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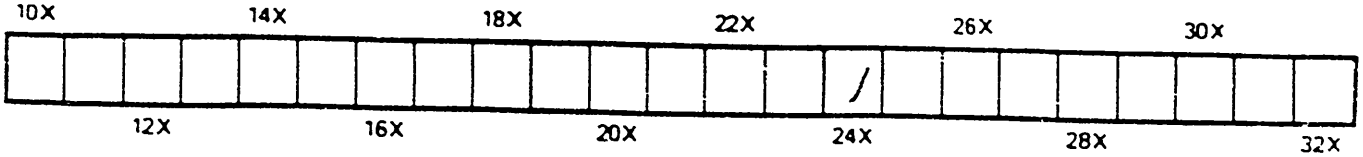

MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. MAY, 1892. No. 5.

ACCEPTANCE—See Sale 4.

ACCIDENT INSURANCE — See Insur. Accident.

ACCOUNT STATED—See Corporations 7.

ACTION FOR NEGLIGENCE—See Railroad Comp. 1.

ACTIONS ON POLICIES—See Ins. 6. 11. 13. 14. 16.

ADDITIONAL INSURANCE—See Ins. 9.

ADULTERATION.

MILK WATERED—SALE BY SERVANT—CONVICTION OF MASTER—NO EVIDENCE OF MASTER'S KNOWLEDGE OR CONNIVANCE — SALE OF FOOD AND DRUGS ACT 1875 (38 & 39 V., c. 63), ss. 6 & 25.

P., a servant of the appellant, was employed to sell milk out of cans by retail. The cans were received by the appellant, the master, on arrival from the country, and a sample taken from each can before it was sent out for sale. The appellant had published a warning to his servants that any servant whose can of milk did not correspond with the sample taken from it would be liable to instant dismissal. P.'s can was duly sampled, and the sample proved to be unadulterated. Subsequently to his taking out the can for the sale of milk, P. admitted watering the milk, some of which milk he sold to an inspector, who thereupon summoned the appellant, the master, as "a person selling to the prejudice of the purchaser an article of food not of the nature, substance and quality of the article demanded," under the terms of section 6 of the Sale of Food and Drugs Act, 1875. The appellant was convicted by a magistrate and fined the full penalty.

Held, by the Court (Hawkins, J., and Wills, J.), that the appellant was rightly convicted, on the ground that he was the seller within the meaning of the Act, and was liable for his servant's action in selling adulterated milk.

Held further, that the fact of the sale of adulterated milk was sufficient proof of the offence without evidence of any connivance by the appellant, though evidence rebutting connivance might properly be admitted by the magistrate with a view to mitigate any penalty he might otherwise have thought fit to impose. *Brown* v. *Foot*, 61 L. J. Rep., M. C. 110.

AGENCY—See Express Co.

AGENT, POWERS OF — See Corp. 2—Ins. 13—Prin. and Agent 3.

AGREEMENT.

VALIDITY — ILLEGAL CONSIDERATION — STIFLING A PROSECUTION — PRESSURE.

The respondents gave a written undertaking to the appellant society to make good part of a debt arising from the criminal default of the secretary of the society, the consideration expressed being that the society should not sue the secretary to recover that part of the debt. The society had threatened to prosecute the secretary, and, though the question of their doing so was not mentioned in the negotiations which led to the under-

taking, the respondents had heard of the threat, and in giving the undertaking were, as was well known to the directors of the society, actuated by a desire to prevent a prosecution.

Held, that it was a term of the true agreement between the parties that there should be no prosecution; that the consideration for such agreement was illegal, and that certain promissory notes given in pursuance of the undertaking could not be enforced by the society. Decision of Williams, J., affirmed.

Semble, *per* Lindley, L. J., and Fry, L.J. (*dubitante* Bowen, L.J.), that where the consideration for a contract is an agreement not to prosecute, it does not follow as a necessary inference of fact that there is such pressure or undue influence on the party to whom the consideration moves as to entitle him to equitable relief. *Jones* v. *Merionethshire Permanent Benefit Building Society. Merionethshire Permanent Benefit Building Society* v. *Jones.* (App.), 61 L. J. Rep., Ch. D. 138.

AIR GUN—See Neg. 12.

ALDERMAN—See Mun. Corp. 13.

ALLEGATION OF PERFORM. OF CONDITIONS—See Ins. 21.

ALIEN CONTRACT LABOUR LAW—See Statute.

ANIMALS, CRUELTY TO — See Crim. Law 8.

ANIMALS, DISEASED—See Officers.

APPEAL—See Companies 1 — Crim. Law 13—Elections.

APPEARANCE BY ATTORNEY — See Corporations 9.

APPLICATION FOR INSURANCE—See Ins. 3.

ARCHITECT, ACTION BY FOR COMMISSION—See Contract 4.

ARGUMENT OF COUNSEL—See Trial 1.

ARREST AS A DANGEROUS LUNATIC —See Damages 2.

ASSESSMENT, VOID—See Mun. Corp. 8.

ASSIGNMENT—See Banks 8—Corporations 15.

ASSIGNMENT OF CLAIM—See Banks 5.

ASSIGNMENT FOR CREDITORS.

FRAUD—LIABILITY OF ASSIGNEE.

(1) Where an assignment for the benefit of creditors is made with an actual fraudulent intent, in which the assignee participates, and the assignment is set aside at the suit of creditors, the assignee is chargeable with all money paid out by him for appraising the property, for counsel fees, and for expenses of conducting the business after the assignment, since such payments were necessarily made by him in pursuance of the fraudulent scheme.

(2) But he is not chargeable with money paid out by him in satisfaction of a *bona fide* note of the assignor, which is preferred in the assignment, even though he is an indorser of such note, since the assignor had a legal right to pay such note in preference to his other debts. March 15, 1892. *Smith* v. *Wise*, N. Y. Ct. of Appeals, 1 N. Y. Supp. 373, modified.

ASSIGNEE, RIGHTS OF—See Banks 8.

ASSIGNEE, LIABILITY OF — See Assignment for Creditors.

ASSIGNOR, RIGHTS OF—See Banks 8.

ASSIGNOR, ACTION BY — See Bills and Notes 4.

ASSUMPTION OF RISK — See Master and Servant 3. 6.

ATTEMPT TO STEAL—See Crim. Law 4.

ATTORNEY.

PRIVILEGED COMMUNICATIONS.

The doctrine of privileged communications does not apply to testimony of a solicitor of patents who is not an attorney at law. *Brungger* v. *Smith*, U. S. C. C. (Mass.), 49 Fed. Rep. 124.

AUTRE FOIS CONVICT — See Crim. Law 15.

AWARD—See Eminent Domain 3.

BALLOT.

MARKING.

The provision in section 20 of the act approved March 4, 1891, known as the "Australian Ballot Law," for the marking of ballots with ink, is directory only, and ballots, if in other respects regular, will, in the absence of fraud be counted, although marked with a pencil. *State, ex rel. Waggoner* v. *Russell*, Supreme Court of Nebraska, March 2, 1892, Alb. L. J.

BANK—See Libel 3.

BANKS AND BANKING.

1. NOTE — NOTICE — BURDEN OF PROOF.

A bank which discounts a note is not affected with notices of defences thereto by reason of the fact that the person presenting it, and who has knowledge of the facts, is vice-president and director of the bank, and also a member of its discounting committee, besides being president of the payee, it appearing that such person in no way acted for the bank in the transaction.

Testimony of the president of a bank that the payee of a note "conferred" with him about the discount of it cannot be considered evidence of actual knowledge on his part that the note was obtained by the payee through fraudulent representations. N. C. Supreme Court., *Commercial Bank of Danville* v. *Burgwyn*, 14 S. E. Rep. 623.

2. ACTION ON NOTE — BONA FIDE PURCHASER—EVIDENCE.

A debtor, desiring to obtain a loan from a bank on notes to be taken by him at an intended cattle sale wherewith to discharge mortgages on the cattle, induced the cashier to attend the sale. After the sale was over, when the cashier was leaving, he said to the debtor: "You have had a good sale; it is all right. When will you be up?"—to which the debtor replied, "As soon as the notes are all in." There was no other evidence of any agreement on the part of the bank to advance money to pay off the mortgages. The bank advanced money on the notes so obtained, but the debtor failed to apply the same to the mortgages, which were afterwards enforced against the purchasers at the sale.

Held, in an action by the bank on one of the notes so taken, that the evidence was insufficient to sustain the defence that the bank had agreed to pay off the mortgages with the proceeds of the notes. Iowa Supreme Court. *City Bank of Boone* v. *Bennett*, 51 N. W. Rep. 246.

3. INSOLVENCY—PURCHASE OF STOCK —RIGHTS OF OWNERS.

The fact that a bank president invests, without authority, in the stock of the bank, money which he holds as executor of an estate, and a few days before the suspension of the bank causes the stock to be resold to the bank at par, and a certificate of deposit to be issued, does not confer upon the estate any greater rights than those of a stockholder, or allow it to recover, as against creditors, the price agreed upon. Bank v. King, 57 Pa. St. 202, and Hallett's Estate, 13 Ch. Div. 696, distinguished. *In re Columbian Bank*, 23 Atl. Rep. 625. Pa. Supreme Court.

4. INSOLVENT BANK — RIGHTS OF DEPOSITORS—SET-OFF.

A depositor in an insolvent bank, who had endorsed a note that was subsequently discounted by said bank, can, in a suit by the bank to recover the amount of the note, set off his deposit against this amount, when the note matured after the insolvency of the bank, and the maker made default in payment. Refusing to follow Armstrong v. Scott, 36 Fed. Rep. 63, and Stephens v. Schuchmann, 32 Mo. App. 333. Bank v. Price, 22 Fed. Rep. 697 distinguished. *Yardley* v. *Clothier*, Circuit Court E. D. Pennsylvania, Jan. 1892.

5. ASSIGNMENT — COLLATERAL SECURITY—RIGHTS OF ASSIGNOR.

Plaintiff assigned a claim against the city of New York to defendant bank, to be collected and applied to plaintiff's indebtedness to the bank and others, and the balance, if any, returned to the plaintiff. The bank in turn assigned the claim to its attorney, for collection, and he, on collection

thereof, retained $1,000 as compensation.

Held, that the bank was liable to plaintiff for the sum so retained. N. Y. City Court, *Noonan* v. *Mechanics' & Traders' Bank*, 17 N. Y. Supp. 845.

6. COLLECTIONS—PROOF OF HANDWRITING.

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.

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 indorsed 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.

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. 13 N. Y. Supp. 411, affirmed, without opinion. *United States National Bank* v. *National Park Bank*, 29 N. E. Rep. 1028, N. Y. Court of Appeal.

7. CERTIFICATE OF DEPOSIT—BONA FIDE PURCHASERS—TRANSFER "WITHOUT RECOURSE"—SET-OFF.

A *bona fide* purchaser of a negotiable certificate of deposit for value, before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper. But if such certificate is transferred when overdue the purchaser takes it subject to all defences which could have been made, had it remained in the hands of the payee.

The indorsement of such paper by the payee before due, "without recourse," is not of itself sufficient to charge the purchaser with notice of defences of the maker.

Across the face of a certificate of deposit in the usual form, payable to the order of the payee on the return of the certificate properly indorsed, were stamped the words: "This certificate payable three months after date, with 6 per cent. interest per annum for the time specified." The instrument was transferred by the payee more than three months after its date. *Held* to be a time certificate, and dishonored when sold.

In an action on a negotiable certificate of deposit transferred after due, the maker may set off any cross-demand which existed in his favor against the original payee at the time of the transfer. *First Nat. Bank of Rapid City* v. *Security Nat. Bank of Sioux City*, 51 N.W. Rep., 305. Neb. Supreme Ct.

8. DEPOSIT IN NAME OF WIFE—CHECKS BY HUSBAND — ASSIGNMENT BY BANK—RIGHTS OF ASSIGNEE.

Defendant deposited money in a bank to the credit of himself as "trustee for G. children." He testified that he deposited the money from time to time for the last ten or fifteen years as a gift to those children. *Held*, that the trust was irrevocable, nothing remaining in defendant but the naked legal title.

Defendant owed the bankers on his note, and directed them to apply such trust fund towards the payment of his

note. They agreed to do that, and to deliver the note as soon as their cashier could make the proper entries. Before the note was delivered, they assigned for the benefit of crediters. Defendant knew nothing of their financial embarrassment, or that they intended to assign. *Held*, in an action on such note by the assignees, that the agreement to apply such trust fund bound the bankers.

Defendant had made another deposit in the name of his wife, and it was understood by the bank that he could check against the deposit. He subsequently checked against the deposit, but his wife had not drawn on it. At the time defendant directed the application of the trust fund towards the payment of his note, he directed, also, that enough be taken from the deposit in the name of his wife to pay the balance due on his note. The bankers agreed to this, and the wife ratified the act of defendant. *Held*, that this agreement bound the bankers.

The assignees were invested with no higher or more extensive authority than the bankers, but were bound by those agreements equally with the bankers.

Code, s. 1530, which provides that deposits by married women of their earnings shall be paid only to such married women, does not apply to a deposit made by defendant in the name of his wife. *Sayre* v. *Weil*, Ala. Supreme Ct., 10 So. Rep., 546.

BILS OF EXCHANGE—See Bills and Notes 14.

BILLS AND NOTES.

1. DISCHARGE.

The acceptance by the payee of a matured note of part of the principal, and delivery of the note to the maker with an intention to transfer the title thereto, extinguishes the note, and discharges the remainder of the debt. *Slade* v. *Mutrie*, Mass., 30 N. E. Rep. 168.

2. BURDEN OF PROOF.

In an action against the indorser of a negotiable note, while it is *prima facie* sufficient to entitle plaintiff to recover, there being no denial of the signature, to produce the note in evidence, and prove demand, protest, and notice to the indorser, yet, where the defendant introduces evidence that the note was fraudulently obtained or put in circulation, it is incumbent on plaintiff to prove that he is a *bona fide* holder for value without notice. *Hazard* v. *Spencer*, R. I., 23 Atl. Rep. 729.

3. PAROL AGREEMENT.

In an action by the payee against the maker of a promissory note which specifies no time for payment, the latter may show a contemporaneous parol agreement that the same should not mature until the payee's marriage. *Horner* v. *Horner*, Penn., 23 Atl. Rep. 441.

4. ACTION BY ASSIGNOR.

Where a complaint in an action on certain notes against the makers thereof states that plaintiff assigned the notes to a bank as security for money, and that the bank refused, and still refuses, to bring suit thereon, and asks judgment against defendants, etc., it shows on its face that plaintiff has no ground of action against defendants. *Davis* v. *Erickson*, Wash., 29 Pac. Rep. 86.

5. CONSIDERATION.

The withdrawal of a suit against a son is a sufficient consideration for a note given by the father. *Mascolo* v. *Montesanto*, Conn., 23 Atl. Rep. 714.

6. PAYMENT—SET-OFF.

Matters of account in favor of the maker of a promissory note, and which might be set-off against it, do not constitute payment of the note; otherwise, if there is an agreement, expressed or implied, that they shall be applied in payment. *Rugland* v. *Thompson*, Minn., 51 N. W. Rep. 604.

7. NOTE—WAIVER OF PROTEST.

The offer by indorsers, prior to the maturity of the note, of a new note, in renewal, is a waiver of notice of protest, as it shows that the indorsers did not expect the note to be paid at maturity, and were not injured by failure to give notice of dishonor. *Jenkins* v. *White*, Penn., 23 Atl. Rep. 556.

8. BONA FIDE PURCHASERS.

The transfer of a note before maturity, in payment of an existing debt, without notice of failure of consideration of the note, is a transfer for value; and a subsequent holder, to whom the title passes from such transferee, may recover on the note, whether or not he pays value or has notice of such failure of consideration. *Herman* v. *Gunter*, Tex., 18 S. W. Rep. 428.

9. CERTIFICATE OF DEPOSIT—BONA FIDE PURCHASERS.

A *bona fide* purchaser of a negotiable certificate of deposit for value, before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper. But if such certificate is transferred when overdue the purchaser takes it subject to all defences which could have been made, had it remained in the hands of the payee. *First Nat. Bank of Rapid City* v. *Security Nat. Bank of Sioux City*, Neb., 51 N. W. Rep. 305.

10. GARNISHMENT — NEGOTIABLE NOTE.

Where the maker of negotiable notes payable at a banking-house disclosed the indebtedness by the notes, without mentioning their negotiability, or where payable, he will not be allowed in a collateral proceeding to defeat a judgment against him as garnishee by showing that the notes were transferred before maturity. *Gatchell* v. *Foster*, Ala., 10 South. Rep. 434.

11. PROMISSORY NOTE — FORGING PAYEE'S NAME — INNOCENT PURCHASER.

Where the lawful custodian of a note, payable to the order of a particular payee, forges the payee's name and transfer the note to an innocent purchaser for value, the latter acquires no title as against the payee. The court criticised and overruled Duke v. Hall, 9 Baxt. 282. Supreme Court of Tennessee, *Roach* v. *Woodall*, 18 S. W. Rep. 407.

12. EXCHANGE OF NOTES—PLEADING COUNTER-CLAIM.

(1) The transfer and delivery of a promissory note by the payee to the maker of another note, in exchange therefor, is a valuable consideration for the latter, and there is no failure of consideration although the former subsequently becomes worthless.

(2) In an action against the maker of a promissory note, an answer of failure of consideration will not enable him to offset a worthless note, for which the note sued on was exchanged, in the absence of allegations amounting to a counter-claim. N. Y. Court of Appeal, Feb. 9, 1892. *Rice* v. *Grange*, 14 N. Y. Supp. 911, affirmed.

13. PROMISSORY NOTE—FAILURE OF CONSIDERATION—LACHES.

In an action on a promissory note the defence set up was that it was given in purchase of a machine for polishing wood, which machine did not do the work for which it was purchased and which it was represented to do. At the trial the evidence showed that the machine had been used for a long time in connection with building cars; that the work was under control of a contractor with the defendant; and that the superintendent of defendant's establishment had inspected the cars as they were finished and delivered, as well as watched the progress of the work. Evidence was offered on behalf of the defendant to show that the contractor had never told him that the machine was defective, and he never knew it until the case was tried; and that the machine could not be used until a fan had been attached to it for keeping off the dust. The defendant himself was not examined nor was an effort made to obtain the evidence of the contractor, who had left the province. The jury found in favour of plaintiffs, and a new trial was refused on the ground that defendant must be charged with the knowledge of the contractor, or at all events his superintendent was in a position to discover the manner in which the machine worked. On appeal to the Supreme Court of Canada.

Held, that the new trial was properly refused. Appeal dismissed with costs. *Esson* v. *McGregor*, Supreme Court of Canada, Feb. 1892.

14. BILL OF EXCHANGE.

In an action on a bill of exchange accepted by defendants, and transferred to plaintiff in good faith, before maturity, it was not error to enter judgment for the face of the instrument, with interest from its maturity, though plaintiff purchased it at a discount. *Petri* v. *First Nat. Bank of Fond du Lac*, Tex., 18 S. W. Rep. 752.

15. PRESENTMENT—NOTICE OF DISHONOUR—WAIVER.

A statement by the indorser of a dishonoured note to the holder that he would see the maker about it, and his subsequent statement that he had seen the maker, who promised to pay as soon as he could, with a request from the indorser not to "crowd the note," are not in themselves sufficient evidence of waiver of notice of dishonour. *Britton* v. *Milson*, Ontario Ct. of Appeal, Feb. 1892, (Can. L. T.)

BONA FIDE PURCHASER—See Bills and Notes 8. 9.

BONDS—SEE ALSO MUN. CORP. 2.

1. CONDITION—BREACH—BONUS—LIQUIDATED DAMAGES.

In 1874 the county of Halton gave to the Hamilton and North-Western Railway Company a bonus of $65,000 to be used in the construction of the railway, upon the condition that the company should remain "independent" for twenty-one years. In 1888 the Hamilton and North-Western Railway Company became (as was on the facts held) in effect merged in the Grand Trunk Railway Company and ceased to be an independent line.

Held, affirming the judgment of the Common Pleas Division and of Robertson, J., at the trial, that there had been a breach of the condition entitling the plaintiffs to recover the whole amount of the bonus as liquidated damages. *County of Halton* v. *Grand Trunk Ry. Co.*, Ont. Ct. of Appeal, March 1892, (Can. L. T.)

2. RELEASE OF SURETY—ERASING NAME.

Co-sureties signed a penal bond while in the hands of the principal obligor, on condition that such bond should not be a completed instrument until enough co-sureties had signed and justified, in the respective amounts signed by each, to make up the full penal sum, and the bond duly delivered to the proper officer for approval as required by law. After the requisite solvent co-sureties had signed, the name of one was erased by drawing a line through his signature, his name in the body of the bond and in the jurat, with the consent of the principal obligor, but without notice to the other sureties. The bond was subsequently delivered to the proper officer for approval, his attention called to the erasure and the bond was then approved by him.

Held, that the erasure and discharge of the one co-surety, having released all those who signed after him, all the other co-sureties were discharged. This view of the principal contention in the case at bar is in perfect harmony with the spirit and reason of the overwhelming current of adjudicated cases in the State and Federal courts in this country. In some the facts are strikingly similar to the case before us; in more—in nearly all—the spirit and reason of the decisions are the same. See Smith v. U. S., 2 Wall. 219; Smith v. Weld, 2 Penn. St. 54; Dickerman v. Miner, 43 Iowa, 508; State v. Craig, 58 id. 238; State v. McGonigle, 101 Mo. 358; State v. Churchill, 48 Ark. 426; Bank v. Sears, 4 Gray, 95; Commissioners v. Daum, 80 Ky. 388; Graves v. Tucker, 10 Smedes & M. 9; Nash v. Fugate, 24 Gratt. 202; 32 id. 595; McCormick v. Bay City, 23 Mich. 457. *State* v. *Allen*, Miss. Sup. Ct. Jan. 1892.

BRAKEMEN, INJURIES TO—See Master and Servant 4.

BREACH—See Bonds 1—Contracts 3—Corp. 11.

BRIDGE, DEFECTIVE—See Counties 2—Neg. 22.

BURDEN OF PROOF—See Banks 1—Bills and Notes 2—Mun. Corp. 8.

BY LAWS OF SOCIETY—See Ins. 26.

CARRIERS—See also Principal and Agent 4—Neg. 14—Trial 1.

OF GOODS.

1. Delay in Delivery—Damages.

(1) In an action against a carrier for delay in delivering cattle shipped, evidence that the cattle sold for $5,027.55, and that had they been delivered in proper time and in proper condition, they would have sold for from 25 to 35 per cent. more, warrants a verdict for $745. A carrier of goods shown to have been more than the ordinary time upon the road has the burden of showing that the delay was occasioned by causes excepted in the shipping contract made at a reduced rate. *Missouri Pac. Ry. Co.* v. *Russell*, 18 S.W. Rep., 594. Tex. Supreme Ct.

Delay Caused by Strikes.

(2) A carrier is not liable for delays in transportation occasioned by a strike of its employees, accompanied by violence or intimidation which it and the civil authorities are unable to prevent. Notice of damage of stock, required by a shipping contract to be given before the removal of the stock from the passession of the carrier, is not required in the case of a claim for damages for delay in transportation. *Louisville & N. R. Co.* v. *Bell*, 13 Ky. L. Rep., 393, Ky. Superior Ct.

OF PASSENGERS.

2. Conditions of Ticket.

In consideration of issuing a round-trip ticket at a reduced rate, the carrier may insert as a condition of the ticket that it shall not be good for a return passage unless the ticket holder shall identify himself as the original purchaser to the satisfaction of the carrier's agent at the point of destination, and unless the ticket is signed and stamped by said agent.

Where such a condition is contained in the body of such ticket and no fraud or unfair means of deception have been resorted to by the carrier, the assent of the ticket holder to the condition will be conclusively presumed, although he may not have signed the ticket. The ticket holder may be ejected from a train for failure to comply with such a condition, though he may offer proof of identification to the conductor. *Abram* v. *Gulf, C. & S. F. Ry. Co.*, Texas Supreme Ct., Jan. 1892.

3. Ejection of Passenger — Damages.

Where a passenger on a railroad train fell asleep at night, and was carried past his destination, it was not the duty of the company to carry him to the next station, unless he paid or offered to pay his fare to such station; and, if the conductor had no reason to believe that injury would result therefrom, he had a right to put the passenger off.

A mere willingness on the part of the passenger to pay the fare, unaccompanied by a move or act calculated to suggest such willingness to the conductor, was not sufficient to place the conductor in the wrong in ejecting the passenger.

Though unnecessary force were used in ejecting the passenger, his damages would not include compensation for his inconvenience in having to make his way back to his station in the dark. *Texas & P. Ry. Co.* v. *James*, 18 S. W. Rep. 589, Tex. Supreme Court.

4. Railway—Contract with Passengers — Reasonable Accommodation—Overfilling Carriages—Negligence — Attack from Fellow-Passengers — Remoteness of Damage.

The plaintiff, whilst travelling from Sunderland to Hartlepool on the defendants' line in a carriage admittedly overcrowded, against which he remonstrated to the defendants' servants, was assaulted by certain passengers in the same compartment, in whose eviction from their houses the plaintiff had been engaged, and consequently had incurred their ill-will and was in danger of being molested by them, of which the defendants' servants had notice. In consequence of the assaults, the plaintiff sustained personal injuries, in respect of which he brought an action claiming damages from the defendants.

Held, that the company was not liable. Redhead v. The Midland Railway Company, 9 B. & S. 519; 38 Law J. Rep. Q. B. 169; Law Rep. 4 Q. B. 379, and Daniel v. The Metropolitan Railway Company, 40 Law J. Rep. C.P. (H. L.) 121; Law Rep. 5 H. L. 45, followed. *Pounder* v. *North Eastern Rail. Co.*, 61 L. J. Rep. Q. B. D. 136.

5. GOODS REFUSED BY CONSIGNEE—SALE BY CARRIER.

Held:—Where the consignee refuses to accept goods from the carrier at the place of delivery, the carrier is not justified in selling the same by private sale, without notice to the consignor or consignee; and a pretended authorization to sell by the consignee who has refused to accept the goods is without affect. The consignor in such case is entitled to recover the value of the goods less freight and storage. *Cottingham* v. *G. T. R. Co.*, 7 M. L. R. (S. C.) 385.

CERTIFICATE—See Ins. 24.

CERTIFICATE OF DEPOSIT—See Banks 7—Bills and Notes 9.

CERTIORARI—See Crim. Law 16.

CHANGE OF BENEFICIARY—See Ins. 26.

CHARTER, VIOLATION OF—See Corporation 4.

CHARTER PARTY—See Ship 2.

CHURCH BUILDING—See Contracts 4.

CHURCH PEWS—See Religious Societies 1.

CHILD INJURIES TO—See Neg. 11.

CLUB.

LIABILITY OF STEWARD—A steward of an unlicensed social club who furnished liquor to a member for a price exceeding the cost of the drink is guilty of selling liquor without a license, within Pa. Act May 13, 1887, s. 15 (P. L. 108), although the liquor is purchased by the club and the receipts from its sale are paid into the club treasury, the steward's salary and other club expenses being paid out of the profits. *Com.* v. *Tierney*, Pa. Quar. Sess., 29 W. N. C. 194.

COLLATERAL SECURITY—See Banks 5—Pledge.

COLLECTIONS—See Banks 6.

COLLISION WITH VEHICLE—See Neg. 18.

COLLISION OF TRAINS—See Railroad Comp. 2.

COMBINATION—See Corporations 10.

COMMUNICATIONS WITH ATTORNEY—Crim. Law 10.

COMPANY.

1. WINDING-UP—SALE OF ASSETS BY LIQUIDATOR — ORDER OF COUNTY COURT APPROVING—R. S. O. c. 183—PRACTICE—APPEAL—FINAL ORDER.

The liquidator of a company, which was being voluntarily wound up under the Ontario Winding up Act, sold the assets thereof *en bloc* to a private individual and then obtained from the County Court an order approving of the sale and making certain provisions for the disposition of the purchase moneys.

On appeal, it was *held*, that the order was made without authority and that it was a nullity.

Such an order is a "final order," as nothing further remains to be done under it, and, therefore, it is the subject of appeal. *In re D. A. Jones Company*, Ontario Ct. of Appeal, Feb. 1892. (Can. L. T.)

2. WINDING-UP — DIRECTOR — ILLEGAL TRANSACTION — SUMMARY APPLICATION TO SET ASIDE—R. S. O. c. 183, s. 23, s-s. 17.

Sub-section 17 of s. 23 of R. S. O. c. 183, which provides for summary proceedings in the course of winding up a company against directors and other officers in respect of alleged misfeasance or breach of trust, is not wide enough to authorize the setting aside as a breach of trust, on the summary application of the liquidator, of a sale of lands by the company to a director especially where the lands have, at the director's request, been conveyed by a company to the director's wife. *In re Essex Centre Manuf'g Co.* Ontario Ct. of Appeal. Jan. 1892. (Can. L. T.)

3. WINDING-UP—DIRECTOR'S LIABILITY — MISFEASANCE — PAYMENT OF DIVIDENDS OUT OF CAPITAL — ULTRA VIRES — LAPSE OF TIME — STALENESS OF DEMAND — STATUTE OF LIMITATIONS.

The articles of association of a company provided that interest at the rate of five per cent. per annum should be payable half-yearly on all money paid on the shares until otherwise determined by the directors, and also that no dividend or bonus should be paid except out of the profits. Although the company never earned any profits, the directors, acting under a *bona fide* mistake of law, made half-yearly payments of interest to the shareholders from 1869 till 1878. In March, 1886, the company was ordered to be wound up. In June, 1889, the liquidator commenced an action against the representatives of a deceased director, who held office from 1869 until his death in December, 1883, to recover the moneys so misapplied.

Held, that, assuming the Statute of Limitations to be applicable, the time did not begin to run until the director ceased to hold office; but *held*, that the Statute of Limitations had no application. *Held*, further, that the circumstances did not justify the defence of staleness of demand.

Whether the doctrine of staleness of demand is applicable to the case of a liquidator seeking relief in respect of a misapplication by a director of the company's funds which the company has no power to sanction, *quære*. Decision of North, J., affirmed. *In re Sharpe. In re Bennett. Masonic and General Life Assur. Co.* v. *Sharpe* (App.) 61 L. J. Rep., Chanc., 193.

4. WINDING-UP—LIQUIDATORS' COMMISSION—ALLOWANCE OF COMMISSION ON SET-OFFS.

Held, that in fixing the liquidators' commission in winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set off, but not actually received by the liquidators. And in this case a commission of two and a quarter per cent. having been allowed on the gross amount of moneys actually collected, a further commission of one and a quarter per cent. on a sum of $231,000, consisting of amounts adjusted or set-off, was allowed.

So far as possible the amounts allowed as compensation to liquidators in such winding-up proceedings should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators when more than one. *In re Central Bank. Lye's Claim*, Ontario Chancery Div., March 1892, (Can. L. T.)

5. SOLICITOR — RETAINING LIEN — DEBENTURE-HOLDER'S ACTION.

A corporation issued debentures charging all its property, present and future, by way of "floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures." Default having been made on the debentures, a debenture-holder's action was commenced, in which the solicitor of the corporation claimed to have a retaining lien on papers and documents of the corporation for costs incurred by the corporation after the issue of the debentures, but before the commencement of the action.

Held, that the lien was valid as against the debenture-holders and their receiver.

The solicitor of a company who acts in the issue of debentures is not therefore debarred from setting up a retaining lien for costs due to him as solicitor of the company against the debenture-holders in respect of documents which, if two solicitors had been employed, would not have been handed over to the solicitor acting for the debenture-holders. *In re* Snell (46 Law J. Rep. Chanc. 627; Law Rep. 6 Ch. D. 105 distinguished. *Brunton* v. *Electrical Engineering Corporation* (*Lim.*), 61 L. J. Rep. Chanc., 256.

COMPENSATION—See Contracts 3.

COMPLAINT—See Pleading.

CONDITION—See Bonds 1.

CONDITIONS OF POLICY—See Ins. 3. 6. 9. 14. 21. 22.

CONDITIONS OF TICKET—See Carriers 2.

CONDUCTOR OF STREET CAR—See Neg. 17.

CONFLICT OF LAWS.

PERPETUITIES.

A testamentary disposition of personal property, lawful and valid at the place of the testator's domicile, where it was made, is enforceable in New York, although if made in New York it would have been invalid as a violation of the statute against perpetuities. 16 N. Y. Supp. 137, affirmed. *Cross* v. *United States Trust Co. of New York*, New York Court of Appeals, March 1, 1892.

CONSIDERATION—See Agreement—Bills and Notes 5. 13—Contracts 1.

CONSTITUTIONAL LAW—SEE ALSO CORPORATIONS 6.

1. POWER OF STATE TO REGULATE ELEVATOR CHARGES.

A State has power to regulate the charges of grain elevators carried on by individuals, and to enact that a violation of such regulation shall be a misdemeanor. *Budd* v. *People of the State of New York*; *People of the State of New York, ex rel. Annan*, v. *Walsh*; *People of the State of New York, ex rel. Pinto*, v. *Walsh*, United States Supreme Court, Feb. 29, 1892, 45 Alb. L. J. 354.

2. FOREIGN CORPORATIONS—FRANCHISE TAX—INTERSTATE COMMERCE.

A State may impose upon foreign corporations (including those organized under the laws of other States) any conditions it may see fit as a prerequisite to their doing any business within its borders; and Act N. Y. May 26, 1881, exacting from all corporations doing business in the State a tax proportioned to the total amount of their capital stock, without regard to what part thereof is employed within the State, or to the amount or kind of business done there, cannot be impeached on the ground of repugnancy to any provision of the federal constitution.

The tax is purely a franchise tax, and, even as applied to a corporation engaged in bringing the products of other States into New York for sale, cannot be considered as a tax upon interstate commmerce.

The articles of association of a corporation stated that it was organized to conduct the business of buying, selling, leasing and operating mines and mining claims, and smelting, reducing, and refining works; of carrying on a general mining, milling and smelting business in all its branches; of conducting a general mercantile business, by buying and selling such merchandise, stores, and miners' supplies as are usually required by a mining camp; of building roads and tramways necessary to the transportation of its products or procuring its supplies; of buying and selling real estate required for its business; and, generally, to do all things incidental to a general mining business.

Held, that it was not a "manufacturing corporation," within the provisions exempting such corporations from the tax imposed by the said act. Mr. Justice Harlan, dissenting. *Horn Silver Min. Co.* v. *People of State of New York*, United States Supreme Ct., Feb. 1892.

CONSTRUCTION OF CERTIFICATE—See Ins. 28.

CONSTRUCTION OF DEED—See Deed.

CONTEMPT, ADJUDGING COMPTROLLER IN—See Mun. Corp. 6.

CONTRACTS IN RESTRAINT OF TRADE—See Monopoly.

CONTRACTS—SEE ALSO CARRIERS 4—CORPORATIONS 1. 10. 11—MARRIAGE—MUN. CORP. 2. 7—NEG. 5—PRIN. AND AGENT 4—SALE OF GOODS 3.

1. CONSIDERATION—PUBLIC POLICY.

An agreement to pay a bondsman for becoming surety on a bond given to obtain a license to sell liquor is not against public policy. *Bing* v. *Willey*, Pa., 23 Atl. Rep. 440.

2. RESCISSION—MISTAKE—PERFORMANCE OF CONDITIONS—REVOCATION OF TRUST.

By a deed made between B., grantor, of the first part, P., grantee, of the second part, and certain named persons, trustees, of the third part, B. conveyed his farm with the stock and chattels thereon to the trustees. The trusts declared in the deed were that the grantee should perform certain conditions intended for the support and maintenance and other advantage of the grantor, and if he survived the grantor, the trustees were to convey the property to him; if the grantor should survive, the trustees should reconvey to him. The deed was executed and acted on for some years, when an action was brought by B. to have it set aside on the ground of mistake, he alleging that when he executed it, being illiterate and not understanding the English language, he did not know its terms. The trial judge found this allegation proved by the evidence, and ordered the deed to be set aside. The full Court on appeal held against this finding of mistake, but affirmed the decision setting aside the deed on the ground that P., the grantee, had not performed the conditions on which his right to the property, in case he survived, depended.

On appeal to the Supreme Court of Canada:—

Held, affirming the decision of the Court below, that P. having failed to perform the obligations which he had undertaken, the trust in his favour failed and the trustees held the property in trust for B., in whose favour the law raised a resulting trust. *Poirier* v. *Brulé*, Supreme Ct. of Canada, Nov. 1891.

3. Breach of Contract—Compensation—Defence.

T. entered into a contract with M. & Co. to supply them with watches to the value of £849 at certain specified prices, the watches to be delivered as they were ready, and paid by bills at four months from delivery. After a number of watches had been delivered in terms of the contract, T. wrote on 26 Nov. 1889 intimating that he would no longer supply watches at the agreed prices. On 30th Nov. T. sent M. & Co. bills for the price of watches delivered prior to 26th Nov., but M. & Co. refused to accept these bills in consequence of the intimation contained in T.'s letter of the 26th, and they met an action at his instance for the price of his watches with a counter-claim of damage on account of the pursuer's refusal to go on with the contract.

Held, (1) that the pursuer's threat that he would not go on with the contract did not justify the defenders in refusing to pay for goods delivered under the contract; and (2) that their refusal was a breach of contract which excluded any claim of damages on their part against the pursuer. *Thorneloe* v. *McDonald & Co.*, 29 Scot. Law Rep. 409.

4. Action by Architect for Commission — Cost of Building more than Amount Contracted for — Basis of Remuneration—Liability of Members of Building Committee of Church.

The defendants were the building committee of a congregation, and the plaintiff sued them on the common counts to recover $213, a balance which he claimed the defendants owed him for his services as architect in connection with the church the defendants had built. The defendants pleaded never indebted and payment. A contract was entered into between the plaintiff and the defendants, by which the plaintiff was to prepare plans and specifications for the church; it was a condition of the engagement that the church the plaintiff was to plan should not cost more than $7,000 or $7,500, at the outside, exclusive of the cost of the seating, but inclusive of the cost of the heating apparatus. Instead of the church costing under $7,500, it cost about $9,800 exclusive of the seating.

The plaintiff charged commission on $10,000. The plaintiff sent the defendants the plan and specifications for the foundation some three weeks before he sent them the remainder of the plans, and the foundation was built by the time the rest of the plans arrived, so the defendants were committed to the building; the plaintiff assured them that the church could be built for $7,500, and defendants proceeded with the work according to his plans. They continued to employ him after

they knew that the cost would exceed $7,500. The plaintiff sued, not on the special contract, but on a *quantum meruit*. The congregation, for whom the committee acted, were not an incorporated body.

Held, that it was to the defendants personally that credit was given, and that if there had been a breach of the contract they were personally liable to the plaintiff.

The defendants having shown that the work had been done under a special contract by which the church was to cost not more than $7,500, they could not be held liable to pay the stipulated commission on more than that amount; as they did not know that the cost would exceed the $7,500 until after they had begun the construction of the church according to the plans and were committed to them, the fact that they had used the plans did not make them liable to pay commission on the cost over $7,500.

Verdict for the plaintiff for $46.25 after allowing for payments made on account. *Macdonald* v. *Harrison*, Manitoba Q. B., April 1892.

CONTRACTOR.

LIABILITY FOR DAMAGE TO PROPERTY OF THIRD PARTY—LANDSLIP—VIS MAJOR.

Under contract with the City of Quebec, the defendant opened a trench for the introduction of water-pipes along certain streets, in the course of which operation a landslip occurred opposite plaintiff's property, whereby his house was seriously damaged.

Held, that defendant was not freed from liability by the fact of working under contract. The contractor, as the party who personally does the act causing the damage, is more directly liable to the person injured, than is the party for whom he executes the contract; and especially is this so, if (as in the present case) the work might have been so done as that no damage should result.

The occurrence of such an accident is a *prima facie* presumption that all due and sufficient precautions and care to avert possible danger were not used, and alleged ignorance of special dangers existing at the locality only strengthens this presumption, for one who undertakes a work of the kind is bound to foresee and guard against all reasonable eventualities, and not doing so, cannot shelter himself under a plea of *vis major*. *St. Jean* v. *Peters*, 17 Q. L. R. 252.

CONTRIBUTORY NEGLIGENCE — See Mun. Corp. 5—Neg. 6. 16. 28. 31. 33. 34. 36.

CO-PROPRIETOR—See Neg. 37.

COPYRIGHT.

INFRINGEMENT.

The copyright of a book describing a new system of stenography does not protect the system, when considered simply as a system apart from the language by which it is explained, so as to make the illustration by another of the same system in a different book, employing totally different language, an infringement. *Griggs* v. *Perrin*, U. S. C. C. (N. Y.), 49 Fed. Rep. 15.

CORPORATE LIABILITIES — See Corporations 3.

CORPORATIONS — SEE ALSO PRINCIPAL AND AGENT 4.

1. CONTRACTS—ESTOPPEL TO DENY AUTHORITY.

The maker of a note to a corporation is estopped from denying the power of the corporation to loan the money for which the note was given. *Bond* v. *Terrell Cotton & Woolen Manufacturing Co.*, 18 S. W. Rep. 691, Tex. Supreme Ct.

2. POWERS OF AGENT — APPARENT AUTHORITY.

Where the president and financial agent of a duly incorporated university, while acting within the scope of his authority, and without assuming to become individually responsible, requests an architect to prepare the plans for a certain building, and the architect knows that the said person is connected with the university, and that the building is intended for a public purpose, this is sufficient to put him on inquiry, and the liability is that of the principal, and not the

agent. *Johnson* v. *Armstrong*, 18 S. W. Rep. 594, Tex. Supreme Court.

3. CORPORATE LIABILITIES—PROMISSORY NOTES.

A note showing on its face that it is given for the debt of a corporation, and signed by the president, with words describing himself as such, is the note of the corporation, and not the personal obligation of the president, in the absence of a personal promise from him. *Humber* v. *Crabb Orchard & O. T. Co.*, 13 Ky. L. Rep. 327, Ky. Superior Court.

4. DISSOLUTION — VIOLATION OF CHARTER.

Where an action to dissolve a corporation is brought by the attorney-general in the name of the people, without a relator, the fact that the persons who applied to him to bring the action were the very officers whose neglect to perform their official duties constitutes the cause for dissolution is no bar to the action. *People* v. *Buffalo Stone & Cement Co.*, 29 N. E. Rep. 947, N. Y. Court of Appeal.

5. CREDITORS OF CORPORATION — PRIORITY.

Where a manufacturing corporation domiciled in another state entered into a contract with an agent for the establishment of a branch of its business in his own name, with the knowledge and consent of the company, and under which he contracted a large amount of indebtedness, and thereupon made an assignment for the benefit of his creditors,

Held, that a creditor of the company was not entitled to a preference over the creditors of such agent by reason of the fact that moneys received from the company had been used in his business, or in the purchase of the assigned property before the indebtedness to such creditor had accrued. *Mackellar* v. *Anchor Manuf'g Co.*, Minn. Supreme Ct., 51 N. W. Rep. 616.

6. TAXATION—CONSTITUTIONAL LAW —INTERSTATE COMMERCE.

A corporation organized in New Jersey, and having its principal office there, but which has an office in New-York, and manufactures and sells some of its wares in that State, is doing business in New-York, within the meaning of the corporation tax laws of that State.

A State law imposing a tax on foreign corporations doing business in the State, based on the amount of capital used by the corporation in such state, is not a regulation of interstate commerce. 15 N. Y. Supp. 446, affirmed. *People ex Rel. Southern Cotton-oil Co.* v. *Wemple*, 29 N. E. Rep., 1002, N. Y. Court of Appeal.

7. CORPORATIONS DE FACTO — LIABILITY — EXERCISE OF CORPORATE FRANCHISE—ACCOUNT STATED.

Plaintiff sold goods to C., operating as the "South Publishing Co.," at a time when no such company had been incorporated. Seven months after the last delivery of goods, C. and his employees were incorporated as the "South Publishing Co."

Held, that the company so organized never having exercised any corporate franchises prior to its organization, plaintiff could not recover against it for the goods sold, as a *de facto* corporation.

The act of the officers of the company after organization, in receiving, acknowledging and retaining an account for such goods, rendered by plaintiff could not render the company liable as on an account stated, since there could be no account stated where there had been no prior transactions between the parties. 14 N. Y. Supp. 917, reversed. *Bradley Fertilizer Co.* v. *South Pub. Co.*, 17 N. Y. Supp. 587, N. Y. Com. Pleas.

8. RIGHT TO PURCHASE THEIR OWN STOCK — CREDITORS — SENIORITY — TRUST-DEED FOR BENEFIT OF CREDITORS—AVOIDANCE—FRAUD.

Exceptions to the report of a referee that he failed to find certain facts are waived by failing to move for a recommitment of the report.

In the absence of statutory prohibition, a corporation may purchase shares of its own stock, but the stockholders are subject, in proper cases, to the rights of corporate creditors to resort

to the capital stock as a trust fund for the payment of their debts.

A stockholder, to whom the corporation is indebted for stock, stands on the same footing with other creditors, unless liable to them as a stockholder.

Debts due from the corporation to stockholders for stock are not entitled to precedence over a debt due to the president for money paid by him as surety for the corporation. *Blalock* v. *Kernersville Manuf'g Co.*, N. C. Supreme Ct., 14 S. E. Rep. 501.

9. KEEPING DISORDERLY HOUSE—INDICTMENT OF CORPORATION — APPEARANCE BY ATTORNEY—JURISDICTION.

If a corporation appears to an indictment by an attorney of the court, it is not necessary to take proceedings under the statute to secure an appearance. The burden will be on the corporation to show that the appearance by the attorney was unauthorized. It need not appear in the record that the trial court ordered the clerk to enter an appearance and indorse the plea of not guilty. It will be presumed that it was done. The quarter sessions is not an inferior court, in the sense that it must in all respects show its jurisdiction. After a demurrer to an indictment is overruled the court may pronounce judgment, unless leave is expressly given to answer over. A corporation is indictable for keeping a disorderly house. *State* v. *Passaic County Agr. Soc.*, Supreme Court of New Jersey, Feb. 1892.

10. CONTRACTS—VALIDITY—ULTRA VIRES — PUBLIC POLICY—"TRUST" COMBINATION.

An agreement by which all, or a majority, of the stockholders of a corporation transfer their stocks to certain trustees, in consideration of the agreement of the stockholders of other companies and of the members of limited partnerships, engaged in the same business, to do likewise; and by which all are to receive, in lieu of their stocks and interests so transferred, trust certificates, to be issued by the trustees, equal at par to the par value of their stocks and interests, and by which the trustees are empowered, as apparent owners of the stock, to elect directors of the several companies, and thereby control their affairs in the interests of the trust so created; and are to receive all dividends made by the several companies and limited partnerships, from which, as a common fund, dividends are to be made by the trustees to the holders of the trust certificates, tends to the creation of a monopoly, to control productions as well as prices, and is against public policy. *State, ex Rel. Attorney-General* v. *Standard Oil Company*, Ohio, Supreme Court, March 1892, (Alb. L. J.)

11. CONTRACT — TERMINATION — BREACH.

Plaintiff contracted with a switch and signal company to become its general manager for $5,000 per year, also giving it the exclusive right to use all his inventions relating to the signal business for $3,000 per year in addition, together with 10 per cent. of its net profits; the contract to continue ten years, subject after two years, to termination by either party on one year's notice, or by the death or incapacity of the plaintiff; and, in the event of "the termination of this agreement, the said company (by reason of the expenditures that shall have been made during the continuance of this agreement) shall have a license (not exclusive) to use all of the inventions that may have been used in carrying on the busines of the company, on the payment of $6,500 per year."

Held, that the contract was not "terminated" so as to bring into operation the latter provision, by the discharge of plaintiff without cause, and no suit could be maintained for the $6,500 royalty.

The effect of the stipulation relating to the termination of the contract was only to give the company an option to continue using the inventions on paying the $6,500 royalty, and, in the absence of an exercise of the option, the royalty would not become due.

An admission by the company's president, on plaintiff's discharge, that they would pay the royalties, would not bind the company, in the absence of evidence that he was authorized to make such promise, or

to put such a construction upon the contract. O'Brien and Peckham, JJ., dissenting. 13 N.Y. Supp. 612, affirmed. *Johnson* v. *Union Switch & Signal Co.* N.Y. Ct. of App., 29 N. E. Rep., 964.

12. POWER OF DIRECTORS TO VOTE SALARY—RATIFICATION.

Where three persons, a majority of the directors of a corporation, each being a salaried officer, pass a vote appointing one of their number as the agent of the corporation to make a contract with the others, and then pass another vote appointing one of the latter to make a contract with the first one, continuing in force for a certain time agreements which were about to expire, and by which they were to receive a certain salary, such contracts are voidable by the corporation, as the directors occupy a fiduciary position, and have no authority to represent the corporation in any transaction in which they are personally interested.

Where such contracts were made in October 1887, and there was nothing to show that the stockholders had any knowledge of them until the day of their next meeting, which was in May, 1888, and no other meeting was held until May, 1889, when new directors were chosen, who promptly repudiated them, the delay was not such as to preclude the corporation from availing itself of the original invalidity of the contracts. *Mallory* v. *Mallory-Wheeler Co.*, Supreme Court of Errors of Conn., June 1891. R. R. and Corp., L. J.

13. INSOLVENT — CANNOT PREFER CREDITORS.

Where a receiver is appointed in a proceeding for creditors supplemental to execution, he has the rights of such creditors, and may maintain a creditor's bill to discover assets of the estate over which he is appointed.

An insolvent corporation cannot prefer one creditor to another. When the corporation becomes insolvent, the directors occupy the position of trustees for the creditor. *Heimberg* v. *Chicago Cheese Co.*, Circuit Court of Cook County, 24 Chicago Leg. News 296.

Note.

But see No. 14 *infra*.

14. INSOLVENCY — PREFERENCES — ASSIGNMENT FOR BENEFIT OF CREDITORS.

An insolvent corporation may prefer creditors by way of mortgage.

Directors of an insolvent corporation do not become trustees for all the creditors alike, so as to prevent their giving valid security by way of preference to stockholders or directors.

Where it does not appear that at the time of the execution of a mortgage by an insolvent corporation to secure certain creditors, the officers thereof had any purpose of making a general assignment thereafter, or that such creditors had any knowledge of any such purpose, although such an assignment was thereafter made, or that the mortgage by its terms creates any trust, or provides for any transfer other than to secure the payment of honest debts, it will not have the effect of a general assignment for the benefit of creditors. *Bank of Montreal* v. *J. E. Potts Salt & Lumber Co.*, 51 N. W. Rep. 512, Mich. Supreme Ct.

15. TRANSFER OF STOCK—VALIDITY — STOCKHOLDERS' MEETING — RIGHT TO SELL — ASSIGNMENT FOR BENEFIT OF CREDITORS.

The charter of a corporation provided that its "shares shall be transferred in such manner as shall be prescribed by the by-laws of the corporation." These by-laws provided that the treasurer shall keep a book, which shall be part of the corporation records, "in which he shall register the names of all the stockholders, and the number of shares held by each." The certificate of stock prescribed by the by-laws contained these words: "Transferable only in person or by attorney on the transfer books of the corporation, and on the surrender of this certificate." There was no by-law prescribing how stock should be transferred, and no stock ledger or transfer book was kept except the certificate book, which contained marginal stubs, setting forth the new certificate number, the old certificate number, the names from whom and to whom transferred, date of transfer, and receipt for the new certificate, signed by the transferee. Pasted to the marginal stubs were the

old surrendered certificates. This was the uniform system of transfer followed, and the holder of the new certificate was recognized by the corporation as a stockholder.

Held, that the corporation, by permitting the transfers to be made and entered on its certificate book in the manner stated, waived any requirements of transfer "in person or by attorney."

It being competent for the corporation to make such waiver, the entries of the transfers on its certificate book were sufficient to vest legal title to the stock in the transferees, and were binding on the corporation and its creditors.

Even if such transfers were not sufficient to pass the legal title to the stock, and the transferees, having paid full value, took only an equitable title thereto, the fact that notice of a stockholders' meeting, which authorized a general assignment for the benefit of creditors, was given to such transferees, and not to the former stockholders, did not render the action of the meeting void: such former holders having a bare legal title, not coupled with an interest.

The by-laws also required that, before a sale of stock, the holder should offer it in writing, through the treasurer of the corporation, to the then existing stockholders, who had the right of pre-emption of such stock at the selling price.

Held, that the corporation having permitted the transfers to be made, the inference therefrom is that the offer had been made and declined, or that the requirement had been waived.

If such offer was neither made and declined, nor waived, the requirement being solely for the benefit of those who were stockholders at the time, none other could raise the objection.

A stockholder of such corporation died, leaving his stock to his executors, who, together with testator, owned all the stock, and who, upon due notice to themselves of a meeting of stockholders for the purpose, transferred the stock to themselves in accordance with the terms of the testator's will, and subsequently, as holders of the stock, made a general assignment of the effects of the corporation for the benefit of creditors.

Held, that the transfer of stock assignment were legal. *American Nat. Bank* v. *Oriental Mills*, Supreme Court of Rhode Island, Dec. 1891.

16. RESIDENCE OF — WHERE HEAD OFFICE EXISTS—CANNOT CHANGE RESIDENCE—53 V. c. 60 (N. B.)

This was a motion for a non-suit on review from the City Court of Moncton. The action was brought by the plaintiffs, a corporation created for banking by the legislature of Nova Scotia, having their head office at Halifax, in that province, and a branch at the city of Moncton. The defendant did not reside in the city of Moncton, and the only question was whether the City Court had the jurisdiction which is given to it by 53 V., c. 60, s. 70 (N. B.), which enacts, "The jurisdiction of the Court in actions where the sum demanded exceeds the sum of twenty dollars shall be confined to causes in which the plaintiff or defendant, or one of the plaintiffs or defendants, resides in the city of Moncton." The motion was made on the ground that the plaintiffs had no residence in the city of Moncton, against which it was urged that the plaintiffs had a branch office and did business in Moncton, and therefore had a residence sufficient to satisfy the Act.

Held, that this was not sufficient. The law on this subject in Canada may be stated thus. The corporation, in law, may be said to be born in the province where by law it is created and organized, and to reside where, by or under authority of its charter, its principal office is. A corporation, therefore, created by and organized by the laws of Nova Scotia and having its principal office there, is, under our constitution and laws, a resident of that province, possessing all the rights and having all the powers its charter confers, but limited to the confines of the province. It cannot migrate or change its residence without the consent, express or implied, of the legislature of its province, but it may transact business wherever its charter allows unless prohibited by local laws; it must dwell in

the province of its creation and cannot migrate to any other sovereignty. It follows that the defendant's contention must be allowed and a non-suit entered, and the bank must pay the costs of review. *The Bank of Nova Scotia* v. *McKinnon*, Supreme Ct. New Brunswick, March 1892, (Can. L. T.)

COSTS — See also Ins. 5. 27 — Libel 1—Mun. Corp. 4—Taxation 2.

Trade Mark—Infringement—Innocent Purchaser.

Defendants bought from E., at a cost of 17s. 6d., a box of 500 cigarettes bearing a label which was a very close imitation of the registered trade mark used by the plaintiffs upon the boxes in which they sold the cigarettes made by them. The defendants bought the cigarettes under the belief that they were made by the plaintiffs. The plaintiffs served the defendants with a writ and notice of motion for an injunction to restrain them from infringing their trade mark or selling the cigarettes. The defendants at once returned to E. the greater part of the cigarettes, and, by their affidavit, submitted to abide by any order the Court should make, but contended that they ought not to be made to pay the costs.

Held, that there ought to be no order as to costs. Upmann v. Forester (52 Law J. Rep. Chanc. 946; Law Rep. 24 Ch. D. 231) discussed. *American Tobacco Co.* v. *Guest*, 61 L. J. Rep. Chanc. 242.

Council—See Mun. Corp. 12.

Councilor, Nomination—See Mun. Corp. 12.

Counter-claim — See Bills and Notes 12.

COUNTIES.

1. Mandamus—Res Judicata.

In *mandamus* proceedings by a railroad company against county officers to compel them to issue bonds in aid of the company, it appeared that the parties were the same parties to a prior injunction suit, wherein were litigated, or might have been litigated, all the questions which could arise in the *mandamus* proceedings, except a question as to the tender of the company's stock for such bonds.

Held, that all such questions, except the question of the tender of stock, were *res judicata*. *Chicago, K. & W. R. Co.* v. *Black*, 29 Pac. Rep. 96, Kan. Supreme Court.

2. Defective Bridge—Respondeat Superior.

A county is liable for the injuries sustained by a horse in falling through a bridge over which it was being driven, where such bridge had been left unguarded by a contractor who was repairing it, for the county. *Park* v. *Comm'rs of Adams County*, Ind. App. Ct., 30 N. E. Rep. 147.

Credit—See Sale of Goods 5.

Creditors of Corporation — See Corporations 5. 8. 13. 14.

CRIMINAL LAW AND PROCEDURE.

1. Former Acquittal.

An acquittal on a charge of illegally selling liquor subsequent to a certain date is not a bar to a prosecution for illegal sales prior to that date. N. Y. Ct. of Appeals, Feb. 1892. *People* v. *Sinell*, 12 N. Y. Supp. 40 affirmed.

2. Larceny.

On a prosecution for larceny, where the evidence shows that defendant struck the hand of a person who was showing him money, but does not show whether he got the money, or merely knocked it to the ground, where it was lost, it is error to refuse to charge that defendant cannot be convicted unless he got the money into his hands or actual possession, since that only would constitute larceny. *Thompson* v. *State*, Ala., 10 South. Rep. 520.

3. Embezzlement — What Constitutes—Larceny.

A clerk, who withdraws from the money-drawer of a cash-register money that he had deposited a moment before without registering the sale of the article for which it had been received, is guilty of embezzlement.

He was none the less guilty of embezzlement because the purchase was a feigned one, made by a detective, with money furnished by the master. *Commonwealth* v. *Ryan*, Massachusetts Supreme Judicial Court, Feb. 1892.

4. LARCENY—ATTEMPT TO STEAL—EMPTY POCKET.

If a person tries to pick a pocket, he is guilty of an attempt to steal, without proof that there was anything in the pocket. The Queen v. Collins (33 L. J. Rep. M. C. 37) over ruled. The Queen v. Brown (24 Q. B. D. 357) followed. *Reg.* v. *Henry King, Thomas Atkins & William Jackson*, 61 Law J. Rep. M. C. 116.

5. SELF-DEFENCE—PROVOCATION.

Deceased called defendant a "liar," whereupon defendant struck or slapped him, but with no intention of provoking a difficulty. Thereupon they both drew pistols and fired.

Held, that though deceased fired first, and defendant fired to save his own life, he was not entitled to the plea of self-defence; the difficulty having been provoked by him, though he may not have intended it. *Polk* v. *State*, Tex. 18 S.W. Rep. 467.

6. MURDER—EVIDENCE—JOINT DEFENDANTS.

Where, on an indictment containing a single count, charging two defendants with jointly committing murder, one of the defendants is tried alone, evidence showing him to have committed the murder alone is sufficient for a conviction. *People* v. *Cotto*, N.Y. Ct. of Appeals, Feb. 9, 1892.

7. PRINCIPAL AND ACCESSORY.

One indicted as principal merely can be convicted on evidence proving him guilty as principal in the second degree, if the facts be such as that the act by which the crime was perpetrated will, on established principles of law, be imputed to him as committed by himself through the agency of another. In such case, the distinction of degree is immaterial. *Collins* v. *State*, Ga., 14 S. E. Rep. 474.

8. CRUELTY TO ANIMALS — NONFEASANCE — NO EVIDENCE OF GUILTY KNOWLEDGE OF ANIMAL'S CONDITION —PREVENTION OF CRUELTY TO ANIMALS ACT, 1849 (12 & 13 V., c. 92), s. 2.

The appellant, a receiver of large consignments of cattle, which he was supposed to personally receive and attend to, had not removed the head ropes from the cattle (which arrived in port on Saturday) until the Monday following. The magistrates having convicted the defendant of cruelty for not removing the head ropes, the defendant appealed on the ground that there was no guilty knowledge on his part, and that there was no intentional cruelty on his part.

Held, that there being no evidence of a guilty knowledge on the appellant's part, or that the appellant wilfully abstained from the knowledge of the alleged cruelty, the conviction must be quashed. *Elliott* v. *Osborn*, Q. B. Div., April 1891, 17 Cox's Crim. Cas. 346.

9. EVIDENCE — DYING DECLARATIONS.

The fact that a dying declaration is untrue, in that it includes among the assailants one who could not have been present, does not affect its admissibility against the others, but only its credibility. *White* v. *State*, Tex., 18 S. W. Rep. 462.

10. EVIDENCE — COMMUNICATIONS WITH ATTORNEY.

Testimony of deceased's attorney that, several days before the killing, deceased asked his advice as to how he could kill defendant and avoid the legal consequences, not within the rule of privileged co. munications between attorney and client. *Everett* v. *State*, Tex., 18 S. W. Rep. 674.

11. PRACTICE—VENIRES.

Where jurors are summoned by a *de facto* officer, and attend, and are sworn and serve, the authority of the officer cannot be questioned by the prisoner. *State* v. *McGraw*, S. Car., 14 S. E. Rep. 630.

12. PRACTICE — FALSE PRETENCES.

An information for obtaining money under false pretences alleged that defendant falsely represented that he was collecting money for a woman whose son was killed in an accident, and that B, being deceived thereby, delivered to him $5 of the moneys of the Detroit Stove-Works:

Held, that the indictment was fatally defective in failing to allege that B had any connection with the stove-works, as agent or otherwise. *People* v. *Behee*, Mich., 51 N. W. Rep. 515.

13. APPEAL—OBJECTIONS WAIVED—JUDICIAL NOTICE.

(1) Where a juror was rejected in a criminal case because of an opinion as to the guilt or innocence of the prisoner, which he said would influence his conduct in the jury box, and it did not appear that defendant's right to cross-examine the juror was in any manner asserted or denied at the trial, it can not be claimed on appeal that no opportunity was given for such examination.

(2) A court will take judicial notice that a certain town is in a certain county. People v. Breese, 7 Cow. 429; Vanderwerker v. People, 5 Wend. 530; Chapman v. Wilber, 6 Hill. 475, N. Y. Ct. of Appeals, March 1, 1892. *People* v. *Wood*, (Alb. L. J.).

14. PERJURY—INDICTMENT — EVIDENCE IN SUPPORT OF AVERMENT AMBIGUOUS.

The averment in an indictment for perjury must be proved precisely.

In an indictment for perjury the averment stated that the prisoner swore he saw W. "about fifteen minutes after the hour of eleven o'clock in the forenoon" on a particular day, whereas it was proved that he had sworn that he saw W. about a quarter past eleven on the day in question, but had not sworn as to whether it was in the forenoon or in the afternoon:

Held, that the evidence being ambiguous, the averment in the indictment was not proved. *Reg.* v. *Bird*, 17 Cox. Crim. Cases 387.

15. PRACTICE—PLEA OF AUTREFOIS CONVICT — MANSLAUGHTER — SUMMARY CONVICTION FOR ASSAULT—42 AND 43 V. C. 49, S. 27, SUB-SECT. 3 (SUMMARY JURISDICTION ACT, 1879).

Where there has been a summary conviction under the Summary Jurisdiction Act, 1879, for assault, and the person assaulted subsequently dies of injuries caused by the acts constituting the assault, a plea of autrefois convict is not a good answer by the person so summarily convicted to an indictment for the manslaughter of the person assaulted. *Reg.* v. *Friel*, 17 Cox's Crim. Cases, 325.

16. PRACTICE—JURISDICTION OF THE VICE-CHANCELLOR'S COURT AT CAMBRIDGE — SPINNING-HOUSE — CHARGE OF "WALKING WITH A MEMBER OF THE UNIVERSITY"—WRONGFUL CONVICTION—OFFENCE NOT KNOWN TO THE LAW—CHARTER OF THE UNIVERSITY OF CAMBRIDGE, 26TH APRIL, 1561—13 ELIZ. C. 29, S. 2—HABEAS CORPUS—CERTIORARI.

A conviction is bad where the charge does not in terms shew a legal offence, although the meaning of the charge was understood by the party charged, and was in a form used time out of mind in the Court before which the party was so charged.

Rule *nisi* for a writ of *habeas corpus* and also for a writ of *certiorari* on behalf of one D. H., who had been arrested at Cambridge by the University constables, and charged before the Vice-Chancellor of the University with "walking with a member of the University." This charge was read over to her, and she pleaded "not guilty." Evidence was given as to her being seen walking with a member of the University, and also as to her being a woman of bad character. The Vice-Chancellor committed her for fourteen days to the Spinning-house, and the warrant of commitment stated that she had been charged with, and convicted of, "walking with a member of the University." It appeared that the above was a common form adopted in the Vice-Chancellor's Court when it was intended to charge a woman with walking with such a member "for immoral purposes," and that for a long time it had been taken to mean such a charge, and that it was intended in this

case so to charge and convict the said D H., and so to enter the conviction on the warrant of commitment.

Held, that the rule should be made absolute; that the proceedings in the Vice-Chancellor's Court were irregular; that the appellant had not been charged within the words of the charter as "suspected of evil"; that she had been charged with an offence not within the jurisdiction of the Vice-Chancellor; that she had not been charged with any other offence, nor had the charge been altered or amended, and that consequently the conviction was bad. *Ex parte Daisy Hopkins*, 61 L. J. Q. B. 240.

CRUELTY TO ANIMALS—See Crim. Law 8.

CUSTOM—See Neg. 26.

DAM—See Master and Servant 9—Injunct. 1.

DAMAGES.—SEE ALSO CARRIERS 1. 3. 4—CONTRACTOR—EVIDENCE 3—EXPRESS CO.—MARRIAGE—MUN. CORP. 2. 5—NEG. 11. 23. 33. 37—NUISANCE 1—OFFICERS—PRIN. AND AGENT 4—RAILROAD COMP. 2. 4. 6—TEL. COMP. 2—TRESPASS TO LAND—WATER COMP. 2.

. PROCEEDINGS TO OBTAIN PAYMENT OF DEBT—MALICE—WANT OF PROBABLE CAUSE.

Held, if there be neither malice nor want of probable cause, a creditor is not liable in damages by reason of proceedings taken by him in the exercise of his right, to enforce the payment of his debt, whether by execution, capias, or otherwise, although such proceedings have been set aside by the Court for informalities. *Scott* v. *McCaffrey*, 1 Q. R. (Q. B.) 123.

2. ARREST AS A DANGEROUS LUNATIC—PROBABLE CAUSE.

Held (1) That arrest and privation of liberty on the charge of being a dangerous lunatic, although such charge does not involve any moral turpitude, entitles the person so arrested to damages, if the proceedings be taken without reasonable or probable cause. (2) Where an information was laid by the defendant against a person as a dangerous lunatic, without the consent or knowledge of his friends and relatives, and it appeared that the person had always been perfectly harmless, and that defendant's apparent motive was to oust him from the house occupied by him, which belonged to the defendant, it was held that the proceedings were instituted without probable cause, and damages were awarded. *Généreux* v. *Murphy*, Superior Court, Montreal. In Review, Johnson C. J., Mathieu, Wurtele, J. J. (Mathieu J. dissenting) May 30, 1891. (L. N.)

DANGEROUS MACHINERY—See Master and Servant 1. 7. 8.

DANGEROUS PREMISES—See Neg. 7. 8. 9.

DEBENTURE HOLDERS' ACTION—See Companies 5.

DEBT OF ANOTHER—See Frauds, Statute of, 1. 2.

DEBTS, FIRM AND PRIVATE—See Partnership 7.

DEED.

CONSTRUCTION OF—TRUST—PAROL EVIDENCE OF—ENFORCEMENT—FINDINGS OF FACT—NON-INTERFERENCE WITH.

A suit was brought to enforce an alleged trust in a deed absolute on its face, or, in the alternative, to have the property reconveyed or sold upon the terms of the alleged agreement. The defendant claimed that he had given valuable consideration for the property, which had been accepted by the plaintiff in full satisfaction and payment. At the trial parol evidence was given to establish the alleged trust and a decree was made granting the alternative relief prayed for and directing the property to be sold and the proceeds applied as the plaintiff claimed had been agreed. The Court affirmed this decree.

Held, that the existence of the trust having been found as a fact by the Court of first instance and the finding having been affirmed by the full Court, it should not be disturbed; and the appeal was dismissed with costs.

Bowker v. *Laumeister*, Supreme Court of Canada, Nov. 1891.

DEFECTIVE BRIDGE—See Neg. 22.

DEFECTIVE SIDEWALK—See Neg. 20.

DEFENCE—See Contracts 3.

DELAY IN DELIVERY OF MESSAGE—See Tel. Comp.

DELAY IN DELIVERY—See Carriers 1.

DEPOSIT CERTIFICATE OF—See Banks 7.

DEPOSIT, IN NAME OF WIFE—See Banks 8.

DEPOSIT, CERTIFICATE OF — See Banks 7.

DEPOSIT, ELECTION—See Elections.

DEPOSITORS, RIGHTS OF—See Banks 4.

DESCRIPTION OF BUILDING — See Ins. 3.

DIRECTORS—See Companies 2. 3.—Corporations 12.—Evid. 1.

DISCHARGE—See Bills 1.

DISORDERLY HOUSE—See Corporation 9.

DISSOLUTION OF CORPORATION—See Corporation 4.

DISTRIBUTION OF ASSETS—See Insurance 27.

DOMINION ELECTIONS — See Elections.

DUE CARE—See Ins. 1.

DYING DECLARATIONS — See Crim. Law 9.

EJECTION OF PASSENGER—See Carriers 3.

ELECTIONS.

DOMINION CONTROVERTED ELECTIONS ACT — APPEAL — DEPOSIT — PROPER OFFICER—R. S. C. c. 9, s. 51—54 & 55 V., c. 20, s. 12.

By s. 51 of the Controverted Elections Act, R. S. C. c. 9, as amended by 54 & 55 V., c. 20, s. 12, a party desiring to appeal from the decision of a judge on a preliminary objection, or from the decision of the judges who have tried the petition, is to deposit the sum specified as security for costs "with the clerk of the court which gave such decision, or of which the judges who gave such decision are members, or with the proper officer for receiving moneys paid into such court." By s. 4 of R. S. C. c. 9, as amended, the distribution of cases for trial in Ontario between the Court of Appeal and the several Divisions of the High Court of Justice shall, if not prescribed by the law of the province, or practice of the court, be arranged by the judges.

In the North Perth election case the petition was filed in the Chancery Division and assigned for trial to two judges of the Queen's Bench Division. The deposit was made with the registrar of the Chancery Division. In the West Northumberland case the petition was filed in the Court of Appeal and tried before two judges of one of the Divisions of the High Court, the deposit being made with the registrar of the Court of Appeal. On motion to quash the appeal:

Held, that making the deposit with the registrar of the court in which the petition was filed was a sufficient compliance with the Act.

Held, further, that as in the North Perth case, the deposit was made with the officer who was the accountant of the Supreme Court of Judicature, and, therefore, the proper officer to receive moneys paid into any of the Divisions of the Court, the statute was on another ground sufficiently complied with.

The motions were dismissed with costs. *West Northumberland Dominion Election; North Perth Dom. Election.* Supreme Ct. of Canada, Feb. 1892.

ELECTORAL FRANCHISE ACT R. S. C. c. 5—See Mandamus.

ELECTRIC LIGHT WIRE — See Injunction 2.—Neg. 21.

ELECTRIC RAILROADS—See Neg. 18.

ELEVATED RAILROAD—See Railroad Comp. 4.

ELEVATOR—See Master and Servant 5—Neg. 13.

ELEVATOR CHARGES, POWER OF STATE TO FIX—See Constit. Law 1.

EMBEZZLEMENT—See Crim. Law 3.

EMINENT DOMAIN.

1. VALUE OF LAND TAKEN—EXPERT EVIDENCE.

Where farmers or others give their opinions, as experts, as to the market value of land with which they are acquainted, it is not improper, upon cross-examination, for the purpose of testing their knowledge and competency, to inquire of them concerning the sales of adjoining land. *Chicago, K. & N. Ry. Co.* v. *Stewart*, 28 Pac. Rep. 1017, Kansas Supreme Ct.

2. REMEDIES OF LAND-OWNERS — PROOF OF VALUE—RES JUDICATA.

In an action for damages to real property by the construction of a railroad, evidence of the rental value of the premises for an appropriate purpose is admissible, although the premises were not used for such purpose at the time in question, nor since.

A judgment in a former action against a railroad company for damages to real property from the construction of its railroad, sustained to the time of the commencement of such former action, is not a bar to an action for such damages accruing subsequently.

Proceedings to condemn land for railway purposes will not operate as a bar to an action for damages by a land owner until such proceedings have been completed and the damages assessed. *Rumsey* v. *New-York & N. E. R. Co.*, 17 N.Y. Supp. 672, N.Y. Supreme Ct.

3. TAKING FOR STREET — MEASURE OF DAMAGES—AWARD.

In taking land for a street opening, the measure of damage to a building thereon, a part of which is taken, is the difference between the value of the building before the taking and the value of the remaining portion after the street is opened, and in making awards for land the benefit should be assessed on the land benefited, and not considered with reference to the land taken. Property owners should not be allowed an award from the time of confirmation of the commissioners' report, but from the time of filing, where the delay has been occasioned by their conduct. *In re Lexington Ave.*, 17 N.Y. Supp., 872. N. Y. Supreme Ct.

EMPTY POCKET—See Crim. Law 41.

ERASING NAME—See Bond 2.

ESTOPPEL—See Corporations 1.

EVIDENCE—SEE ALSO BANKS 2—CRIM. LAW 6. 9. 10. 14—EXPRESS CO.—INS. 7. 8. 10—NEG. 1. 14. 16. 19. 24. 29—SALE OF GOODS 4—TEL. COMP. 3.

1. DECLARATIONS OF DIRECTORS.

The declarations or representations of individual directors or officers of a corporation, relating to its affairs, but not shown to have been made in the course of or connected with the performance of their authorized duties as agents, are not binding on the corporation. *Browning* v. *Hinkle*, Minn., 51 N. W. Rep. 605.

2. DECLARATIONS OF PRINCIPAL.

In an action to recover a team of horses owned by plaintiff, but purchased in good faith by defendant from one A., who had possession of the team, defendant alleged, that A was the agent of plaintiff to effect a sale, and offered in evidence a statement of plaintiff to a third person that "A wants to sell that team."

Held, that such statement, though unknown to defendant at the time of the sale, was admissible in evidence, as it was in effect an admission by the owner of the authority of A to sell the team. *McDonald* v. *Freed*, Wash., 28 Pac. Rep. 915.

3. DAMAGES—OPINIONS.

In an action for damages to lands from the overflow of a river it was error to admit the opinions of witnesses that the overflow was caused by a railroad embankment, when it appeared that they had little familiarity with the river, the rain-falls, and previous overflows, and that their knowledge of the embankment, as compared with the width, fall, and volume of water in the river, was meagre and indefinite. *Gulf C. & S. F. Ry. Co.* v. *Hefner*, Tex., 18 S. W. Rep. 441.

4. PHYSICIAN—INJURIES.

Where one who has sued for personal injuries by neglect employs a physician to make an examination for the purpose of giving testimony, the physician may not at the trial testify to exclamations of pain made by such person on such examination, after suit brought. *Jones* v. *President, etc., of the Village of Portland*, Supreme Ct. Mich. Dec. 1891.

Notes.

1. The court distinguished *Hyatt* v. *Adams*, 16 Mich. 180; *Johnson* v. *McKee*, 27 id. 471; *Elliott v. Van Buren*, 33 id. 49; *Mayo* v. *Wright*, 63 id. 32.

2. The general rule in regard to other classes of hearsay evidence and statements admitted upon the same principle is that they must have been made *ante litem motam*, which is interpreted to mean not merely before suit brought, but before the controversy exists upon the facts. *Stockton* v. *Williams*, Walk. Ch. 120; 1 Doug. (Mich.) 546, citing the *Berkeley Peerage Case*, 4 Camp. 401; *Richards* v. *Bassett*, 10 Barn. & C. 657; *Doe d. Tilman* v. *Tarver*, Ryan & M 141; *Monkton* v. *Attorney-General*, 2 Russ. & M. 160; *Whitelock* v. *Baker*, 13 Ves. 514.

5. FOREIGN COMMISSION—APPLICATION FOR—MATERIAL ON—GOOD FAITH—NECESSITY FOR EVIDENCE—EXPENSE—DELAY—ADMISSIONS.

In an action for libel published in the defendants' newspaper, the plaintiff applied for the issue of a commission to take his own evidence and that of other witnesses in England, where he and they lived.

The plaintiff's affidavit stated only that the witnesses were material and necessary for him on the trial of the action, and that he was advised and verily believed that he could not safely proceed to trial without their evidence.

Held, sufficient to entitle the plaintiff *prima facie* to a commission. Smith v. Greey, 10 P. R. 531, commented on.

Every application for a commission must be made in good faith, and the evidence sought to be obtained must be such as to warrant a reasonable belief that it may be material and necessary for the purposes of justice; but it is safer where any injustice to other parties, in the way of delay or expense or otherwise, can be provided against, to favour the granting rather than the refusing of the application. The main considerations are a full and fair trial and the saving of expense. Under the circumstances of this case the order for a commission to take the evidence of the plaintiff and his witnesses abroad was granted, upon the plaintiff securing the defendants for their costs of the execution of the commission and undertaking to speed the proceedings and not delay the trial. It was contended by the defendants that the evidence expected from the witnesses was unnecessary by reason of implied admissions in the statement of defence.

Held, that it was for the defendants to make the evidence unquestionably unnecessary, either by amending their pleadings so as to expressly make the admissions or by undertaking to do so at the trial. *Robins* v. *The Empire Printing and Publishing Co.*, Ontario High Ct. of Justice in Chambers, April 1892 (Can. L. T.)

EXCAVATION IN STREET—See Neg. 3.

EXCHANGE OF NOTES—See Bills and Notes 12.

EXCHANGE FOR PAID-UP POLICY—See Ins. 22.

EXECUTION AGAINST INDIVIDUAL PARTNER—See Partnership 5.

EXPERT TESTIMONY — SEE ALSO EMINENT DOMAIN 1.

HANDWRITING—COMPARISON.

An administrator, who states that he found among the papers of the intestate, after his death, a large number of checks purporting to be those of the intestate, and that he examined them, and from the information thus obtained could say that he was acquainted with the signature, is competent to give an opinion as to whether a certain signature is that of the intestate, although he had never seen him write. *Tucker* v. *Kellogg*, Utah, 28 Pac. Rep. 870.

EXPRESS COMPANY.

LIABILITY FOR INJURY TO DOG—DAMAGES—AGENCY—EVIDENCE.

In an action against an express company for damages to a dog while in transit, evidence of the breeding and characteristics of her dam, of the elements constituting her value, and

of the value of her sire and dam, was admissible.

Where the dog was injured while being taken from plaintiff's residence to defendant's office in a wagon, on the side of which appeared defendant's name, and plaintiff sought to show that defendant, by the use of the wagon in collecting and delivering packages, and by the use of call cards, had clothed the driver with apparent authority to receive packages, questions to such driver, calling for a statement inconsistent with defendant's entire control of the wagon, unaccompanied by an offer to show a knowledge by plaintiff of such use, were properly excluded.

But testimony by such driver that he had used the wagon in plaintiff's own service for other purposes than the express business was admissible to rebut the evidence of his apparent authority.

Instructions.

Where the evidence as to whether defendant's agent had given plaintiff notice that dogs must be sent at the owner's risk, as required by defendant's instructions, was conflicting, an inquiry as to whether such instructions were at defendant's local office, when not limited to the time at which it was claimed the notice was given, was properly excluded as too general. *Winchell* v. *National Express Co.*, 23 Atl. Rep. 728, Vermont Supreme Court.

FACTS, FINDINGS OF—See Deed.

FACTS GROSSLY MISTATED — See Libel 1.

FALSE PRETENCES — See Crim. Law 12.

"FALSO DEMONSTRATIO NON NOCET"—See Ins. 3.

FEES.

NEW TARIF — QUEBEC — PENDING CASES.

Held: The new tariff of fees is applicable to proceedings subsequent to the 1st Sept., 1891, the date of its enforcement, even in regard to cases commenced anterior to that date and then pending. *Quebec Bank* v. *Bryant*, 1 Q.R. (S. & C. C.), 100.

FINAL ORDER—See Companies 1.

FIRE INSURANCE — See Insurance, Fire.

FOREIGN COMMISSION—See Evidence 5.

FOREIGN CORPORATION—See Constit. Law 2 — Inhabitant.

FORFEITURE—See Ins. S. 25.

FORGERY—See Bills and Notes 11.

FORMER ACQUITTAL — See Crim. Law 1.

FRANCHISE TAX—See Constit. Law 2.

FRATERNAL SOCIETIES—See Ins. 2.

FRAUD — SEE ALSO ASSIGNMENT FOR CREDITORS — CORPORATIONS S — PARTNERSHIP S.

1. FRAUDULENT CONVEYANCES—INTENT.

Where, in an action to set aside a conveyance as fraudulent, there is a special finding of fact, the fraudulent intent must be found, or the conveyance will not be set aside. *Sickman* v. *Wilhelm*, Ind., 29 N. E. Rep. 908.

2. FRAUD AND MISREPRESENTATION —DECEIT—DAMAGE.

In order that a representation may be actionable, it must be fraudulently made. Where therefore, in an action to recover damages for falsely representing that a forged cheque was genuine, the jury answered in the negative the question, "Did the defendant falsely, fraudulently, and deceitfully represent the signature to the cheque to be genuine, when in truth and in fact it was a forgery?" the action was held not maintainable, though in answer to other questions the jury found that the defendant made the representation without knowing whether it was true or false, without a reasonable belief in its truth, and without making proper inquiries. *White* v. *Sage*, Ontario Ct. of Appeal, March 1892 (Canada L. T.)

FRAUDS, STATUTE OF

1. DEBT OF ANOTHER.

A physician, having rendered professional services to defendant's father, was told by defendant to charge the

bill to him, and also future services. The charge had been made in the physician's account-book to the father, by his surname, but, after the promise, defendant's first initial was prefixed.

Held, that defendant was liable for the services rendered after his promise, but not for those rendered prior thereto. *Chappel* v. *Barkley*, Mich., 51 N. W. Rep. 351.

2. DEBT OF ANOTHER.

Where plaintiff refuses to furnish any further supplies to a certain person, unless the defendants will become responsible, the parol promise of the defendants to pay for all supplies thereafter delivered is an original undertaking, and not, therefore, within the statute of frauds; and the fact that the supplies were charged on the books to the person to whom they were delivered is not conclusive that the sale was made upon his credit, but may be explained by showing upon whose credit the sale was in fact made. *Mackey* v. *Smith*, Oreg., 28 Pac. Rep. 974.

FUMES OF CHEMICALS—See Master and Servt. 6.

GARNISHMENT—See Bills and Notes 10.

GOOD-WILL.

"CARRYING ON SAME BUSINESS."—

An agreement by defendant, on sale of the stock and good will of a plant for making zinc etchings, that he will not enter into the same line of business in any way or manner whatever, is not violated by engaging in the electrotyping and stereotyping business, and supplying occasional demands for zinc etchings from customers by procuring them from makers not connected with defendant. *Breck* v. *Ringler*, N. Y., 29 N. E. Rep. 833.

GOODS REFUSED BY CONSIGNEE—See Carriers 5.

GOVERNMENT EMPLOYEE.

OFFICIAL REPORT — PRIVILEGED COMMUNICATION—MALICE.

Held, a report made by a government employee, to the Department of Public Works, condemning the use of certain cement, is an insufficient basis for an action of damages by the owner of such cement, in the absence of proof of malice; and malice cannot be presumed from the fact that defendant's views on the subject might be erroneous—such report being a privileged communication. *Gauvreau et al* v. *Marquet*, 17 Q. L. R. 245.

GRADE, CHANGE OF IN STREET—See Mun. Corp. 5.

GUARANTY FUND, POWER TO CREATE—See Ins. 13.

HABEAS CORPUS—See Crim. Law 16.

HANDWRITING, PROOF OF — See Banks 6—Expert Testimony.

HAND-CAR—See Neg. 27. 30.

HIGHWAYS—SEE ALSO NEG. 23. 24. 25.

1. DEDICATION.

Where the original owner of land assisted in laying out through it a road, which was "worked" and used as a highway for over ten years, with the knowledge and consent of the subsequent owners of the land, it constituted such road a legal highway. *Witter* v. *Damitz*, Wis., 51 N. W. Rep. 575.

2. RAILROAD CROSSING.

Where the legislature authorizes and requires a railway company, by its charter, in constructing its railways across streets and highways, to put the same in proper condition and repair, so as not to interfere with public travel, it is not a trespasser in entering thereon for the purpose of restoring and improving the same, as commanded by its charter, and, if the work is done with reasonable prudence and skill, it is not liable for consequential damages to owners of abutting land. *Robinson* v. *Great Northern Ry. Co.*, Minn., 51 N. W. Rep. 38.

HOTEL KEEPER AND GUEST—See Neg. 10.

HUSBAND AND WIFE—See Libel—Neg. 33.

ICY SIDEWALKS—See Neg. 20.

ICY STREETS—See Neg. 19.

ILLEGAL TRANSACTION — See Companies 2.

INDICTMENT—See Corporation 9.

INDUSTRIAL SOCIETY.

APPLICATION OF PROFITS— "LAWFUL PURPOSE" — SUBSCRIPTION TO STRIKE FUND—INDUSTRIAL AND PROVIDENT SOCIETIES ACT, 1876.

The application to "any lawful purpose" of the profits of an industrial society authorized by section 12, subsection 7, of the Industrial and Provident Societies Act, 1876, and by the rules of the society, must be taken to mean an application to any lawful purpose *ejusdem generis* with the general purposes and objects of the society as contained in its rules. Where therefore an industrial society established to carry on the trades of general dealers, manufacturers and farmers, passed a resolution at a properly constituted meeting to devote a portion of the profits to a subscription to a strike fund for the support of workmen on strike in the neighborhood,

Held, that the purpose was not "a lawful purpose" within the meaning of the rules of the society, and that the society must be restrained from such an application of its profits. *Warburton* v. *Huddersfield Industrial Society*, 1 Q. B. 1892, p. 213.

INHABITANT.

FOREIGN CORPORATION.

(1) The term "inhabitant," as used in the first section of the judiciary act, includes a foreign corporation engaged in business in the district in which it is such, according to the laws thereof.

(2) A foreign corporation engaged in business in any State in this Union, who, in pursuance of the laws thereof, appoints an attorney with power to receive service of process in any suit against it, thereby consents in advance to be sued therein. *Gilbert et al.* v. *New England Insurance Company*, U. S. C. C. Dist. of Oregon, March 1892.

INJUNCTION—SEE ALSO LIBEL 2.

1. MAINTAINING DAM.

The rule that a past or completed act is not ground for a preventive or mandatory injunction does not apply where it is sought to enjoin the maintenance of a dam, which has already been fully constructed, and which causes an overflow on plaintiff's land, since not only the building of the dam, but its continuance, is the act complained of. *Groe* v. *Larson*, Iowa, 51 N.W. Rep. 179.

2. INTERFERENCE WITH ELECTRIC LIGHT WIRES.

This was an injunction suit by one electric light company against another. The bill alleged that defendant was about to erect its wires along the streets and alleys on which complainant's wires were located, and to place them in such close proximity to complainant's wires as to do irreparable injury to complainant, and greatly endanger the lives of its servants. It was held that the answer, which merely denied that danger would ensue "with a reasonably prudent management of complainant's system of wires" was insufficient to authorize a dissolution of the temporary injunction. *Consolidated Electric Light Co.* v. *People's Electric Light & Gas Co.*, Sup. Ct. Alabama, 34 Cent. L. J., 316.

Notes.

We think applied electricity has been long enough employed, and its uses and dangers sufficiently ascertained, to authorize the statement of certain propositions as falling within the purview of common knowledge. Among them, may we not state the following:

1. Contact with electrical conductors, sufficiently charged to subserve the purposes of city illumination, destroys animal life.

2. To properly regulate the apparatus for distributing electric light requires that the employees or servants shall ascend the poles and go among the wires.

3. Two sets of wires, occupying the same space, and charged from different dynamos, located apart, and controlled by separate and independent engineers, could not fail to be dangerous in many ways. We cite the following authorities, which shed light on the questions we have been discussing: Thomp. Electr. §§ 43, 92, 93; Teachout v. Railroad Co. (Iowa), 38 N. W. Rep. 145; Gas-Light Co. v. Hart (La.), 4 South Rep. 215; Nebraska Tel. Co. v. York Gas & Elect. Light Co. (Neb.), 43 N.W. Rep. 126.

INNOCENT PURCHASER — See Bills and Notes 11— Costs.

INSOLVENCY— See Banks 3. 4 — Corporations 13. 14 — Ins. 27 — Sale of Goods 5 — Surety.

INSTRUCTION — See Railroad Companies 2.

INSURANCE.

ACCIDENT.

1. ACTION ON POLICY—PLEADING—DUE CARE—INTOXICATION.

Where, in a suit on an accident policy providing that the assured, a railroad switchman, should at all times use due care for his personal safety, the insurer pleads that the assured failed to use due care, but contributed directly to his injury by getting off a moving engine with his back towards the direction in which it was going, a replication which does not deny that the assured failed to use due care, but only alleges that he was insured as a switchman, and that the injury occurred while in the discharge of his customary duties, is insufficient in assuming that the policy would cover all such injuries, whether the assured was in the exercise of due care or not. *Standard Life & Acc. Ins. Co.* v. *Jones*, Ala. Supreme Court, 10 So. Rep. 530.

2. FRATERNAL SOCIETIES — INSURANCE ACT, R. S. C. c. 124, ss. 43, 49— SUMMARY CONVICTION.

The defendant, with the alleged object of establishing in the province of Ontario a branch of a society called the International Fraternal Alliance, having its head office in the United States, induced a number of persons to make application for membership therein and to pay a joining fee of $5, which, in addition to certain alleged social benefits, entitled a member, on application therefor and on payment of certain fees, to pecuniary benefits, namely, to a weekly payment in case of illness or accident and to certain sums in case of death or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the $5 for, as stated, the purposes mentioned in an agreement written thereunder, namely, to forward to the head office the application on signature thereof and, if declined, to return the amount paid; but, if accepted, the payer was constituted a member, entitled to the full benefits of all social advantages, and therefore might secure all the pecuniary benefits on application therefor.

Held, that the defendant was carrying on the business of accident insurance without having obtained the necessary license therefor, contrary to s. 49 of the Insurance Act, R. S. C. c. 124; and that no protection was afforded by s. 43, relating to fraternal and other societies, the scheme not being an insurance of the lives of the members exclusively; and the Court, therefore, refused a rule *nisi* to quash a summary conviction of the defendant for carrying on such business. *Regina* v. *Stapleton*, Ontario Com. Pleas. Div., Feb. 1892, (Can. L. T.)

FIRE.

3. FIRE INSURANCE — APPLICATION —DESCRIPTION OF BUILDING — VARIANCE — FALSA DEMONSTRATIO NON NOCET.

An insurance policy insured goods in a one-and-a-half story building with shingled roof, occupied as a storehouse for storing feed and provisions, said building shown on plan on back of application for insurance as "feed house," situate attached to wood-shed of assured's dwelling house. The building marked feed house on the said plan was not a one-and-a-half story building with shingled roof, was not attached to the wood-shed, and was not used as a store house; but another building on the plan answered the description in the policy, and the goods insured were in said last mentioned building when they were destroyed by fire. The plan had been drawn by a canvasser who had obtained the application. He was not a salaried officer of the insurance company, but received a commission on each policy obtained through his efforts.

The insurance company refused to pay the loss, claiming that the policy was made void by the alleged mis-

representation as to the building. On the trial of an action on the policy the jury found for the plaintiff, leave being reserved to move for nonsuit on the ground of misrepresentation. The full court refused to nonsuit.

Held, affirming the judgment of the court below, there was no misrepresentation; that the company was in no way damnified by the misdescription in the plan, and the maxim *falsa demonstratio non nocet* applied; that if that maxim did not apply the matter was one for the jury, who had pronounced on it in favour of the assured; and that it was evident that the intention was to insure goods in the building which really contained them.

Held, also, that the canvasser could not be regarded as the agent of the assured, but was the agent of the company, which was bound by his acts and could not take advantage of his mistake. Appeal dismissed with costs. *Guardian Assur. Co.* v. *Connelly*, Sup. Ct. of Canada, Feb. 1892.

4. Waiver of Proof of Loss.

Waiver of proofs of loss made by an agent of an insurance company without notice to the insured of want of authority on his part to make the waiver, is binding upon the company.

A clause of an insurance policy requiring submission to appraisers of the question of the amount of loss is waived by failure of the company to require the arbitration and take the steps pointed out in the policy to secure it.

Failure of an insured to comply with a clause of the policy of insurance requiring submission of the amount of the loss to appraisers does not release the company from liability, where it has continuously denied it was liable upon the policy.

Waiver is a question for the jury where the evidence is conflicting. *Ins. Co. of North America* v. *Forwood*, Ky. Superior Ct., 13 Ky. L. Rep. 261.

5. Conditions of Policy — Proof of Loss—Property Covered—Costs on Appeal.

In an action on an insurance policy, which contained a provision that it should be void if other insurance on the property should be effected without notice to the company, it appeared that plaintiff's partner, who had an undivided interest in the property, placed insurance thereon without the knowledge of plaintiff or notice to the company.

Held, that the provisions of plaintiff's policy were not thereby violated.

The policy specified that proof of loss should be made within thirty days; that the "claim shall not be due until sixty days after the completion of all the requirements herein contained;" and that action thereon should be barred unless brought within six months after loss.

Held, failure to make proof of loss within thirty days did not forfeit the policy, but only postponed the right of action till furnished.

The insurance was written on a stock of eggs "in pickle," and the agent who wrote the policy testified that he understood the insurance was to cover the stock "while being pickled and disposed of."

Held, that the entire stock was insured, though only a part of the eggs were in the pickling vats when the loss occurred.

The judgment appealed from was excessive by an erroneous computation. In the Supreme Court the excess was remitted with appellant's consent, after which the case was brought to a hearing, and the judgment affirmed.

Held, that appellee was entitled to full costs of the appeal. *Hall* v. *Concordia Fire Ins. Co.*, Mich. Supreme Ct., 51 N.W. Rep. 524.

6. Conditions of Policy—Actions on Policies — Interrogatories to Juries.

A policy insured plaintiff to a specified amount, certain portions thereof on different parts of his stock, on his safe, and on his store fixtures. A complaint thereon alleged a total loss of fixtures.

Held, that the safe was included under the term "fixtures."

A policy provided that no suit should be brought thereon until after arbitra-

tion to determine the amount of loss, if the parties could not agree. A few hours after the loss the insurer charged the insured with causing the fire, and refused to pay the loss for that reason.

Held, that the insured might sue without demanding an arbitration.

In an action on a policy of fire insurance permitting additional insurance to a specified amount, with a condition that the insured should not recover any greater proportion of the loss than the amount of the policy should bear to the whole sum insured, it is not error to refuse to charge the jury that a verdict for plaintiff should in no event be for an amount in excess of that proportion. There can be no apportionment, in such a case, unless the loss is less than the total insurance on the property destroyed. Insurance Co. v. Starr (Tex. Sup.) 13 S. W. Rep. 1017, distinguished.

An agreement for a partnership, never in fact entered upon, although in view of it acts were done consistent with the existence of the partnership, will not affect the ownership of insured property, the subject of such agreement, so as to render void a policy of insurance containing a condition that the insured is the sole owner.

A policy of insurance against fire provided that "any fraud, or attempt at fraud, or any false swearing, on the part of the assured shall cause a forfeiture of all claim under the policy."

Held, that an attempt by the assured, after a loss by fire, to suppress testimony or information tending to show that he set the fire, would not render the policy void unless such testimony or information was true.

Testimony of a physician is admissible as to the physical and mental condition of plaintiff, in an action on an insurance policy, at the time of an alleged attempt by him to suppress testimony, claimed by him to have been intended to prevent unjust suspicion that might make it difficult for him to collect his insurance. *Pencil* v. *Home Ins. Co.*, 28 Pac. Rep. 1031, Wash. Supreme Court.

7. WAIVER OF PROOF OF LOSS—EVIDENCE.

The insurer may either expressly or by implication waive the preliminary proof and the certificate of loss.

The contract of insurance is one of indemnity. The insurer obligates himself to make good such loss or damage as may be sustained, not exceeding the amount of the policy.

The evidence of the value of another plant than that destroyed by fire, and for which indemnity under a policy is claimed, tends to establish the value of the destroyed plant. It is not conclusive, and will not be maintained, when a number of witnesses testified as to the capacity and value of the destroyed plant. *Purves* v. *Germania Ins. Co.*, La. Supreme Ct. 10 So. Rep. 495.

8. FORFEITURE — WAIVER — EVIDENCE—MORTGAGEE.

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. 9 N. Y. Supp. 873, reversed. *Armstrong* v. *Agricultural Ins. Co.*, 29 N. E. Rep. 991. N. Y. Ct. of App.

9. CONDITION OF POLICY — ADDITIONAL INSURANCE.

The condition on a fire policy that additional insurance shall not be obtained without the consent of the company indorsed on the policy is neither complied with nor waived by the assured telling the company's agent that he intends to take out an additional insurance when able, and the agent expressing a desire to write the policy; and the subsequent procurement of additional insurance, without

the agent's knowledge, invalidates the first policy. *New Orleans Ins. Ass'n.* v. *Griffin*, 18 S. W. Rep. 505. Tex. Supreme Court.

10. Proof of Loss — Waiver — Evidence.

In an action upon a policy of insurance, wherein it is provided that in case of loss the insured shall within sixty days render to the company an account of the loss, signed and sworn to, the insured cannot recover without showing either a waiver thereof or that proof of loss in substantial compliance with the terms of the policy had been rendered before the commencement of the suit.

In such a case it is error for the Court, in the absence of any proof of waiver, to refuse to instruct the jury "that, unless the plaintiff made proof of loss, in substantial compliance with the terms of the policy, before the commencement of this suit, she cannot recover."

The evidence in a cause must be confined to the issues as formed by the pleadings. A waiver cannot be proved unless it is within the issues made by the pleadings. Johnson, J., dissenting. *Western Home Ins. Co.* v. *Thorp*, 28 Pac. Rep. 991. Kan. Supreme Ct.

11. Actions on Policies — Pleading.

By a policy of fire insurance, the insurance company was not liable in case of fire from certain specified causes. In an action thereon the petition alleged that the fire was not occasioned by any of such excepted causes, and the policy was made an exhibit to the petition.

Held, that the introduction of the policy in evidence was not objectionable, either on the ground of variance or of surprise. *Phœnix Ins. Co.* v. *Boren*, 18 S. W. Rep. 484. Tex. Sup. Ct.

12. Additional Insurance — Consent of Insurer — Protection of Property.

In an action on an insurance policy which provided that other insurance should not be taken out on the property without the consent of the company indorsed on the policy, it appeared that such consent was indorsed on the policy by the attachment of the printed form used for that purpose, and signed by the agent who procured the insurance.

Held, that the jury was justified in finding that defendant consented to the additional insurance, as the policy was silent as to where or by whom the consent should have been indorsed.

In such case it was no defence that the clerk, who slept in the store when the insurance was placed, did not sleep there when the loss occurred, as the application provided for no such precaution, and there was no evidence that the clerk's sleeping in the store affected the rate of premium paid, or that defendant was prejudiced by the clerk's failure to sleep there. *Grubbs* v. *Virginia Fire & Marine Ins. Co.*, 14 S. E. Rep. 516, N. C. Supreme Ct.

13. Action on Policy—Authority of Agent.

Where in an action on an insurance policy, defendant denies that any property was destroyed on the premises insured, and plaintiff alleges no other facts, bearing on the issue, evidence is inadmissible on behalf of plaintiff to show that the policy was intended to cover the property destroyed, and through mistake, described other premises.

An agreement between an insurance company and an agent recited that the latter agreed to devote his whole time to the service of the company, under instructions to be issued from time to time, indicated the territory in which he was to work, and specified the amount of compensation. A document of later date gave him authority to receive applications for insurance under instructions from the company.

Held, that he was not a general agent, and had no authority to waive a condition against incumbering property insured. *Martin* v. *Farmers' Ins. Co. of Cedar Rapids*, 51 N. W. Rep. 29, Iowa Supreme Court.

14. Loss Payable to Mortgagee—Conditions of Policy — Proofs of Loss—Actions on Policy.

A policy insuring the owner of property against fire contained a clause,

"loss, if any, payable to C., mortgagee, as his mortgage interest may appear." In a subsequent agreement, extending the time of payment of the mortgage, the owner agreed to keep the mortgagee's interest insured so long as the mortgage remained unpaid, etc.

Held, that, as the policy did not run to the mortgagee, nor insure his interest only, the owner, having procured the insurance and paid the premium, was entitled to recover thereon. Richelieu & O. Nav. Co. v. Thames & M. Ins. Co., 24 N. W. Rep. 547, 58 Mich. 132, distinguished.

In an action upon a policy of fire insurance, defendant pleaded the general issue, and gave notice of special matter.

Held, that testimony tending to show that the application for the insurance contained a misrepresentation was properly excluded; no such misrepresentation being set up in the notice. Insurance v. Curtis, 32 Mich. 402 followed.

The discretion of a trial court in denying a motion to amend such notice will not be reviewed on appeal unless the discretion has been abused.

A policy of insurance contained a condition, printed in small type, that the procurement of other insurance, without the companies' consent indorsed on the policy, would avoid it, and a written clause that no other insurance should be allowed without consent. It also contained a printed clause that the companies' agent had no authority to waive or modify any of the printed conditions unless his assent was indorsed on the policy. The insured applied to the agent for leave to procure additional insurance, and was informed by the latter that the companies assented but there was no indorsement to that effect. Such additional insurance was procured.

Held, that the written provision controlled, and that the insured was warranted in relying upon the agent's representations as to the companies' assent.

A policy issued by "The Cincinnati Underwriters," for two fire insurance companies doing business under that name, provided that proof of loss should be given to the companies.

Held, that proof given to the secretary of the underwriters, who also acted in that capacity in both companies, and by him given to one who acted as president of both companies and had charge of their loss departments, was sufficient.

A policy of insurance provided that it should be void in case of false representation as to, or concealment of, facts material to, or which might increase, the risk, and likewise upon the passing or entry of a decree of foreclosure.

Held, that the representations and concealment meant were those attending the inception of the policy, and the increased risks contemplated were those arising from changed physical conditions, and did not include a mortgage of which the company had knowledge; and that the commencement of proceedings to foreclose the same did not avoid the policy, there having been no decree passed or entered. *Minnock* v. *Eureka Fire & M. Ins. Co.*, 51 N. W. Rep. 367, Mich. Supreme Ct.

15. FIRE MUTUAL INSURANCE COMPANIES — POWER TO CREATE GUARANTY FUND.

A contract between a mutual fire insurance company and its policyholders, whereby the latter establish a fund for the purpose of guaranteeing the existing and future indebtedness of the company, is *ultra vires* and void, where the power to make such a contract is not expressly conferred upon the company by its charter, and is not within its general powers for raising a fund to meet its losses and expenses. *Kennan* v. *Rundle*, Sup. Ct. Wisconsin, Feb. 1892, (Alb. L. J.)

Notes.

1. The case of Insurance Co. v. McKelway, 12 N. J. Eq. 133, is clearly in point. The company had similar powers. If losses occurred exceeding their means to pay, the company was to make assessments ratably on the members, according to the amount of each member's insurance. Instead of doing this they took guaranty money bonds, secured by mortgage, to the amount of $150,000, and an assessment was to be made thereon as provided in this obligation. In a suit on one of the mortgages it was held "that the corporation had no power to enter into the

contract with the contributors to the guaranty fund, and that each contract was illegal and void, and could not be enforced in a court of law or equity." *Held* also, that the charter of the insurance company "makes its members mutual insurers, and constitutes a fund to meet losses, made upon premiums to be contributed by the members.., and no other fund can be created for that purpose." This case is cited approvingly in Morris & E. R. Co. v. Sussex R. Co., 20 N. J. Eq. 564, and Trust Co. v. Miller, 33 id. 160.

2. In Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 630, it is held that a lease by one company to the other, not authorized by the charter, was void as to both lessor and lessee. In this case Madison, W. & M. Plankroad Co. v. Watertown & P. Plankroad Co., 7 Wis. 59, above cited, is cited approvingly.

3. In Central Transp. Co. v. Pullman Car Co., 139 U. S. 24, the first-named company leased its business and property to the last-named company, of another State. It was held that the contract was unlawful and void, because beyond the corporate powers of the lessor, and that no action could be maintained by the lessor on the contract to recover the sums thereby payable, even while the lessee had enjoyed the benefits of the contract.

4. In Mill-dam Corp. v. Ropes, 6 Pick, 23, it is held that "if a corporation is created with a specific fund limited by the act, it cannot enlarge or diminish that fund but by license from the Legislature."

5. An insurance company had no right to receive accessions to its funds from sources not authorized by its charter. Dietrich v. Association, 45 Wis. 79; Jemison v. Bank, 12 N. Y. 135; Bank v. Earle, 13 Pet. 588; Trust Co. v. Miller, supra; Insurance Co. v. Martin, 13 Minn. 59 (Gil. 54).

6. When the Legislature had authorized the city of Milwaukee to raise and expend $100,000 on the harbor at that place, the city could not bind itself exceeding that limit, and the contract for such purpose is void for want of power. Hasbrouck v. City of Milwaukee, 13 Wis. 37.

7. Where an insurance company is authorized to take the notes of its members for insurance, it cannot take the note of a third person for such purpose. Insurance Co. v. Davis, 12 N. Y. 569.

8. Where a corporation had no power to loan money, a note taken for a loan is void. Beach v. Bank, 3 Wend. 573.

9. Corporations can do business in no other way than prescribed by their charters. Loan Co. v. Helmer, 12 Hun, 35; City of Montgomery v. Plankroad Co., 31 Ala. 76; Bank v. Baldwin, 23 Minn. 198; Bank v. Harrison, 57 Mo. 503.

10. Where the statute provides for the payment of losses and expenses by making assessments on the members, the company cannot adopt any other plan or means of doing so. This power being expressly given, and to be carried out in a particular way, excludes all other measures and resources. Matthews v. Skinker, 62 Mo. 329; Thomas v. Railway Co., 101 U. S. 71; Crocker v. Whitney, 71 N. Y. 161.

GENERAL.

16. ACTION ON POLICY — JURISDICTION—PROOF OF DEATH.

A Boston insurance company, doing business in the State of New York by permission of the State, on condition that it shall subject itself to the laws of the State, and that process served upon it in the State shall be binding upon it, cannot, in an action on its policy issued in New York, brought in New York by a resident of New Jersey, set up the defence that the contract was executed and delivered at the home office in Boston, and that, therefore, the New York Courts were without jurisdiction of the case.

The obstinate and unjust refusal of a physician to furnish a certificate of the cause of the death of the insured, so that those interested are thereby prevented from complying with a condition of the policy requiring all claims against the company to be asserted within one year after the death of the assured, cannot deprive them of the right to enforce the policy. *O'Neil* v. *Massachusetts Ben. Ass'n*, 18 N.Y. Supp. 22.

17. INSURANCE PREMIUM—PAYMENT TO AGENT.

It is a familiar rule that where an insurance company has delivered its policy, the delivery is *prima facie* evidence that the conditions in the policy providing that the insurance shall not take effect until the premium is paid, are waived, and an intention to give a short credit for the premium will be presumed.

In the payment of insurance premiums, the important thing is the payment of the money, and if it be paid to and accepted by one who is apparently authorized by the company to receive it, is sufficient whether it be in conformity with the terms of the policy or not. The delivery of a policy of this kind to a person apparently clothes him with the authority to receive the premium. *Gosch* v. *State Mutual Fire Ins. Co.*, Appellate Ct. of Illinois, March 1892, 24 Chic. Leg. News 276.

LIFE.

18. PAYMENT OF PREMIUMS WITH STOLEN MONEY—RIGHT TO PROCEEDS.

Life insurance for the benefit of the wife of the insured was procured, and all the premiums paid with money stolen by the insured from a firm of which he was a member. The amount stolen exceeded the amount of the policies.

Held, that the entire proceeds of such policies belonged to the firm as against the wife.

Where life insurance for the benefit of the wife of the insured is procured with his money, but the subsequent premiums are paid with money stolen by him from a firm of which he was a member, the wife is entitled to the amount of such insurance, charged with a lien for the amount of the premiums paid with stolen money.

In an action by partners to recover the proceeds of life insurance policies procured with money stolen by the insured from a firm of which he was a member, it appeared that for several years the insured had been taking the money of the firm, and deceiving his partners by periodic false statements. Some of the premiums were paid by checks drawn by the insured in the firm name on the firm's deposits, and charged to himself in his account in the firm's books.

Held, that such evidence did not show a consent by the co-partners to such use by the insured of the funds of the firm. *Holmes* v. *Davenport*, 18 N. Y. Supp. 56, N. Y. Supreme Ct.

19. CONSTRUCTION OF POLICY — JUDGMENT.

A life insurance policy, after providing for the payment, on the assured's death, of a fixed sum to his children, in consideration of annual premiums, declared that, after full payment of two or more premiums, "this policy becomes a paid-up non-forfeiture for an amount equal to a sum of one-tenth of that hereby insured for each and every premium which shall have been so paid, requiring no further payment of premiums, subject to no assessments, but entitled to its apportionment of the surplus accumulation in the ratio of its contribution thereto."

Held, that there was no agreement to issue a paid-up policy at any time, and there was no right of action, before the assured's death, to determine the rights of his children in the policy.

Nor did the non-payment of premiums entitle the company to ask for the surrender and cancellation of the policy by way of affirmative relief. There was no right of action by either party until the death of the assured. *Lyon* v. *Union Mut. Life Ins. Co.*, 17 N. Y. Supp. 756, N. Y. Supreme Ct.

20. PAYMENT OF PREMIUMS BY BENEFICIARY — DESIGNATION OF BENEFICIARY.

After a default in payment of premiums on a policy of life insurance, the insurance company received the arrears from a person whom the insured had designated as beneficiary. *Held*, that there was no lapse.

A written designation of a person to whom the amount of a policy is to be paid, and request for such payment, addressed to the insurance company made by the insured upon a paper furnished by the company, and in the form and manner thereby provided, is sufficient evidence of the right of such person to recover on the policy. *Arnott* v. *Prudential Ins. Co.*, 17 N.Y. Supp. 710, N.Y. Supreme Ct.

21. CONDITIONS — ALLEGATION OF PERFORMANCE.

In an action against an insurance company, the policy attached to the complaint stated, as one of the conditions, that the first premium should be paid at the home office on the delivery of the policy. The complaint alleged that the policy was duly executed and delivered for value.

Held, that, as against a demurrer, this was a sufficient allegation of performance, as it must be presumed therefrom that the premium was so paid or that a credit was given. Bergardus v. Insurance Co., 4 N. E. Rep. 522, 101 N.Y. 328, distinguished. *Stewart* v. *Union Mut. Life Ins. Co.*, 17 N.Y. Supp. 886, N. Y. Supreme Ct.

22. CONDITIONS OF POLICY — EXCHANGE FOR PAID-UP POLICY.

Under the terms of a policy of life insurance, that it could be exchanged for a paid up term policy, subject to the condition that the policy, duly receipted, should be transmitted to and received by the company before default in the payment of a premium, or within thirty days thereafter, it is not sufficient that within thirty days after default a letter was sent to the company by attorneys, stating that the policy had been left with them for the purpose of procuring a term policy, and that they demanded such term policy, and on receipt of it would sent the original policy duly receipted. *Universal Life Ins. Co.* v. *Devore*, Supreme Ct. of App. of Virginia, Feb. 1892.

MUTUAL BENEFIT.

23. SUSPENSION FOR NON-PAYMENT.

Under by-laws of a mutual benefit association, requiring notice of an assessment to be given to members, but without prescribing the form, a notice specifying the number of the assessment, and bearing the seal of the association, received by a member, inclosed in an envelope addressed to him at his residence, is sufficient, although not signed by the officer whose duty it is to give the same, nor addressed to such member upon the notice itself. *Hansen* v. *Supreme Lodge Knights of Honor*, 29 N. E. Rep. 1121, Ill. Supreme Ct.

24. CERTIFICATE—CONSTRUCTION.

While the certificate of membership in a benefit society contains the contract of insurance, yet the same is governed by the charter and by-laws of the association, and the statutes of the state of its domicile. *In re Globe Mut. Ben. Ass'n* 17 N. Y. Supp. 852, N. Y. Supreme Ct.

25. NOTICE OF ASSESSMENTS—PRESUMPTION FROM MAILING — FORFEITURE.

Provisions of the constitution of defendant, relating to its system of mutual life insurance, and prescribing that notices of assessments for the death of members shall be "sent" by the 8th day of the month, *held* to be only directory as to the time specified.

Notice sent by mail is effectual if actually received. It is presumed as a fact that a notice properly sent by mail was received.

Defendant's constitution construed as allowing 20 days for the payment of an assessment; but whether this time is to run from the time of mailing the notice or of its receipt is not decided.

Evidence deemed to show a forfeiture of membership for non-payment of an assessment. *Benedict* v. *Grand Lodge A. O. U. W.*, 51 N. W. Rep. 371, Minn. Supreme Ct.

26. CHANGE OF BENEFICIARY—BY-LAWS OF SOCIETY.

A person holding a certificate of membership in a benefit society, which designated the holder's daughter as the beneficiary thereof, on his second marriage inserted, immediately after the daughter's name as beneficiary, the words "and my wife." The by-laws of the society provided: "A member in good standing may at any time surrender his relief-fund certificate, and a new certificate shall thereafter be issued, payable to such person or persons as the member may direct."

Held, that such certificate could only be made payable to any other person than the beneficiary therein mentioned by surrender to the society as provided by its by-laws, and that such member's wife, on his death, acquired no title to any part of its proceeds on account of decedent's alteration thereof in her favor. 15 N. Y. Supp. 15, affirmed. *Thomas* v. *Thomas*, 30 N. E. Rep. 61, N. Y. Ct. of App.

27. INSOLVENT CORPORATION—DISTRIBUTION OF ASSETS — COSTS — RECEIVER.

The constitution of a co-operative or assessment life insurance company provided that the assessments should be applied to the creation of two distinct funds, one of which was a "death fund" and the other a "reserve fund;" that the death claims should be paid from the "death fund," and that no death claim should be paid from the "reserve fund" except upon a contingency that never happened. The company was

dissolved at the suit of the attorney-general, and a receiver put in charge of its property.

Held, that, although the "death fund" was insufficient to pay the death claims in full, the death claimants were not entitled to share in the "reserve fund."

The constitution also provided that the reserve fund should be paid only to those members who were living when the fund was to be divided and who had paid all assessments. After the suit to dissolve the company had been begun, an assessment was made by order of court.

Held, that those who paid such assessment were entitled to be repaid such assessment in full out of the reserve fund, and that the balance should be divided *pro rata* among those members who had paid all assessments up to the commencement of the suit, regardless of the last assessment, since the pendency of the suit was a sufficient excuse for the members who failed to pay the last assessment.

The time at which to determine which members were to share in the reserve fund and which in the death fund is the date of the commencement of the suit, and not the date of the decree of dissolution.

A death claim which had been approved before the levy of the last assessment made before suit, has no priority over other death claims where the assessment in question was not made to satisfy that particular claim, but merely to increase the death fund.

The costs of the receiver should be paid *pro rata* out of the two funds. 16 N. Y. Supp. 80, modified. *In re Equitable Reserved Fund Life Ass'n of New York*, Court of Appeals of New York, March, 1892.

28. Construction of Certificate.

A certificate of membership in a life insurance association declared that the amount therein mentioned should be payable from the death fund at the time of death, or from any moneys that should be realized to the fund from the next assessment, and that "no claim should be otherwise due or payable except from the reserve fund, as hereafter provided." It also provided that if the death fund was insufficient to meet existing claims by death an assessment should then be made upon every member at the date of the death last assessed for, and 80 per cent. of the net proceeds thereof should go into the death fund. The constitution provided that the death fund should be used only for the payment of death claims; that payment should be made to the beneficiaries, of the amount to which they were entitled according to the terms of their certificates; that, so long as the mortuary fund was sufficient to pay existing claims, no assessment should be made; and that, whenever a single assessment was insufficient to meet a death claim in full, there should be paid, in full satisfaction of such claim, a sum *pro rata* of the membership and benefits in force at the time of death. The company required each person proposing to become a member to pay what was called the "first assessment." The insured was the first member to die, and the death fund at his death was insufficient to pay the claim, and assessments were made to meet it.

Held, that the claim was not satisfied by paying the amount of the death fund on hand, and that the proceeds of the assessment made to meet it should be appropriaied to the full satisfaction thereof. 9 N. Y. Supp. 711, affirmed. *Wadsworth* v. *Jewelers' and Tradesmen's Co.*, 29 N. E. Rep. 1101, N. Y. Ct. of App.

Interpleader—See Sheriff.

Interstate Commerce — See Companies 2 — Corporations 6 — Natural Gas.

Intoxicating Liquors — See Ins. 1 —Sunday Laws.

Joint Defendant — See Crim. Law 6.

Judicial Notice—See Crim. Law 13.

Judgment—See Ins. 19.

Jurisdiction—See Corporation 9—Crim. Law 16—Ins. 16.

Jury, Misconduct of — See Trespass to Land.

Justification—See Libel 1. 4.

LACHES — See Bills and Notes 13 — Sheriff.

LAND, TEMPORARY OCCUPATION OF —See Railroad Companies 3.

LANDSLIP—See Contractor.

LARCENY—See Crim. Law 2. 3. 4.

LIBEL AND SLANDER.

1. LIBEL BY NEWSPAPER—JUSTIFICATION—FACTS GROSSLY MISSTATED—COSTS.

Held:— (1) A plea of justification, to an action against a newspaper for libel, cannot be supported where it appears that the facts were grossly misstated, but without malice, in the article complained of; as where it was stated that a collision between vehicles was caused by plaintiff's intoxicated condition, and the proof showed that he was not intoxicated, and not to blame for the collision.

(2) In an action for libel, where the plaintiff obtains judgment for part of the amount claimed, he cannot be charged with any part of the costs, unless there has been a tender by defendant. *Turgeon* v. *Wurtele*, Superior Ct. Montreal in Review. Johnson, C.J., Mathieu, Pagnuelo, JJ., (Mathieu, J., diss. as to costs), May 30, 1891, (The Legal News).

2. INJUNCTION — TRADE UNION — "SWEATING"—TRADE LIBEL.

A motion was made by a firm of manufacturers for an interim injunction to restrain the secretary of a trade unions committee and a printer from publishing false and injurious statements to the effect, *inter alia*, that the plaintiffs practised in their business a pernicious system of sweating. The respondents offered to treat the hearing of the motion as the trial of the action, but such offer was declined by the applicants. The court being of opinion that the statements constituted a trade libel, and that there was nothing reserved for the trial of the action, granted an interim injunction. Bonnard v. Perryman, 60 Law J. Rep. Chanc. 617; Law Rep. 1891, 2 Ch. 269, observed upon and distinguished. *Collard & Collard* v. *Marshall & Stuart*, 61 L. J. Chanc. 268.

3. MALICIOUS PROTEST OF NOTE BY NOTARY—LIABILITY OF BANK.

It is libellous and therefore actionable, for a notary public falsely and maliciously to protest for non-payment the acceptance of a person engaged in manufactures, and then send the draft, together with such protest, "to the source from whence it came." That the protest shows on its face that no proper legal demand was made for payment will not render the libel harmless to the credit and business of the acceptor, since to be published as one who has dishonored his commercial paper tends naturally to produce injury. As a general rule a bank is not responsible for a malicious protest made and published by a notary public rightly employed by it, such notarial act being that of a public officer; and it makes no difference that such notary is also an employee and agent of the bank. In order to render the bank liable, it would at least have to be alleged that it shared maliciously in the production or publication of the libel. An allegation "that the action of the notary in the matter, he acting under the authority of the bank, is the action of said bank," is not sufficient to charge the bank as a joint tort-feasor with the notary. *May* v. *Jones*, Sup. Ct. of Georgia, 34 Cent. L. J. 317.

4. POSTER ADVERTISING ACCOUNT FOR SALE—JUSTIFICATION.

The defendants M. and B., merchants, placed in the hands of the defendant A., a collector of debts, an account against the plaintiff Sarah G., wife of the plaintiff John G., for collection, well knowing the method of collection adopted by A., who, after a threatening letter to Sarah G., which did not evoke payment, caused to be posted up conspicuously in several parts of the city where the plaintiffs lived, a yellow poster advertising a number of accounts for sale, among them being one against "Mrs. J. Green (the plaintiff), Princess street, dry goods bill, $59.35." The evidence showed that Sarah G. owed the defendants M. and B. $24.33 only.

Held, that the publication was libel-

lous and could only be justified by shewing its truth ; and, as the defendants had failed to show that Sarah G. was indebted in the sum mentioned in the poster, they were liable in damages. *Green* v. *Minnes*, Ontario Q. B. D. Feb. 1892, (Can. L. T.)

5. PUBLICATION.

It is libellous to communicate to the public, without cause or utility, the misdemeanours of a neighbour and the fines to which he was subjected. *Bedard* v. *Cusson*, 1. Q. R. (Q. B.), 105.

6. SLANDER—REPARATION—MALICE — PRIVILEGE — STATEMENT REGARDING CANDIDATE FOR TOWN COUNCIL BY ONE ELECTOR TO ANOTHER.

A candidate for election to the Town Council of Glasgow brought an action of damages for slander against an elector, who, as he averred, had stated to other electors prior to the election "that he had been bankrupt as a grocer, that he had made a very bad failure — meaning thereby that it was a dishonest and disreputable failure— and that his creditors had received only eighteen pence in the pound, and that he was in consequence an unsuitable person to represent the electors in the Council of Glasgow."

Held (1) That it was a jury question whether the words used bore the innuendo sought to be put upon them, but (2) that the record disclosed a case of privilege, and, as malice had not been averred, the action fell to be *dismissed*. *Bruce* v. *Leisk*, 29 Scot. Law Rep. 412.

7. SLANDER—HUSBAND AND WIFE—RESPONSIBILITY.

Held: The husband is not responsible in damages for slanderous or insulting language used by his wife (*vide* art. 1294 C. C.) *Bourassa* v. *Drolet*, 1 Q.R. (S. & C. C.), 107.

LIFE INSURANCE — See Insurance, Life.

LIMITATION OF ACTIONS — See Railroad Companies 1.

LIQUIDATED DAMAGES—See Bonds 1.

LIQUIDATOR'S COMMISSION—See Companies 4.

LIVE STOCK—See Officers.

LOAN.

PROOF OF LOAN—PARTNERSHIP — POWER OF PARTNER TO BIND THE FIRM.

The wife of a partner of a mercantile firm lent to her husband a sum of money out of her separate funds for the purposes of the firm, stipulating that she should receive the firm's acknowledgement of the loan. Her husband took the money to the cashier of the firm with instructions to put it to the credit of his private account. This was done, and it was paid into the firm's bank account. Acting on the husband's instructions the cashier wrote out in the name of the firm an acknowledgment of the loan which he signed *per procuration* for the firm. It was booked in the firm's private letter book and delivered through the husband to the wife.

In an action by the wife against the firm for repayment of the loan, the defenders alleged :

(1) That the acknowledgment was neither holograph nor tested, and that therefore the loan was not instructed by legal evidence.

(2) That it was the writ of the cashier, whose general procuration did not include authority to borrow money or sign such a receipt.

Held, (Lord Young *diss.*) (1) that writing used not as a solemnity, but only *in modum probationis*, need not be probative, but is sufficient if shown to be genuine.

(2) That the acknowledgment was the writ of the defenders, because the money was borrowed not by the cashier, but by a partner who directly authorized and instructed the cashier to grant such an acknowledgment as he himself could have completely granted. *Bryan* v. *Butters Bros*, 29 Scot. Law. Rep. 415.

MALICE — See Damages 1 — Government Employee—Libel 6.

MALICIOUS PROTEST OF NOTE BY NOTARY—See Libel 3.

MALICIOUS PROSECUTION.

REASONABLE AND PROBABLE CAUSE —JURY.

In an action for malicious prosecu-

tion, it is a question for the jury and and not for the Judge whether the defendant acted upon reasonable and probable cause.

If there is any evidence it must be submitted to the jury, and the Judge cannot withdraw the case from them because in his opinion there was reasonable and probable cause for the prosecution. Judgment of the Queen's Bench Division reversed; Burton, J.A., dissenting. *Hamilton* v. *Cousineau*, Ontario Court of Appeal, March, 1892, (Can. L. T.)

MANDAMUS — See also Counties 1.—Mun. Corp. 3. 6.

Revising Officer — Electoral Franchise Act, R. S. C. c. 5—Objection to Name on List — Notice — Grounds of Objection.

The Queen's Bench Division. 21 O. R. 424, having ordered a *mandamus* to issue directing a revising officer to consider the objections to the qualification of certain persons whose names appeared on the preliminary voters' list, and the revising officer having obeyed the *mandamus*, this court declined to consider the question of the right to grant the *mandamus*.

A notice of application to have a name removed from the voters' list giving as the ground of objection only the statement "not qualified" is sufficient. *In re Lilley & Allin*, Ontario Ct. of Appeal, Feb. 1892 (Can. L. T.)

Manslaughter—See Crim. Law 15.

Marking Ballot—See Ballot.

MARRIAGE.

Action for Wife's Services — Witness — Contract—Will — Damages.

(1) In an action by a husband for services performed by his wife to defendant's testator, it appeared that such services had been rendered by the wife with the knowledge and consent of her husband, and while assisting him in his business; that moneys which were expended in connection with said services were furnished by the husband, and that the wife never made a personal claim for compensation. *Held*, that the husband could maintain an action for such services. (2) In such action the wife is a competent witness. (3) Where defendant's testator promised plaintiff's wife, when the service commenced, that he would give her $5,000 in his will, but upon subsequent occasions only promised to remember her in his will, without naming any amount, and finally left her only $500, after nearly eleven years of unpaid service, plaintiff is not limited to $5,000 in suing for the reasonable value of such services. N. Y. Ct. of Appeal. March 1, 1892. *Porter* v. *Dunn*, 16 N. Y. Supp. 77, reversed.

Measure of Damages — See Eminent Domain 3.

MASTER AND SERVANT.

1. Injuries to Employees — Defective Machinery.

Where an injury occurs to an employee of a railway company through a defect in the machinery or implements furnished to the employees by the company, knowledge of such defect must be brought home to the company, or it must be proved that it was ignorant of the same, through its own negligence or want of care, before the company can be made liable.

It is the duty of such railroad company to guard its employees from injuries resulting from unsound, unsafe, and defective engines, cars, and appliances, by having the same continuously inspected by persons competent to perform that duty; and the negligence of such inspector in the discharge of his duty is the negligence of the company. *Johnson* v. *Chesapeake & O. Ry. Co.*, 14 S. E. Rep. 432, W. Va. Supreme Ct.

2. Regulations for Protection of Employee — Risks of Employment.

An injury to a railway brakeman while engaged in coupling cars, caused by a co-employee, having charge of an engine, backing it up against cars standing on a siding with such force as to drive them back upon one of the cars which the brakeman was coupling, is within the risks incident to his employment. Goodrich v. Railroad

Co., 116 N. Y. 403; Byrnes v. Railroad Co. 113 id. 251; Appel v. Railroad Co., 111 id. 550; Harvey v. Railroad Co., 88 id. 481. *Berrigan* v. *New York L. E. & W. R. Co.*, N. Y. Ct. of Appeals, Feb. 12, 1892, 14 N. Y. Supp. 26, reversed. (Alb. L. J.)

3. ASSUMPTION OF RISK.

A parent, or one standing *in loco parentis* to a minor, cannot contract so as to exempt the latter's employer from responsibility to the minor for permanent injury inflicted on him. *International & G. N. Ry. Co.* v. *Hinzie*, Tex., 18 S. W. Rep. 681.

4. INJURIES TO BRAKEMEN — UNBALLASTED TRACK.

(1) A railroad company owes no duty to a brakeman in its employ to ballast storage or switch tracks so as to prevent his foot being caught between the ties.

(2) A brakeman riding on a switch engine, and directing its movement toward cars to be coupled, is guilty of negligence in jumping off and walking before it on an unballasted track, while removing the coupling link and pin from the draw-head on the tender. Pennsylvania Co. v. Hankey, 93 Ill. 580, cited; Plank v. Railroad Co., 60 N. Y. 607, distinguished; Appel v. Railroad Co., 111 id. 550, approved, Jan. 20, 1892. *Finnell* v. *Delaware L. & W. R. Co.*, 14 N. Y. Supp. 946 *mem.*, reversed. N. Y. Ct. of Appeals. (Alb. L. J.)

5. NEGLIGENCE — ELEVATOR — INJURY TO EMPLOYEE.

In an action for personal injuries, plaintiff's evidence showed that he was an intelligent boy, 19 years old; that he had been taught how to run an elevator, which operated by pulling on a shipper rod outside the elevator well; that it had not been pointed out how near a cross-beam of the elevator passed to the upper floor in descending through it; that he had operated the elevator for several weeks; that at the time of the accident he had started the elevator to go down; that, before the cross-beam had passed the upper floor, he reached out below the cross-beam in order to turn the rod and stop at the middle floor; and that he kept hold of the rod until his hand was caught between the descending cross-beam and the upper floor, and injured.

Held, that a verdict for defendant should have been directed, as the evidence was insufficient to show either negligence on the part of defendant, or due care on the part of plaintiff. *Rood* v. *Lawrence Manuf'g Co.*, 30 N. E. Rep. 174, Mass. Supreme Court.

6. FUMES OF CHEMICALS—ASSUMPTION OF RISK.

In an action against a chemical company for injuries sustained by plaintiff in the inhalation of the fumes of nitric acid, where it appeared that plaintiff had been employed as a common laborer outside the establishment, but had afterwards been set to work inside in connection with the process of manufacture, and expert witnesses at the trial had been unable to agree whether or not the fumes of the said acid were injurious to the human system, it could not be said that the danger of exposure to such fumes was so apparent that plaintiff should be deemed to have voluntarily assumed it as one of the risks of his employment.

The fact that plaintiff left his work, saying he could not endure it, did not show that he knew or had reason to believe the fumes would do him permanent injury, and upon the assurance of the superintendent that they would not hurt him, it was not negligence for him to return to work. Beittenmiller v. Brewing Co., (Pa. Sup.) 12 Atl. Rep. 599, distinguished. *Wagner* v. *H. W. Jayne Chemical Co.*, Supreme Court of Pennsylvania, March, 1892.

7. DANGEROUS MACHINERY.

Plaintiff was employed by a certain person to manage a stationary engine used in drilling wells for a railroad company. The person who employed plaintiff had charge of the drilling in capacity of foreman, and was authorized to apply the steam and set the machinery in motion by means of ropes connected with the engine. He was authorized also to employ and discharge the plaintiff, and there was evidence, although disputed, that plaintiff

was subject to his orders. Plaintiff, having been injured by the foreman negligently starting the machinery, brought suit against the company.

Held, that the foreman and plaintiff were not fellow-servants, and an instruction that if plaintiff was to manage the engine, and the foreman was to have charge of the drill and apply the steam, they were fellow-servants, was erroneous and misleading, without a further instruction that, if the foreman had authority also to order his movements, they would not be fellow-servants.

Where, in an action by a servant for injuries occasioned by the iron clamps, with which the driving belt of certain machinery was fastened together, the court has instructed that if the said clamps were in common use, and were not known to be dangerous, the plaintiff was not entitled to recover, and there was some evidence to the effect that they were not like those in common use, but were more dangerous, the converse of the proposition involved in the said instruction should also have been given, and the court should further have instructed that defendant was bound only to use ordinary care in furnishing machinery, and that if the clamps were dangerous, and plaintiff knew it, or might have known it, he was not entitled to recover. *Nix* v. *Texas, & P. Ry. Co.*, 18 S. W. Rep. 571, Tex. Supreme Ct.

8. NEGLIGENCE — MACHINERY — "DEFECT IN THE ARRANGEMENT" — WORKMEN'S COMPENSATION FOR INJURIES ACT R. S. O., c. 141.— 52 V., c. 23.

The plaintiff was employed in the laundry department of the defendant's factory and while she was standing on a bench to open a window for the purpose of letting steam and hot air escape, her hair was caught by an unguarded revolving horizontal shaft which passed through the room near the ceiling and in front of the window, and she was severely injured.

Held, (Burton, J. A., dissenting), affirming the judgment of the Queen's Bench Division in favour of the plaintiff, that she could not be said to have been doing an act so entirely unconnected with her employment and duties as to be regarded as a mere volunteer, and, as such, outside the protection of the Act; and there was a "defect in the arrangement" of the machinery within the meaning of the amending Act, 52 V., c. 23, s. 3, that is, an element of danger arising from the position and collocation of machinery, in itself perfectly sound and well fitted for the purpose to which it is to be applied and used. *McClotherty* v. *Gale Manufacturing Co.*, Ont. Ct. of App., Feb., 1892, (Can. L. T.)

9. NEGLIGENCE — PROOF OF — RESPONSABILITÉ.

Held: The employer is only responsible for injuries to his workmen to the extent of his own fault or negligence. Therefore, where workmen have been drowned by the breaking of a dam on which they were working, in the absence of proof that the employer was negligent as to its construction, they cannot recover. *Mercier* v. *Morin*, 1 Q. R. (Q.B.) 86.

MONOPOLIES.

INEXECUTION OF OBLIGATION – DAMAGES—RESTRAINT OF TRADE — LAWFUL COVENANT — STAT. 52 V., c. 41 (D.)

P. *et al.* & R. mutually agreed that the latter should not buy any wood on the River Charest, and that the former should not manufacture any wood for the County of Champlain. R. having bought about 3,000 logs on the River Charest, P. *et al.* sued him for breach of contract.

Held: (1) Plaintiffs' claim for damages caused to them by the purchase of wood on the River Charest by R. is well grounded, and to the extent of the profit which the sawing of this wood would have brought them in, but they cannot further claim the damages resulting from the execution of their own obligation, *i. e.* the profits they might have derived from the manufacture of lumber for the County of Champlain;

(2) The above-mentioned covenant is lawful. It is not in restraint of trade and is not prohibited by the

Federal Act 52 V., c. 41. *Picher* v. *Rousseau*, 17 Q. L. R. 239.

MILK—See Adulteration.

MISFEASANCE—See Companies 3.

MISTAKE—See Contracts 2.

MORTGAGEE—See Ins. 14.

MUNICIPAL CORPORATION

—SEE ALSO NEG. 25—NUISANCE 2.

1. STREET ASSESSMENTS—CONFIRMATION—NOTICE—DEATH OF PROPERTY OWNER.

Where notice of motion to confirm a report of commissioners of estimate and assessment in a proceeding for street opening has been duly given to a party who afterwards dies, his executors are not entitled to be made parties to the proceedings, nor to notice of the motion. *In re Lexington Ave.*, 17 N. Y. Supp. 873, N. Y. Sup. Court.

2. CONTRACT—ORDINANCES—BONDS—DAMAGES.

A city passed an ordinance authorizing a certain firm to construct waterworks for it upon terms fully set out. This was accepted by the firm, and a memorandum of the acceptance was attached to a copy of the ordinance and signed in behalf of the city by the mayor and clerk thereof, under its corporate seal, and by the firm and each member thereof under their individual seals.

Held, that this constituted a binding contract. *City of Goldsboro* v. *Moffett*, 49 Fed. Rep. 213, U S. Circ. Ct.

3. MANDAMUS TO MUNICIPAL BOARD.

On an application for a writ of *mandamus* to compel the city of New Orleans to pay a judgment regularly obtained against it, such judgment is conclusive as to the city's liability, and no defence can be made on the ground that the debt was not paid out of the revenues of the year for which it was contracted, in accordance with Acts La. 1877 (Ex. Sess.), No. 30, p. 47, providing that no municipal corporation shall expend any money in any year in excess of the actual revenue for that year, and that the revenue for each year shall be devoted to the expenditures thereof. *Mayor, etc., of City of New Orleans* v. *United States*, 49 Fed. Rep. 41, U. S. C. C. of App.

4. OPENING STREET — DEFAULT OF LAND-OWNER — RECOMMITTAL OF REPORT—COSTS.

Where a land-owner fails to appear before the commissioners of estimate in proceedings to open a street, and afterwards moves to open his default, and send back the report of the commissioners for review, without explaining his default, the motion should not be granted, except on payment of costs. *In re Brownell Street*, 17 N. Y. Supp. 747, N. Y. Supreme Court.

5. DAMAGES FROM CHANGE OF GRADE OF STREETS — CONTRIBUTORY NEGLIGENCE.

In an action against a city for injuries to property resulting from an overflow caused by a change of grade of a street, and the insufficiency of a sewer, it appeared that if plaintiff's premises had been raised to the new grade, at a cost of $500, the overflow would have been prevented, and that the value of the property was greatly increased by the grading of the street.

Held, that it was error to direct a verdict for defendant on the ground of plaintiff's contributory negligence. *Cooper* v. *City of Dallas*, 18 S. W. Rep. 565, Tex. Supreme Ct.

6. MANDAMUS TO POLICE JUDGE—ADJUDGING COMPTROLLER IN CONTEMPT—INVESTIGATION BY CITY COUNCIL.

Where the files and papers relating to proceedings in a police court have been turned over by the clerk to the city comptroller, and are being used by the city council to investigate the accounts of the clerk and judge, the judge has no authority to order the comptroller to return the files and papers.

The city council have a right to investigate the accounts of the clerk and judge of the police court, and to have access to the files and papers thereof.

Where a police judge, with jurisdiction, adjudges the city comptroller in contempt for refusal to deliver papers

and files, the Supreme Court will by *mandamus* compel the judge to vacate the order. *Schwartz* v. *Barry*, 51 N. W. Rep. 279, Mich. Supreme Ct.

7. CONTRACT WITH WATER COMPANY —TAXES.

A city of the second class has the power to enter into a contract with private parties or a corporation for water to be furnished to it for fire protection by such party or corporation; and when a city of the second class has entered into such a contract, and a water-works plant has been erected and maintained at great expense for a period of four years or more, and during that period the corporation owning the plant has furnished water, in accordance with a contract entered into and recognized by the city, and the city has levied the proper tax and paid the hydrant rental for three years, and otherwise recognized the validity of such contract, *held*, that this court will not hold the contract void under the facts as stated in the petition, because the city did not possess the power to make a contract for the period of twenty-one years. While the city may be powerless to make a contract for the duration alleged, still the contract should be upheld for a reasonable time, when the circumstances and condition of the city as to population and assessed valuation are substantially the same, and no better facilities are offered upon more reasonable terms.

The tax limitation imposed by paragraph 796, Gen. St. 1889, restricting the levy of all city taxes of the current year to 4 per cent., only applies to city taxes for general purposes. *Columbus Water Co.* v. *Mayor etc. of Columbus*, 28 Pac. Rep. 1097, Kan. Supreme Ct.

8. VOLUNTARY PAYMENT — VOID ASSESSMENT—BURDEN OF PROOF.

An assessment paid without coercion in fact or law, cannot be recovered back as an involuntary payment, upon the ground of illegality of the assessment. To render the payment involuntary, there must be some fact or circumstance which overcomes the will and imposes a necessity of payment to escape further ills.

In an action against a city to recover an assessment so paid, the burden is on plaintiff to show that he was not aware of its illegality. *Tripler* v. *Mayor, etc. of New York*, 17 N. Y. Supp. 750, N. Y. Supreme Ct.

9. ASSESSMENTS — LIABILITIES OF STREET RAILWAYS.

A borough charter authorized certain officials to pave the public streets, and gave them "power to determine what lands and buildings will be specially benefitted" by such improvements, and to apportion the cost accordingly. A horse railroad line extended through the main street, and its charter required it to keep the space between the rail and two feet on either side in good repair without expense to the borough, which it neglected to do; whereupon the borough paved the entire street with Belgian blocks and assessed the actual cost thereof between the rails against the railroad company. This assessment was approved by a committee appointed by the Court of Appeals. *Held*, that the validity of the assessment is determinable under the borough charter and not under the railroad charter.

Where the improvements did not "specially benefit" or enhance the value of the railroad property no assessment could be made.

Such assessment could not be made on the ground that the borough had done certain work which the railroad, under its own charter, was bound to pay for, the obligation under such charter remaining in full force after the improvements.

Nor could such assessment be made on the ground of the increased value of the franchise of the railroad, such franchise being a thing entirely distinct from the term "land and buildings" referred to in the borough charter. *Farmers' Loan & Trust Co.* v. *Borough of Ansonia*, 23 Atl. Rep. 705, Conn. Supreme Ct.

10. REMOVING TREES FROM SIDEWALK.

Where shade trees have been growing on the sidewalk of a public street, the city may, without notice to the abutting lot owner, remove them, if they constitute an obstruction to public

travel; and whether or not they are an obstruction is to be determined by the proper city authorities, which determination cannot be reviewed by the courts unless they have clearly abused their discretion. So that where, in an action by the abutting lot owner against the city for removing such trees, no abuse of discretion is shown, it is error to submit to the jury the question as to whether they were an obstruction.

The fact that the city has allowed such trees to remain in the street for a great length of time cannot operate as an abandonment of the right of the public to their removal, if they are an obstruction.

Trees which have been for a long time growing on the sidewalk of a public street, and which obstruct travel thereon, are an obstruction, and cannot be regarded as a mere encroachment, so as to make their removal by the city unlawful without a hearing on notice to the abutting lot owner.

Shade trees from 25 to 40 feet high, and about 12 inches in diameter, standing within the side walk, from 8 to 15 inches from the curb, are obstructions. *Chase* v. *City of Oshkosh*, 51 N. W. Rep. 560, Wis. Supreme Ct.

Note.

In Beauchamp v. City of Montreal, Superior Court of Montreal, April 1891, it was *held*, (1) that ornamental trees planted on the roadways of Montreal, are the property of the owners of the lots abutting upon the street; and that these trees must be considered as an accessory of the property in said lot.

(2) That these proprietors have an action for damages against the city of Montreal for having cut down and taken away, said trees.

11. POWERS OF — RIGHT TO ENTER LANDS OF ANOTHER MUNICIPALITY FOR SEWAGE PURPOSES — RESTRICTIONS—R. S. O. c. 184, s. 479, s.-s. 15, 51 V., c. 28, s. 20.

The municipal act of Ontario R. S. O. c. 184, by s. 479 gives power to one municipality to enter upon the lands of another for the purpose of extending a sewer into or connecting with an existing sewer of the latter upon such terms and conditions as shall be agreed upon between the respective municipalities, and, failing an agreement, upon terms and conditions to be determined by arbitration. If the municipality into which the entry is proposed objects thereto, the arbitrators shall determine not merely the said terms and conditions, but whether or not such entry shall be allowed at all.

By 51 V., c. 28, s. 20, a municipal council may pass a by-law for taking land in or adjacent to the municipality necessary or convenient for the purpose of opening, making, etc., drains, sewers, or water-courses within its jurisdiction, or enter upon, take, and use any land not adjacent to the municipality for the purpose of providing an outlet for any sewer, but subject always to the restrictions contained in the municipal act.

Held, affirming the judgment of the Court of Appeal, 17 A. R. 346, that the latter act did not take away the necessity for having the terms and conditions of entering upon lands of another municipality settled by agreement or by arbitration as provided by s. 479 of the municipal act. *City of Hamilton* v. *Township of Barton*, Sup. Court of Canada, Nov. 1891.

12. QUO WARRANTO — MUNICIPAL COUNCIL—RESOLUTION — NOMINATION OF COUNCILLOR.

Held: That the president of a municipal council can only vote as such when the other votes in a regularly assembled meeting of the council are equally divided.

That when only three councillors are present inclusive of the president, the latter cannot form a quorum by his preponderant vote, which he has no right to cast.

That article 346 of the Municipal Code only relates to cases of invalid elections susceptible of contestation, of corruption, of violence, or an absence of proper formalities, and not to such as the nomination of a councillor by the council. *Bissonnette* v. *Nadeau*, 1 Q. R. (S. & C. C.) 34.

13. CITY OF SOREL—ALDERMAN.

Held: That where an alderman of the city of Sorel made an abandonment of his property, his seat is thereby rendered vacant, and the council can replace him without notifying him of their resolution to do so; and that the alderman cannot attack this reso-

lution unless he can show that he has an interest to do so as an elector. *City of Sorel* v. *Prevost*, 1 Q. R. (Q. B.) 115.

MUNICIPAL COUNCIL — See Mun. Corp. 12. 13.

MUNICIPAL LAW—Taxation 2.

MURDER—See Crim. Law 6.

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

MUTUAL INSURANCE CO.—See Insurance 15.

NAME, AUTHORITY TO USE — See Prin. and Agent 2.

NAMES OF MEMBERS See Partnership 3.

NATURAL GAS.

TRANSPORTATION — REGULATION BY STATES—INTERSTATE COMMERCE.

The act of March 9, 1889, of Indiana, making it unlawful to conduct natural gas from within to points outside the State, having been declared unconstitutional, the legislature, on March 4, 1891, passed an act to regulate the mode of procuring, transporting and using natural gas, and providing, among other things, that such gas shall not be transported through pipes at a pressure exceeding three hundred pounds per square inch, nor otherwise than by the natural pressure of the gas flowing from the well, and making it unlawful to use a device or artificial appliance for the purpose of increasing the natural flow of wells. In the present suit it became necessary, incidentally, to determine the validity of this act. The court held that the act, under the guise of police regulation, sought, in effect, to restrict interstate commerce, and, therefore, so far as this suit was concerned, would be held invalid. *Benedict* v. *Columbus Const. Co.*, 23 Atl. Rep. 485, Court of Chancery of New Jersey.

NEGLIGENCE — SEE ALSO CARRIERS 4 — MASTER AND SERVANT — TELEGRAPH COMPANY.

1. EVIDENCE.

Where the negligence of the defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence was a proximate cause of the injury. *Johnson* v. *Northwestern Telephone Exchange Co.*, Minn., 51 N. W. Rep. 225.

2. DEFECTIVE ARM ON TELEGRAPH POLE.

In an action against a telegraph company for the death of a servant, it appeared that deceased, while working as lineman on one of defendant's telegraph poles, leaned his weight on one of the cross-arms, so that it broke, causing him to fall, and resulting in his death. The arm had been in use about six years, during which time it had answered its purpose, and it did not appear that there was any defect in it discernible by an ordinary inspection. Defendant's inspectors were not required to climb each pole, and examine the arms, and deceased knew this, having been employed by defendant for several years—part of the time as an inspector, and the rest of the time as a lineman.

Held, that deceased should have inspected the arm before putting his weight on it, and that a verdict for plaintiff could not be sustained. *Flood* v. *Western Union Tel. Co.*, 30 N. E. Rep. 196, N. Y. Ct. of App.

3. EXCAVATIONS IN STREETS.

Where the owners of a city lot, in the course of constructing thereon a building abutting on a street, make, by their own employees, an excavation in the adjacent sidewalk for coal vaults, and an area to be used in connection with the building, a duty devolves upon them to guard it with ordinary care; and this duty is not shifted from them by letting the work of building the area walls and constructing the coal vaults to an independent contractor who is to furnish all the material as well as to perform the labor necessary therefor. *Hawver* v. *Whalen*, Ohio, 29 N. E. Rep. 1049.

4. Where plaintiff, while walking along a public street is put in sudden peril by the negligent act of defendant

in throwing a trunk from a wagon, and in an instinctive effort to escape plaintiff falls over a trunk standing on the sidewalk, and is injured, defendant is liable. *Vallo* v. *United States Exp. Co.*, Penn., 23 Atl. Rep. 594.

5. IMPROPER PERFORMANCE OF CONTRACT.

Defendant cleansed a privy vault for the landlord of the premises, who accepted and paid for the work:

Held, that defendant was not liable for injuries occasioned by a loose board, left by his servants upon the roof of the privy structure, falling upon the child of a tenant, more than a year after completion of the work. *Fitzmaurice* v. *Fabian*, Penn., 23 Atl. Rep. 444.

6. CONTRIBUTORY NEGLIGENCE.

Plaintiff was injured while blasting rock in defendant's quarry, and sought damages therefor on the ground that by reason of defendant's failure to remove certain loaded cars from the works, as was its duty, plaintiff's exit to a safe retreat from the flying *débris* was cut off. The evidence showed that plaintiff made the blast with full knowledge of where the cars stood, and that they obstructed his escape.

Held, that plaintiff was guilty of contributory negligence, and could not recover. *Wilson* v. *Louisville & N. R. Co.*, 18 S. W. Rep. 638, Ky. Ct. of App.

7. DANGEROUS PREMISES—FIRE.

At common law, the owner of a building not peculiarly exposed to the danger of fire is not bound to adopt extra or unusual precautions for the escape of the occupants in case of fire. *Pauley* v. *Steam-gauge & Lantern Co.*, N. Y., 29 N. E. Rep. 999.

8. DANGEROUS PREMISES — RIGHT TO ENTER.

Where one lets a dock for unloading stone, charging toll for each boatload, and there was no suggestion at the time that any one else had any interest in the dock, it is no defense to an action by a boatman for personal injuries caused by the unsafe condition of the dock that the legal title to the unsafe part of the dock was in a third person, or that in fact the defendant had no legal right to go upon or repair it. N. Y. Ct. of Appeals. March 1, 1892. *Thomas* v. *Henges*, 16 N. Y. Supp. 700, affirmed.

9. DANGEROUS PREMISES—LICENSE.

The owner of a private way opening on a public street, who fails to erect a sign that the way is not public, is not liable for injuries resulting from defects therein to strangers venturing thereon without permission. *Stevens* v. *Nichols*, Mass., 29 N. E. Rep. 1159.

10. ACCIDENT — LIABILITY OF HOTEL-KEEPER TO GUEST — TRAP-DOOR.

The plaintiff went into the defendant's hotel on Sunday, as a customer. He had been there several times before. In passing through the building to go to the urinal, he fell through an open drap-door, which had been left unguarded, and received injuries.

Held, that he was entitled to damages from the defendant. *Per* Boyd, C.—The plaintiff, being a customer of the defendant, came to the defendant's place of business for the demand and supply of that which was for the mutual advantage of the parties, and so is to be treated not as a mere licensee, but as being on the premises by the invitation of the proprietor. That invitation is different in its legal consequences as to safety while on the premises from the merely hospitable invitation which arises between host and guest. *Hasson* v. *Wood*, Ontario Chancery Div., March 1892. (Can. L. T.)

11. INJURIES TO CHILD—DAMAGES.

In an action for personal injuries to a child four years old, it was held that the jury may take into consideration, as an element of damages, loss of earnings after he shall have obtained majority, though he has never earned anything, and though no one can tell with any certainty what his earning capacity will be. *Rosenkranz* v. *Lindell Ry. Co.*, Supreme Court of Missouri, Dec. 22, 1891.

Notes.

1. It is well settled that prospective damages to adults, on account of impairment of

earning capacity in the future, is a proper element of damages in cases of personal injuries. Whalen v. Railroad Co., 60 Mo. 323; Pry v. Railroad Co., 73 id. 124; 2 Sedgw. Dam. (8th ed.), § 485.

2. This plaintiff had never earned anything, and what his ability to labor or his capacity for earning money in business pursuits will be in the future no one can tell with any certainty. It is properly held, in such case, in the absence of the existence of direct evidence, that much must be left to the judgment, common experience and 'enlightened conscience of the jurors, guided by the facts and circumstances in the case.' Grogan v. Foundry, 87 Mo. 326; Nagel v. Railroad Co., 75 id. 658; Davis v. Railroad Co., 60 Ga. 329; Fisher v. Jansen, 128 Ill. 551; City of Chicago v. Major, 18 id. 349; Railroad Co. v. Miller, 51 Tex. 275.

12. PURCHASE OF TOY AIR-GUN FOR CHILD.

The purchase by a father for his son, eleven years of age, of a toy air-gun, is not an act of culpable negligence, nor made in reasonable anticipation of an injury caused by the use of the gun by another boy to whom the son had lent it. *Harris* v. *Cameron*, Wisconsin Supreme Ct., Feb. 1892, (Alb. L. J.)

Notes.

1. We are clearly satisfied that it was not an act of culpable negligence on the part of the defendant. The act or fact must be such that negligence can be directly and logically inferred from it. Wood v. Railway Co., 51 Wis. 196.

2. The defendant's negligence must be proved, and cannot be presumed. Chamberlain v. Railway Co., 7 id. 367; Steffen v. Railway Co., 46 id. 259; Denby v. Willer, 59 id. 240.

3. In any view than can be taken of this device as a toy or plaything, but which can possibly be put to a dangerous use, it would be illogical and unreasonable to hold that the defendant was guilty of culpable negligence in buying it for his boy, and ought to have reasonably expected that such an unusual and extraordinary consequence would follow it. He is only chargeable with ordinary care, such as fathers generally would exercise under like circumstances. Parish v. Town of Eden, 62 Wis. 272.

4. It was held in Haggerty v. Powers, 66 Cal. 368, that the father was not liable for giving his eleven-year-old boy a loaded pistol to play with, and an accident happened by the boy's careless use of it.

5. In Chaddock v. Plummer (Mich.), 50 N. W. Rep. 135, the defendant bought a similar air-gun, with similar shot, for his nine-year-old-boy, and another boy found it in a storm-door, and the defendant's wife gave the boy some shot, and in firing it at a board on a frequented street the shot glanced and put out the plaintiff's eye. The Court held "that it was not negligence *per se* for the defendant to buy this toy-gun, and place it in the hands of his boy, nine years of age."

6. In Poland v. Earhart, 70 Iowa, 285, a storekeeper sold a revolver to a minor, fifteen years of age, who accidentally fired it and injured himself. The father of the boy sued the storekeeper, and it was held that he could not recover, as the accident could not have been reasonably anticipated.

13. ELEVATOR—LIABILITY FOR RUNNING OF

Where the owner of a building has the care of an elevator in use for the purposes of the tenants, he is liable to the tenants for any defect in it, or its appointment or management, which reasonable care or vigilance would prevent. *People's Bank* v. *State of Maryland*, Ct. of Appeals of Maryland, March 1892.

Notes.

1. In the case of Tousey v. Roberts, 114 N.Y. 316, it is said that "an elevator for the carriage of persons is not like a railroad crossing at a highway, supposed to be a place of danger to be approached with great caution, but on the contrary, it may be assumed when the door is opened by an attendant to be a place which may be safely entered without stopping to look, listen or make a special examination."

2. In Duncan v. Sloan, 49 N. Y. (Superior) affirmed in 100 N. Y. 620, it was held that where a tenant in an apartment house saw the owner's elevator boy sitting in a nodding position and plaintiff, supposing the platform to be in its place, but failing to inquire or stop to examine and see, stepped in and fell to the bottom of the shaft, it was held to be for the jury to decide if the appearances were not such as to throw the plaintiff off his guard. And a verdict for the plaintiff was sustained.

14. EVIDENCE — CARRIERS OF PASSENGERS.

Where, in an action to recover damages for loss of services and expenses incurred by reason of the injury of plaintiff's infant son, there was evidence that the conductor of defendant's car signaled the driver to start before plaintiff's five-year-old boy and his attendant had reached a place of safety upon the car, and the car immediately started with a jerk, thereby throwing the child under the car and crushing his leg, a verdict for plaintiff will be sustained, though such evidence rests solely on the testimony of the child's attendant. Earl, C. J., and Finch and Gray, J.J., dissenting. 8 N. Y. Supp.

926, affirmed. *Akersloot* v. *Second Ave. R. Co.*, 30 N. E. Rep. 195. N. Y. Ct. of Appeal.

15. SNOW-PLOW RIDGES.

It is negligence in a street-car company, occupying a street so narrow as not to admit of two teams passing each other on either side of the car track, to throw the snow from its track with a snow-plow so as to cause a ridge of snow on either side of the track so high, when packed down by travel, as to upset a sleigh necessarily going thereon, in turning out to allow a team to pass. *Somerville* v. *City R. Co. of Poughkeepsie*, 17 N. Y. Supp. 719, N. Y. Supreme Ct.

16. CONTRIBUTORY NEGLIGENCE — EVIDENCE — QUESTIONS OF FACT — INSTRUCTIONS.

In an action for personal injuries there was evidence that plaintiff, while a passenger in defendant's street-car, was obliged to stand, as all the seats in the car were occupied; that there were other persons standing in the car; that the car ran off the track, and came to a sudden stop; and that plaintiff was thrown forward, and received certain injuries from the fall, and from other passengers being thrown on her by the sudden stop.

Held, that it could not be said as a matter of law that plaintiff was guilty of contributory negligence.

The court, in the course of the charge to the jury observed: "I think that I must charge you that the evidence establishes fairly and affirmatively in favor of the plaintiff that she was not guilty of contributory negligence"; but in leaving the question the court said: "If this be answered in the affirmative, then you come to the next question."

Held, that the charge did not take the question of contributory negligence from the jury.

Married Women—Right to Sue for Personal Injuries.

A motion for a nonsuit in an action for personal injuries on the ground that plaintiff was a married woman, and that the cause of action was her husband's, was properly denied, as the evidence showed that her husband had left her, that she carried on business in her own name, and that she received and used her earnings for the support of herself and children. *Griffith* v. *Utica & M. R. Co.*, 17 N. Y. Supp. 692, N. Y. Supreme Court.

17. NEGLIGENCE PER SE—JUMPING FROM MOVING STREET CAR—JUSTIFICATION—NEGLIGENCE OF CONDUCTOR.

It is gross negligence in a passenger on a street railway to jump from the car when it is going at a speed of 20 miles an hour, whether he knows or does not know that the car is going so fast. That the city ordinance restricted the speed of the car to 7 miles an hour would make no difference.

The presence of the conductor, and his silence on hearing another passenger tell the plaintiff that the car was not going to stop, and he had better get off, will not justify him in jumping from the car and causing his own injury. *Masterson* v. *Macon City & S. St. R. Co.*, 14 S. E. Rep. 591, Ga. Sup. Court.

18. ELECTRIC RAILROADS — COLLISION WITH VEHICLES—NEGLIGENCE.

In an action against an electric railroad it appeared that plaintiff and her husband, while driving along the track after dark, were struck and injured by a car; that there was no head-light on the car, nor any light either inside or out; and that it was running 15 or 20 miles an hour. Previous to that time the cars had used head-lights. The husband testified that when he went upon the track he looked for a car, but did not see any; and that, if the car had had a head-light, he could have seen it 1½ or 2 miles. The wife testified that she too looked for a car when they went upon the track, but that afterwards she did not look particularly, as she thought they would see the head-light. The first warning she had of the car was the sight of the flame on the trolley, and the glitter of the car window. It was then too late to get out of the way.

Held, that the plaintiff and her husband were not negligent in driving upon the track, and that whether they

used ordinary care to prevent the collision was a question for the jury.

Evidence.

It was admissible, in such a case, to show that the public were in the habit of driving on the track, as bearing upon the question of defendant's negligence in running a car without a headlight or other light. *Rascher* v. *East Detroit & G. Ry. Co.*, 51 N. W. Rep. 463, Mich. Supreme Ct.

19. ICY STREETS—EVIDENCE.

Plaintiff was injured by slipping on a sidewalk, and in an action therefor against the city, testified that she did not notice the ice on the walk until she got on it; that she then hesitated whether she should go back or go on, but concluded that, as she had on new rubbers, she thought it would be all right, and went on; that the walk was "sidling;" that there was ice and snow on the walk, and that it looked as though it had been cleaned and then saturated with water; that the water had run over it and left it perfectly icy, so that it was smooth.

Held, that the court was justified in refusing to grant a nonsuit, and in submitting to the jury the question of plaintiff's contributory negligence.

In such case it was error to allow witnesses, other than plaintiff, to testify that they had previously fallen on the same walk, as such facts did not prove notice of the defect to defendant, or negligence in not having taken measures to remedy it. *Richards* v. *City of Oshkosh*, 51 N. W. Rep. 256, Wis. Supreme Ct.

20. DEFECTIVE SIDEWALKS—ICE.

In an action against a town treasurer for injuries alleged to have been caused by a defect in a street of the town, it appeared that the streets were icy at the time of the accident; that the street on which plaintiff fell was washed and gullied; and that the cobble-stones were exposed, on one of which plaintiff stepped and slipped and fell and was injured.

Held, that the Court properly charged that if the sidewalk was so defective as to render the town liable in case an accident had happened by reason of the defect, in the absence of ice, and if plaintiff's injuries were caused by such defect, and would not have happened but for it, then the town was liable, though the ice was one of the proximate causes of the accident. *Hampson* v. *Taylor*, 23 Atl. Rep. 732. R. I. Supreme Ct.

21. INJURY TO INFANTS — ELECTRIC WIRES.

Where several boys had been playing on their way home in a public street, and had stopped to rest, and one of them, while walking along before the others, came in contact with an electric wire which had been allowed to hang within a few feet of the street, and from which he received a severe shock, the fact that just before the injury he had been using the street for the purpose of play did not divest him of the character of a traveler, within Pub. St., c. 52, s. 1, which declares that the streets shall be kept in repair so that the same may be reasonably safe for "travelers." *Graham* v. *City of Boston*, 30 N. E. Rep. 170. Mass. Supreme Ct.

22. DEFECTIVE BRIDGES — INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

Plaintiff sued defendant city for damages sustained from falling off a public bridge whereon there was no railing or light. The jury returned a general verdict for plaintiff, and found, specially, that plaintiff lived within a hundred feet of the defective bridge for a year and a half immediately preceding the accident, during which time it was in the same condition, as was well known to her. On the night of the injury plaintiff had passed over the bridge on foot, and at the time of the injury she had no light or other assistance to guide her, but the outlines of the bridge were not so obscured by darkness that she could not, by reasonable use of her sight, have seen them. *Held*, that the Court erred in giving judgment on the special findings *non obstante*.

In such case, the failure of plaintiff to provide herself with a light was not contributory negligence. The outlines of the bridge being visible, its

condition was not such that a prudent person would decline to pass it without a light. *Vance* v. *City of Franklin*, 30 N. E. Rep. 149. Ind. App. Ct.

23. DAMAGES — REMOTENESS — ACTION FOR NEGLIGENCE—OBSTRUCTION IN HIGHWAY—REMEDY OVER—R.S.O. c. 184, s. 531, s-s. 4.

The plaintiff was driving a horse and sleigh along a highway belonging to a city corporation, when the runner of the sleigh came in contact with a large boulder, whereby both horse and sleigh were overturned. In endeavouring to raise his horse, the plaintiff sustained a bodily injury, on account of which he sued the corporation for damages, alleging that his injury was due to their negligence.

Held, that the damages were not too remote. Page v. Town of Bucksport, 64 Maine 51; and Stickney v. Town of Maidstone, 30 Vermont 738, applied and followed.

Held, also, that the person who placed the boulder on the highway, and who had been added as a defendant under s. 531 of the Municipal Act, R. S. O. c. 184, was liable over to the corporation under s-s. 4. Corporation of Vespra v. Cook, 26 C. P. 185, distinguished. Balzer v. Corporation of Gosfield South, 17 O. R. 700, followed. *McKelvin* v. *City of London*, Ontario Q B. D., Feb. 1892. (Can. L. T.)

24. HIGHWAYS—DEFECTIVE — NEGLIGENCE—EVIDENCE.

In an action against a town for personal injuries it appeared that while plaintiff was driving along a highway her horse became frightened and backed down an embankment into a pond. The place of accident was on a country road which had been used for nearly fifty years, during which time no similar accident had ever happened, and the break in the woods skirting the boundary between the pond and the highway, through which plaintiff's horse backed, was only from eight to twelve feet long.

Held, that failure to guard such a short distance, under the circumstances, was not sufficient evidence of negligence to submit the case to a jury. Hubbell v. City of Yonkers, 104 N. Y. 434, *Glasier* v. *Town of Herron*, N. Y. Ct. of Appeals, March 1, 1892. (Alb. L. J.)

25. HIGHWAYS — MUNICIPAL CORPORATIONS—R. S. O. c. 184, s. 531 (4).

Sub-section 4 of s. 531 of R. S. O c. 184, which provides that if an action is brought against a municipal corporation to recover damages sustained by reason of any obstruction, excavation, or opening in a public highway, placed, made, left, or maintained by another corporation or by any person other than a servant or agent of the municipal corporation, the last mentioned corporation shall have a remedy over against the other corporation or person for any damages which the plaintiff in the action may recover against them, applies to the case of an obstruction, excavation, or opening, directly and immediately placed on or dug in the highway by the corporation or person against whom the remedy over is given. It does not give a right to one municipal corporation to recover from an adjoining municipal corporation damages recovered for an accident caused by non-repair of a road lying between the townships which they were jointly liable to keep in repair. *Township of Sombra* v. *Township of Moore*, Ontario, Ct. of Appeal, March 1892, (Can. L. T.)

26. EXIT FROM STATION — USE OF TRACKS — CUSTOM — FLAGMAN.

Decedent, after leaving defendant's train at a suburban station, in order to reach the public highway, was compelled to walk along defendant's tracks, or to go through private property by a way over which travel was forbidden. While walking along the tracks towards the highway, he stepped from one track to another to avoid a train, and was struck by a train coming from an opposite direction, and killed.

Held, no safe way having been provided by the company for reaching the highway, that the court properly refused to adjudge decedent guilty of contributory negligence in using the tracks.

In such case, witnesses were properly allowed to testify as to whether

or not there was a footpath along the track between the station and the highway crossing, as to the custom of walking along the tracks, and as to the maintenance of a ticket agent at the station.

Evidence that no flagman was stationed at the highway crossing at the time of the accident was properly admitted for the purpose of showing the exact condition of affairs at that place at that time, though as a matter of law it was not the duty of defendant to keep a flagman there.

There being no evidence elsewhere in the case that the private way in question was in fact private property, the refusal of the court to strike out the testimony of a witness as to the ownership of such way founded on hearsay, was harmless error. *Reid* v. *New-York, N. H. & H. R. Co.*, 17 N.Y. Supp. 801.

27. Accident to Person on Track —Injury From Hand-car.

It is negligence in a railroad company to propel a hand-car past a station at the rate of 15 miles an hour, on a down grade, without bell or other notice of approch, at an hour when passengers are about to gather to take a train.

Plaintiff was struck by the hand-car while crossing the track to reach the station. Her view of the approaching hand-car was obscured by persons interposed, and the smoke and steam of a freight engine near by.

Held, that the question of contributory negligence was properly submitted to the jury. *Conklin* v. *N. Y. Cent. & H. R. R. Co.*, 17 N. Y. Supp. 651, N. Y. Supreme Ct.

28. Contributory Negligence.

A person who voluntarily and unnecessarily attempts to cross a railroad track in front of an approaching train is guilty of contributory negligence, and, having been struck and killed by the train, there can be no recovery against the railroad company for his death, though its agents were culpably negligent in the management of the train.

The consequences of the contributory negligence of plaintiff's intestate in voluntarily attempting to cross a railroad track within the limits of a town will not be obviated by the fact that the train was running at a rate of speed prohibited by an ordinance of the town council. *Korrody* v. *Lake Shore & M. S. Ry. Co.*, 29 N. E. Rep. 1069, Ind. Supreme Court.

29. Evidence of Negligence.

In a case where plaintiff's evidence is competent, and in some fairly appreciable degree tends to show on the part of the railroad company a want of ordinary care in keeping a reasonable lookout ahead for persons and animals, and other obstructions on the track, in front of the moving train, which runs over and kills a child between four and five years old seated on the track in plain view, capable of being recognized to be a child by any one using ordinary care and precaution to discover it, and for a distance not less than twice that required to stop the train in,

Held, it is error to withdraw the case from the jury by the method of striking out all the plaintiff's evidence. *Gunn* v. *Ohio River R. Co.*, 14 S. E. Rep. 465, W. Va. Supreme Ct.

30. Instructions.

In an action against a railroad owner by an employee to recover damages for personal injuries it appeared that plaintiff's injuries resulted from defects in a hand-car on which he was returning from work. The car when originally furnished was fit for service, but got out of repair.

Held, that the failure of those using the car—plaintiff's fellow-servants—to report its condition and to request defendant to put it in order, constituted negligence on their part affecting plaintiff.

In such case the court erred in virtually instructing the jury that plaintiff was entitled to recover if he had not personal knowledge of the condition of the car, no matter how negligent his fellow-servants may have been in using the car, or in placing it in front instead of the rear of a moving train of similar cars. *Reynolds* v. *Kneeland*, 17 N. Y. Supp. 895, N. Y. Supreme Ct.

31. CARRIER—RAILROAD—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—RIDING ON PLATFORM.

Where a passenger on defendant's excursion train secured a seat for himself, but afterward resigned it to a lady, and after remaining in the aisle of the car for a time, went out on the platform, intending to enter another car, but finding that full, remained on the platform, from which he fell or was thrown off, he was guilty of contributory negligence.

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 R. Co.*, Vermont S. C. Jan. 1892, (Alb. L. J.)

32. INJURIES TO PERSONS ON TRACK —NEGLIGENCE.

The fact that the fireman in charge of a switch engine in the railway yard is not looking in the direction in which the engine is moving because he is looking back to see when the following cars have cleared the switch, and for the signals of the switch-man, is not negligence on his part, in respect to a man on the track in front of the engine who was guilty of contributory negligence. *Eddy* v. *Sedgwick*, 18 S. W. Rep. 564, Tex. Supreme Ct.

33. INJURIES TO PASSENGER — ACTION BY HUSBAND — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — DAMAGES.

In an action by husband and wife for injuries to the wife alleged to have been caused by defendant's negligence, if by reason of the injuries to the wife the husband was deprived of the wife's services, compensation therefor may be given.

Where a passenger on a train is injured without fault of his own, there is no legal presumption of negligence on the part of the carrier. Scott, J., dissenting.

The fact that plaintiff, a passenger on a cable train, was riding on the dummy when there were seats in the trail car, where she would have been in safety, does not establish contributory negligence.

Where plaintiff at the time of the accident was with child, and before delivery the child died, to recover damages therefor she must show some additional injury to herself arising from such fact. *Hawkins* v. *Front-Street Cable Ry. Co.*, 28 Pac. Rep. 1021. Wash. Supreme Ct.

34. INJURIES TO EMPLOYEE — UNSAFE APPLIANCES — CONTRIBUTORY NEGLIGENCE.

A complaint in an action for personal injuries alleged that plaintiff, for several years prior to the accident, had been in defendant's employ, engaged in making general repairs, and had occasionally been required to use a ladder; that, on complaining that the ladder furnished was not safe, he was told that a suitable one would be provided for future work; that, relying on such promise, he continued in the employ; that a suitable ladder was not provided, and that, thereafter, while by the foreman's order he was ascending a ladder unprovided with spikes at its end or with other safe appliances, and resting upon an oily floor, it slipped and occasioned the injury complained of.

Held, on demurrer, that the complaint failed to state a cause of action, as the danger might have been anticipated by the exercise of ordinary care on the part of plaintiff. *Corcoran* v. *Milwaukee Gas Light Co.*, 51 N.W. Rep. 328. Wis. Supreme Ct.

35. RAILWAYS AND RAILWAY COMPANIES—ACCIDENT AT CROSSING—51 V. C. 29 S. 256 — RINGING BELL OR SOUNDING WHISTLE—OTHER PRECAUTIONS— UNUSUAL DANGER — 51 V., C. 29, S. 260 — ENGINE AND TENDER, A "TRAIN OF CARS" — "STOP, LOOK AND LISTEN."

In an action against a railway company for negligence whereby the plaintiff was run over and injured by an engine and tender at a railway crossing where eight tracks crossed the road, and where trains were continually shunting,

Held, that where the company are not able to comply with the terms of s. 256 of 51 V. c. 29 as to ringing a bell or sounding a whistle at least eighty rods from a crossing, because the engine starts to cross within that distance, some other kind of precaution should be taken to warn the public of danger; and where, as in this case, the crossing is unusually dangerous, it is incumbent upon them to use even greater and other precautions than those required by the statute.

Held, also, that an engine with a tender, moving reversely, is a "train of cars" within the meaning of s. 260, and some one should be stationed on the tender to warn persons crossing the track.

The rule "stop, look, and listen," as applied by the Pennsylvania State Courts to persons about to cross a railway track, is not in force here and is not one that should be adopted. *Hollinger* v. *Canadian Pacific Ry. Co.*, Ontario, Queen Bench Div. Feb. 1892 (Can. L. T.)

36. CONTRIBUTORY NEGLIGENCE — INJURY TO PASSENGER — RAILROAD.

(1) It is a well settled rule of the law of negligence that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of the injury of which he complains, if the defendant, after he became aware, or ought to have become aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him, and he was thereby injured.

(2) Where the employees of a railroad company engaged in operating one of its trains have notice, such as a person of ordinary prudence would believe and act upon, that a passenger had stepped or fallen from the train while moving at a high rate of speed, on to the track, where he is exposed in a helpless condition to the danger of injury from another of its trains, the company owes him the duty of observing due care to prevent his being so injured, although he was guilty of negligence in so stepping or falling from the train, and this was known to the employees thereon; and in such case the company should, in the exercise of proper care, stop the train from which the passenger fell, and remove him from the track, if that could be done without danger to the passengers or employees on the train from which he was in danger of receiving injury and cause it to be operated with due regard for his safety, or adopt some other reasonable precaution to avoid injury to him. This omission to use such care, if injury in consequence ensues, is actionable negligence.

(3) The rule, that the negligence of the injured party which proximately contributes to the injury precludes him from recovering, has no application where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed to use a proper degree of care to avoid injuring him. Judgment affirmed. *R. R. Co.* v. *Kassen's Administrator*, Ohio Supreme Court.

37. DAMAGES — SNOWSLIDE FROM ROOF — OWNER RESPONSIBLE — CO-PROPRIETORS.

Held, the proprietor of a house fronting on a public street is responsible for accidents to the public, caused by snow and ice falling froom the roof, whether the house be tenanted or not. The injury caused by such a snowfall being in the nature of a quasi-delict, one co-proprietor may be sued alone for the damage, he having the right to call in his co-proprietors, if so disposed. *Rancour* v. *Hunt*, 1 Q. R. (S. & C. C.) 74.

NEWSPAPER—See Libel 1. 6.

NEW TRIAL—See Tresspass to Land.

NONFEASANCE—See Crim. Law 8.

NOTES—See Bills and Notes—Banks 1.—Corporation 3.—Partnership 4.

NOTICE—See Banks 1. 2.—Mandamus — Mun. Corp. 1.— Partnership 2. — Princip. and Surety 2. — Religious Societies 3.—Bills and Notes 15.—Ins. 25.

NUISANCE.

1. SMOKE FROM CHIMNEY—DAMAGES.

In an action for damages to property caused by the smoke, steam and cinders

from defendant's chimney, the court instructed the jury, on the part of plaintiff, that if defedant erected a boiler and engine near to the house and lot of plaintiff, and smoke, steam and cinders escaped from the chimneys of defendant and entered the premises of plaintiff so as "to render her house and premises less comfortable, enjoyable or useful than they otherwise would have been, then plaintiff is entitled to their verdict."

Held, that such instruction was too broad, and was misleading. *Euler* v. *Sullivan*, Court of Appeals of Maryland March 17, 1892.

2. MUNICIPAL CORPORATION — SLAUGHTER HOUSE.

Where a city council has declared by an ordinance that a slaughter house erected within the limits of the city shall be declared a public nuisance, it is conclusive of the fact, and the question whether or not the same is a nuisance can not be revised. *Harrison* v. *City of Lewiston*, Ill. App. Ct. April 1892, 24 Chic. Legal News 268.

OBLIGATIONS.— SEE ALSO MONOPOLIES—SURETY.

NULLITY.

Held, that an obligation based upon a person's influence with a member of Parliament or his friends, with a view to securing a government situation, is void. *Raymond* v. *Fraser*, 1 Q. R. (S. & C. C.) 103.

OFFICERS.

LIVE STOCK COMMISSIONERS—KILLING DISEASED ANIMALS—DAMAGES.

Held, following and citing approvingly the Massachusetts case of Miller v. Horton, 32 Cent. L. J. 246, that it is no defence to an action against the members of the board of live stock commissioners for killing the plaintiff's horses that the defendants, as such board, caused an examination to be made, and upon such examination decided that said horses were diseased, and therefore had them killed, since the board's statutory "power to order the slaughter of diseased animals" does not protect them from liability for killing animals, except where it is shown that the animals are in fact diseased. *Pearson* v. *Zehr*, Supreme Court of Illinois, 34 Cent. L. J. 277.

OFFICIAL REPORT—See Government Employee.

OPINION EVIDENCE—See Evid. 3.—Witness 1.

ORDINANCES CITY—See Water Companies 1.

OVERFLOW CAUSED BY EMBANKMENT—Railroad Companies 5.

PAROL AGREEMENT—See Bills and Notes 3.

PAROL EVIDENCE—See Deed.

PARTIES—See Tel. Comp. 2.

PARTNER, POWER OF TO BIND FIRM—See Loan.

PARTNERSHIP—SEE ALSO LOAN.

1. PARTNERSHIP.

Though an unequal contribution by copartners to the capital may not, in the absence of other evidence, be sufficient to overcome the presumption of an equal participation in the profits, it is sufficient to show that the capital is not to be divided equally on a final settlement and distribution. *Johnston* v. *Ballard*, Tex., 18, S. W. Rep. 686.

2. NOTICE OF DISSOLUTION.

At the close of a season's business a partnership, running a creamery under the names of both partners, was dissolved; and, on the opening of the following season, one of the partners carried on the business with the old patrons until nearly the close of the season, when he absconded.

Held, that the fact that during such time the patrons were paid by checks drawn in the name of the continuing partner alone was sufficient notice of the dissolution. *Kehoe* v. *Carville*, Iowa, 51 N. W. Rep. 166.

3. NAMES OF MEMBERS.

A certificate of partnership which states the names of the members with the initials by which they are generally known, is within Civil Code, § 2466, requiring a certificate of partnership to

state "the names in full of the members of such partnership." *Meads* v. *Lasar*, Cal., 28 Pac. Rep. 935.

4. NOTE.

A member of a firm engaged in the business of repairing machinery, and selling it on commission, gave a note in the firm name in payment for a patentright. His co-partners did not know of the giving of the note, and never ratified it.

Held, that the note was binding only on the partner who signed it. *Faires* v. *Ross*, Tex., 18 S. W. Rep. 418.

5. EXECUTION AGAINST INDIVIDUAL PARTNER—Sale of Share.

Under an execution against an individual partner the sheriff can seize the partnership goods and sell the execution debtor's share, whatever may be the difficulties that arise thereafter; and the Judicature Act has made no difference in this respect. *Harrison* v. *Harrison*, Ontario, Chancery Div. March 1892, (Can. L. T.)

6. RIGHT TO HAVE RECEIVER APPOINTED.

The mere fact of the dissolution of a partnership does not entitle a partner, as a matter of right, to have a receiver of the partnership property appointed. *Pini* v. *Roncoroni*, 61 L. J. Rep. Chanc. 218.

7. FIRM AND PRIVATE DEBTS.

Defendant purchased certain machinery of J, who retained title until paid for. Defendant sold a half interest to his partner, R. The debt to J was charged on the books as a partnership liability. R mortgaged his interest in the firm to plaintiff to secure an individual debt.

Held, that the firm debt to R had priority over the mortgage. *Embry* v. *Lewis*, Ark., 18 S. W. Rep. 372.

8. FRAUDULENT CONVEYANCES.

The principle that the rule making the assets of a partnership first applicable to firm debts, and requiring the private creditors of the partners to seek indemnity from the surplus, is for the benefit of the partners, and that if on dissolution they waive the privilege by dividing the property between them, and then mortgage it severally to secure their individual debts, the firm creditors have no ground of complaint, cannot be invoked in favor of parties who in their transactions were guilty of fraud or collusion against the creditors. *Kelley* v. *Flory*, Iowa, 51 N. W. Rep. 181.

PATENT DEFECTS—See Warranty.

PATENTS.

1. LICENSE TO MANUFACTURE.

Licensees authorized to manufacture a patented article on the payment of a stipulated royalty during the term of the patent, with the understanding that, if it "shall be declared invalid by any court of competent jurisdiction, the payment of the royalty shall thereupon cease," cannot defend an action for the royalties on the ground of the invalidity of the patent, where such invalidity was never judicially declared. *Hardwick* v. *Galbraith*, Penn., 23 Atl. Rep. 451.

2. THREATS OF LEGAL PROCEEDINGS — CIRCULAR IN GENERAL TERMS — "PERSON AGGRIEVED"—INVALID PATENT—PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883 (46 & 47 V. c. 57), s. 32.

A patentee brought an action against a second manufacturer for passing off his goods as those of the plaintiff. He also issued, in the boxes containing his own goods, the following circular: "Notice to grocers and others. Information of extensive violation of Mr. Wm. Edge's patent rights has been received. All parties are warned not to infringe these rights. R. & R. C. Winder, solicitors, Bowker's Row, Bolton, England." A third manufacturer, commencing to sell similar goods and finding that some of his customers had received the circular, brought an action under section 32 of the Patents, Designs, and Trade Marks Act, 1883, to restrain the patentee from issuing threats and for damages.

Held, by Mathew, J., and by the Court of Appeal, that the circular did not refer to future infringements only, and

that it was issued under such circumstances that persons who received it must have considered that it applied to the second and third manufacturers; that it was therefore not a general warning such as a patentee might be justified in issuing, but was a threat within the 32nd section, and that the third manufacturer was a person aggrieved and entitled to bring the action. Per Lindley, L. J. Section 32 applies to threats by the owner of an invalid patent. Challender v. Royle (56 Law J. Rep. Chanc. 995; Law Rep. 36 Ch. D. 425) explained. *Johnson* v. *Edge* (App.) 61 L. J. Chanc. 262.

PAYMENT—See Bills and Notes 6.—Ins. 17.

PERFORMANCE OF CONDITIONS—See Contract 2.

PERJURY—See Crim. Law 14.

PERPETUITIES—See Conflict of Laws.

PERSONAL LIABILITY—See Prin. and Agent 1.

PEWS—See Religious Societies 1.

PHYSICAL EXAMINATION — See Trial 2.

PHYSICIAN—See Evidence 4—Witness 2.

PIPES; POWERS OF WATER COMPANY TO LAY—See Water Comp. 1.

PLATFORM, RIDING ON—See Neg. 31.

PLEADING—See also Insurance 1. 11.

REPLY — DEPARTURE FROM COMPLAINT.

A reply admitting that the policy declared on in the petition was written after the destruction of the property as claimed in the answer, but alleging that it was issued pursuant to an agreement to insure made prior to such destruction, is not demurrable as a departure from the complaint. *Bennett* v. *Connecticut F. Ins. Co.*, Cincinnati Sup. Ct., 27. Ohio L. J. 15.

PLEDGE.

COLLATERAL SECURITY—SALE.

Where a debt for which collateral security was given has been paid, plaintiff cannot enforce the collateral to satisfy some other debt due from the same indorser.—*Hardie* v. *Wright*, Tex., 18 S. W. Rep. 615.

POSSESSION—See Sale of Goods 1.

POSTER ADVERTISING ACCOUNT FOR SALE—See Libel 4.

PRACTICE—See Companies 1—Crim. Law 12. 15. 16.

PREFERENCES—See Corporations 13. 14.

PREMIUM—See Ins. 17. 18. 20.

PRESIDENT, POWERS OF — See Sale of Goods 2.

PRINCIPAL AND ACCESSORY — See Crim. Law 7.

PRINCIPAL AND AGENT.

1. PERSONAL LIABILITY.

When one who assumes to act as another's agent, without authority so to do, signs the name of the other as maker of a due bill, he is not personally liable, in an action of contract thereon, unless it contains apt words to charge him as such. *Cole* v. *O'Brien*, Neb., 51 N. W. Rep. 316.

2. AUTHORITY TO USE NAME.

A telegram authorizing the use of a person's name for a certain sum of money is not in the nature of a general or continuing letter of credit, and does not extend the right to use the name beyond the amount specified. *Bullen* v. *Dawson*, Ill., 29 N. E. Rep. 1038.

3. POWERS OF AGENT.

Where the president and financial agent of a duly incorporated university, while acting within the scope of his authority, and without assuming to become individually responsible, requests an architect to prepare the plans for a certain building, and the architect knows that the said person is connected with the university, and that the building is intended for a public purpose, this is sufficient to put him on inquiry, and the liability is that of the principal, and not the agent. *Johnson* v. *Armstrong*, Tex., 18 S. W. Rep. 594.

4. CORPORATIONS — RAILWAYS — CARRIERS—CONTRACT—DAMAGES.

Where it was sworn that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line but on a connecting line:

Held, that this was evidence to be submitted to a jury of a contract to that effect binding the defendants and that a non-suit was wrong.

The measure of damages against carriers for non-delivery of trees considered.

Judgment of the County Court of Middlesex reversed; Hagarty, C. J. O., dissenting. *McGill* v. *Grand Trunk Ry. Co.*, Ontario, Ct. of Appeal, March 1892. (Can. L. T.)

PRINCIPAL AND SURETY.

1. DISCHARGE OF SURETY.

A bond by a principal and sureties, conditioned on the faithful performance by the principal of his duties under a contract of employment is a contract of suretyship, and not of guaranty; and a request by one surety to withdraw his name, made after delivery of the bond and after notice by the employer to the employee to enter upon the discharge of his duties, which request is not assented to by the employer, will not operate as a release of the surety making the request, or of the others, who became sureties on condition that he should join with them. *Saint* v. *Wheeler & Wilson Manuf'g Co.*, Ala., 10 South, Rep. 539.

2. NOTICE TO SURETY.

Where an agent in California of an insurance company in New York, under a contract requiring him to remit payments within 50 days from the end of the month in which they are payable, fails, through tardiness and neglect, but with no wrongful intent, to remit the premiums until from 60 to 120 days after the end of such month, and this action is acquiesced in by the company as substantial compliance with the contract, failure of the company to give notice of such delay to the surety on the agent's bond, indemnifying the company against losses caused by the agent's fraud or dishonesty, is not a breach of a condition of the bond that the company shall report to the surety "any act of omission or commission on the part of the" agent "that might involve a loss from which the" surety "is responsible hereunder. *Pacific Fire Ins. Co.* v. *Pacific Surety Co.*, Cal., 28 Pac. Rep. 842.

PRIVILEGE OF LAST FURNISHER—See Ship 1.

PRIVILEGED COMMUNICATION — See Attorney — Government Employee — Libel and Slander 6.

PROBABLE CAUSE—See Damages 1. 2.

PROOF OF LOSS—See Ins. 5. 10. 14.

PROOF OF DEATH—See Ins. 16.

PROOF OF VALUE — See Eminent Domain 2.

PROTEST, WAIVER OF—See Bills and Notes 7.

PROVOCATION—See Crim. Law 5.

PUBLIC POLICY — See Contracts 1 — Corporations 10.

PUBLICATION—See Libel 5.

QUO WARRANTO—See Mun. Corp. 12.

RAILROAD COMPANIES—SEE ALSO NEGLIGENCE—PRIN. AND AGENT 4.

1. ACTION FOR NEGLIGENCE—LIMITATION OF ACTIONS—C. S.C., c. 66, s. 83—51 V., c. 29, s. 287.

Held, that section 287 of the Railway Act 1888, 51 V., c. 29 (D) by implication repeals C. S. C., c. 66, s. 83, and therefore, the plaintiff was not barred of his action for damages for negligence against the defendants, in respect to injuries sustained through disrepair of one of their bridges, by the lapse of six months since the accrual of the cause of action, but had one year within which to commence his action. *Zimmer* v. *Grand Trunk Ry. Co.* Ontario Chancery Div. Feb. 1892, (Can. L. T.)

2. Collision of Trains—Instructions—Negligence—Damages.

When a passenger is injured by the collision of trains at a crossing of two railroads, each company is liable in full if its servants are negligent; and hence in an action against both it is proper to refuse an instruction requested by one, correctly defining the duty of the other with respect to the care to be exercised in approaching the crossing, and casting upon it the liability in case the jury found a breach of the duty. Both companies are bound to the same degree of care, and the instruction should be made applicable to both. *Kansas City, F. S. & M. R. Co.* v. *Stover*, 49 Fed. Rep. 209 U. S. Circ. Ct.

3. Railways Clauses Act—Temporary Occupation of Land—"Roads"—Tramway—Necessity.

A railway company proposed to take temporary possession of a piece of land adjoining their railway, in course of construction, for the purpose of laying thereon a tramway for carrying materials for their new line. The materials could be brought by the high road, but at greater expense.

Held, that the temporary occupation was not shewn to be "necessary for the construction" of the railway, within section 32 of the Railways Clauses Consolidation Act, 1845. The Court, on motion, restrained the company from taking possession of the land, being strongly inclined to hold also that the proposed tramway was not a road within the same section. *Morris* v. *Tottenham and Forest Gate Rail. Co.* 61 L. J. Rep. Chanc. 215.

4. Elevated—Damage to Market Value of Lands—Benefits.

In an action against an elevated railroad company for damages to the market value of lands not actually taken for its purposes, the court erred in excluding evidence of benefits accruing to such lands from defendant's road. Newman v. Railroad Co., 118 N. Y. 618, and Bohm v. Same, 29 N. E. Rep. 802. N. Y. Ct. of Appeals, Jan. 26, 1892. *Odell* v. *New York El. R. Co.* 8 N. Y. Supp. 951, reversed. (Alb. L. J.)

5. Overflow Caused by Railway Embankments.

In an action against a railway company for damages to land occasioned by an overflow, evidence that an embankment made by defendant prevented the water from passing off as it formerly did, although considerable openings were left for that purpose, and so caused the overflow, is sufficient to sustain a judgment for plaintiff. *Texas & P. Ry. Co.* v. *Snyder*, 18 S. W. Rep. 559. Tex. Supreme Ct.

6. Railroad in Street—Action for Damages—Nonsuit.

In an action against a railroad company for injury to property by reason of the widening of an embankment in the street in front of the property and the construction and operation of an additional track thereon, where no evidence was introduced by plaintiff as to how much the market value of the property was diminished by the increased servitude, the court should have granted a nonsuit. *Denver & R. G. R. Co.* v. *Costes*, 28 Pac. Rep. 1129. Colorado Court of Appeal.

7. Condemning the Right of Way.

A judgment in proceedings by a railroad company to condemn a right of way does not bar an action by the landowner for damages to his crops by cattle getting upon his land because his fences were unnecessarily destroyed in constructing the road-bed. *Louisville, St. L. & T. R. Co.*, v. *Barrett*, 13 Ky. L Rep. 232. Ky. Superior Court.

Railroad Crossing—See Highways 2.

Ratification—See Corporation 12.

Reasonable Accommodation—See Carriers 4.

Reasonable and Probable Cause—See Mal. Prosec.—Damages 1. 2.

Receiver, Appointment of—See Partnership 6.

RELIGIOUS SOCIETIES.

1. Attachment or Execution against Pews.

Property, such as a church pew, which is in its essential nature real

estate and cannot be detached without injury to the realty, cannot be made personalty by agreement between the parties to a conveyance thereof, so as to confer jurisdiction upon a subordinate court having no jurisdiction where title to realty is involved.

A church pew is real estate, and not personalty, and is not affected by an execution issued out of a justice's court, or by an attachment of any kind. *Deutsch* v. *Stone*, 27 Ohio L. J. 20. Ohio Com. Pleas.

2. INCORPORATION—NOTICE—WITHDRAWAL OF FACTION.

Where there are two factions in a church, each claiming to be the true church and entitled to the enjoyment of its temporalities, the members of one faction, by keeping up a separate organization, holding separate services under another pastor, and supporting only their own organization, do not thereby withdraw from the church, but are still members; and an incorporation by them upon due notice to the other faction is an incorporation of the entire church, and serves to invest the corporation with the legal title to the church property. West Koshkonong Congregation v. Ottesen, (Wis.) 49 N. W. Rep. 26, followed. *Holm* v. *Holm*, 51 N.W. Rep. 579. Wis. Supreme Court.

RES JUDICATA — See Counties 1 — Eminent Domain 2.

RESCISSION OF CONTRACT—See Contracts 2.

RESIDENCE—See Corporation 16.

RESOLUTION—See Sale of Goods 6.

"RESPONDEAT SUPERIOR" — See Counties 2.

RESPONSABILITY — See Libel 7 — Master and Servant 9.

RETAINING LIEN—See Companies 5.

REVISING OFFICER—See Mandamus.

REVOCATION OF TRUST — See Contracts 2.

RESTRAINT OF TRADE — See Monopolies.

RIGHT OF WAY—See Railroad Comp. 7.

RISK OF EMPLOYMENT—See Master and Servant 2.

SALE OF GOODS — SEE ALSO PLEDGE—TAXATION 2—CARRIERS 5.

1. POSSESSION.

Where a person buys, at its full value, machinery used by the seller in a manufacturing business, and has it taken to her own premises, where she keeps it four or five months, and at the expiration of that time has it removed to the house of the seller, in close proximity to the premises where it had formerly been used, for the purpose of having it painted and sold, the return to the seller does not, in the absence of any suspicious circumstances, invalidate the sale so as to allow of an attachment by the seller's creditors. *White* v. *O'Brien*, Conn., 23 Atl. Rep. 751.

2. SALE OF PERSONALTY — POWER OF PRESIDENT.

It is not necessary to the validity of a sale of ice by the president of an ice company that he shall have been authorized by resolution of the board of directors of the company to make the sale. *J. M. Horton Ice Cream Co.* v. *Merritt*, 17 N. Y. Supp. 718, N. Y. Supreme Court.

3. CONTRACT FOR SALE OF GOODS OVER £10—MEMORANDUM IN WRITING—ACCEPTANCE—STATUTE OF FRAUDS, S. 17.

A verbal contract was entered into at Liverpool for the sale of a cargo of deals at a price exceeding £10. The deals were conveyed by a carrier designated by the purchaser to the carrier's wharf at Manchester, and an advice note was sent to the purchaser, which contained a description of the deals corresponding with the description in the invoice. The purchaser twice inspected the deals at the wharf, and then wrote across the advice note and signed the following statement, "Refused. Not according to representation." Ten days after the arrival of the deals the purchaser notified his refusal to the vendors.

Held, first, that there was no sufficient connection between the advice note and

the invoice to constitute a memorandum in writing of the contract; secondly, that there was no acceptance within the Statute of Frauds. Page v. Morgan (54 Law J. Rep. Q. B. 434; Law Rep. 15 Q. B. D. 228) distinguished, *Taylor* v. *Smith*, (App.) 61 L. J. Q. B. 331.

4. Acceptance — Manufactured Articles—Evidence.

(1) In an action for the price of vans, evidence that they had been used by defendants for a long time, and were still being used, without any return, or offer to return, warrants the conclusion that defendants had accepted the vans as built in accordance with the contract.

(2) Testimony that one of defendants was at plaintiff's shop every few days during the construction of the vans, and took charge of them, and called plaintiff's attention to the manner in which the panels should be constructed, precludes any recovery by defendants on the ground of a latent defect, in that the panels were not as thick as they should be for vans of such a size.

(3) Where the time of the delivery of goods sold becomes material in an action for the price, and the defendants put in evidence their books containing entries of the time of delivery, the meaning of certain marks on the books near the entries becomes immaterial where the person who made the entries testifies that the entries were made before the marks were. N. Y. Ct. of Appeal, Feb. 9, 1892. *Schuchman* v. *Winterbottom*, (Alb. L. J.)

5. Credit — Insolvency of Purchaser—Rights of Seller.

Where goods are sold on credit, it is an implied condition of the contract that the buyer shall keep his credit good; and the seller is not bound to deliver the goods if the buyer be insolvent. The fact that the buyer has given his note or bill for the price, payable at the expiration of the credit, does not vary the rule. If the insolvency of the buyer is discovered by the seller while he yet has the goods, or while they are in transit, and he retakes them, he may elect to treat the agreement for credit as at an end, and resell the goods, unless the buyer pay or tender the price agreed on. A party to a contract of sale cannot sue for its breach unless he is himself able to perform on his part. It is therefore a good defence to an action by the vendee for damages for the failure to deliver the property sold that, at the time fixed by the agreement for the delivery, he was insolvent, and on that account not able to perform his part of the contract. *Deim* v. *Kablitz*, Sup. Ct. Ohio, 29 N. E. Rep. 1124.

6. Resolution.

Held, that the purchaser or grantee of moveables who claims that they are not of the quality agreed upon, should examine them without delay, and if he allows several months to elapse and even disposes of the goods before bringing his action, he will be non suited. *Cushing* v. *Strangman*, 1 Q. R. (S & C. C.) 46.

Saloon—See Sunday Law 1. 2.

Self-Defense — See Crim. Law 5.

Set-off—See Banks 4. 7.—Bills and Notes 6.—Companies 4.

Sewage, Right to Enter Lands of Municipality for—Mun. Corp. II.

SHERIFF.

Exercise of Discretion by — Interpleader — Laches — Protection of Sheriff.

A sheriff seizing goods under an execution and having notice that a third party claims the goods seized, if he desires to interplead, must apply to the court promptly, and not exercise a discretion by selling or otherwise dealing with the goods.

Boswell v. Pettigrew, 7 P. R. 303, followed. Darling v. Collatton, 10 P. R. 110, considered.

Protection will be given to the sheriff only when he has not abused his power, or caused substantial grievance and has not been guilty of misconduct or neglect, the object of the statute being to protect him when it is unjust that he should be sued. *Harris* v. *York*, 8 Man. R. 89.

SHIP.

1. VOYAGE — PRIVILEGE OF LAST FURNISHER—QUEBEC.

Held:—That the creditor who has made advances for the equipment of a vessel which left Quebec in November 1886 and returned thereto in the spring of 1887 and which during the interval *made different trips in different parts of the world*, loses his privilege of last furnisher. *Henn et al.* v. *Kennedy, ès-qual. & Ross*, 17 Q. L. R. 243.

2. CHARTER-PARTY—DEMURRAGE—"TO BE DISCHARGED WITH ALL DESPATCH AS CUSTOMARY" — STRIKE OF DOCK LABOURERS — CUSTOM TO EMPLOY DOCK COMPANY TO DISCHARGE—HABITUAL AND NOTORIOUS DILATORINESS OF DOCK COMPANY IN DISCHARGING.

It was agreed by charter-party between ship-owner and charterer that a vessel should proceed with a cargo to a port of discharge, and there "be discharged with all despatch as customary." The discharge of the vessel occupied twenty days, two of which were attributable to the cessation of work by the dock labourers in consequence of a strike, two more to the employment of inexperienced men, and six more to the habitual and notorious dilatoriness of the dock company, who were, by the custom of the port, employed to do the work of discharge both for the ship-owner and the charterer:

Held, that the ship owner was entitled to recover demurrage in respect of the four days' delay caused by the strike, that being an exceptional impediment to the discharge in no way arising out of the custom of the port; but not in respect of the other six days' delay, it being attributable in part to the dock company, as agents for the ship-owner. *Castlegate Steamship Co.* v *Dempsey & Co.*, 61 L. J. Rep. Q. B. 263.

SIDEWALKS—See Neg. 20.

SLANDER—See Libel and Slander 6.

SLAUGHTER HOUSE—See Nuisance 2.

SNOW SLIDE FROM ROOF—See Neg. 37.

SNOW PLOUGH RIDGES—See Neg. 15.

SOLICITOR—See Companies 5.

STALENESS OF DEMAND — See Companies 3.

STATION—See Neg. 26.

STATUTE LAW.

STATUTE—ALIEN CONTRACT LABOR LAW.

The Alien Contract Labor Law (23 Stat., p. 332) prohibits the importation of "any" foreigners under contract to perform "labor or service of any kind."

Held, that it does not apply to one who comes to this country under contract to enter the service of a church as its rector. *Rector, etc., of Holy Trinity Church* v. *United States*, United States Supreme Court, Feb. 29, 1892.

Note.

"It appears also from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap, unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and least of all that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress or of the people was not directed. So far then as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act."

"A singular circumstance, throwing light upon the intent of Congress, is found in this extract from the report of the Senate committee on education and labor, recommending the passage of the bill: "The general facts and considerations which induce the committee to recommend the passage of this bill are set forth in the report of the committee of the House. The committee report the bill back without amendment, although there are certain features thereof which might well be changed or modified, in the hope that the bill may not fail of passage during the present session. Especially would the committee have otherwise recommended amendments, substituting for the expression "labor and service," whenever it occurs in the body of the bill, the words 'manual labor,' or 'manual service,' as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may uge to the proposed legislation. The committee however believing that the bill in its present form will be construed as including only those whose

labor or service is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change." Page 6059 Congressional Record, 48th Cong. And referring back to the report of the committee of the House, there appears this language: "It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens, and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them. They are men whose passage is paid by the importers. They come here under contract to labor for a certain number of years. They are ignorant of our social condition, and that they may remain so they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food, and in hovels of a character before unknown to American workmen. They as a rule do not become citizens, and are certainly not a desirable acquision to the body politic. The inevitable tendency of their presence among us is to degrade American labor, and to reduce it to the level of the imported pauper labor." Page 5359 Congressional Record, 48th Cong."

"We find therefore that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor." (Opinion of the Court.)

STATUTE OF LIMITATIONS—See Companies 3.

STATUTE OF FRAUDS — See Sale of Goods 3.

STATUTES — R. S. O., c. 183 — Companies 1.

STATUTES — R. S. O., c. 183, s. 23, s.s. 17 — Companies 2.

STATUTES—R.S.O. c. 141—Mast. and Servt. 8.

STATUTES — R. S. O., c. 184, s. 479, s.s. 15—Mun. Corp. 11.

STATUTES — R. S. O., c. 184, s. 531, s.s. 4—Neg. 23. 25.

STATUTES — R. S. C., c. 9, s. 51 — Elections.

STATUTES—R. S. C., c. 124, ss. 43-49 —Insurance 2.

STATUTES—R.S.C., c. 5—Mandamus.

STATUTES—Consol. Stat. Can., c. 66, s. 83—Railway Company.

STATUTES — Canada, 51 V., c. 29, ss. 256-260—Neg. 35.

STATUTES — Canada 51 V., c. 29, s. 287—Railway Company.

STATUTES — Canada, 52 V., c. 41 — Monopolies.

STATUTES — New Brunswick, 53 V., c. 60—Corporations 16.

STATUTES — Ontario, 52 V., c. 23 — Mast. and Servant 8.

STEWARD, LIABILITY OF—See Club.

STIFLING PROSECUTION—See Agreement.

STOCK, PURCHASE OF—See Banks 3 —Corporations 8.

STOCK, TRANSFER OF — See Corporation 15.

STOCK-HOLDERS' MEETING—See Corporation 15.

STREET CAR, JUMPING FROM — See Neg. 17.

STREET RAILWAY, LIABILITY OF — See Neg. 15. 18—Mun. Corp. 9.

STREETS, ASSESSMENTS — See Mun. Corp. 1.

STREETS, EXCAVATION IN—See Neg. 3.

STREETS, ICY—See Neg. 19.

STREETS, OPENING—See Mun. Corp. 4.

STREETS, RAILROAD IN — See Railroad Company 6.

STREETS, TAKING LAND FOR — See Eminent Domain 3.

STRIKE—See Ship 2.

STRIKE FUND — See Industrial Society.

SUNDAY LAW.

1. KEEPING SALOON OPEN.

A saloon-keeper who allows his bar-tender to enter the saloon on Sunday, and help himself to a glass of beer, is guilty of the offence of keeping his saloon open on Sunday. *People* v. *Crowley*, Mich., 51 N. W. Rep. 517.

2. KEEPING SALOON OPEN.

A saloon keeper who receives his friends on Sunday in his office, connected with his bar, in another building, by archways, but separated therefrom by damask curtains and barricades, is guilty of keeping his saloon open on Sunday. *People* v. *Hughes*, Mich., 51 N. W. Rep. 518.

SURETY—SEE ALSO BONDS 2. — PRIN. AND SURETY 1. 2.

OBLIGATION WITH A TERM — INSOLVENCY OF PRINCIPAL DEBTOR — ARTS 1933, 1934 C. C.

Held, that a surety whose obligation is limited to the capital of the debt, is entitled to the benefit of the term stipulated for payment; not withstanding the insolvency of the principal debtor. 7 M. L. R. (S. C.) 414.

SUSPENSION FOR NON-PAYMENT — See Ins. 23.

SWEATING—See Libel 2.

TARIFF OF FEES—See Fees.

TAXATION—SEE ALSO CORPORATIONS 6.—MUN. CORP. 7.

1. PROPERTY HELD IN TRUST.

Where the capital of a life insurance company is divided into shares, and its stock is taxable by law against the respective stockholders at its market value, the property constituting a fund made up of certain sums set apart from payments made by the certificate holders, and held by a trust company under a contract made part of every certificate, and stipulating that the fund is the property of the insurance company, subject to the trusts expressed, is not taxable in the hands of the trust company as property held in trust for the certificate holders. *Security Co.* v. *Town of Hartford*, 23 Atl. Rep. 699 Conn. Supreme Court.

2. MUNICIPAL LAW—SALE OF LAND FOR TAXES—NULLITY OF—RIGHTS OF PURCHASER—WARRANTY—COSTS.

Held, where lands are sold illegally for taxes by school trustees, and the purchaser, more than two years after the sale, has brought a petitory action to obtain possession, and the trustees intervene, and admit the nullity of the sale, which was made *super non domino et non possidente*, they are bound to reimburse the purchaser, not only the price of adjudication, but also to pay all the costs of both sides, as well of the principal action as of the intervention. *Corp. Dissent. School Trustees Cote St. Paul* v. *Brunet*. 1 Q. R. (Q. B.) 79.

TELEGRAPH COMPANIES.

1. NEGLIGENCE.

Where a mother telegraphs her son, "Your stepfather died this morning," and the person who delivers the message to the telegraph company tells the agent that it is important that the message should be rushed through, the company is sufficiently informed that the telegram is sent for the mother's benefit, and is an invitation to her son to come to her.

Damages for Delay.

Negligent delay of several days in delivering such a message constitutes a breach of contract, for which the sender may recover the sum paid for the transmission of the message and compensation for injury to her feelings, as actual damage. *Western Union Tel. Co.* v. *Nations*, 18 S. W. Rep. 709, Tex. Supreme Ct.

2. DELAY IN TRANSMITTING MESSAGE—ACTION FOR DAMAGES—PARTIES.

Where a woman delivers a message to a telegraph company, addressed to her brother, and asking that he come to her at once, as her husband is not expected to live, and there is nothing to show that her husband had any estate or any other heirs than herself, a suit for failure to transmit the said message need not be brought in favor of the estate, but by the wife, as the injury sued for resulted only from a breach of the contract to transmit the message, and not from the death of her husband.

In an action for delay in transmitting to plaintiff's brother a message announcing that plaintiff's husband is not expected to live, and asking him to come at once, it is not necessary, to

sustain a claim for injury to plaintiff's feelings, that the message should show on its face the relationship between the plaintiff and the addressee. Telegraph Co. v. Kirkpatrick, (Tex. Sup.) 13 S. W. Rep. 70, distinguished. *Potts* v. *Western Union Tel. Co.*, 18 S. W. Rep. 604. Tex. Supreme Ct.

3. DELAY IN DELIVERY OF MESSAGE —EVIDENCE —DELAY OF PLAINTIFF.

An action may be maintained against a telegraph company for delay in the transmission and delivery of a message whereby a son was prevented from reaching the bedside of his dying mother. In such case, evidence that the son was the favorite child of his mother was properly admitted.

Declarations of defendant's agent, made to the sender of the message, that it had been delivered at the other end of the line, were properly admitted in evidence.

The Court properly permitted plaintiff to show that he sent another telegraphic message to the same place, but to a different person, and that it was delivered, and a reply received within a specified time.

The court properly refused to charge the jury that plaintiff could not recover if he failed to take certain trains by which he would have reached the bedside of his mother before her death, it being the province of the jury to say whether or not plaintiff's delay was accounted for or excused.

Plaintiff replied to the message announcing his mother's illness at a time when it would be several hours before any train would leave his place, hoping to receive an answer in the meanwhile.

Held, that the court properly refused to instruct the jury that he should have acted on the first dispatch instead of trusting to receive another. *Western Union Tel. Co.* v. *Lydon*, Supreme Ct. of Texas. Nov. 1891.

TELEGRAPH POLE, DEFECTIVE ARM ON—See Neg. 2.

TICKET, CONDITION ON—See Carriers 2.

TITLE—See Trespass to Land.

TOY AIR GUN —See Neg. 12.

TRACK—See Neg. 27. 32. 35.

TRADE MARK—See Costs.

TRADE UNION—See Libel 2.

TRADE LIBEL—See Libel 2.

TRAMWAY—See Railroad Comp. 3.

TRAP-DOOR—See Neg. 10.

TREES, REMOVING FROM SIDEWALK —See Mun. Corp. 10.

TRESPASS TO LAND.

TITLE — APPLICATION FOR NEW TRIAL—MISDIRECTION — MISCONDUCT OF JURORS—NOMINAL DAMAGES.

S. brought an action against C. for trespass on his land by placing ships' knees thereon, whereby S. was deprived of the use of a portion of the land and prevented from selling or leasing the same. On the trial S. gave no evidence of substantial damage suffered by the trespass, but contended that an action was necessary to preserve his title. The defendants, however, did not set up title in themselves, but only denied that plaintiff had title. Before the verdict was given the jury viewed the premises, one of the conditions on which the view was granted being that "nothing said or done by any of parties or their counsel should prejudice the verdict." The jury found a verdict in favour of C., and S. moved for a new trial on the ground of the misdirection and misconduct of the defendant's counsel at the view. The court below refused a new trial.

Held, that by the terms on which the view was granted S. could not set up misconduct thereat in support of his application.

Held, further, that there was no misdirection, but if there was, all that S. could obtain at a new trial would be nominal damages, and it was properly refused by the court below. Appeal dismissed with costs. *Simonds* v. *Chesley*, Supreme Court of Canada. Nov. 1891.

TRIAL.

1. ARGUMENT OF COUNSEL—CARRIERS OF PASSENGERS.

Where, in an action against a railroad

company for personal injuries to plaintiff's wife, defendant procures, without opposition, an order of the court to have the wife's person examined by physicians, and the physicians, without objection, testify at the trial as to the examination, it is error for counsel for plaintiff, in his argument to the jury, to excite their prejudice by referring to the examination as an outrage, etc,; and where the court fails to check such argument on defendant's objection and there appears a probability that the jury were influenced thereby, the error is ground for reversal.

Such a line of argument is not warranted by the fact that defendant's counsel, in his argument, referred to the examination of the wife's person, and the testimony of the physicians, and to the lack of evidence for plaintiff showing injury.

A carrier of passengers, though not bound to have its depot platform absolutely safe, is bound to use more than ordinary care and precaution in making it reasonably safe. *Gulf, C. & S. F. Ry. Co.* v. *Butcher*, Supreme Ct. of Texas. February, 1892.

2. PHYSICAL EXAMINATION OF CHILD.

Held, that in an action by a father, in his quality of tutor, for personal injuries suffered by his minor child, the defendant, before pleading, may obtain an order for an examination of the child by a physician. *McCoombe* v. *Phillips*. 7 M. L. R. (S. C.)

TRUSTS—See Deed—Corporation 10—Taxation 1.

TRUST DEED—See Corporation 8.

"ULTRA VIRES"—See Companies 3. 10.

UNBALLASTED TRACK — See Mast. and Servt. 4.

"VIS MAJOR"—See Contractor.

WAGES.

DISRATING — DEDUCTION FROM WAGES—MERCHANT SHIPPING ACT, 1854 (17 AND 18 V. C. 104), S. 171.

The plaintiff, having shipped on board the H. C. as refrigerating engineer, with wages at the rate of 10*l*. per month, was, during the voyage, disrated by the master for alleged drunkenness and unfitness for his duties. He was placed in the main engine-room, and his wages were reduced from £10 to £7 per month.

Held, that this disrating and reduction of wages was not a "deduction" from the wages within the meaning of section 171 of the Merchant Shipping Act, 1854, and that it was not, therefore, necessary that the amount by which the wages had been reduced should be shewn under the head of deductions in the account of wages delivered to the plaintiff by the master. *The Highland Chief*. 61 L. J. Rep. P. D. & A. 51.

WAIVER—See Bills and Notes 7. 15—Ins. 4. 7. 8. 10.

WARRANTY—SEE ALSO TAXATION.

WARRANTY—PATENT DEFECTS.

In a suit for damages for breach of warranty of a horse, *held*, that a general warranty of soundness does not cover patent defects, nor defects known to the buyer. Yet, the rule is equally well settled that a vendor may, in express terms, warrant against an obvious defect It is a matter of contract, and in construing it the object is to discover the real intention of the parties. *Samuels* v. *Bortee, Adm'r*.

WATER COMPANIES — SEE ALSO MUN. CORP. 7.

1. POWER TO LAY PIPES IN STREETS—CITY ORDINANCES.

A water company, in the exercise of its power under its charter, to open streets for the purpose of laying pipes, "provided, that, when the same shall be opened for that purpose, they shall, as soon as practicable, be repaired by the said company at their own cost and expense, subject to the approval of the superintendent of police of said town or the common council thereof," is not within an ordinance of such city providing that no person shall break or dig up any portion of a street "without first having obtained the written permission of the mayor, and depositing with the city treasurer such sum as the committee on street may

deem sufficient to repair the street." Lacy, J., dissenting. *Wheat* v. *City Council of Alexandria*. Supreme Ct. of Appeals of Virginia, Jan. 1892.

Notes.

1. The right to dig up the streets of a city for the purpose of laying water or gas pipes therein is a franchise which can be granted only by the legislature or by the city under legislative authority. 2 Dill. Mun. Corp. (4th Edit.) s. 656 (518); Water-works v. Rivers, 115 U. S. 674; New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650; State v. Gas Co., 18 Ohio St. 262; Gas Co. v. Dwight, 29 N. J. Eq. 242.

2. It is not doubted, however, that the city council may prescribe regulations touching as well the opening as the repair of the streets by the water company which are not inconsistent with the essential rights granted by the company's charter. Commissioners, etc., of the Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St. 318; New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650, 671, 6 Sup. Ct. Rep. 252.

2. INSUFFICIENT SUPPLY OF WATER LIABILITY FOR DAMAGE BY FIRE.

Where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the tax-payers of the city, and by the terms of the city ordinance, which the water company accepts, the water company agrees "that it will pay all damages that may accrue to any citizen of the city by reason of a failure on the part of the company to supply a sufficient amount of water or a failure to supply the same at the proper time, or by reason of any negligence of the water company," there is no such privity of contract between a citizen or resident and the water company as will authorize him to maintain an action against it for the injury or destruction of his property by fire, caused by the failure of the water company to fulfill its contract. *Mott* v. *Cherryvale Water & M. Co.*, 28 Pac. Rep. 989, Kan. Supreme Court.

WIFE, ACTION FOR SERVICES OF—See Marriage.

WILL—See Marriage.

WINDING-UP — See Companies 1. 2. 3. 4.

WITNESS—SEE ALSO MARRIAGE.

1. OPINION EVIDENCE.

A witness familiar with a railroad track at place where cattle were killed is competent to testify as to the distance at which cattle on the track could be seen by the engineer. Such testimony is not objectionable as being the statement of an opinion. *Gulf C. & S. F. R. Co.* v. *Washington*, 49 Fed. Rep. 347, U. S. Cir. Ct.

2. PRIVILEGE—PHYSICIANS.

A physician who has attended a person professionally, and has also seen her at various other times when not in attendance on her professionally, may testify to her mental condition from knowledge and information acquired by him when not treating her professionally. Edington v. Insurance Co., 77 N.Y. 564; People v. Schuyler, 106 id. 304; Hoyt v. Hoyt, 112 id. 515, *Fisher* v. *Fisher*, N. Y. Ct. of Appeals, Jan. 20, 1892. (Alb. L. J.)

WORKMEN'S COMPENSATION FOR INJURIES ACT—R. S. O., c. 141—See Mast. and Servant.

LIABILITY OF SLEEPING-CAR COMPANIES.

In our February number we gave a condensed report of the case of Sise v. The Pullman Palace Car Company, Superior Court, Montreal, Tait, J., Jan. 30, 1892. This case has gone to appeal. In the meantime the very same question has arisen in France, and it is interesting to note that the Court there decided in accordance with the views entertained by the majority of American judges, viz: that a sleeping-car can notbe likened to an hotel or inn on wheels. The Montreal case decided that the resemblance was sufficient to give rise to "necessary deposit." We think the French case is of sufficient importance to be worth translating in full.

TRIBUNAL CIVIL DE LA SEINE.

14 MAY 1892.

Compagnie des wagons-lits c. époux Barthélemy.

(*Translation*).

The question that here arises is, whether a sleeping-car company, in the absence of proof of negligence on the part of its agents, is liable for the loss or theft of unchecked baggage which the passengers keep with themselves and do not intrust to the guard.

It is certain that the sleeping-car company, if it is a carrier, would no more be liable than railway companies for unchecked baggage which passengers keep with themselves instead of intrusting to the guards; whence it follows that the said company could only be liable (as has been pleaded on behalf of Barthelemy), as if it were an innkeeper or hotel-keeper and that its special carriages were inns or hotels.

An inn or hotel is a house, or portion of a house, where a traveler, who stops in a locality with the intention of remaining there for a greater or less length of time, can find board and lodging for a sum of money.

It is certain that the codifiers of the Civil Code could have intended no other meaning for the word *inn* than that given by them, for they were far from foreseeing the scientific, industrial and economic advances that were to take place after their day, and could not have had even a suspicion of the existence one day of carriages, so managed, that they might to a certain extent be likened to inns.

The sleeping-car company, in their dealings with the railroad companies, never intended their rolling stock to be considered as inns on wheels, but simply in the nature of improved railway carriages, where travelers of means might find for an extra consideration, certain advantages, notably the provision of a bed with coverings upon which to lie down, washing facilities, the use of a closet, and the power to obtain certain services from the employees of the company, placed there to wait on the passengers.

The respondent, who claims that the sleeping-cars are inns, and the company innkeepers without their knowing or wishing it, basing his argument upon the existence in each sleeping-car, of compartments with room for two or four people, or two or four beds, claims also that these compartments with beds and coverings can be likened

to the apartments of hotels, and the employees of the company to hotel attendants, etc.; that passengers intending to lie down on the beds which can be substituted for the seats are obliged to bring certain articles of night toilet, and this baggage constitutes a "necessary deposit."

But although there may exist certain analogies between sleeping-cars and inns, and especially those of an inferior class, where sometimes there are several beds in a room, it by no means follows that there is identity between an inn and a sleeping-car, and this identy must be complete in order that articles 1952 *et seq.* of the Civil Code may apply.

In order to render these articles inapplicable to the present case, it is sufficient that there be differences between an inn and a sleeping-car, and recourse must therefore be had to the common law; for such is the method adopted by both doctrine and jurisprudence in cases of loss of articles in establishments more or less analogous to inns, such as *cafés*, restaurants, baths and lavatories which are frequented by the public and who bring articles there.

It is by an abuse of words that the night effects brought in to sleeping-cars by passengers are stated to be a "necessary deposit." "Necessary deposit" in its proper legal sense is that which the depositary is obliged to afford, through urgency, to the first person at hand, on account of some accident: fire, ruin, pillage, shipwreck or other unforeseen occurrence of which he is a victim.

It is certain that the fact of traveling in a sleeping-car, an incident foreseen and even desired by the traveler, has in it nothing analogous to those unfortunate and unforeseen events which give rise to the "necessary deposit" which the Roman law rightly designated by the name of *depositum miserabile.*

The differences between sleeping-cars and inns are numerous; thus a sleeping-car is essentially moveable, and is only occupied while moving, whereas the inn is stationary and is only used by people who are sojourning in its locality. In sleeping-cars the compartments contain two or four beds, which is not the case with, and would not be tolerated in, an hotel frequented by respectable people. Neither in an inn or hotel would the promiscuity necessary in a sleeping-car, be tolerated. The sleeping compartments of a sleeping car cannot be locked on the outside with a key, so that were the passenger alone in his compartment, he could not carry away the key or hand it to the employee in charge, which is exactly the reverse of the state of affairs which exists in hotels or inns, where rooms can be locked and the keys either retained by the occupiers, or left with the innkeeper who keeps watch over them.

It is maintained that these distinctions are not essential, and that their extent can be modified by assimilating sleeping-car compartments, for which the passengers pay very dear, to such rooms as contain several beds, or rooms in an inn, or furnished rooms on a ground flat, the occupants of which possess little or nothing, and who are exposed only to very slight losses, thus engendering but little responsibility upon their landlords.

But there exist other distinctions which are essential and conclusive. In effect, the innkeeper, subjected as he is to exceptional responsibility, is always in his inn, and can exercise an incessant watchfulness in order to prevent the loss or theft of the property of his guests. He can notably select his guests, by refusing to entertain persons

whose presence in his inn might be a source of danger. This is not the case with the sleeping-car companies, who, by the terms of their agreements with the railroad companies are not at home (so to speak) in their own cars, the management and construction of these being, in a certain measure, controlled by the railroad company. Again, sleeping-car companies are obliged to accept all persons who demand and pay for a place in their cars, whether they are suspected to be dangerous or not.

This obligation to receive without any distinction all passengers who apply, and to retain them the whole of their journey, is imposed upon the company by all its contracts, and especially by that with the Orleans Railway Company in the organization of its Southern Express, which binds it to furnish the latter with the necessary dining and sleeping-cars for the making up of its special *trains de luxe* running between Calais, Paris, Madrid and Lisbon and *vice-versa*.

This contract reads as follows: "Places in the Southern Express trains shall be granted without favour to the first passengers applying therefor, until the car is filled. A passenger desiring a place in these trains shall pay: 1st, to the railway company the price of a first class ticket for the journey he wishes to make; 2nd, to the sleeping-car company an extra payment at the rate of 50 p. c. of the amount of the first class ticket."

In addition, it must be observed that the sleeping-car company are obliged to allow the employees of the railroad company to enter their cars and keep watch over their general management.

Therefore it is certain that the sleeping-car companies are not hotel or innkeepers, and hence articles 1952 *et seq.* applicable to that class only, cannot be applied to them.

Thus the theory that a passenger in a sleeping-car enters into two contracts, one of carriage with the railroad company and another of hostelry with the sleeping-car company, herein fails; —that a contract of hostelry cannot exist with the sleeping-car company, for they are not innkeepers. In reality there are not two contracts different as to their nature, but two contracts of carriage; one which gives the passenger a first class journey, the other affording him, in consideration of an extra paid to the "sleeper" company, which they share with the railroad company, a journey in a sleeping-car.

The truth is, that the sleeping-car company is but a common carrier acting in concert with the railroad company whose lines and traction they hire, thus procuring for passengers who make application and pay an extra price, luxurious compartments of a special nature, and who in fact substitute themselves for the Southern Express trains of the railway company, excepting as regards the traction and its auxiliaries, and guaranteeing within certain ascertained conditions, service as common carriers; whence it follows that, like the railway company, it is not responsible for hand baggage which the passengers have not had checked and left in their care, but which they have kept themselves and at their own risks. Appeal allowed.

LIST OF CASES DIGESTED IN THIS NUMBER.

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