. *Inhabitants of Weymouth*, Mass. 29 N. E. Rep. 646.

2. LICENSE TO FLOOD HIGHWAY—LIABILITY OF LICENSOR FOR NEGLIGENCE OF LICENSEE — DAMAGE BY BREAKING OF MILL DAM—RIGHTS AND LIABILITIES OF RIPARIAN PROPRIETORS FOR DAMAGE.

A mill owner, having a license from the township to construct his mill dam in such a way as to flood a part of the highway, constructed it so negligently that it gave way, causing damage to proprietors below.

Held, that the license to dam water

back upon the highway was except in so far as it might be a public nuisance affecting travellers on the road, a lawful thing; and, the damage being caused by the negligence of the mill owner, the township was not liable.

Judgment of MacMahon, J., at the trial, reversed. *Ward* v. *Township of Caledon; Algie* v. *Township of Caledon*, Ontario Ct. of Appeal, Jan. 1892.

WATER WORKS—See Taxation 2.

WIFE, INJURY TO—See Negligence 5. 6.

WIFE—See Marriage.

WIFE'S SEPARATE ESTATE

GIFTS TO HUSBAND — CHECKS INDORSED IN BLANK.

Rev. Stat. 1879, § 2396 (Missouri) in providing that a wife shall have a separate estate in certain personal property, including choses in action, declares that "the title of any husband to any personal property reduced to his possession with the express assent of the wife" shall not be affected thereby, "provided that such personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care, or protection thereof, but the same shall remain her separate property, unless by the terms of said assent in writing full authority shall have been given by the wife to the husband to sell, incumber, or otherwise dispose of the same for his use and benefit."

Held, that a wife cannot make a parol gift of such property to her husband, and her delivery to him without consideration of a check indorsed in blank gives him no right to its proceeds, although she verbally requested him to deposit and use them as his own. *McGuire* v. *Allen*, Supreme Ct. of Missouri, Dec. 1891, 34 Cent. L. J. 255.

Note.

See note to this case reviewing the strong dissenting opinion of Barclay, J., 34 Cent. L. J. 257.

WILLS.

1. CONSTRUCTION.

Under a will by which property is bequeathed to the testator's executors in trust to sell the same, and pay part of the proceeds to the children of one who has several children at the time of the testator's decease, children born after said decease, but before distribution of the legacy, are not entitled to share therein. *In re Landwehr's Estate*, Penn., 23 Atl. Rep., 348.

2. CONSTRUCTION.

Under a clause in a will providing that "it is my distinct will and desire that none of the effects, real, personal, or mixed, as above devised and bequeathed to my children, or to either of them, can be seized upon or levied upon for any debt or claim whatever," against any of them, a legacy given by the will cannot be attached in the hands of the executor. *In re Goe's Estate*, Pa., 23 Atl. Rep., 383.

3. WILLS — AMBIGUITIES — DESCRIPTION OF LEGATEES.

Where a bequest of $4,000 "to the Sailors' Home in Boston" is claimed by the National Sailors' Home and by the Boston Ladies' Bethel Society, both corporations chartered by Massachusetts, and transacting business in Boston, evidence that testator was a prominent Baptist, interested in the work of a Baptist church that was represented in the management of the Boston Ladies' Bethel Society, a Baptist institution, which had maintained a "Sailors' Home in Boston," since several years prior to testator's death, and prior to the date of testator's will began the creation of the "Sailors' Home Fund," which was known to the testator, is admissible to show his intention. Mass. Sup. Jud. Ct., Jan. 19, 1892. *Faulkner* v. *National Sailors' Home.*

4. CONSTRUCTION.

To a will by which legacies were left to three grand-children of the testator a codicil was made, reciting that, "in the event of loss to my estate, by my being security, or indorser for others, and my executors have to pay the same, then I direct that my grand-children shall pay their proportional share of the same." Before his death the testator paid a sum of money as surety for his brother.

Held, that such loss was not intended by the codicil to be shared by the grand-children. *Ahalt* v. *Hersperger*, Md., 23 Atl. Rep. 66.

5. CONSTRUCTION.

A will gave to each of several legatees a specified number of shares of stock in a manufacturing company, including a bequest of 500 shares to testator's brother for life, and then provided that the residue of such stock owned by the testator at the time of his death "shall be divided among the several persons and parties to whom I have herein before given legacies of stock, in the ratio and proportion in which said legacies of stock are herein before given; meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same rateable proportions." By a codicil testator provided that "I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of 500 shares of the stock given in the aforesaid will" to his brother.

Held, that the proportional part of the residuary stock which would fall to the brother by virtue of the specific legacy was separate and independent from it, and hence was not revoked by the revocation of the latter. *Colt* v. *Colt*, U. S. C. C. (Conn.) 48 Fed. Rep. 385.

6. CONSTRUCTION — RELEASE TO LEGATEES OF PRE-EXISTING DEBTS.

A. by his last will, after making specific legacies, requested that all notes, bills, accounts, etc., against any of his brothers, held by him at his decease, should be cancelled by his executors and delivered up to the maker or makers thereof. Among them was a note given to testator by his brother J. and partner, a joint note for partnership purposes, on which payments were made by the partnership, and defendants cancelled and returned the notes.

Plaintiff, the brother J. demanded return of the money so paid as having been made in ignorance of the terms of the will, and under a mistake of law and fact.

Held, that the notes in question being partnership notes, were not within the scope of the releasing clause of the will, and plaintiff was not entitled to recover. *Waterman* v. *Alden et al.*, Supreme Court of the United States, Feb. 29, 1892. 24 Chicago Legal News, 217.

WINDING-UP ACT R. S. C., c. 129, s. 62—See Insolvency 2.

WITNESS.

PRIVILEGED COMMUNICATIONS.

The fact that confidential communications by a client to an attorney were made in the presence of a third person does not qualify the attorney as a witness in regard to such communications. *Blount* v. *Kimpton*, Mass., 29 N. E. Rep. 590.

WRONGFUL DISMISSAL OF OFFICER OF CORPORATION — See Mun. Corp. 17.

LIABILITY OF DEBT. COLLECTING AGENCIES.

The recent case of Aubin v. Emond, decided in the Superior Court at Montreal April, 5th, 1892, by Mr. Justice Davidson, did not, as some of the daily papers first reported, determine the point that it was lawful for a debt collecting agency to advertise debts for sale in an unusual and conspicuous manner; what was decided was, that it was lawful for such agencies to circulate among its subscribing members a list containing the names of delinquent debtors. No one can doubt that such a decision was quite right where the issue was simply whether it was lawful to circulate the names of debtors among parties who are interested in such information for the purpose of self-protection. But how would it have been if another element had been introduced; that of *threatening* to publish matter with intent to extort money, and the action had been taken on a criminal instead of a civil basis? We will try to answer that question.

Another method adopted by these debt collecting agencies, is to advertise for sale by means of conspicuous posters, the debts of delinquent debtors. It has always been a matter of surprise to us that actions against these agencies for advertising these debts have always, in Ontario, been brought on grounds of libel, with the result of course that the debt collecting agencies have got the best of it, so far. (See however note at the end of this article).

We will first give section 1 of Lord Campbell's Libel Act as incorporated in our penal statutes c. 163 Rev. Crim. Law of Can.

"Every one who publishes or threatens to publish any libel upon any other person, or directly or *indirectly* threatens to print or publish, or proposes to abstain from printing or publishing of, or offers to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money or security for money or any valuable thing, from such person or from any other person, or with intent to induce any person to confer upon or procure for any person any appointment or office of profit or trust, is guilty of a misdemeanor, and liable to a fine not exceeding six hundred dollars, or to imprisonment for any term less than two years, or to both."

Now, Regina v. Coghlan, 4 F. and F., 316, is a case quite in point. This was a criminal action. The publication complained of consisted of two placards, one of which ran thus:—"W. Gee, solicitor, Bishop Stotford. To be sold by auction, if not previously disposed of by private contract, a debt of the above, amounting to £ 3,197, due upon partnership and mortgage transactions;" and the other was in substance the same though stating the amount of the debt as £3,900.

It appeared that there had been transactions some ten years ago between the prosecutor and the prisoner's brother, a Mr. Michael Coghlan; and the prisoner conceived that there was a balance due, and upon seeing prosecutor in March, said he applied to him for the *accounts*. In October he saw the prosecutor again, and threatened to publish the matter; and that was followed by the publication of the

placards complained of. But there had been no express threat that they would be published, if *money* was not paid.

The prosecutor Mr. Gee, the above mentioned solicitor upon examination, stated that when the prisoner applied to him for the "accounts", he answered that he had already given his brother accounts, and was ready to enter further into particulars, if required to do so by his brother: but he declined to enter into the matter with a stranger. On another occasion in October after threatening to institute proceedings, the prisoner said: "I shall do something more summary," and produced a parcel containing some hundreds of placards (copies of those in question), and stated, "I shall post them all over the county;" to which the witness said he replied, "That is simply an attempt to extort money, and if you do so I shall apply to the police." The prosecutor swore that money was due to him from the prisoner's brother, and stated that he had made advances upon property; but he denied any partnership. On a subsequent occasion he stated he saw both brothers, and the prisoner, in his brother's presence, renewed his demand for accounts, and repeated his threat of publishing; but Michael declined to enter into the matter and went away. The prosecutor again warned the prisoner not to post the bills; but he said he should, and would "show him up." Next day seeing one of the placards posted up, the prosecutor applied for a warrant.

In cross-examination the prosecutor admitted that the prisoner never asked for *money*, but said, "There is a large sum due to his brother, and I do not mean to lose it."

The prosecution was then pressed a good deal as to the alleged advance, etc., and the transactions connected therewith, with a view to show that there were open accounts between him and the brother, which the prisoner might naturally enough press for, so that he was not in the position of a mere stranger trying to extort money, which he knew not to be due, under colour of demanding accounts. He admitted that the prisoner had not asked for *money*, but only applied for *accounts*, and that the brother had once come with the prisoner to demand accounts, so that it appeared the prisoner was authorized to apply for the accounts.

Palmer for the prisoner submitted that every count required that the matter threatened to be published should be libellous: but

BRAMWELL B. thought otherwise: since one section had the words "any *matter*," not saying "libellous"; so that assuming the intent to extort *money, the indictment might be sustained.* Here, however, he thought that there was no evidence of an intent to extort *money;* but only to extort *accounts.*

What could be clearer than the language of the learned Judge. Now, the head-note to this case states, *inter alia*, "An intent to extort money may be implied from the circumstances, and does not require an express demand of money. But, if it appears that the object is to compel the *delivery of accounts* of moneys honestly believed to be due and owing, there is no evidence of the intent." Mr Odgers in his work on Libel and Slander, (Philadelphia Edit. of 1887 from second English Edition), p. 426, states: "and a demand of *money* which defendant honestly believes to be due, and owing to him, is no evidence of such an intent," citing this case. It is evident that this writer did not read the case through, and the rather misleading terms in which the

syllabus is couched, no doubt led him into an entire error.

It is evident from the language of the learned Judge that the prosecutor lost his case through a technicality, for the act in question only provides for extorting money, which is technically different from extorting an account. After considering the question of libel, the learned Judge concluding said: "As to the count for extorting money, he thought there was no evidence of an attempt to extort *money ;* on the contrary, it was plain that the intent was to compel the delivery of *account.* And as to the count for libel, he was of opinion that there was no libel (as he had told the grand jury) because it was not libellousto publish of another that he owed money. On the count for libel the jury returned a verdict of "not guilty." The other count was withdrawn from them.

There is not the least doubt that the collecting agencies in question, either through their subscribers or their officers do "directly or indirectly threaten to print or publish, or propose to abstain from printing or publishing" the names of debtors. When the agency through its officials makes the threat, the case is still clearer against them, for they are not extorting money due to themselves, but the whole scheme is got up on their part for the securing of a commission, whether the commission is paid to them, in the form of an annual fee or otherwise. The sole *raison d'être* of these agencies is their ability to earn a commission from their customers by blackmailing their debtors. And therefor a part of the money which they extort goes into their own hands.

Let us now see how the civil law affects such agencies. We will cite from Sourdat on "*Responsabilité.*" At art. 439 he says (Trans.)

"We think, however, that he who, having open to him several methods of exercising a right, chooses without good reason and with the manifest view to injuring another, the method which is most likely to injure that other, is chargeable with both *fault* and *delict* in the sense of art. 1382 Civil Code."

In this sense Touillier, 11. No. 119; Proudhon, No. 1486, Prussian Code 1st part, tit. 6, art 36 and 37.

It is quite evident that there are methods of advertising debts for sale which, while giving the best possible results to the advertiser, will not injure the debtor. Such is the method usually adopted by the curators of insolvent estates.

Is then the advertising of debts for sale by means of conspicuous posters such an extraordinary method as to shew "manifest intention to injure"? If it is preceded by a more or less threatening letter, as is generally the case with collecting agencies, the intention to injure becomes quite evident, for the publication or otherwise of the matter is shown to be dependent upon the non-payment or otherwise of the debt.

Note.

Since writing the above we have just noticed the decision in Green v. Minnes, digested in the "Early Notes of Cases" of the current number of the *Canada Law Journal.* In this case there was a difference between the amount advertised and that which was actually due by the plaintiff. This difference made plaintiff's account appear larger.

Held, that the publication was libellous and could only be justified by showing its truth; and as the defendants had failed to show that plaintiff was indebted in the sum mentioned in the poster, they were liable in damages (Queen's Bench Div., Feb. 27.)