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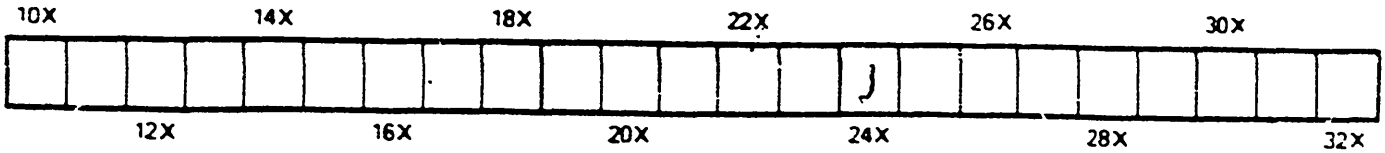

MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. MARCH, 1892. No. 3.

ACCEPTANCE—See Sale of Goods 2.

ACCIDENT INSURANCE—See Insurance.

ACTION FOR ACCOUNT—See Parties Action.

ACTION ON NOTE—See Banks and Banking 4.

ACTION ON POLICY—See Insurance 6.

ACTION TO SET ASIDE DEED—See Insolvency 2.

ACTION TO SET ASIDE SECURITY—See Insolvency 3.

ACTIONS FOR STOCK—See Corporations 2.

ADJOURNMENT WITHOUT DAY.

CONVICTION ON A SUBSEQUENT DAY AD.

The justice adjourned the trial without day, stating in the presence of all parties that he would make up his judgment and notify the parties affected, which he did in time for an appeal from the conviction.

Held, that no conviction could be made, the justice having lost jurisdiction by the adjournment without day. *Queen* v. *Morse*, 22 N. S. Repts., 98.

ADULTERATION.

GUILTY INTENT—SALE OF FOOD AND DRUGS ACT, 1875 (38 & 39 VIC., c. 63, s. 9.)

By sec. 9 of the Sale of Food and Drugs Act, 1875, "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it, so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."

Held, that the words "so altered" refer to a physical alteration of the article, irrespective of the intent with which the alteration is made. — The respondent, a retail milk seller, poured into a pail eight barn gallons of unskimmed milk, which she sold therefrom in small quantities to her customers, dipping it out of the pail from time to time with a measure. The sale of the contents of the pail extended over a space of between four and five hours, during the whole of which time, owing to the neglect of the respondent to keep the milk stirred, the cream was continually rising to the surface. When not more than two quarts of milk remained in the pail, the appellant purchased of the respondent a pint of milk, which was served to him from the pail, and which, upon analysis, shewed a deficiency of 33 per cent. of fatty matter. The respondent did not disclose the deficiency to the appellant. The deficiency was entirely due to the manner in which the earlier customers had been served.

Held, that the respondent, in so selling the milk to the appellant without disclosing its condition, was guilty of an offence against the above section. Pain v. Boughtwood, (24 Q. B. D., 353) followed. *Dyke* v. *Gower* [1892] 1, Q. B., 220.

AFFIDAVIT OF "BONA FIDES"—See Bill of Sale.

AGE OF BUILDING—See Insurance 9.

AGENTS, POWERS OF—See Insurance 1—Sale of Goods 3.

AGENTS, RIGHTS OF—See Insurance 2.

ALTERATION OF NAME OF COMPANY—See Companies 1.

ANTE-NUPTIAL CONTRACTS — See Foreign Law.

APPEAL—SEE ALSO ARBITRATION AND AWARD — ELECTIONS — EXPROPRIATION—MANDAMUS.

1. SUPREME AND EXCHEQUER COURTS AMENDING ACT, 1891, S. 3—APPEAL FROM COURT OF REVIEW.—QUEBEC.

By s. 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the Supreme Court of Canada from the Superior Court in Review, Province of Quebec, in cases which by the law of the Province of Quebec are appealable direct to the Judicial Committee of the Privy Council. A judgment was delivered by the Superior Court in Review at Montreal in favour of D., the respondent, on the same day on which the Amending Act came into force. On a motion by D. to quash an appeal to the Supreme Court of Canada taken by H.:

Held, that the appellant not having shown that the judgment was delivered subsequent to the passing of the amending Act, the Court had no jurisdiction.

Quære, whether an appeal will lie from a judgment pronounced after the passing of the amending Act in an action pending before the change of the law. Appeal dismissed. *Hurtubise* v. *Desmarteau*, Supreme Court of Canada, 10 Nov. 1891.

2. TITLE TO LAND—SUPREME AND EXCHEQUER COURTS ACT, SEC 29 (*b*).

In an action brought before the Superior Court with seizure in recaption under arts. 857 and 887 C. C. P. and art. 1624 C. C. the defendant pleaded that he had held the property (valued at over $2,000) since the expiration of his lease under some verbal agreement of sale. The judgment appealed from, reversing the judgment of the Court of Review, held that the action ought to have been instituted in the Circuit Court. On appeal to the Supreme Court,

Held, that as the case was originally instituted in the Superior Court and that upon the face of the proceedings the right to the possession and property of an immoveable property is involved, an appeal lies. Supreme and Exchequer Courts Acts, sec 29 (*b*.) and ss. 28 and 24. (Strong, J. diss.) *Blatchford* v. *McBain*, 19 Can. S. C. R. 42.

Notes.

See *Darling* v. *Ryan*, Cassels Dig. p. 254: *Bank of Toronto* v. *Le Curé etc.*, 12 Can. S. C. R. 25; *Gilman* v. *Gilbert*, 16 Can. S. C. R. 189: *Chagon* v. *Normand*, 16 Can. S. C. R. 661.

3. APPEAL FROM REPORT OF OFFICIAL REFEREE—DAMAGES TO PROPERTY FROM WORKS EXECUTED ON GOVERNMENT RAILWAY—PAROL UNDERTAKING TO INDEMNIFY OWNERS FOR COSTS OF REPAIRS BY OFFICER OF THE CROWN—EFFECT OF.

Held, affirming the judgment of the Exchequer Court, that where by certain work done by the government railway authorities in the City of St. John the pipes for the water supply of the City were interfered with, claimants were entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and serviceable condition, under an arrangement made with the chief engineer of the government railway, and upon his undertaking to indemnify the claimants for the cost of the said work. Strong and Gwynne, JJ. dissenting on the ground that the chief engineer had no authority to bind the Crown to pay damages beyond any injury done. *The Queen* v. *The St. John Water Commissioners*, 19 Can. S. C. R. 125.

4. JURISDICTION — ACTION IN DE AVOWAL — PRESCRIPTION — APPEAR ANCE BY ATTORNEY — SERVICE OF SUMMONS—C. S. L. C., ch. 83, sec. 41 Quebec.

In an action brought in 1866 for the sum of $800 and interest at 12½ per cent, against two brothers, J. S. D. and W. McD. D., being the amount of

promissory note signed by them, one copy of the summons was served at the domicile of J. S. D., at Three Rivers, the other defendant W. McD. D. then residing in the state of New York. On the return of the writ the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874 when judgment was taken, and in December, 1880, upon the issue of an *alias* writ of execution, W. McD. D. having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by J. S. D., saying "be so good as to file an appearance in the case to which the enclosed has reference &c."

The petition in disavowal was dismissed. On the appeal to the Supreme Court of Canada, the respondent moved to quash the appeal on the ground that the matter in controversy did not amount to the sum of $2,000.

Held, 1st, that as the judgment obtained against W. McD. D. in March, 1874, on the appearance filed by the respondent, exceeded the amount of $2,000, the judgment on the petition for disavowal was appealable.

2nd. That there was no evidence of authority given to the respondent or of ratification by W. McD. D. of respondent's act, and therefore the petition in disavowal should be maintained.

3rd. Following *McDonald* v. *Dawson*, Cassels' Digest, p. 322, and 11 Q. L. R. 181, that the only prescription available against a petition in disavowal is that of thirty years.

4th. That where a petition in disavowal has been served on all parties to the suit, and is only contested by the attorney whose authority to act is denied, the latter cannot on appeal complain that all parties interested in the result are not parties to the appeal.

The appeal was allowed with costs. *Dawson* v. *Dumont*, Supreme Court of Canada, Nov. 6, 1891.

APPEARANCE BY ATTORNEY — See Appeal 4.

ARBITRATION AND AWARD

SEE ALSO EXPROPRIATION.

EXPROPRIATION UNDER RAILWAY ACT R. S. C., c. 109 — DISCRETION OF ARBITRATORS—AWARD — NON-INTERFERENCE ON APPEAL—QUEBEC.

In a case of an award in expropriation proceedings it was held by two courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice. On appeal to the Supreme Court of Canada,

Held, that the judgments should not be interfered with. *Benning* v. *Atlantic and Northwest Railway Company*, Sup. Court of Canada, Nov. 1891.

ARBITRATORS — See Expropriation.

ARTICLES OF ASSOCIATION — Companies 2.

ASSESSMENT AND TAXES—Taxation 1.

ASSESSMENTS, DUTY TO LEVY—See Benefit Associations 2.

ASSIGNEE—See Insolvency 1.

ASSIGNMENT OF PREFERENCES—See Insolvency 1, 3.

ATTESTING WITNESS — See Bill of Sale.

AWARD—See Arbitration and Award —Expropriation.

BANK STOCK—SEE ALSO BANKS AND BANKING 2.

SUBSTITUTED PROPERTY — REGISTRATION—ARTS. 931, 938, 939 C. C.—SHARES IN TRUST.

The curator to the substitution of W. Petry paid to the respondents the sum of $8,632 to redeem 34 shares of the capital stock of the Bank of Montreal entered in the books of the bank in the name of W. G. P. in trust, and which the said W. G. P., one of the *grévés* and manager of the estate, had pledged to the respondent for advances made to him personally. H. P. *et al*, appellants, representing the substitution, by their action sought to have refunded the money which they alleged

the Rev. J. P., one of them, had paid by error as curator, to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to show that they formed a part of the estate, and no *acte d'emploi* or *remploi* to show that they were acquired with the assets of the estate.

Held, affirming the judgment of the court below, *per* Ritchie, C. J., and Fournier and Taschereau, JJ., that the debt having been paid with full knowledge of the facts, the plaintiffs could not recover.

Per Strong and Fournier, JJ., that bank shares cannot be held, as regards third parties in good faith, to form part of substituted property, on the ground that they have been purchased with moneys belonging to the substitution, without an act of investment in the name of the substitution and a due registration thereof: Arts. 931, 938, 939, C. C.; Patterson, J., dissenting. *Petry* v. *Caisse d'Economie*, Supreme Ct. of Canada, 17 Nov. 1891.

BANKRUPTCY — See also Insolvency.

Contempt of Court—Refusal of Witness Summoned under s. 27 of the Bankruptcy Act, 1883 (46 & 47 Vict, c. 52), to Submit to Examination — Motion for Committal — Civil Process — Privilege of Parliament—Bankruptcy Rules—1886, rr. 70, 88.

On a motion by a trustee in bankruptcy to commit a member of Parliament to prison for contempt of Court in having refused to submit to examination touching the bankrupt's affairs, when summoned for that purpose under s. 27 of the Bankruptcy Act, 1883, the witness claimed privilege of Parliament.

Held, that as the order of committal would be in its nature, not punitive, but a civil process to enforce obedience to the order of the Court, an attachment would not lie, and that the witness was privileged from arrest. *In re Armstrong. Ex parte Lindsay*, (1892), 1 Q. B. 327.

BANKS AND BANKING — See also Constitutional Law 1, 2.

1. Liability of Directors.

The directors of a savings bank, who have in good faith lent to one person a sum greater than one-fourth of the banks' capital stock, contrary to law, are liable to the bank or its receiver for any loss that may accrue from such loan, although the statute itself does not provide any penalty for its violation. The wilful violation of the statute, and consequent loss therefrom, furnish sufficient proof of liability. 1 Mor. Priv. Corp., § 555; *Association* v. *Coriell*, 34 N. J. Eq., 383; *Bank* v. *Wilcox*, 60 Cal., 126; *Fusz* v. *Spaunhorst*, 67 Mo., 264, distinguished. Mo. Sup. Ct., Dec. 2, 1891; *Thompson* v. *Greeley*. Opinion by Macfarlane, J.

2. Shares of Bank Stock Held by Deceased Person — Injunction to Compel Transfer of Shares to Executor — Shares Specifically Devised — The Bank Act R. S. C. c. 120, ss. 29, 30, 32, 34, 35.

B. held twenty-six shares of stock of the above bank, registered in her name at the time of her death. Probate of her will was granted to the plaintiff, who wished to sell and dispose of the shares and have the bank assign and transfer the same to the purchaser under ss. 29 and 30 of the Bank Act. He then made and filed with the bank the declaration provided for by s. 32 of the act. and also filed a copy of the probate of the will showing that he was executor, and required the bank to transfer the stock to him as such, which they refused to do, on the ground that by the will the stock was specifically bequeathed to be divided among certain legatees. The plaintiff then applied for a mandatory injunction to compel the transfer, and the question raised was whether the bank was compelled to do so without the consent of the legatees and *cestuis que trustent*.

Held, that by R. S. C. c. 120 it was the duty of the bank to make the transfer, where the provisions of ss. 32, 34 and 35 had been complied with, and that there was no obligation

the bank to see that the bequests of the will were carried out by the executor. *Boyd* v. *Bank of New Brunswick.* Supreme Ct. of New Brunswick, January, 1892.

3. PAYMENT OF FORGED DRAFT BY DRAWEE.

W., on December 17, 1885, presented to defendant bank at Kansas City a letter of introduction from a bank at Nevada, showing his genuine signature, and also a certificate of deposit, a small portion of which he collected, leaving the balance on deposit. He rented an office, and December 22nd, employed a book-keeper. On the same day he deposited with defendant a draft on New York for $3,500, drawn by an Omaha bank, and on December 23rd drew $2,500. On the afternoon of the same day he deposited a draft for $4,000, drawn by an Omaha bank on plaintiff bank at Chicago. On Dec. 24th he drew $4,500, and left town. At that time his balance in defendant bank was $550. Defendant, December 24th, sent the draft of $4,000 to its correspondent in Chicago, "For collection," and it was paid by plaintiff bank, the drawee, through the Chicago Clearing House, on December 26th. January 4th it was sent to the drawer bank at Omaha, where it was found to be a forgery. The officers of the Omaha bank, as well as the clerk whose name was signed to the draft, at first thought it genuine. Due notice of its forgery was given to all parties, but W. could not be found.

Held, that defendant was not negligent in its dealings with W., either before or after presentation of the draft, and that it was a *bona fide* owner of the draft; that by its indorsement of the same, "For collection," it only guaranteed the genuineness of the payee's signature, and retained title thereto until it was paid by the drawee bank, of which fact the latter had notice by such indorsement; and an action would not lie by the drawee to recover the amount thereof. *Northwestern Nat. Bank of Chicago* v. *Bank of Commerce of Kansas City.* Sup. Ct. of Missouri, Dec. 1891, 11 R. R. & Corp. L. J., 86.

4. NATIONAL—CONVERSION—ELECTION OF REMEDIES—ACTION ON NOTE.

(1) The Revised Statutes of the United States, section 5201, which forbids National banks to make loans on the security of shares of their own capital stock, does not invalidate such a loan, since only the government can take advantage of the breach of the law. *Bank* v. *Matthews*, 98 U. S. 621; *Bank* v. *Whitney*, 103, id. 99; *Fortier* v. *Bank*, 112, id. 439; *Wyman* v. *Bank*, 29 Fed. Rep. 734; *Thompson* v. *Bank*, 113 N. Y. 325, 334; *Bank* v. *Savery*, 82, id. 291. (2) The cashier of a National bank, in order to obtain security for a note discounted by the bank, procured from the maker an assignment to himself of some stock in the bank. In order to evade the National Banking Law he put the stock in a separate envelope, and indorsed the note himself. *Held*, that he held such stock for the bank as cashier, and that for his misappropriation thereof the sureties on his official bond were liable. (3) A suit by the bank against the cashier as indorser of the note and the recovery of judgment therein does not estop the bank from suing the sureties for the misappropriation of the stock, since the two causes of action are concurrent, and not inconsistent. By indorsing the notes, not formally but as it must now be assumed with the intention of binding himself, Rutherford became liable to the plaintiff on his contract. Subsequently, by misappropriating the security that he had taken and was holding as cashier for the plaintiff's benefit, he violated his fiduciary relation to the bank, and made himself liable in tort. The latter cause of action accrued nearly five years after the former, to which it had only an accidental relation. His liability on the notes did not prevent him from wrongfully disposing of the bank's collateral, and making himself liable on that account also. The casual circumstance that one payment would discharge both liabilities does not affect their independent origin and nature, because no fact essential to liability on the note was essential to liability for the misappropriation. There was a breach of contract, and also a breach of duty, in

no manner dependent on such contract. Under such circumstances no election of remedies was required, for both were available. *Manning* v. *Keenan*, 73 N. Y. 45, 51; *Morgan* v. *Skidmore*, 3 Abb. N. C. 92; *Morgan* v. *Powers*, 66 Barb. 45; *White* v. *Whiting*, 8 Daly, 23, 25; 6 Am. and Eng. Enc. Law, 248. Second Div., Dec. 1, 1891. Walden Nat. Bank v. Birch. Opinion by Vann, J. 7 N. Y. Supp. 934, affirmed, 45 Alb. L. J. 154, New-York Court of Appeals.

BENEFICIARIES, CHANGE OF — See Benefit Associations 1.

BENEFIT ASSOCIATIONS

1. BENEFIT CERTIFICATE— CHANGE OF BENEFICIARIES.

A holder of a mutual benefit certificate had three sons and a daughter, and made the "children" the beneficiaries, but afterwards caused the names of the sons only to be inserted after the word "children."

Held, that since neither the certificate nor the laws of the society provided for a change of beneficiaries, the daughter acquired a vested right as a beneficiary, which would descend to her heirs at her death. *Johnson* v. *Hall*, 17 S. W. Rep. 874 Ark. Sup. Ct.

2. DUTY TO LEVY ASSESSMENTS

A certificate of membership by which the association agrees, upon the member's death, to levy an assessment, and to pay the money thereby collected "to his devisees, or, in the event of their prior death, to the legal heirs or devisees of the certificate holder," obliges the association, in case the member dies intestate, to levy an assessment, and pay the proceeds to his heirs. Such obligation may be enforced by suit in equity for specific performance. *Covenant Mut. Ben. Ass'n* v. *Sears.*, 29 N. E. Rep., 480, Ill. Sup. Ct.

BENEFIT CERTIFICATE — See Insurance 15—Benefit Ass'ns.

BILL OF EXCHANGE—See Bills and Notes 2—Conflict of Laws.

BILL OF LADING — SEE ALSO CHARTER-PARTY.

CONSTRUCTION — LIBERTY TO DEVIATE FROM SPECIFIED VOYAGE — EXTENT OF DEVIATION AUTHORIZED.

In an action by shippers of goods against the shipowners for damage to the goods, it appeared that the goods were shipped under a bill of lading, which stated that the goods (oranges) were shipped on board the defendants' steamer, "now lying in the port of Malaga, bound for Liverpool, with liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever."—After the oranges had been shipped at Malaga the ship, instead of going direct to Liverpool, went first to Burriana, a port on the north-east coast of Spain, about two days' steam from Malaga, and afterwards returned and proceeded to Liverpool. By reason of the delay thus occasioned, the oranges were in a rotten state when they arrived at Liverpool.

Held, that the general words of the bill of lading must be limited with reference to the specified voyage, and that they only allowed the ship to proceed to ports which were fairly and substantially in the ordinary course of the voyage, that they did not justify the actual deviation; and that the defendants were liable. *Margetson* v. *Glynn*, [1892] 1. Q. B. 337.

BILL OF SALE.

AFFIDAVIT OF "BONA FIDES"—ADHERENCE TO STATUTORY FORM—PROOF OF EXECUTION—ATTESTING WITNESS.

Where an affidavit of *bona fides* to a bill of sale stated that the bill of sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, while the form given in the Statute uses the words "against *any* creditors of the bargainor," such variation did not avoid the bill of sale as against execution creditors, the two expressions being substantially the same. Gwynne, J., dissenting.

The statute requires the affidavit to be made by a witness to the execution of the bill of sale, but as attestation is not essential to the validity of the instrument, its execution can be proved by any competent witness. *Emerson* v. *Bannerman*, 19 Can. S. C. R. 1.

Notes.

1. "I think the evidence furnished by the statute itself by means of the retention of the expression "the creditors", in the two cognate sections (3 and 4) proves that the legislature regarded the two forms of expression as practically synonymous." Patterson, J.

2. We have in this particular a different rule of construction to follow from that on which we had lately to act in *Archibald* v. *Hubley*, 18 Can. S. C. R. 116 in applying a statute which required a rigid adherence to the forms it prescribed." Patterson, J.

3. In this case it was *held*, that the omission of the date and the words "before me" from the jurat of an affidavit accompanying a bill of sale under s. 4 of the Nova Scotia Bills of Sale Act (R. S. N. S., 5th Ser.) makes such affidavit void and the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods. Gwynne, J., dissenting.

4. The interpretation ordinance of the N. W. Territories enacts that slight deviations from forms prescribed by the ordinances, not affecting the substance or calculated to mislead, shall not vitiate them.

BILLS AND NOTES.—See also Conflict of Laws.

1. Promissory Note—Indorsement—Proof.

Held, that in the trial of facts in an action upon promissory notes, recourse must be had to the English laws in force on May 30, 1849, by force of which parol testimony is admissible to prove that the indorsement of a promissory note was given upon the request and for the accommodation of the bearer and not to guarantee the maker. *Northfield* v. *Laurance*, S. C. Montreal, 1891, 21 Rev. Leg. 359.

Notes.

1. The liabilities *inter se* of the successive indorsers of a bill or promissory note, must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them. It is in accordance with that rule, that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill, sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law merchant, is not altered or affected by reference to such acts and circumstances, he may still obtain relief by shewing that the party from whom he claims indemnity agreed to give it him; but in that case he sets up an independent, and collateral guarantee; which, he can only prove by means of a writing, which will satisfy the Statute of Frauds.

Where the directors of a company mutually agreed with each other to become sureties to the bank for the same debts of the company, and in pursuance of that agreement successively indorsed three promissory notes of the company,

Held, reversing the judgment of the Court below, that they were entitled and liable to equal contribution *inter se*, and were not liable to indemnify each other successively according to the priority of their indorsements. Reynolds v. Wheeler, (10 C. B. (N. S.) 561) approved; Steele v. McKinlay, (5 App. Cas. 754) distinguished.

According to the Civil Code of Lower Canada (arts. 2340 and 2346) the law of England, in force on the 30th day of May 1849 is applicable to the question raised in this appeal. *Macdonald* v. *Whitfield*, Privy Council, 1883, 8 App. Cas. 733.

2. See *Macdonald* v. *Whitfield*, 2 Dorion's Q. B. Repts 165. *Scott* v. *Quebec Bank*, 7 L. N. 343; *Merchants' Bank of Canada* v. *Whitfield*, 2 Dorion's Q. B. Repts 157; art. 2326 S. R. Q.; arts. 2340, 2341 and 2346 C. C.; *Léveillé* v. *Daigle*, 2 Dorion's Q. B. Repts 129; *Scott* v. *Turnbull*, 6 L. N. 397; *Deschamps* v. *Léger*, 3 M. L. R., S. C. p. 1.

2. Bill of Exchange—Presentment for Acceptance—Declaration, what it should allege—Demurrer—Leave to Amend.

This was an action on a bill of exchange drawn by the defendant upon J. R., payable to his own order, ninety days after sight, and indorsed to the plaintiffs. The declaration, after stating the drawers and indorsers of the bill and that it was overdue, alleged as

follows :—" and the said bill was duly presented for payment and was dishonoured, whereupon the same was duly protested for non-payment, of all of which the defendant had due notice but did not pay the bill."

The defendants demurred to the declaration on the ground that it did not allege that the bill had been presented for acceptance, nor that it had matured when it was presented for payment.

Held, that it was necessary to aver presentment in order to shew the time when the bill became due, and that the plaintiffs had a cause of action.

Demurrer allowed, with leave to the plaintiffs to amend the declaration on payment of costs. *Merchants' Bank of Halifax* v. *Roatt*, Supreme Ct. of New Brunswick, January 1892, Can. L. T.

3. CHECKS—DAYS OF GRACE.

An instrument in form of a check, which read : " 100 Franklin St. $200. Boston, Au 31, 1889. The National Revere Bank of Boston, pay to the order of Geo. H. Towle, Oct. 1, 1889, two hundred dollars. No. 9,288. [Signed] Samuel W. Creech, Jr.," was a check and was not entitled to grace. The question whether a check made payable on a day subsequent to its date should be regarded as a check or as a bill has been decided differently in different jurisdictions. *In re Brown*, 2 Story, 502 ; *Champion* v. *Gordon*, 70 Penn. St. 474 ; *Bank* v. *Wheaton*, 4 R. I. 30 ; *Ivory* v. *Bank*, 36 Mo. 475 ; *Henderson* v. *Pope*, 39 Ga. 361 ; *Morrison* v. *Bailey*, 5 Ohio St. 13 ; *Minturn* v. *Fisher*, 4 Cal. 36 ; *Bowen* v. *Newell*, 13 N. Y. 290. In the present case the check appears to be upon one of the ordinary printed blanks of the bank on which it is drawn. It is dated August 31, 1889, and the only difference that is suggested between it and an ordinary check is that it is made payable October 1, 1889. If it had been post-dated as of that date it would not have been payable until then, and yet would in that case have been a check. It has all the other characteristics of a check, and we cannot believe that it was intended by the parties, or would have been taken by the bank on which it was drawn, as any thing else than a check. It is often convenient to make a check payable at a future day, and we see no valid distinction between post-dating it and making it payable at a subsequent date. In the latter case, as in the former, it is expected that it will be presented on the day when payable, which in the one instance would be the day of its date, and in the other the day fixed for its payment, and that there will be funds to meet it, and that it will then be paid. And neither in the latter case, any more than in the former, would it be expected that the holder would present the check for acceptance before payable to the bank on which it was drawn, and on its refusal to accept it protest it and bring suit forthwith against the drawer for non-acceptance. We think it better accords with the intent and understanding of the parties and of bankers and business men generally to treat the instrument in suit as a check than as a bill of exchange, and we see no valid objection to doing so. Mass. Sup. Jud. Ct., Jan. 9, 1892. *Way* v. *Towle*. Opinion by Morton, J. 45 Alb. L. J. 177.

4. PROMISSORY NOTE — PRESENTMENT FOR PAYMENT — WHERE PAYABLE.

Certain promissory notes were made payable at the Imperial Bank of Canada without stating any special place. The notes were dated at Brandon. The head office of the Imperial Bank was at Toronto, but it had a branch office at Brandon and the notes were presented at that office for payment. *Held*, a sufficient presentment. *The Commercial Bank of Manitoba* v. *Bissett*, 7 Man. Reports, 586.

Notes.

1. In the absence of anything on the paper to indicate or restrict the place of payment the presumption of law is that it is payable where dated, if dated at any place ; *otherwise* where made and delivered. Abbott's Trial Evidence, p. 411.

2. Whether or not due diligence to find the maker of a note at the place where it is dated will be sufficient, has been debated. The place of date is *prima facie* evidence that it is the place of the maker's residence and place of business, and it is sufficient we should say, to charge an indorser to have the note in the place at the time of maturity, and to make proper inquiry after the place of the maker

residence or place of business, provided that the holder does not know that his residence is elsewhere. And, if it were found that the maker's residence is elsewhere, it would not devolve upon the holder the burden of showing that he made inquiries as to his residence. Daniels on Negot. Instruments, 640.

BOARDS OF HEALTH.

ABATEMENT OF NUISANCE—NOTICE TO OWNER OF PREMISES.

The making of an order by a board of health to a person as the owner of certain real property, requiring him to abate a nuisance thereon, involves a judicial determination that he is the owner, and, as such, permits the existence of the nuisance; and the order is therefore void when made without previous notice to him, even though the statute authorizing such order (Laws 1885, c. 270, § 3) does not require notice of the making thereof; and a failure to comply therewith cannot be made the basis of a criminal prosecution under the provision making it a misdemeanor to wilfully violate or refuse to obey such an order, (Laws 1885, c. 270, § 4). *People* v. *Wood*, 16 N. Y. Supp. 664, N. Y. Supreme Court.

BREACH OF CONTRACT—See Insurance 3.

BUILDING CONTRACT.

CHARGES OF QUANTITY SURVEYOR—LIABILITY OF BUILDER—USAGE.

The plaintiff, a quantity surveyor, was employed by an architect to take out the quantities for a building about to be erected; the defendant, a builder, tendered for the work upon the basis of a specification, containing the following clause: "To provide for copies of quantities and plans, 25 guineas to be paid to the surveyor" (naming the plaintiff) "out of the first certificate." The defendant's tender was accepted, and he received the first instalment of the price of his work from the building owner. In an action by the plaintiff to recover the 25 guineas according to the specification, evidence was given that, by the usage of the building trade, the builder whose tender was accepted was liable to the quantity surveyor for the amount due for the quantities; but that if no tender was accepted the building owner or architect was liable:

Held, that the usage was reasonable and valid, and that there was evidence of a contract with the plaintiff upon which he was entitled to recover. *North* v. *Bassett* (1892), 1 Q. B. 333.

BY-LAW — See Municipal Corporations 1, 4.

CANCELLATION OF POLICY—See Insurance 7.

CARGO LEFT IN PERIL FOR BENEFIT OF VESSEL—See Maritime Law.

CARRIERS

OF GOODS.

1. DELAY IN DELIVERING CORPSE—DAMAGES.

A wife can recover damages for distress of mind occasioned by the negligence of a railroad company in delaying the transportation of her husband's corpse. *Hale* v. *Bonner* S. C. Texas, Oct. 1891.

Note.

In the case of *Telegraph Company* v. *Simpson*, 73 Tex. 422, the resulting injury was somewhat similar to that in the present case.

2. DANGEROUS FREIGHT — NEGLIGENCE OF SHIPPER — PERSONAL INJURIES—EVIDENCE — EXCESSIVE VERDICT.

A quantity of naphtha was placed in a car by a shipper and billed as "carbon oil." Across the heads of the barrels was branded the words, "Unsafe for illuminating purposes." On the trip the conductor entered the car with a lantern to stop a leak, and while so engaged was injured by an explosion.

Held, that the shipper was bound to so mark the barrels that the employees of the carrier, in the exercise of ordinary prudence, would ascertain the explosive nature of the goods; and whether the brand mentioned was sufficient for this purpose was a question for the jury.

Evidence that the naphtha was billed by the shipper as carbon oil

under a contract with the company whereby it was to be carried at the same rate as carbon oil was admissible to show good faith, but not for the purpose of showing knowledge by the conductor, as notice to the company was not notice to him.

Evidence that the wooden barrels in which the naphtha was shipped were safe, and that naphtha was ordinarily shipped in wooden barrels by prudent business men, was admissible.

Evidence that after the accident the shipper changed the method of labeling the barrels was inadmissible.

At the time of the injury the conductor was a vigorous and laborious man, about 30 years old. He was burned about the face so as to disfigure him for life, and permanently lost the use of his left arm. His right hand was somewhat injured, and his feet were badly burned. He suffered much pain for several months.

Held, that a verdict for $25,000 was excessive. *Standard Oil Co.* v. *Tierney*, Ct. of Appeals of Kentucky, Dec. 1891, 11 R. and Corp. L. J. 92.

OF PASSENGERS.

3. EJECTMENT OF PASSENGER—SUNDAY—PAYMENT OF FARE.

The complaint alleged that defendant railroad company advertised to run an excursion train on a certain day to a certain place, giving the time of its arrival and departure at the various stations, and the fare for the round trip; that plaintiff went to one of the small stations, and sought to procure a round trip excursion ticket, but there were no such tickets for sale at that station; that plaintiff paid more than the fare for the round trip at the excursion rate to the conductor, and took his receipt, and demanded that he be carried the round trip; that, returning on the same train, the same conductor demanded a return fare, and, on his refusal to pay, ejected plaintiff from the train.

Held, that the complaint showed sufficient compliance on plaintiff's part with defendant's regulations to entitle him to the special excursion rate. The fact that the trespass occurred on Sunday is no defence, since the action was not based on a breach of contract, but on the violation of a personal right assured by law on plaintiff's compliance with defendant's regulations. It was not incumbent on plaintiff to pay the return fare demanded, and then sue to recover the same, since such a course would be purchasing a right he already had. It was no defence that the ticket office had been discontinued at this station, as plaintiff had a right to expect defendant to furnish reasonable facilities for obtaining tickets. Since the action was not based on a special contract with the conductor, the substance of the cash fare receipt, and defendant's regulations respecting the purchase of excursion tickets, were immaterial. *Chicago St. L. & P. R. Co.* v. *Graham*, App. Court of Indiana, Nov. 1891, 11 R. and Corp., L. J., 57.

Notes.

1. The company may run an excursion train at reduced rates, and require passengers to purchase tickets as a condition upon which they shall obtain the benefit of such rates; and it may enforce this rule against all who, by their own fault, fail to comply with it. If, however, a passenger is unable to procure a ticket through the fault of the company, he may take passage on such train, and upon a tender of a ticket fare will be entitled to all of the rights and privileges that a ticket would afford him. Upon a tender of fare under such circumstances, the relation of carrier and passenger would obtain, and the company would have no right to eject such passenger, or deny him passage, because he is without a ticket. This principle is firmly settled by the decisions of the Supreme Court of this State. *Railroad Co.* v. *Rogers*, 28 Ind. 1; *Railroad Co.* v. *Myrtle*, 51 Ind. 566; *Railroad Co.* v. *McDonough*, 34 Ind. 289; *Railway Co.* v. *Fix*, 88 Ind. 381. *Godfrey* v. *Railway Co.*, 116 Ind. 30, 18 N. E. Rep. 61; *Pennsylvania Co.* v. *Bray*, 125 Ind. 229, 25 N. E. Rep. 439.

2. As between carrier and passenger, the law imposes a duty upon the carrier, independent, in a sense, of their contractual relations, although incidental thereto, but which has its basis in the regard the law has for human life and personal security. *Railroad Co.* v. *Fraley*, 110 Ind. 18, 9 N. E. Rep. 594; *Carroll* v. *Railroad Co.*, 58 N.Y., 125.

3. If the appellee had paid the extra demand, and been carried to his destination, perhaps he could only recover the excess unless some element of special damages entered into the occurrence; but he was not bound to do this. This identical question was before the court in *Railroad Co.* v. *Rogers*, 28 Ind. 1

and in deciding it the court said: "The plaintiff was under no obligation to purchase, even for a trifle, the right which was already his own."

4. *See Poulin* v. *Can. Pac. Ry. Co.*, 1 M. L. D. & R., 73 and notes thereto.

CHANGE OF INTEREST OF INSURED—See Insurance 8.

CHARTER-PARTY.

BILL OF LADING — LIABILITY OF OWNER OF CHARTERED SHIP—PRINCIPAL AND AGENT—MASTER—REGISTERED MANAGING OWNER.

The owner of a ship, who was also registered as managing owner, chartered her for a period of four months, and concurrently agreed to sell her to the charterer on certain terms, the sale to be completed on the expiration of the charter-party. It was provided by the charter-party that the captain, officers, and crew (with the exception of the chief engineer) should be appointed and paid by the charterer, and they were in fact so appointed and paid. The chief engineer might be and was appointed by the owner, who was to pay for the insurance of the vessel and to maintain her in a thoroughly efficient state in hull and machinery for service, the charterer paying all other charges. The charter-party reserved to the owner sufficient space for ship's officers, crew, tackle, and stores; and it was also thereby provided that the captain should be under the orders of the charterer, and that the charterer should indemnify the owner from all liability arising from the captain signing bills of lading. The plaintiffs shipped on board the vessel certain bales of cotton under bills of lading, some of which were signed by the captain, and the rest by a firm of shipping agents who acted as the charterer's agents at the port of shipment. Neither the captain nor the shipping agents had any authority to sign bills of lading on behalf of the owner. This fact was not known to the plaintiffs, who had no knowledge that the ship was under charter. The cotton having, during the currency of the charter, been lost at sea by reason (as was alleged) of the unseaworthiness of the vessel, the plaintiffs sued the owner for the loss:

Held, reversing the judgment of Charles J., that the intention and effect of the charter-party was that the owner parted with the possession and control of the vessel to the charterer, and that provisions that were not consistent with this intention might be disregarded; that, consequently, the captain was not in fact, nor could he be taken to be, the servant of the owner; and that as neither the shipping agents nor the captain were the agents of the owner, he could not be liable either under the bills of lading, or for any alleged negligence of the captain in taking the vessel to sea in an unseaworthy condition, or by reason of his being registered as managing owner. *Baumwoll Manufactur von Scheibler* v. *Gilchrest & Co.* [1892] 1 Q. B. 253.

CHATTELS—See Sale of Goods 3.

CHECKS—See Bills & Notes 3.

CHILDREN—See Negligence 4, 6.

CITY, POWERS OF — See Riparian Rights.

CITY, RIGHT OF TO EXTEND STREETS ACROSS RAILROAD—See Railroad.

CO-HABITATION—See Criminal Law & Procedure 3.

COMMISSION OF INQUIRY—See Constitutional Law 3.

COMPANIES.

1. MEMORANDUM OF ASSOCIATION—ALTERATION OF OBJECTS—EXTENSION TO NEW BUSINESS—ALTERATION OF NAME OF COMPANY — COMPANIES (MEMORANDUM OF ASSOCIATION) ACT, 1890 (53 & 54 VICT., c. 62, s. 1.

A marine insurance company applied under the provisions of the Companies (Memorandum of Association) Act, 1890, for the sanction of the court to resolutions altering the company's deed of settlement, by extending the objects of the company so as to combine therewith businesses in the nature of life, fire, and accident insurance connected with marine risks. There was evidence that such businesses were commonly transacted by marine insurance companies at the present time, and that they could conveniently or

advantageously be combined with the existing business of the company:

Held, following *In re Foreign and Colonial Government Trust Company* [1891] 2 Ch. 395, that the proposed alteration ought to be sanctioned only on the condition that the name of the company should be altered in such manner as should be approved of by the judge in chambers, so as to indicate to persons dealing with the company the extended nature of the company's business. *In re Alliance Marine Assurance Company* [1892], 1 Ch. 300.

2. ARTICLES OF ASSOCIATION—CONSTRUCTION — DIRECTOR — QUALIFICATION—THE COMPANIES ACT 1862 (25 & 26 VIC., CAP. 89. SECS. 23, 30).

The articles of a company registered under the Companies Acts, as an unlimited Company, provided that any two of the directors should be a quorum, that any member holding ten shares should be eligible as a director, and that "in case any share or interest in this concern shall be held in the name of a company or firm, only one individual partner of that company shall be entitled to attend and vote at the general meetings, and to give proxy as aforesaid, whose name shall be entered in the books of the company as the ostensible holder, and no trustee on the bankrupt estate of a partner shall be entitled as such to attend any meetings or to vote by proxy at the same."

A call having been made at an ordinary meeting by a quorum of the directors who were registered individually, and as possessing more than ten shares each, a shareholder objected to their qualification, alleging that they had no beneficial right in their shares, but held them in trust for a certain company, and further that as such partners of this company only one was entitled to act.

The Court *held*, that this defence was irrelevant on these grounds—(1) that as the directors were registered individually, and were therefore liable individually for all the obligations of an individual shareholder, they were entitled to all the privileges pertaining to such a character: (2) that the word "held" in the clause "any share held in the name of a company" was equivalent to "registered," and did not apply to the shares held by the directors; and that as the directors were not registered as "ostensible holders" for the company for which they were alleged to hold in trust, the restriction on persons registered as such did not apply to them; (3) that the article founded on did not affect the present case, as it applied only to general meetings. *Galloway Steam Packet Co. v. Wallace*, 29 Scot. Law Rep. 264.

3. LIMITED BY GUARANTEE—RIGHT IN SECURITY — PLEDGE — POWER TO HYPOTHECATE GUARANTEE LETTERS IN SECURITY OF ADVANCES — "ULTRA VIRES"—COMPANIES ACT, 1862 (25 and 26 VIC. c. 89.) SEC. 9.

In the memorandum and articles of association of a company registered under the Companies Act, 1862, as a company limited by guarantee and empowered to create a guarantee fund, the subscribers to which were, in the event of a winding-up and there being a deficiency of assets, to contribute to the assets of the company to the extent of their guarantee, it was provided that the company might borrow money and, in security thereof, assign or hypothecate to the lender the guarantee obligations, letters, and relative documents from subscribers to the guarantee fund. The executive council having borrowed a sum of money from a bank in terms of the above provisions, hypothecated the letters of guarantee to the bank in security of the advance.

In a voluntary liquidation, under supervision of the Court, the liquidator presented a note praying the Court to ordain the bank to deliver the letters to him, and to declare that the bank had no valid security or preference over the guarantee fund or letters of guarantee for payment of their advances.

The Lord Ordinary (Stormonth Darling) *granted* the prayer of the petition, holding (1) that as the guarantee fund had no existence until the company went into liquidation, and then only in the event of there being a deficiency of assets, and for the purpose of equal distribution among the creditors, it was *ultra vires* of the executive council

to create a security over it in favour of any particular creditor; and (2) that in any view the hypothecation or pledge of the letters was ineffectual to constitute a preference over the fund in competition with the liquidator, who was entitled to possession of the letters as accessories of the fund. *Robertson* v. *British Linen Co.* 18 Sc. Sess. Cas. 4th, Ser. 1225.

Notes.

Neither the memorandum nor the articles of association can confer power upon directors to do any thing contrary to the statutes by which limited liability is allowed. Of this there are two very recent illustrations in Scotland (Klenck v. East India Co. for Exploration and Mining, Limited, Dec., 21, 1888, 16 R. 271, and General Property Investment Co. and Liquidator v. Matheson's Trustees, Dec., 21, 1888, 16 R. 282) where it was held *ultra vires* of a company in the one case to issue its shares at a discount, and in the other to purchase its own shares, although there was power to that effect in the memorandum and articles. These cases were decided in conformity with Trevor v. Whitworth in the house of Lords (1887, 12, L. R. App. Cas. 409) which was also a case of a company buying its own shares.

When the directors of a company limited by shares, had exercised a power contained in the articles to "borrow on mortgage of all or any part of the property of the company" and to include in any such mortgage "all or any definite proportion of the capital of the company then uncalled" it was held by the Court of Appeal that the calls to be made by the liquidator in the winding-up were bound by the mortgages, and that the several mortgagee were entitled to have the calls applied in payment of their mortgage debts in priority to the general creditors. *In re Pyle Works* 1890, L. R. 44 Ch. D. 534.

COMPOSITION.

Loan to Effect Payment—Secret Agreement — Failure to Pay — Arts. 1039, 1040, C. C.

On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at four, five, and twelve months. At the time L. was indebted to the Exchange Bank, then in liquidation, who did not sign the composition deed, in a sum of $14,000. B. and others, the appellants, were at that time accommodation indorsers for $7,415 of that amount, and held as security a mortgage dated 5th September, 1881, on L.'s real estate. The bank having agreed to accept $8,000 cash for their claim, B. *et al.*, on the 11th January, 1884, advanced $3,000 to L., and took his promissory notes and a new mortgage for the amount, having discharged and released on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. *et al.*, who on the 14th January, 1884, advanced a sum of $3,000 to L. to enable him to pay off the Exchange Bank, and for which they accepted L.'s promissory notes. L. the debtor, having failed to pay the second instalment of his notes D. *et al*, who were not originally parties to the deed, brought an action to have the transaction between L. and the appellants set aside, and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors.

Held, reversing the judgments of the courts below, that the agreement by the debtor L., with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. The Chief Justice and Taschereau, J., dissenting.

Per Fournier, J. That the mortgages ought to be set aside, having been registered on the 13th January, the respondent's right of action was prescribed by one year from that date. Art. 1040 C. C. Appeal allowed with costs. *Brossard* v. *Dupras*, Supreme Court of Canada, 16 Nov. 1891.

Conditions—See Insurance 12.

CONFLICT OF LAWS — See also Foreign Law.

Bill of Exchange — Overdue Inland Bill Indorsed Abroad — Claims by Different Holders in Absence of Payer—Indorsee with Valid Title under Foreign Law—Rights against Prior Holder with Equitable Title in England — Conflict of Laws—Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), ss. 29 (sub-s. 2), 36 (sub-s. 2), 72 (sub-s. 2).

A bill of exchange, drawn and accepted by English firms, and payable in England to the order of X. & Co.,

was indorsed in Norway by X. & Co., to the order of M., who indorsed it in blank and handed it in Norway to S., as agent for A., an Englishman residing in London, and an English firm of A. & Co. carrying on business in London (in which A. & J. were partners). While the bill was in the hands of S., and still current, it was seized in execution under a judgment obtained in Norway by a creditor of J., and, after, the bill had become overdue, it was sold by public auction to M. The seizure and sale took place in the ordinary course of Norwegian law, under which a perfect title was conferred by the sale on M. freed from all equities—that law not recognising the English doctrine that the purchaser of an overdue bill only gets such title as his vendor had, or any difference as to extent of negotiability between a current and an overdue bill. M. sold the bill in Sweden (the law of which is the same for this purpose as that of Norway) to K., who bought in the ordinary course of business, without knowledge of any infirmity of title to the bill. K. sent the bill for collection to his agents in England, the N. Bank. Before presentation for payment A. and A. & Co. obtained an *ex parte* injunction restraining the drawers and acceptors from paying the bill, and after presentation A. and A. & Co., obtained an *ex parte* injunction against the N. Bank, restraining them from parting with the bill. By arrangement, the proceeds of the bill were paid into Court, and the N. Bank and all the defendants except K. were dismissed from the action:

Held, by Romer, J., that sub-sect. 2 of sect. 36 of the Bills of Exchange Act, 1882, which provides, that "where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had," is only declaratory of the English law when that law applies; and that, the action being in reality to recover the bill, the only question being between two persons each claiming against the other to be entitled to hold the bill and as holders to obtain payment, and no question being raised by or affecting the payers, the case was not within the proviso to sub-sect. 2 of sect. 72 of the Bills of Exchange Act., 1882, that "where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdon:"

Held by Romer, J., and on appeal, that the effect of the transactions in Norway must be determined by Norwegian law, and that, as according to that law their effect was to give to M. a complete title to the bill and its proceeds free from all equities, the title of K. prevailed over that of A. and A. & Co. Lebel v. Tucker (Law Rep. 3 Q. B. 77) distinguished. *Alcock v. Smith*, [1892] 1 Ch. 238.

CONJUGAL UNION—See Crim. Law and Proced. 3.

CONSIDERATION—See *Contract* 4—Insolvency 3—Patent.

CONSPIRACY.

INDICTMENT—MOTION TO QUASH.

Held:—The offence of "conspiracy to defraud" results from the "combination to defraud" and this can be executed by means which in themselves may be lawful. It is not therefore necessary that the overt acts should in themselves constitute offences. *Regina* v. *McGreevy et al*, 17 Q. L. R. 196.

Notes.

"Conspiracy is a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means." Baron Alderson, in *Regina* v. *Vincent*, C. & P., p. 91.

"An indictment for conspiracy ought to show that it was for an unlawful purpose, or to effect a lawful purpose by *unlawful means*." Lord Denman, in *Regina* v. *Seward*, 1 A. & E. p. 713.

"The crime of conspiracy is complete if two or more than two, should agree to do an illegal thing; that is to effect something in itself unlawful, or to effect by unlawful means something which in itself may be indifferent or even lawful." Chief Justice Tindal, in *O'Connell* v. *Regina*.

CONSTITUTIONAL LAW.

1. VALIDITY OF DOMINION ACTS—31 V., c. 17 (*D*)—33 V. c. 50 (*D*)—BANKING AND INCORPORATION OF BANKS—BANKRUPTCY AND INSOLVENCY—TAXATION—EXEMPTION—CROWN LANDS—BENEFICIAL INTEREST OF CROWN—ONTARIO.

The Bank of U.C. was insolvent when the B. N. A. Act was passed, and all its property and assets had been transferred to trustees. By 31 V., c. 17, the Dominion Parliament ratified the assignment and constituted the trustees a body corporate with power to carry on the business of the bank so far as was necessary for winding up the same. By 33 V., c. 50, the same Parliament transferred all the property and assets of the bank to the Dominion Government. Subsequently a piece of land included in said assets was sold by the Government and a mortgage taken for the purchase money. This land was assessed by the municipality in which it was situate and sold for unpaid taxes. In a suit to set aside this tax sale,

Held, affirming the judgment (*sub nomine The Queen* v. *County of Wellington*) of the Court of Appeal (17 Ont. App. R. 615) that said acts of the Dominion Parliament were *intra vires*.

Per Ritchie, C. J. Parliament having legislative jurisdiction over "Banking and the Incorporation of Banks," and over "Bankruptcy and Insolvency," could pass the acts in question.

Per Strong, Taschereau and Patterson, JJ. The right of the Dominion Parliament to pass the said acts cannot be referred to its right to legislate with respect to "Banking and the Incorporation of Banks," but is derived from its jurisdiction over "Bankruptcy and Insolvency."

Held, also, that the Crown having a beneficial interest in the lands on which it held a mortgage, such lands were exempt from taxation and the tax sale was invalid. Appeal dismissed with costs. *Quirt* v. *The Queen*, Supreme Court of Canada, Nov. 1891.

2. VALIDITY OF DOMINION ACTS—31 V. c. 17—33 V. c. 40—BANKING AND INCORPORATION OF BANKS — BANKRUPTCY AND INSOLVENCY—TAXATION—EXEMPTION—CROWN LANDS—BENEFICIAL INTEREST OF CROWN, ONTARIO.

The Bank oi Upper Canada was insolvent when the British North America Act was passed, and all its property and assets had been transferred to trustees. By 31 V. c. 17 the Dominion Parliament ratified the assignment, and constituted the trustees a body corporate with power to carry on the business of the bank as far as was necessary for winding up the same. By 33 V. c. 40 the same Parliament transferred all the property and assets of the bank to the Dominion Government. Subsequently a piece of land included in the assets was sold by the Government and a mortgage taken for the purchase money. This land was assessed by the municipality in which it was situate and sold for unpaid taxes. In an action to set aside this tax sale :—

Held, affirming the judgment of the Court of Appeal, 17 A. R. 421, and the Queen's Bench Divisional Court, 17 O. R. 615, that these Acts of the Dominion Parliament were *intra vires*.

Per Ritchie, C. J.—Parliament, having legislative jurisdiction over "banking and the incorporation of banks," and over "bankruptcy and insolvency," could pass the Acts in question.

Per Strong, Taschereau and Patterson, JJ.—The right of the Dominion Parliament to pass the Acts cannot be referred to its right to legislate with respect to "banking and the incorporation of banks," but is derived from its jurisdiction over "bankruptcy and insolvency."

Held, also, that the Crown having a beneficial interest in the lands on which it held a mortgage, such lands were exempt from taxation and the tax sale was invalid. *Regina* v. *County of Wellington*, Supreme Court of Canada, 16 Nov. 1891.

3. EXECUTIVE POWER—COMMISSION OF INQUIRY—R. S. Q. 590, 598.—PROHIBITION, WRIT OF

Held, reversing the judgment of Wurtele J. (M. L. R. 6 S. C. 289.) 1. An inquiry into an alleged attempt to influence and corrupt members of

the provincial legislature is a matter connected with the good government of the province, and the conduct of the public business therein, within the meaning of R. S. Q. 596.

(2). A commission of inquiry issued by the Lieutenant-Governor-in-Council under the said section, has the same power to enforce the attendance of witnesses, and to compel them to give evidence before it, as is vested in any court of law in civil cases, and has therefore the power to punish by fine or imprisonment, or both, any contempt of its authority by any person summoned as a witness refusing to appear, or to answer questions put to him concerning the matters which are the subject of such inquiry.

(3). Under the provisions of the B. N. A. Act 1867, the provincial legislature was empowered to enact the provisions contained in articles 596 and 598 of the Revised Statutes of Quebec.

(4). Even if the commissioners, in the course of the inquiry which they were duly authorized to make, had permitted some irregular or illegal questions to be put to a witness, their improper ruling on the subject could not have authorized the issue of a writ of prohibition, which only applies to cases of want of jurisdiction, and not to cases of erroneous judgments, for which other remedies are provided. *Turcotte* v. *Whelan*, M. L. R. 7, Q. B. 263.

CONSTRUCTION—See Bill of Lading —Companies 2.

CONTEMPT OF COURT — See Bankruptcy.

CONTRACT OF SALE, SLIGHT VARIATION FROM—See Sale of Goods 1.

CONTRACT OF SALE — See Sale of Goods 2.

CONTRACTS.

1. RESCISSION — EVIDENCE — DAMAGES.

(1) Defendants contracted with plaintiff to furnish him a theatre for performances by his comedy company, plaintiff to receive therefor fifty per cent of the gross receipts. In a letter written by plaintiff to defendants subsequent to said contract plaintiff inclosed a written contract, to be signed by defendants, for sixty per cent of the gross receipts, stating that he could not think of playing for less. Defendants in reply returned the contract unsigned, and said they did so because "we have a contract signed by you and do not need any other." *Held*, that plaintiff was justified by defendants' letter in considering the first contract as still in force. *Johnstone* v. *Milling*, 16 Q. B. Div. 460; *Frost* v. *Knight*, L. R. 7 Exch. 111; *Zuck* v. *McClure*, 98 Penn. St. 541. (2) In an action for the breach of such contract plaintiff is entitled to recover the amount of the losses he sustained in preparing for the appearance of his company at defendants' theatre, and not the profits he might have made by the performances, as they are not ascertainable. Second Division, Dec. 22, 1891. *Bernstein* v. *Meech*. Opinion by Bradley, J. 8 N. Y. Supp. 944, affirmed, 45 Alb. L. J. 101. New-York Court of Appeals.

2. MUNICIPAL CORPORATION—CAPACITY TO CONTRACT EXCEPT UNDER SEAL—MANITOBA.

G. in answer to advertisement tendered for a contract to build a bridge for the municipality of North Dufferin, and his tender was accepted by resolution of the municipal council. No by-law was passed authorizing G. to do the work, but the bridge was built and partly paid for. A balance remained unpaid, for which B., to whom G. had assigned the contract, notice of the assignment having been given to the council in writing, brought an action. This balance had been attached by a creditor of G., but the only defence urged to the action was that there was no contract under seal, in the absence of which the corporation could not be held liable. On the trial there was produced a document signed by G. purporting to be the contract for the building of the bridge. It had no seal and was not signed by any officer of the municipality. The duplicate was alleged to have been mislaid in the office of the clerk of the municipality.

Held, reversing the judgment of the Court of Queen's Bench for Manitoba

6 Man. L. R. 88, Ritchie, C.J., and Strong, J., dissenting, that the work having been executed and the corporation having accepted it, and enjoyed the benefit of it, they could not now be permitted to raise the defence that there was no liability on them because there was no contract under seal. *Bernardine* v. *Municipality of North Dufferin*, Supreme Ct. of Canada, 16 Nov. 1891.

3. ENGINEER'S CERTIFICATE — FINALITY OF—BULK SUM CONTRACT—DEDUCTION—ENGINEERS, POWERS OF —INTEREST.

In a bulk sum contract for various works, executed and performed, and materials furnished on the Quebec Harbour Works, the contractors were allowed by the final certificate of the engineers a balance of $52,011.

The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February, 1886. In an action brought by the contractors (appellants) for $181,241 for alleged balance of contract price and extra work,

Held, 1st, that although the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, yet that such certificate can be corrected or reformed by the court where it is shown that the engineers have improperly deducted from the bulk sum contract price the sum of $32,100 for an alleged error in the calculation of the quantities of dredging to be done, stated in the specification, and the quantities actually done.

2nd. That interest could not be computed from an earlier date than from the date of the final certificate, fixing the amount due to the contractors under the contract, viz. 4th February, 1886.

Strong and Gwynne, JJ., were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs. Appeal and cross appeal allowed with costs. *Peters* v. *Quebec Harbour Commissioners*, Supreme Court of Canada, 17 Nov. 1891.

4. SURETYSHIP — INDORSEMENT OF NOTE — RIGHT TO COMMISSION FOR INDORSING—CONSIDERATION.

M. by agreement in writing, agreed to become surety for McD. & S. by indorsing their promissory note, and McD. & S. on their part agreed to transfer certain property to M. as security, to do everything necessary to be done to realize such securities to protect M. against any loss or expense in regard thereto or in connection with the note, to pay him a commission for indorsing, and to retire said note within six months from the date of the agreement. The note was made and indorsed and the securities transferred, but McD. & S. were unable to discount it at the bank where it was made payable, and having afterwards quarrelled with each other the note was never used. In an action by M. for his commission:

Held, affirming the decision of the Court of Appeal, Taschereau and Gwynne, JJ., dissenting, that M. having done everything on his part to be done to earn his commission, and having had no control over the note, after he indorsed it, and being in no way responsible for the failure to discount it, was entitled to the commission. *McDonald* v. *Manning*, 19 Can. S. C. R. 112.

CONTRIBUTION—See Maritime Law.

CONTRIBUTORY NEGLIGENCE — See Negligence 2.

CONVERSION—See Banks and Banking 4.

CONVICTION—See Adjournment without Day.

CORPORATE INDEBTEDNESS—See Corporations 1.

CORPORATIONS — SEE ALSO TRUSTS.

1. ESTOPPEL — CORPORATE INDEBTEDNESS.

Where money was advanced on the bonds of a corporation, with the express understanding that it should be used for the improvement and development of the property of the corporation, all persons engaged in the negotiations leading to the loan are estopped from denying the validity of the mortgage upon which the loan was made, and from asserting a lien upon the property in preference to such loan. *Holland Trust Co.* v. *Taos Valley Co.*, U. S. C. C., D. Colo., Jan. 1892.

2. ACTIONS FOR STOCK—TRANSFERS—FORGERY.

Where, in an action against a corporation to recover the value of certain stock, plaintiff stockholder claimed that a transfer thereof, purporting to have been made by her, was forged, it was competent for defendant to show that the alleged forger had general authority from plaintiff to execute all such instruments. The fact that the corporation made the transfer on its books, and issued new certificates to the assignee, it believed that the signature was made by plaintiff, does not estop it to claim that the signature was made by a duly authorized agent. *Camden Fire Ins. Ass'n* v. *Jones*, 23 Atl. Rep., 166, N. J. Ct. of Error.

3. POWERS RELATING TO DEALING IN STOCK.—In a suit to enjoin the officers of M. T. Co., a fraternal association, from selling certain shares of its stock to one B. on the ground that such sale was illegal, and that the stock was held in trust for a widows' and orphans' home, and, if not, that the stock should be canceled, and not sold, it appeared that the shares were purchased of subordinate lodges of the order pursuant to a resolution authorizing the purchase of any stock of M. T. Co. that may be for sale, to be held and voted as the board of directors may order; that when the stock was purchased it was the purpose of the directors to apply the same to the benefit of the widows' and orphans' home, but no plan therefor was adopted. Afterwards the president was directed by the board to sell the stock at not less than par, and B. purchased the same. *Held*, that though the corporation may not have been authorized by its charter to hold its own stock, yet, as the stock was not purchased for cancellation, it had authority to sell it; that no right to the stock had vested in the widows' and orphans' home; and, as B. had consummated his purchase before the injunction issued, in good faith and for value, equity would not require the stock surrendered. *Jefferson* v. *Burford*, 17 S. W. Rep. 855. Ky. Ct of App.

4. STOCKHOLDER'S RIGHT OF ACTION.

A stockholder may bring a suit in equity in his own name, to enforce a right of the corporation, without first requesting the directors to sue, when it is made to appear that, if such request had been made, it would have been refused, or, if granted, that the litigation following would necessarily be subject to the control of persons opposed to its success.

Where the directors of a corporation are themselves the wrong-doers, or the partisans of the wrong-doer, they are incapacitated from acting as the representatives of the corporation in any litigation which may be instituted for the correction of the wrong which it is alleged they have committed or approved.

Agreement between Stockholders.—Where one stockholder agrees with another, at the formation of a corporation, that the other may pay for his stock with property, at a valuation agreed upon by them, and afterwards consents to the issue of stock in execution of the contract, though the corporation is not bound by their contract, the consenting stockholder will be held to be bound by it to the extent of depriving him of the right to maintain an action to compel the other stockholder to pay for his stock in a manner different from that agreed upon. N. J. Ct. of Chan., *Knoop* v. *Bohmrich*, 23 Atl. Rep. 118.

COSTS—See Expropriation.

CREDITORS, PREFERRING—See Insolvency 3.

CREDITORS, RIGHTS OF—See Insurance 14.

CRIMINAL LAW AND PROCEDURE.

1. PROCEDURE—MURDER—DEFENCE. INSANITY—HOMICIDAL MANIA—MEDICAL TESTIMONY—EVIDENCE—SUPPOSITITIOUS CASE.

Held: Where the defence of insanity is set up, a medical man, who has been present in Court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing right from wrong.

Where the opinion sought is that of a medical expert who has had no previous acquaintance with the prisoner, and has merely read the depositions without hearing the witnesses, the question must be put to him in the form of a supposititicus case, relating all the facts proved, and asking if, assuming all such facts to be true, they would indicate in the accused any, and what, form of insanity.

To establish a defence on the ground of insanity, it must be clearly proved that the accused, at the time of committing the act, was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong. *The Queen* v. *Dubois*, 17 Q. L. R. 203.

Notes.

The doctrine laid down in the case of McNaghton, 10 Cl. and F., p. 199, now guides the English Courts, and has been followed by the American tribunals and is now the established jurisprudence in the Courts of the United States. *Vide People* v. *Kleim*, Edm. L. Cases, p. 13; *United States* v. *McGlue*, 1 Curtis, p. 1; *State* v. *Felter*, Supreme Court of Iowa, 25 Iowa Rep., p. 67; *Webb* v. *State*, Texas Court of Appeals, 9 Texas App. Rep., p. 491.

2. CRIMINAL LAW—VIOLATION OF ORDINANCE—DRIVING ON SIDEWALK.

The violation of a city ordinance against driving on a sidewalk cannot be justified on the ground of necessity arising from the muddy condition of a street, where such condition was known to defendant before he started to drive along it, and where, to avoid unloading his wagon, he drove on the sidewalk, though such street was the only passage to his place of business. *State* v. *Brown* N. C. Sup. Ct. Dec. 8, 1891.

3. CRIMINAL LAW—53 VICT. (D) C. 37, S. 11—CONJUGAL UNION—COHABITATION.

Held, the mere fact of cohabitation between two persons, each of whom is married to another person, will not sustain a conviction under R. S. C. Ch. 161, as amended by 53 Vict. (D), Ch. 37, s. 11. *Regina* v. *Labrie*, M. L. R. 7 Q. B. 211.

CROWN LANDS, P. Q. — SEE ALSO CONSTITUTIONAL LAW 1. 2.—TAXATION 1.

LOCATION TICKETS—TRANSFER OF PURCHASER'S RIGHTS—REGISTRATION OF—WAIVER BY CROWN—CANCELLATION OF LICENSE—23 VIC. C. 2, SS. 18 AND 20—32 VIC. C. 11 S. 18 (Q)—36 VIC. C. 8 Q.

A location ticket of certain lots was granted to G. C. H. in 1863. In 1872, G. C. H. put on record with the Crown Land Department that by arrangement with the Crown Land Agent he had performed settlement duties on another lot known as the homestead lot. In 1874, G. C. H. transferred his rights to appellant, paid all moneys due with interest on the lots, registered the transfer under 32 Vict. c. 11, sec. 18, and the Crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878, the Commissioner cancelled the location ticket for default to perform settlement duties.

Held, that the registration by the Commissioner, in 1874, of the transfer to respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected. Appeal allowed with costs. *Holland* v. *Ross*, Supreme Court of Canada, Nov. 16, 1891.

DAMAGES — SEE ALSO CARRIERS 1—CONTRACTS 1—INJUNCTION—NEGLIGENCE 7.

PENALTY—LIQUIDATED DAMAGES—SUM PAYABLE ON ONE EVENT ONLY—NON-COMPLETION OF WORKS BY DAY SPECIFIED.

By a contract for the construction of sewerage works, it was provided that the works should be completed in all respects by a specified date; and, in default of such completion, the contractor should forfeit and pay the sum of 100*l.* and 5*l.* for every seven days during which the works should be incomplete after the said date as and for liquidated damages.

Held, that inasmuch as the sums agreed to be paid as liquidated damages were payable on a single event only, viz, non-completion of the works, they were to be regarded as liquidated damages, not as penalties. *Law* v. *Local Board of Redditch* [1892], 1 Q.B. 127.

DAMAGES TO PROPERTY — See Appeal 3.

DANGEROUS FREIGHT—See Carriers 2.

DANGEROUS PREMISES — See Negligence 3.

DAYS OF GRACE — See Bills and Notes 3.

DECLARATION, WHAT IT SHOULD ALLEGE—See Bills and Notes 2.

DEED, ACTION TO SET ASIDE — See Insolvency 2.

DEFAMATION—See Libel 1.

DELAY IN DELIVERING CORPSE — See Carriers 1.

DEMURRER—See Parties to Action—See Bills and Notes 2.

DEPOSIT—See Election.

DIRECTORS, LIABILITY OF — See Banks and Banking 1.

DIRECTORS, QUALIFICATION OF—See Companies 2

DISCOVERY — PHYSICAL EXAMINATION OF PARTY.

Courts have no power to compel one who sues for personal injuries to submit his person to examination in advance of the trial, at the instance of the adverse party. 15 N. Y. Sup. 973, affirmed. *McQuigan* v. *Del. L. & W. R. Co.* N. Y., Ct. App., Dec. 1891. 11 R. R. and Corp. L. J. 62.

Note.

See *Railway Co.* v. *Botsford*, 141 U. S., 250.

DISSOLUTION OF PARLIAMENT — See Elections.

DOMICILE—See Foreign Law.

DOMINION ACTS, VALIDITY OF — See Constitutional Law 1. 2.

DRIVING ON SIDEWALK — See Crim. Law and Proced. 2.

EJECTMENT OF PASSENGER — See Carriers 3.

ELECTION OF REMEDIES—See Banks and Banking 4.

ELECTION — PETITION—APPEAL — DISSOLUTION OF PARLIAMENT — RETURN OF DEPOSIT—ONTARIO.

In the interval between the taking of an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition and the February sitting (1891) of the Supreme Court of Canada, Parliament was dissolved, and by the effect of the dissolution the petition dropped. The respondent subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the court below by the petitioner as security for costs moved before a Judge of the Supreme Court in Chambers to have the appeal dismissed for want of prosecution, and to have the record remitted to the court below. The petitioner asserted his right to have his deposit returned to him.

Held, per Patterson, J., (1st.) That the final determination of the right to costs being kept in suspense by the appeal the motion should be refused.

(2nd.) That inasmuch as the money deposited in the court below ought to be disposed of by an order of that court, the Registrar of this court should certify to that court that the appeal was not heard, and that the petition dropped by reason of the dissolution of Parliament on the 2nd February 1891. Motion refused. *Halton Election*, *Lush* v. *Waldie*, Supreme Court of Canada in Chambers, Nov. 1891.

ELECTORAL FRANCHISE ACT—See *Mandamus* 2.

EMPLOYERS AND WORKMEN ACT 1875 (ENG.)—See Master and Servant 1.

ENDORSEMENT—See Indorsement.

ENGINEER'S CERTIFICATE—See Contracts 3.

ENGINEER'S, POWERS OF—See Contracts 3.

EQUITABLE ASSIGNMENT OF SHARE IN PATENT—See Patent.

EQUITY—See Trusts 1.

ESTOPPEL—See Corporations 1.

EVIDENCE—SEE ALSO CARRIERS 2—CONTRACTS 1 — INSURANCE 11—MUN. CORP'S 2—NEGLIGENCE 9—CRIM. LAW AND PROCED. 1.

MALICIOUS PROSECUTION — POLICE OFFICERS' PRIVILEGE — DISCLOSURE OF INFORMATION — DISCRETION OF JUDGE.

In an action for malicious prosecution against two police officers, the defendants declined on examination before the trial to give the name of the person from whom the information was received on which the plaintiff was arrested and prosecuted, on the ground that it was contrary to public policy and would obstruct the detection of crime if the name of the informer was given.

Held, reversing the decision of Ferguson, J., and the Master in Chambers, that, as the information sought was material to the fair trial of the issue, the defendants must give the name; and they were ordered to appear at their own expense for further examination.

Per Boyd, C.—It is for the Judge to decide whether the answering of any such question would or would not in such case be injurious to the administration of justice.

The most efficient protection for the detective is not to isolate him by some circle of privilege, but to hold him harmless when he acts without malice and upon reasonable grounds of suspicion; but the same facility of redress should be given against him if he abuses his position as against the ordinary unofficial member of the community who engages in unscrupulous and unjustifiable prosecutions under the criminal law.

Per Meredith, J.—The matter does not rest in the mere discretion of the magistrate, Judge, or Court. The disclosure should not be compelled without the consent of the informer except when material to the issue, when higher public interest requires it; and it then should be enforced.

Semble, per Meredith, J.—There is nothing to show that it was any part of the duty of the defendants to lay any information, so that it may be that in so doing they stand on no more privileged ground than a private prosecutor. *Humphrey* v. *Archibald*, Ontario, Chancery Div. Dec., 1891, Can. L. T.

EXECUTIVE POWER—See Constitutional Law 3.

EXPROPRIATION UNDER RAILROAD ACT—See Arbitration and Award.

EXPROPRIATION — R. S. Q. 5164, ss. 15, 16, 17, 18, 24—AWARD—ARBITRATORS — JURISDICTION OF — LANDS INJURIOUSLY AFFECTED — 43 & 44 V. c. 48 (P. Q.) — APPEAL — AMOUNT IN CONTROVERSY — COSTS—QUEBEC.

In a railway expropriation case the respondent in naming his arbitrator declared that he "only appointed him to watch over the arbitrator of the company," but the company recognized him officially, and subsequently an award of $1,974.25 and costs for land expropriated and damages was made under Art. 5164, R. S. Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their tract, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award,

Held, affirming the judgment of the Court below, that the appointment of the respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction.

Strong and Taschereau, JJ., doubted whether the case was appealable, the amount in controversy, deducting the taxed costs, being under $2,000.—*Quebec, etc. Railway Company* v. *Mathieu*, Supreme Court of Canada, Nov. 1891.

FINAL JUDGMENT — See Municipal Corporations 3.

FIRE INSURANCE — See Insurance, Fire.

FIXTURES.

PICTURES — HERITABLE AND MOVEABLE.

In a question between the purchaser and seller of a mansion-house, *held*, that a picture, valued at £100, painted on canvas, and inserted as a panel above the fire-place in the dining-room, was moveable, although its removal left exposed a stone and lime wall. *Cochrane* v. *Stevenson*, 18 Sc. Sess. Cas. 4th Ser. 1208.

Notes.

The leading case in England on this subject is that of *Beck* v. *Rebow*, 1 P. W. 94. In that case the Lord Keeper of the day, held that hangings and looking-glasses fixed to the walls of a house by nails and screws, although put up in lieu of wainscot underneath, were only matters of ornament and furniture, and did not pass to a purchaser as part of the house or freehold. According to Amos and Ferrard on Fixtures this decision has been frequently cited and approved by the English Courts.

FOREIGN LAW—SEE ALSO CONFLICT OF LAWS—WILLS 1.

CONFLICT OF LAWS—ANTE-NUPTIAL—PRESENT AND FUTURE PROPERTY—MATRIMONIAL DOMICILE—"LEX REI SITAE—STATUTE OF FRAUDS — SIGNATURE BY NOTARY IN QUEBEC.

The plaintiff's husband entered into an ante-nuptial contract in the Province of Quebec with her concerning their rights and property, present and future. He subsequently moved to this Province and died there intestate:

Held, that this contract must govern all his property moveable and immoveable, though situate in this Province provided that the laws of this Province relating to real property had been complied with; and that it made no difference whether the matrimonial domicile of the parties at the time of the contract and marriage was in Ontario or Quebec.

The ante-nuptial contract in question was not signed by the parties but by the notaries in their own names, they having full authority from the parties to do so:

Held, that this was a sufficient signature within the statute of Frauds to bind the parties. *Taillefer* v. *Taillefer*, 21 O. R. 337.

Note.

Where there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere, unless under the circumstances it stands prohibited by the laws of the country wherein it is sought to be enforced. It will act directly on moveable property every where. But as to immoveables in foreign territory, it will at most confer only a right of action to be enforced according to the jurisprudence *rei sitae*. Where such an express contract applies in terms or intent only to present property and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to after future acquisitions: Story, Conflict of Laws, 8th Edit. Sec 184.

FORGED DRAFT, PAYMENT OF BY DRAWEE—See Banks and Banking 3.

FORGERY—See Corporations 2.

FRAUD—See Insurance 16.

FRAUDULENT APPRAISEMENT — See Insurance 6.

FRAUDULENT PREFERENCES — See Insolvency 2.

FRENCH LAW—See Wills 1.

GAMBLING—See Stocks 2.

GAS COMPANIES—See Taxation 2.

GAS PIPES—See Taxation 2.

GENERAL AVERAGE—See Maritime Law.

GOVERNMENT RAILWAY — See Appeal 3.

GUILTY INTENT—See Adulteration of Food.

HOMICIDAL MANIA—See Crim. Law and Proced. 1.

HYPOTHECATE, POWER TO — See Companies 3.

ICY STEPS—See Master and Servant 2.

IMPUTED NEGLIGENCE—See Negligence 5.

INDICTMENT, MOTION TO QUASH—See Conspiracy.

INDORSEMENT—See Bills and Notes 1—Contracts 4.

INJUNCTION.

UNDERTAKING AS TO DAMAGES—DISMISSAL OF ACTION AT TRIAL—AWARD OF DAMAGES—REFERENCE.

The jurisdiction to award an inquiry as to damages, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages taken, is a discretionary one to be exercised judicially and not capriciously. And where the trial judge was, on the evidence, of opinion that no damage was proved, occasioned by the injunction as distinct from the detriment arising from the litigation whereby the defendant's title to the property in question was impeached, and where no additional evidence was before the Divisional Court,

Held, that under the circumstances, no reference as to damages should be ordered or damages awarded. *Gault* v. *Murray*, Ontario, Chancery Div., Jan. 1892, Can. L. T.

INJURIES ON TRACK—See Negligence 2. 4. 6.

INJURIES, PERSONAL—See Carriers 2.

INNUENDO—See Libel 2.

INSANITY, DEFENCE OF—See Crim. Law and Proced. 1.

INSOLVENCY — SEE ALSO CONSTITUTIONAL LAW 1, 2 — COMPOSITION — INSURANCE 14.

1. ASSIGNMENTS AND PREFERENCES—INSPECTOR OF INSOLVENT ESTATE—PURCHASER OF ESTATE FROM ASSIGNEE—R. S. O., c. 124.

An inspector of an insolvent estate, appointed by the creditors under R. S. O., c. 124, who acts towards the assignee in an advisory capacity, cannot become a purchaser of the estate at a private sale thereof.

Semble, *per* Armour, C. J., that a private sale by an assignee to any creditor, without the consent of the others, would also be open to objection. *Thompson* v. *Clarkson*, 21 O. R. 421.

Note.

By the Dominion Insolvent Act of 1875, 38 Vic., c. 16, sec. 35, it was expressly provided that no inspector of any insolvent estate should purchase any part of the stock-in-trade, etc. Amended to assignee or inspector," 39 Vict., chap. 30, sec. 8.

2. FRAUDULENT PREFERENCE—ACTION TO SET ASIDE DEED—KNOWLEDGE BY GRANTEE OF INSOLVENCY.

The fact that the grantors in a deed were, to the knowledge of the grantee, insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. c. 124. *Molsons Bank* v. *Halter*, 18 S. C. R. 88, followed. Where valuable consideration has been given, clear evidence of actual intent to defraud the creditors of the grantor is necessary to have the deed declared void under the Statute of Elizabeth. Judgment of the Common Pleas Divisional Court, affirming the judgment of Armour, C.J., reversed. *Hickerson* v. *Parrington*, Ontario Court of Appeal, [C. P. D.] Nov. 1891, Can. L. T.

3. ASSIGNMENTS AND PREFERENCES—PREFERRING CREDITORS—MONEY ADVANCED TO INSOLVENT TO PAY CREDITORS—ACTION TO SET ASIDE SECURITY—CONSIDERATION BAD IN PART.

These were two actions brought to set aside two chattel mortgages as void under R. S. O. c. 124. The cases were tried together. In the first case the mortgagee raised money and advanced it to the mortgagor, who was then in insolvent circumstances, receiving therefor the mortgage in question. The insolvent thereupon paid off certain of his creditors with the money thus raised.

Held, that the mortgage was valid.

Semble, that it would be so whether the mortgagee knew of the insolvent's

intention to apply the moneys to pay off certain creditors in preference to others, or not.

In the second case, it was shown that the mortgage was unreal as to $500, part of the alleged consideration of $4,000.

Held, that it was therefore void as to the whole; following Commercial Bank v. Wilson and Douglas, 3 E. & A. 257.

Judgment of Boyd, C., in the first case reversed and in the second case affirmed. *Campbell* v. *Roche*, *McKinnon* v. *Roche*, Ontario Ct. of Appeal, Nov. 1891, Can. L. T.

INSPECTOR OF INSOLVENT ESTATE — See Insolvency 1.

INSURANCE—SEE ALSO BENEFIT ASSOCIATIONS.

GENERAL.

1. POWERS OF AGENTS.

Plaintiff cashed a draft to the order of H. or bearer, drawn on defendant insurance company by W., its local agent. W. had power to receive proposals for insurance, to countersign, issue and renew policies and receive premiums. The draft purported to be in full of all claim against defendant for loss under policy No. 100, and was presented to plaintiff by W., with a letter to W. from defendant's secretary, which authorized him "to make a draft to the order of the court for the benefit of whom it may concern" for the sum due. *Held*, that there was no evidence of W's authority to draw and negotiate the draft. *Commercial Union Assur. Co.* v. *Rector*, 17 S. W. Rep. 878. Ark. Sup. Ct.

2. RIGHTS OF AGENTS.

Agents of an insurance company, entitled by their contract to 30 per cent of the premiums received through their agency, deducted the full 30 per cent, on the issue of a policy providing that at any time, on application of the assured, it would be canceled, and the unearned premium refunded. After the agents' term of employment had expired, they induced assured to cancel his policy and insure in a company for which they had become agents. *Held*, that they would be obliged to refund to the company 30 per cent. of the amount it had to refund to the assured. 6 N. Y. Supp. 507, affirmed. N. Y. Ct. of App., *Amer. Steam Boiler Co.* v. *Anderson*, 29 N. E. Rep. 231.

ACCIDENT.

3. RISK INCIDENTAL TO EMPLOYMENT —BREACH OF CONTRACT.

M. who was described in the application for insurance as "Superintendent of the International Railway," was insured by the company appellant against accidents. By one of the conditions of the policy it was stipulated as follows: "The insured must at all times observe due diligence for personal safety and protection, and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to unnecessary or obvious danger of any kind, nor death or disablement... from getting or attempting to get on or off any railway train, etc., while the same is in motion." M., when travelling on the business of his railway, was killed while getting on a train in motion.

Held, that inasmuch as M. was insured as superintendent of a railway, and there was evidence that his duties required him to get on and off trains in motion, of which fact the insurer had knowledge, the condition did not apply. *Accident Ins. Co. of N. Am.* v. *Duncan McFee*, M. L. R., 7 Q. B. 25.

FIRE.

4. TRANSFER OF ASSURED'S INTEREST.

A provision in a policy of fire insurance, to the effect that a sale or transfer of the property insured shall forfeit the policy, does not operate to avoid the policy, unless the entire interest of the assured in the property insured is sold or transferred. *Blodwell* v. *Ins. Co.*, 29 N. E. Rep. 25 Ohio Sup. Ct.

5. PROOF OF LOSS — PREMATURE ACTION.

Insured property was destroyed by fire June 7, 1885, and three days afterwards preliminary loss papers were served on, but rejected by, the company, for want of a certificate of a justice, required by the policy. One year afterwards the required certificate was filed, and action against the company begun on the same day.

Held, that the action was prematurely brought, defendant being entitled by the policy to sixty days after service of complete loss papers within which to pay the insurance. *McNally* v. *Phœnix Ins. Co.*, 16 N.Y. Supp. 696, N.Y. Sup. Ct.

6. Action on Policy — Fraudulent Appraisement.

Where an insurance company procures from the insured an agreement in writing for the appointment of two appraisers to ascertain and appraise a loss, on the false and fraudulent representations of its adjuster that the person nominated by the company is a disinterested person, the award made by such appraisers will be set aside, and the insured be allowed to recover the actual loss sustained by him. *Bradshaw* v. *Agricultural Ins. Co.*, 16 N.Y. Supp., 639, N.Y. Sup. Ct.

7. Cancellation of Policy—Other Insurance.

Defendant, after having had insurance policies issued to him by plaintiff's agent, which he had a right to and did cancel, to take out a policy at a lower rate in another company, was offered by the agent a lower rate to change back and take a policy in the plaintiff company. He did so, but, unlike the former policies, the new one contained a clause in fine print, under which defendant could not cancel it to take out insurance in any other company without forfeiting his premium. The agent did not call his attention to the clause, but, on the contrary, when told by defendant that the other company would offer him a still lower rate, instead of saying that he would not be able to cancel, merely said that they would not be able to give a lower rate.

Held, that there was such concealment by the agent as rendered the cancellation clause not binding on defendant. *Hartford Steam Boiler, &c. Ins. Co.* v. *Cartier*, 50 N. W. Rep., 747, Mich. Sup. Ct.

8. Change of Interest of Insured.

Defendant issued its policy to plaintiff, by which it contracted that, in case the steamship Samana was lost at sea, it would pay to the Steamship Samana Company, "on account of whom it might concern," the sum of $5,000. A further clause provided that "any change of interest in the vessel hereby insured shall not affect the validity of this policy." The steamship was sold to the Banana Steamship Company, and lost at sea during the life of the policy. The Samana Company and plaintiff were practically one and the same, and to the latter the Banana Company transferred the policy of insurance, inuring to it as vendee, as security for a balance of purchase money unpaid; the Samana Company also transferring its rights, *pro forma* to plaintiff.

Held, that the provisions of the policy extended to the vendee under the clause providing for the change of interest; and that the plaintiff, as assignee of the vendee, was entitled to maintain suit in his own name by virtue of the promise to pay the loss "to whom it might concern." 14 N. Y. Supp. 301, affirmed. *Duncan* v. *China Mut. Ins. Co.*, 29 N. E. Rep. 76, N. Y. Ct. of App.

9. Age of Building.

Defendant's application for fire insurance stated the building insured to be 12 years old. In an action on the policy, the jury found that the frame part of the house was 6 years old, and that therefore the average age of the building was 15 years. The log building had been entirely reconstructed, and built of new materials, except that the old logs were used in the body.

Held, that the jury had no right to consider the age of the materials of which the house was built in ascertaining the age of the house. *Notice of Loss—Waiver.*

The company's adjuster of losses visited the scene of the fire the day after the loss occurred, in his official capacity, and informed the insured that he need furnish no notice nor proof of loss.

Held, a sufficient excuse for not giving notice of the loss within 50 days.

Notice of loss was duly mailed in an envelope plainly addressed to the company at its general office, and stamped with sufficient postage, and receipt thereof was not denied by the company.

Held, that the jury properly found that the notice was received by the company. *Phœnix Ins. Co.* v. *Pickel*, 29 N. E. Rep. 432, Ind. App. Ct.

10. LIGHTS—WATCHMAN.

A policy forbade the use of open lights on the premises insured, but at the same time permitted necessary repairs. The evidence showed that open lights were indispensable in making such repairs, and that this fact was brought to the notice of the insurance company's secretary at the time the application for the insurance was made, and he replied that in the policy permission was given to repair at all times.

Held, that the use of the open lights in repairing could not be considered a breach of the policy, as the agreement not to use such lights must be construed to relate to the ordinary use of lights about the premises, and not to the special and necessary use in making the repairs permitted by the policy. Where the policy stipulates for the employment of a watchman about the premises, it is immaterial that the person exercising a watchful care and supervision over the premises was not called a "watchman." Where the watchman in making his rounds discovers that a bin in the barn is not locked, and recollects that he took the key and lock to get it fixed, and left them at his boarding house, about 300 feet from the mill, and goes there to get them, and on his immediate return hears the cry of 'Fire!' and on running to the mill finds it afire, such absence cannot be considered a violation of the terms of a policy requiring the presence of a watchman about the premises, as such trip to his boarding-house was directly in line of the watchman's duty. *Au Sable Lumber Co.* v. *Detroit Manufacturers' Mut. Fire Ins. Co.*, 50 N. W. Rep. 870, Mich. Sup. Ct.

11. WATCHMAN — EVIDENCE — APPLICATION.

In an action on an insurance policy the refusal to allow the defendant on cross-examination to ask a witness, who has previously testified that he had been employed as watchman, how much he was paid for his services, is not error, as the jury cannot measure the watchman's diligence by the amount of his pay, and the only inquiry is whether he was *in fact* so employed.

An insurance company has no right, in an action on a policy, to inquire whether a certain person had obtained "other insurance" for the plaintiff in violation of a provision of the policy, without having first established that the said person was the plaintiff's agent, or at least satisfied the court that it would subsequently do so.

One of the questions in an application for insurance was as to the length of time that the plaintiff had been merchandising, and who slept in the store. The answer was: "Four years; watchman on premises at night."

Held, that the answer amounted only to a warranty that the plaintiff had a watchman on the premises at the time of the application, not that he would continue to keep one there; and hence the absence of the watchman without the plaintiff's knowledge on the night of the fire was no defence. *Virginia Fire and Marine Ins. Co.* v. *Buck*, 13 S. E. Rep. 973, Va. Court of Appeal.

12. VOIDABLE POLICY — RATIFICATION—POWERS OF OFFICERS—CONDITIONS—NONSUIT.

(1) The by-laws of a mutual fire insurance company provided that its president, vice-president and secretary should constitute an executive committee, one of whom must approve each application for insurance before a policy could be issued, and that every

application taken by a duly authorized person should constitute a contract of insurance until the applicant was notified of its modification or rejection. *Held*, that an application by the secretary for insurance on his own property, when approved by the vice-president, constituted a valid contract of insurance. *New York Cent. Ins. Co.* v. *National Protection Ins. Co.*, 14 N. Y. 85; *Voltz* v. *Blackmar*, 64 id. 440; 1 May Ins. (3rd ed.), § 125. (2) A policy afterward issued by the secretary on such application, without the previous approval of some other officer, though voidable, does not invalidate the contract of insurance created by the approval of the application. (3) Where the insurance company retains the premium paid by the secretary at the time of making application, and after he has gone out of office and turned over the application with the other papers of the company to his successor, includes the policy issued to him in its report of outstanding insurance, and after the fire requires him to submit proofs of loss, it thereby ratifies the policy. *Titus* v. *Insurance Co.*, 81 N. Y. 410; *Roby* v. *Insurance Co.*, 120 id. 510; *Hyatt* v. *Clark*, 118 id. 563. (4) Where the affairs of a mutual fire insurance company, of which every person insured by it is required to be a member, are managed by a board of directors, who select all the officers of the company, such officers have power to waive defects and ratify invalid policies of insurance. (5) Where a single policy of insurance covers both real and personal property, a mortgage of the realty alone in violation of the terms of the policy does not invalidate the insurance on the personalty. Whatever the rule may be elsewhere, it is settled in this State that where insurance is made on different kinds of property, each separately valued, the contract is severable, even if but one premium is paid, and the amount insured is the sum total of the valuations. *Merrill* v. *Insurance Co.*, 73 N. Y. 452; *Schuster* v. *Insurance Co.*, 102 id. 260; *Smith* v. *Insurance Co.*, 47 Hun, 30; *Woodward* v. *Insurance Co.*, 32 id. 365. (6) On appeal from a compulsory nonsuit, no objection to plaintiff's proof can be made that was not stated in the trial court as a ground of the motion for nonsuit. Second Division, Dec. 1, 1891. *Pratt* v. *Dwelling-House Mut. Fire Ins. Co.* Opinion by Vann, J. 6 N. Y. Supp. 78, reversed. N. Y. Ct. of Appeals, Alb. L. J.

LIFE.

13. Forfeiture for Non-Payment of Premium.

Two insurance policies were issued by defendant on the same life, and each provided that, in case of default in the payment of premiums, the policy should cease and determine, and all previous payments be forfeited; provided that, if default should be made after the receipt of two annual premiums, then the company would issue a new paid-up policy for a proportion of the sum insured, on the surrender of the old policy, free from all indebtedness, within six months after default. Premiums were paid on one of the policies for six years and a half, and on the other for five years, but the policies were not surrendered within six months after default.

Held, that the company was not liable for any part of the sums insured. *N. W. Mut. Life Ins. Co.* v. *Barbour*, 17 N. W. Rep., 796. Ky. Ct. of App.

14. Surrender of Policy—Rights of Creditors.

Two insurance policies were issued by defendant on the life of one M., a citizen of Canada, the benefits thereunder being payable to his legal representatives. But two premiums were paid on the policies when M. made an assignment for the benefit of his creditors, and at the first opportunity informed them of the existence of the policies. The creditors considered them of no value, and for that reason neither they nor the assignee claimed them. M. held them about a year and then surrendered them to the company, and had two other policies issued, identical in all respects with the first ones, except that they were payable to his wife. Shortly afterwards M. was duly discharged in insolvency.

Held, that the surrender of the policies by M. was not fraudulent, there being no intent to defraud, and the

policies being of no value as assets. Such surrender, even if the policies had been of value as assets, would not have been fraudulent as to creditors whose claims arose subsequent to M.'s discharge in insolvency, since a subsequent creditor must rest the foundation for his relief on the equity of an antecedent creditor; and by the insolvent law of Canada (32 & 33 Vic., c. 16, ss. 109, 110) such discharge completely absolves the insolvent debtor from all liabilities then existing against him, and proveable against his estate. *Barbour* v. *Connecticut Mut. Life Ins. Co.*, 23 Atl. Rep. 154. Conn. Sup. Ct.

15. BENEFIT CERTIFICATE IN FAVOUR OF WIFE—CLAIM BY FIANCEE OF DECEASED — SUMMARY DISPOSITION OF CLAIM—RULE 1149—ISSUE.

An application by the Grand Council of the Canadian Order of Chosen Friends for an order directing the trial of an issue between Margaret Roddy and Joseph Leah, two claimants for the proceeds of an insurance certificate of $1,000 on the life of Samuel Leah, deceased. The certificate was on its face made payable to "his wife." The uncontradicted affidavit evidence shewed that the deceased was engaged to marry Margaret Roddy at the time he effected the insurance and up to the time of his death; that when insuring he had stated that he was to marry her in a short time and was insuring for her benefit; that he gave her the certificate and that she always held it and had it at time of his death; that he had often declared it was a provision for her should anything happen him before or after marriage. Joseph Leah claimed as administrator of the estate of the deceased.

The Master in Chambers, holding that the issue was purely one of law and that Margaret Roddy had no legal claim to the moneys, made an order barring her claim.

Meredith, J., on appeal, held that it was not contemplated by Rule 1149 that such a case, involving such an amount and such nice questions on fact and law, should be summarily disposed of by the Master in Chambers in this way, and ordered that, unless the adverse claimants could agree to state facts for a special case to be submitted to a Divisional Court, an issue should be tried. *In re Roddy* v. *Leah*, Ontario High Court of Justice in Chambers, Jan. 1892, Can. L. T.

16. SUICIDE—RELEASE—FRAUD.

(1) The condition in a life insurance policy that it shall be void if the insured die by his own hand, has no application where the insured killed himself by accidentally taking an overdose of laudanum, nor where he intentionally took the overdose of laudanum but at the time was of unsound mind, and incapable of judging the moral consequences of the act. "The condition in a policy of life insurance, that it shall be void if the insured shall die by his own hand, has no application where the insured kills himself by accident." *Insurance Co.* v. *Hazelett*, 105 Ind. 212; *Insurance Co.* v. *Paterson*, 41 Ga. 338; *Mallory* v. *Insurance Co.*, 47 N. Y. 52; *Penfold* v. *Insurance Co.*, 85 Id. 317; *Edwards* v. *Insurance Co.*, 20 Fed. Rep. 661. Nor does such a condition in a policy of life insurance apply if the insured destroys his life while of unsound mind, if his mind is so impaired by disease that he does not comprehend the moral character of the deed, though he may have sufficient mental capacity to know the physical consequences of the act. *Breasted* v. *Farmer's, etc., Co.*, 8 N. Y. 299; 59 Am. Dec. 482, and note on page 487; *Phadenhauer* v. *Insurance Co.*, 7 Heisk. 567; *Phillips* v. *Insurance Co.*, 26 La. Ann. 404; *Insurance Co.* v. *Groom*, 86 Penn. St., 92; *Schultz* v. *Insurance Co.*, 40 Ohio St. 217; *Insurance Co.* v. *Terry*, 15 Wall. 580; *Insurance Co.* v. *Rodel*, 95 U. S. 232; *Insurance Co.* v. *Broughton*, 109, id. 121; 2 Cent. L. J. 378.

(2) Where a life insurance company for the purpose of compromising a loss for one-half the amount of the policy fraudulently represented to the beneficiary that the deceased died by his own hand, while of sound mind, and that the company had proof of it, these were material facts which the beneficiary had a right to rely on, and the beneficiary may retain the money received and sue for the damage

resulting from the deceit. It is insisted by the appellant however that the alleged fraudulent representations were not such as the appellee had the right to rely upon, that they were not of material facts and were at most representations of opinion. This we think is true as to some of the representations made, but not of all. The representations that the decedent had died by his own hand, while he was of sound mind, and that the appellant had evidence whereby it could prove that he so died, were each representations of fact and of material facts. We think, under the circumstances detailed in the complaint, the appellant was justified in relying and acting upon them. In our opinion the facts stated in the complaint clearly bring the case within the rule stated in *Insurance Co.* v. *Howard*, 111 Ind. 544, which like this was where a party alleged that he had been induced by fraud to settle a claim on an insurance policy, and surrendered the policy on receiving a portion of the sum due. The court said (111 Ind. 548): "A person so circumstanced may retain what he has received, and sue whoever is liable for the consequences of the deceit by which the compromise was brought about, and recover whatever damages resulted therefrom." See also Johnson v. Culver, 116 Ind. 278; Hayes v. Insurance Co. (Ill. Sup.), 18 N. E. Rep. 322. Ind. Sup. Ct., Dec., 15, 1891. *Michigan Mut. Life Ins. Co.* v. *Naugle*. Opinion by McBride, J. Alb. L. J.

MARINE.

17. MARINE POLICY INSURING ADVANCES.

The clause in a cargo policy insuring advances, that "it is understood that freight and advances insured under this policy are subject to the terms and conditions of freight policy attached hereto," means that to the terms and conditions of the cargo policy are added such of the terms and conditions of the freight policy as are pertinent. A provision avoiding the insurance in case of any act of the insured whereby the insured's right of action against any person, which would inure to the insurer on his payment of loss, is released, is waived where the insurer, after being requested by the owner to insure their advances so that in case of loss they would not call on the owner for reimbursement, reply that they have "covered the amount by insurance," since they thereby became estopped from asserting any claim against the owner in case of loss. Under a policy insuring advances, recovery cannot be had for commission for procuring a charter for the vessel, since the claim for such commission does not constitute a lien on the vessel, and is therefore not insurable. Where, on payment of loss under a policy insuring advances, the insured assign to the insurer their claim against the vessel and its owner for advances and commissions, such assignment passes to the insurer the insured's claim for commission for procuring a charter for the vessel, even though the claim for advances does not pass because it has been previously released. Where the insurer, after receiving such assignment, brings suit against the owner of the vessel, and is defeated, the record of such suit is admissible in evidence in a subsequent suit brought by the insurer against the insured to recover the amount paid in settlement of the loss. In such subsequent suit the insurer is entitled to recover from the insured the costs of his unsuccessful action against the owner. 13 N. Y. Supp. 615, modified. *Phœnix Ins. Co.* v. *Parsons*, 29 N. E. Rep. 87, N. Y. Court of Appeal.

18. MARINE INSURANCE—WARRANTY AS TO LOAD CARRIED.

In a marine insurance policy containing a warranty that the insured vessel should not load more than her registered tonnage, the term "registered tonnage" refers to the vessel's carrying capacity, as stated in the ship's papers under which she was sailing at the date of the policy. It appeared that the vessel was built in the United States, and when first launched had an American register of 916 tons, but was afterwards sold to a citizen of Hanover, and received a Hanoverian register of 351.97 "commercial lasts." At the time she was lost she carried a load of about 901½

gross tons. It was also shown that a "last" was the equivalent of 6,000 pounds.

Held, that there was no violation of the warranty. A law of the German Empire, providing a rule for reducing "lasts," to tons, cannot be used in estimating the carrying capacity of a vessel which was lost before the law was enacted. The law of measurement existing under the acts of congress, by which 100 cubic feet of space within a ship's hold are taken as holding a ton of freight, has no application to a vessel sailing under a foreign registry.

Warranty as to Ports Used.

A ship was insured in January, while at Rotterdam, under a policy containing a warranty not to use ports in Europe north of Antwerp between November 1st and March 1st.

Held, that having insured the vessel while lying at Rotterdam, which is a port north of Antwerp, the company waived the warranty. The complaint alleged that the vessel arrived in New York about April 14th, but there was no evidence of when she left Rotterdam, nor of the usual length of the voyage between that port and New York.

Held, that assuming the allegation to be correct, the court could not determine as a fact that she left Rotterdam prior to March 1st. Evidence that a vessel sailed in May, was seen in the following October, and was never seen or heard of again, is *prima facie* proof, in an action on a policy expiring on December 29th following, that the ship was lost during the life-time of the policy. 7 N. Y. Supp. 492, reversed. *Reck* v. *Phœnix Ins. Co.*, 29 N. E. Rep. 137, N. Y. Ct. of App.

INTEREST—See Contracts 3.

JURISDICTION—See Appeal 4.

JURY, QUESTION FOR — See Mun. Corp. 2—Master and Servant 2.

LANDS INJURIOUSLY AFFECTED — See Expropriation.

LETTERS OF PARTNERS AFTER DISSOLUTION—Partnership 3.

LIBEL.

1. DEFAMATION—PRIVILEGED COMMUNICATION—TESTIMONY OF LAWYER AND HIS WIFE.

Held, (1) That a doctor who, in good faith, while at a ball, tells a lady friend who incidentally consults him, his opinion as to the value of a new and secret remedy adopted by a *confrère* in accouching women, and who cited a case where a woman died from the effects of his treatment, referring at the same time to a third doctor who attended the operation, for details, cannot be sued for defamation, because the conversation was privileged.

Semble: That a letter upon the subject of the above conversation, written by defendant in reply to a letter from plaintiff asking from whom he obtained this information, is also confidential and privileged.

(2) That the friend to whom the confidence was entrusted, having acted as counsel for plaintiff upon a former action relating to this conversation and having advised the present action, is incompetent to give testimony; equally so his wife. *DeMartigny* v. *Mount*, 21 Rev. Leg., 461.

2. HOTEL CONDUCTED WITHOUT CERTIFICATE — "SHEBEEN" — TRUST — BREACH OF TRUST — INNUENDO — "VERITAS."

The proprietrix of a hotel obtained a certificate and excise license therefor from Whitsunday 1889 to Whitsunday 1890. She died in October 1889, and her trustees carried on the business without obtaining a transfer of the certificate until March 1890. On 6th Dec. 1889, a letter appeared in a local newspaper which suggested that the police superintendent "might inquire into the truth or untruth of the report at present current that an old public-house in the Guestrow is being personally conducted as a shebeen — in point of strict law — waiting the convenience of an ex-bailie and a town councillor who are both about to become joint-proprietors of the place when a licence has been secured." The trustees in possession of the hotel, who were the parties referred to in the letter, sued the writer thereof for damages.

Held, That the letter was not libellous, as (1) in strict law the public-house was a shebeen, and (2) the letter would not bear an innuendo of breach of trust. *Cook* v. *Gray*, *Mearns* v. *Gray*, 29 Scot. Law Rep. 247.

Note.

The interpretation clause of the Public House Amendment Act 1862, defines a "Shebeen" as meaning and including "every house, shop, room, premises, or place in which spirits, etc., or excisable liquors are trafficked in by retail without a certificate and excise license in that behalf."

LICENSE, CANCELLATION OF — See Crown Lands.

LICENSE—See Mun. Corp. 1.

LICENSOR AND LICENSEE—See Negligence 5.

LIGHTS—See Insurance 10.

LIQUIDATED DAMAGES — See Damages.

LIVERY STABLES AND CABS — See Mun. Corp. 1.

LOAN TO EFFECT PAYMENT — See Composition.

LOCATION TICKETS — See Crown Lands.

MALICIOUS PROSECUTION—See Evidence.

MANDAMUS.

1. ESTABLISHMENT OF NEW SCHOOL DISTRICT—SCHOOL VISITORS—SUPERINTENDENT OF EDUCATION — JURISDICTION OF, UPON APPEAL—APPROVAL OF THREE VISITORS—40 V. c. 22, s. 11 (P. Q.)—R. S. P. Q. ART. 2055.

Upon an application by H., the appellant, for a writ of mandamus to compel the respondents to establish a new school district in the parish of Ste. Victoire, in accordance with the terms of a sentence rendered on appeal by the superintendent of education, under 40 V. c. 22, s. 11, (P. Q.), the respondents pleaded *inter alia* that the superintendent had no jurisdiction to make the order, the petition in appeal to the superintendent not having been approved of by three qualified visitors. The decree of the superintendent alleged that the petition was also approved of by one L., inspector of schools.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the petition in appeal must have the approval of three visitors qualified for the municipality where the appeal to the superintendent originated, and as The Rev. A. Deserey, one of the three visitors who had signed the petition in appeal, was parish priest of an adjoining parish and not a qualified school visitor for the municipality of Ste. Victoire, the sentence rendered by the superintendent was null and void.

Taschereau, J., dissented on the ground that, as the decree of the superintendent stated that L., the inspector of schools, was a visitor, it was *prima facie* evidence that the formalities required to give the superintendent jurisdiction had been complied with. C. S. L. C c. 15, s. 25. *Hus* v. *Commissaires d'Ecole de Ste. Victoire*, Supreme Ct. of Canada, Nov. 1891.

2. REVISING OFFICER—ELECTORAL FRANCHISE ACT, R. S. C., c. 5, ss. 19, 33—NOTICE OF OBJECTION TO NAMES ON VOTERS' LIST—GROUNDS OF OBJECTION—"NOT QUALIFIED"—VALIDITY OF NOTICE—RULING OF REVISING OFFICER UPON—APPEAL TO COUNTY JUDGE.

A notice under sec. 19 of the Electoral Franchise Act, R. S. C. c. 5, as amended by 52 Vic. c. 9, sec. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, simply gave "not qualified" as the ground of objection.

Held, sufficient. The revising officer (who was not a judge) having ruled that the notice was valid, the person whose name was objected to appealed from that ruling to the County Judge, who held that the notice was invalid, and the revising officer thereupon refused to go on and hear the complaint:

Held, that no appeal was given by sec. 33 of the Act from the revising officer's ruling; and therefore the proceedings before the County Judge were *coram non judice*. A *mandamus* was granted. *Re Lilley* v. *Allin*, 21 O. R., 424.

MANDATE—See Partnership 3.

MARINE INSURANCE—See Insurance, Marine.

MARINE INSURANCE COMPANY—See Companies 1.

MARITIME LAW.

GENERAL AVERAGE—CONTRIBUTION — SALVAGE — CARGO LEFT IN PERIL FOR BENEFIT OF VESSEL — EXPENSE OF SUBSEQUENT EFFORTS TO SAVE BOTH VESSEL AND CARGO.

A vessel loaded with coal stranded. The owners of the cargo desired to take the coal out, which could have been done at small expense, but the underwriters of the ship refused to permit this as it would much increase the risk to the vessel. Extraordinary expense was gone to for the purpose of saving both vessel and cargo, and most of the cargo was saved; but the vessel was a total loss.

Held, that the owners of the cargo were only liable to pay a reasonable amount for the cost of saving the coal, and that there was no claim for general average against the coal saved. Judgments of Boyd, C., 19 O. R. 462, and of the Queen's Bench Divisional Court, 20 O. R. 295, affirmed. *Western Assurance Co.* v. *Ontario Coal Co.*, Ontario Ct. of Appeal, Jan. 8, 1892, Can. L. T.

MASTER AND SERVANT.

1. EMPLOYERS AND WORKMEN ACT, 1875 (38 & 39 VIC., c. 90), s. 10 — WORKMAN — PERSON ENGAGED IN MANUAL LABOUR — REAL AND SUBSTANTIAL OCCUPATION.

The test of whether an employee is engaged in manual labour, within the meaning of the Employers and Workmen Act, 1875, is—whether such labour is his real and substantial employment, or whether it is incidental and accessory to such employment. The appellant, a grocer's assistant, whose duty it was to serve customers in a shop, had also other duties involving manual labour, such as making up parcels for customers, carrying parcels from the shop to the cart at the door, and bringing up goods from the cellar to the shop:

Held, reversing the decision of the Queen's Bench Division, that such occupations were incidental to his real and substantial employment as a salesman, and that he was not engaged in manual labour within the meaning of the Employers and Workmen Act, 1875. *Bound* v. *Lawrence* [1892], 1 Q. B. 226.

2. MASTER AND SERVANT — RISKS OF EMPLOYMENT — ICY STEPS — QUESTION FOR JURY.

A servant, by entering an employment necessitating the use of steps, does not assume the risk of an injury by reason of their subsequent icy condition, where, when the contract was made, the steps were not icy, nor was there reason to suppose that the business involved a risk in regard to them. An employee, in attempting to leave her employer's mill by steps which are the only means of egress, and which are rendered icy by the freezing of spray falling from steam-pipes, of which fact she is aware, does not, as matter of law, voluntarily assume a risk, which she understands, where the degree of slipperiness is not determinable by ocular inspection. *Fitzgerald* v. *Connecticut River Paper Co.*, Mass. Sup. Judicial Ct., Dec. 19, 1891, 45 Alb. L. J., 166.

Notes.

1. In *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, Bowen, L. J., says: "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger and voluntarily run the risk."

2. It would be unjust that one who freely and voluntarily assumes a known risk for which another is, in a general sense, culpably responsible, should hold that other responsible for damages for the consequences of his own exposure. In *Yarmouth* v. *France*, 19 Q. B. D. 647, Lord Esher, M. R., expresses the opinion that in such a case it is incorrect to say that the defendant no longer owes a duty to the plaintiff, but that it should rather be said that the duty is one of imperfect obligation, performance of which the law will not enforce.

3. It has been held by some that where a man is not physically constrained, where he can take his option to do a thing or not to do it, and does it, he must be held to do it voluntarily. See opinion of Lord Bramwell in *Membery* v. *Railway Co.*, L. R., 14 App. Ca. 179, and the dissenting opinion in *Eckert*

Railroad Co., 43 N. Y. 502. But by the authorities generally, one who in an exigency reluctantly determines to take a risk is not held so strictly.

4. There has been much difference among the English judges in regard to the question whether a servant who discovers a defect in machinery, not existing when he entered the service, which the master is bound to repair, and who works on, understanding the danger, rather than to lose his place by complaining of it, or refusing to work until it is repaired, shall be held to have voluntarily assumed the risk. In *Membery* v. *Railway Co.*, *supra*, Lord Bramwell expresses the opinion that the plaintiff cannot recover in such a case, while the lord chancellor and Lord Herschell, without expressing an opinion, prefer to keep the question open for future consideration. In *Thrussell* v. *Handyside*, 20 Q. B. Div. 359, the Court of Queen's Bench holds that a workman, by continuing to work under such circumstances does not voluntarily assume the risk; and in *Yarmouth* v. *France*, 19 Q. B. Div. 647, a majority of the Court of Appeal are of the same opinion.

5. In Massachusetts, as well as elsewhere, plaintiffs have been precluded from recovering alike where their assumption of the risk grew out of an implied contract in reference to the condition of things at the time of entering the defendant's service, and where they voluntarily assumed a risk which came into existence afterward. *Moulton* v. *Gage*, 138 Mass. 390; *Taylor* v. *Manuf. Co.*, 140 id. 159; *Wood* v. *Locke*, 147 id. 604; *Murphy* v. *Greeley*, 146 id. 196; *Huddleston* v. *Machine Shop*, 106 id. 282; *Pingree* v. *Leyland*, 135 id. 398; *Gilbert* v. *Guild*, 144 id. 601; *Lothrop* v. *Railroad Co.*, 150 id. 423; *Mellor* v. *Manuf. Co.*, id. 362; *Minor* v. *Railroad Co*, 153 id.

6. This court has recognized the doctrine that mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk. *Scanlon* v. *Railroad Co.*, 147 Mass. 484; *Linnehan* v. *Sampson*, 126 id. 506; *Ferren* v. *Railroad Co.*, 143 id. 197; *Taylor* v. *Manufacturing Co.*, 140 id. 150; *Williams* v. *Churchill*, 137 id. 243; *Lawless* v. *Railroad Co.*, 136 id. 1.

7. Many other cases in which the plaintiff has not been precluded from recovering may be referred to this principle, and some of them more properly rest on the ground that there were such considerations of duty or exigency affecting him as to present a question whether the assumption of the risk was voluntary or under an exigency which justified his action and induced him unwillingly to encounter a danger to which he was wrongfully exposed. *Pomeroy* v. *Westfield*, 154 Mass.—; *Mahoney* v. *Railroad Co.*, 104 id. 73; *Lyman* v. *Amherst* 97 id. 339; *Thomas* v. *Telegraph Co.*, 100 id. 156; *Dewire* v. *Bailey*, 131 id. 169; *Looney* v. *McLean*, 129 id. 33; *Gilbert* v. *Boston*, 139 id. 313; *Eckert* v. *Railroad Co.*, 43 N. Y. 502.

8. Whether the fear of losing one's situation would constitute such an exigency, where the place had become dangerous by reason of the negligence of the employer to repair it, especially if notice of the danger had been given by the servant, and there had been a promise speedily to repair it. See *Leary* v. *Railroad*, 139 Mass. 580; *Haley* v. *Case*, 142 id. 316; *Westcott* v. *Railroad Co.*, (Mass.), 27 N. E. Rep. 10.

9. *Osborne* v. *Railroad Co.*, 21 Q. B. Div. 220, a case in which the plaintiff sued to recover for an injury received in going down some icy stone steps, is precisely similar to the present one in respect to the manner of receiving the injury.

MEMBER OF PARLIAMENT — See Bankruptcy.

MEMORANDUM OF ASSOCIATION — See Companies 1.

MUNICIPAL CORPORATIONS

— SEE ALSO CONTRACTS 2 — NEGLIGENCE 3.

1. BY-LAW—LIVERY STABLES AND CABS—LICENSE.

Held, that, under the by-law of the city of Toronto relating to livery stables and cabs, a person licensed as a livery stable keeper, but not having a cab license, cannot for the purpose of soliciting passengers, stand with his cab at places, though owned by him, other than that mentioned in his license. *Regina* v. *Gurr*, Ontario Common Pleas Div. Jan. 1892, Can. L. T.

2. NEGLIGENCE—CARE OF STREETS—EVIDENCE—QUESTION FOR JURY.

(1) In an action against a village for injuries caused by a fall on the sidewalk, evidence that there was on the sidewalk a ridge of snow and ice five or six inches high, which was uneven and very slippery; that the ridge had been there for a week before the accident, and was formed in part of snow that had fallen more than two weeks before, and that no attempt to remove the ridge had been made, is sufficient to justify a refusal to grant a nonsuit. (2) In an action to recover damages for personal injuries resulting from a fall on a slippery sidewalk, the question as to whether the rectocele from which the plaintiff was shortly afterward found to be suffering was occasioned by the fall is a question for the jury, where there is expert testimony to the effect that rectocele might be produced

by a fall. Second Division, Dec. 1, 1891. *Keane* v. *Village of Waterford.* Opinion by Haight, J. 8 New-York Supp. 790, affirmed. New-York Ct. of Appeals.

3. MUNICIPALITY — FINAL JUDGMENT — PRACTICE — SPECIALLY ENDORSED WRIT—SUMMARY JUDGMENT ON—MANITOBA.

In an action against a municipality to recover the amount of certain debentures the writ of summons was specially indorsed, and defendants having appeared, a summons was taken out according to the practice in the Court of Queen's Bench in such cases calling upon said defendants to show cause at a day named why judgment should not be signed against them summarily. On the return of the summons the judge before whom it was returnable, after hearing the parties, ordered that plaintiffs should be at liberty to enter up judgment in the action for the amount indorsed on the writ. This order was affirmed on appeal to the full Court, and a further appeal was sought by the defendants to the Supreme Court of Canada.

Held, that the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court Act, and no appeal therefrom would lie. Appeal quashed with costs. *Municipality of Morris* v. *The London and Canadian Loan Co.*, Sup. Court of Canada, Nov. 17, 1891.

4. BY-LAW PROHIBITING SUNDAY PREACHING IN PARKS, VALIDITY OF—R. S. O., c. 184 SEC. 504 SUB-SEC. 10—VIOLATION OF CONSTITUTIONAL RIGHT—UNREASONABLENESS—UNCERTAINTY "SABBATH-DAY."

It is provided by R. S. O., c. 184, s. 504, sub-sec. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, etc.

Held, that the municipal council of a city had power under this enactment to pass a by-law providing that no person shall on the Sabbath-day in any public park, square, garden, etc., in the city, publicly preach, lecture, or declaim.

Held, also, that the by-law violated no constitutional right, and was not unreasonable. Bailey v. Williamson, L. R. 8 Q. B. 118 followed:

Held, also, that the by law was not bad for uncertainty as to the day of the week intended, by reason of the use of the term "Sabbath-day." *Re Cribbin & The City of Toronto*, 21 O. R. 325.

Notes.

Bailey v. *Williamson*, L. R. 8 Q. B. 118, was a case arising out of a breach by the appellant of the regulations made by the commissioners of Her Majesty's works and public buildings under the provisions of an act for the regulation of the royal parks and gardens. The breach complained of was a violation of the rule that "no public address may be delivered except within forty yards of the notice-board on which this rule is inscribed." Cockburn, C. J., said, "I think it is quite clear that the regulation as to rules being made by one or other of those authorities, for the purpose of imposing conditions on the delivery of addresses in the park, was clearly within the jurisdiction of the ranger or the commissioners, as the case might be; and that being so, we have no authority here to look into the rules to see whether they are reasonable and proper or not." — "The appellant's counsel seemed to be under the idea which has been lately put forward, that persons were entitled by law to do what they liked in the parks, to make speeches or anything of the kind. I am aware of no legal principle and no authority which says anything of the sort. I am quite sure that persons are not entitled by law to make addresses in the parks, and consequently the passing of this act which says that they shall not make an address, by no means interferes with any right to which by law they are entitled."

MUNICIPALITY—See Mun. Corp. 3.

MUD-HEAPS—See Negligence 8.

MURDER — See Criminal Law and Proced. 1.

NAVIGABLE WATERS—See Riparian Rights.

NEGLIGENCE—SEE ALSO MASTER AND SERVANT — MUNICIPAL CORP. 3.

1. To rest the arm upon the window sill of a car, provided it does not protrude, is not negligence *per se*, but if it does protrude, the act becomes negligent, in the contemplation of law. *Carrico* v. *West Virginia Cent. and P. Ry. Co.*, Supreme Court of Appeals of West Virginia, Nov. 1891.

2. INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

Plaintiff while walking along defendant's tracks looked both ways before he stepped on the first track, but looked no more toward the west, from which direction he knew the train would come, and was then about due. He crossed the first and second tracks, and walked toward the east between the second and third tracks, and close to the third track, on which he knew the train would pass. He had on an ulster overcoat, with the collar turned up, but the air was still and the rumbling of the coming train was distinctly heard by others.

Held, contributory negligence sufficient to defeat his recovery. Second Division, Dec. 23, 1891. *Scott* v. *Pennsylvania R. Co.* Opinion *per Curiam*. 9 N. Y. Supp. 189, reversed. New York Court of Appeals.

3. DANGEROUS PREMISES — VAULT UNDER SIDEWALK—CONSENT OF MUNICIPAL OFFICERS.

(1) The owner of a city lot, who has, with consent of the city authorities, constructed a vault under the sidewalk in front of his lot, is not responsible for injuries received by a pedestrian who falls into the vault on account of the breaking of the flag-stone over it, where no actual negligence on the part of the lot-owner is shown. *Jennings* v. *Van Shaick*, 108 N. Y. 530; *Chicago City* v. *Robbins*, 2 Black, 418, 425; *Robbins* v. *Chicago City*, 4 Wall. 657, 679; *Village of Seneca Falls* v. *Zalinski*, 8 Hun, 571, 573; *Van O'Linda* v. *Lothrop*, 21 Pick, 292, 297; *Fisher* v. *Thiskell*, 21 Mich. 21; *Gridley* v. *City of Bloomington*, 68 Ill. 47, 50; *Nelson* v. *Godfrey*, 12 id. 20, 23; *Clark* v *Fry*, 8 Ohio St. 358; *Wood* v. *Mears*, 12 Ind. 515; *Mallory* v. *Griffey*, 85 Penn. St. 275; *Hundhausen* v. *Bond*, 36 Wis. 31; *Irrin* v. *Fowler*, 5 Robt. (N. Y.) 482; 2 Dill. Mun. Corp., §§699, 700; Cooley Torts, 748. (2) The consent of a city to the construction of a vault under the sidewalk in front of a business block may be inferred from the acquiescence for nine years of the public officers in charge of the streets. Second Division, Dec. 8, 1891. *Babbage* v. *Powers*. Opinion by Vann, J. 7 N. Y. Supp. 306, affirmed. New York Ct. of Appeals, Alb. L. J.

4. INJURY TO CHILD ON TRACK.

Plaintiff, a child 2½ years of age, while in charge of her half-grown sister, who was in their house at work, slipped into the street unseen by the sister, and while there was badly hurt by defendant's horse car, which was being slowly pulled up hill by the regular horses and an extra tow-horse. A witness testified that he saw the child on the down track crossing over to the other track while the car was about 10 feet away, and heard people shouting to the driver. He then turned his back, but, at renewed shouting, turned again, and saw the child knocked down by one of the horses. The driver and tow boy both testified that they were looking straight ahead, but did not see the child, and knew nothing of the accident until the conductor blew his whistle to stop, which was after the car had passed the child.

Held, that a verdict for plaintiff would not be set aside as unsupported by the evidence. *Giraldo* v. *Coney Island & B. R. Co.*, 16 N. Y. Supp. 774 N. Y. Sup. Ct.

Note.

This case very much resembles the recent one of *Dufresne* v. *The City Passenger Rly. Co.* M. L. R. 7, S. C. In this Court the plaintiff won his case, but the Court of Queen's Bench in Appeal reversed the decision, M. L. R. 7 Q. B. 214. (See Monthly Law Digest and Reporter March. No. Article on Contributory Negligence where this and similar cases are discussed) and infra No. 6.

5. IMPUTED NEGLIGENCE—LICENSOR AND LICENSEE.

Where a telegraph company permits a messenger service company to string its wires on the poles of the telegraph company, and the two occupy towards each other only the relation of licensor and licensee, the telegraph company is not liable for the negligence of the messenger service company in permitting its wires to fall to the pavement and remain there, to the injury of a passer-by. *Holmes* v. *Union Telegraph and Telephone Co.*, N. Y. Sup. Ct. Nov. 1891, 11 R. R. and Corp. L. J. 55.

Notes.

1. The rule seems well settled that to render one person liable for the negligence of another the relation of master and servant or principal

and agent must exist. *Stevens* v. *Armstrong*, 6 N. Y. 435; *English* v. *Breman*, 60 N. Y. 609.

2. There is nothing in this case which shows that the defendant bore such relation to the messenger company as to make the former liable for the negligence or misconduct of the latter (Opinion of the Court).

6. CHILD KILLED ON STREET RAILWAY.

Held, reversing the judgment of Loranger, J., M. L. R., 7 S. C. 10, where a child, two years of age, through the negligence or want of vigilance of its parents, is allowed to leave its residence and get on the track of a street railway, and is killed there by a car of the railway company, without any fault on the part of the employees of the company, an action of damages by the father of the child will not be maintained. *Cie. de Chemin de Fer à Passagers de Montréal* v. *Dufresne*, M. L. R., 7 Q. B. 214.

Note.

See also our article on Contributory Negligence, this number.

7. LIABILITY OF STEAMBOAT OWNERS FOR—ACTION BY A FATHER FOR DAMAGES FOR ACCIDENT CAUSING HIS DAUGHTER'S DEATH—APPEAL FROM JUDGMENT FOR PLAINTIFF DISMISSED WITH COSTS.

Plaintiff's daughter, who was a passenger by defendants' steamer, fell overboard and was drowned in consequence of a gangway, against which she was leaning, having been left insecurely fastened. The defence mainly relied on was contributory negligence. It was shown that there was a cabin for passengers, and that, at the time of the accident, there was a heavy sea and the vessel rolling and pitching. It was also contended that plaintiff suffered no actual pecuniary loss. The cause was tried before a judge without a jury, who found for the plaintiff, and assessed damages at $300.

An appeal by defendants was dismissed with costs. *McAdam* v. *Ross et al*, 22 N. S. Reports 264.

8. ROAD — OBSTRUCTION — MUD-HEAPS LEFT ON ROAD REPARATION—FAULT (SCOTCH LAW).

Roadsmen in the ordinary discharge of their duty accumulated the mud raked off the Crow Road, in the neighbourhood of Glasgow, in heaps of from 8 to 12 inches in height, in close proximity to the foothpath in front of certain cottages, and left it there for a few days to solidify before carting it away. The road was not lighted at night, and a woman who lived in one of the cottages, while endeavouring to cross the road after dark, tripped over one of these heaps and broke her arm. There were no cottages and no foot path on the other side of the road.

Held, (without laying down any general rules as to road cleaning) that there was fault on the part of the roadsmen in leaving such heaps in such a place, and that the road trustees were liable in damages to the injured woman. *Nelson* v. *The Lanarkshire Road Trustees*, 29 Scot. Law Rep. 261.

9. RAILROAD COMPANIES — ACCIDENTS AT CROSSINGS—NEGLIGENCE—EVIDENCE.

In the absence of statutes regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle at the intersection of a mill road, or a point where the public have been habitually permitted to cross, is evidence of negligence.

For a moving train to omit to give, in a reasonable time, some signal when approaching a highway from which the train is hidden by an embankment, cut or curve, is negligence *per se*.

Where a railroad company has erected a whistle post at a proper distance from a crossing in order to notify engineers where to give warning, and the public are led to believe that a signal will be given at the post, it is negligence if the engineer, in passing with a freight or passenger train, fail to sound the whistle at such post.

Where the person injured would not have ventured upon the track at the crossing but for the negligence of the engineer in failing to give warning, the railroad company is liable, though plaintiff may have been careless in exposing himself.

In an action against a railroad company for damages resulting from personal injuries the court properly in

structed the jury that it was the duty of plaintiff as well as the engineer to keep a proper lookout at a crossing, and that one time looking and listening at a distance from the track is not a proper lookout; that plaintiff should have used his senses of sight and hearing; and that if, by failure to do so, he caused the injury, he could not recover.

Where the testimony in regard to contributory negligence was conflicting, the court rightly refused to charge that it was "the duty of plaintiff to see and hear," and that his failure to do so was equivalent to not looking or listening, since such a charge would decide the question of plaintiff's negligence.

Plaintiff testified that he and his father came along the highway in a covered wagon, and that plaintiff looked several times to see if a train was coming, and that when within about twenty yards of the crossing he stopped the wagon and listened, and then rode on the shaft, looking and listening, and did not see nor hear the train until the horse was on the track.

Held, that because the engineer testified, and introduced a man to corroborate his opinion, that the track was visible for several hundred yards from the highway, it would have been error for the court to instruct the jury that they must disregard plaintiff's statements and find against him, for in such a conflict the court could not instruct as to the weight of the evidence.

It was not the duty of plaintiff, if after listening at twenty yards' distance and riding on the shaft he neither heard nor saw an approaching train, to get down and look up and down the track, even though his view of the railroad line was obstructed.

If the engineer saw that the horse was attached to a covered wagon, and could see that the occupants were not on the outlook, but were inside the wagon, it was his duty to stop his engine.

If the engineer failed to give the usual signals, then it was his duty to keep a more vigilant watch along the track.

Plaintiff showed that soon after the accident defendant repaired the mill-road crossing where the accident took place.

Held, that since such road may also have been a plantation road, which defendant was required to keep in repair under Code N. C. s. 1975, it was not prejudicial to allow the testimony. *Hinkle* v. *Richmond & D. R. Co.*, 11 R. & Corp. L. J. 81, Supreme Court of North Carolina, Nov. 1891.

NEGLIGENCE OF SHIPPER—Carriers 2.

NOTARY, SIGNATURE BY, IN QUEBEC—See Foreign Law.

NOTICE, VALIDITY OF—*Mandamus* 2.

NOTICE, TO OWNER OF PREMISES—See Board of Health.

NUISANCE, ABATEMENT OF — See Board of Health.

ORDINANCE, VIOLATION OF — See Crim. Law and Proced. 2.

OTHER INSURANCE — See Insurance 7.

PAROL GUARANTEE BY CROWN OFFICER—See Appeal 3.

PARTIES TO ACTION.

ACTION FOR ACCOUNT—DEMURRER—"RES JUDICATA"—PARTIES—NEW BRUNSWICK.

C., who had a suit pending on certain policies of insurance, assigned to defendant all his interest in said suit and said policies, and being indebted to B. & Co., he gave them an order on defendant directing the latter to pay B. & Co. the balance coming from the insurance claim after paying what was due to defendant himself. B. & Co. indorsed the order and delivered it to plaintiff, who presented it to defendant, and defendant accepted it by writing his name across the face. B. & Co. afterwards gave plaintiff a written document stating that, having been informed that the order was not negotiable by indorsement, in order to perfect plaintiff's title they assigned and transferred to him the order, and made him their attorney, in their name, but for his own benefit, to collect the same.

The insurance moneys having come into the hands of defendant he refused to give plaintiff an account or pay what was due to him, but stated that prior claims had exhausted the money. In an action for an account and payment the defendant demurred claiming that both C. and B. & Co. should be made parties. The demurrer was overruled and the same objection was raised in the answer. On appeal the question of want of parties was the only one argued.

Held, affirming the judgment of the Court below, Strong, J., dissenting, that the question was *res judicata* by the judgment on the demurrer; if not, the judgment was right as neither C. nor B. & Co. were necessary parties. Appeal dismissed with costs. *McKean* v. *Jones*, Supreme Ct. of Canada, June 22, 1891.

PARTNERSHIP.

1. What Constitutes.

S. and K. made a contract, whereby the former agreed to purchase of a third person certain lots and erect two houses thereon, K. agreeing to make the necessary advances to complete the same above a certain amount to be raised on a builder's loan. It was also agreed that on completion of the buildings S. would convey to K. either one of the houses, or at the option of K., in case the lots were sold at a price satisfactory to both parties, S. would, after paying all advances, pay to K. one half the sum realized on the sale, "it being the intent of the parties to equally divide any profits which may be realized by the sale of said buildings."

Held, that the agreement was a mere executory contract of sale and not a partnership. Curry v. Fowler, 87 N. Y. 33, Dec. 1, 1891. *Demarest* v. *Koch*. Opinion by Ruger, C. J., 9 N.Y. Supp. 726, affirmed. New-York Ct. of Appeals, 45 Alb. L. J. 105.

2. Partnership Articles—Expiration or Determination of Partnership by Effluxion of Time — Continuance of Business without Fresh Arrangement—Application of Provisions in Articles to Partnership at Will.

A. and B. carried on business under articles of partnership which contained a clause providing that "within three months after the expiration or determination of the partnership by effluxion of time," B. should have the option, to be signified within three months after the determination of the partnership, of purchasing A.'s share in the business. After the expiration of the term created by the articles of partnership, A. and B. continued to carry on the business without making any fresh arrangement.

Held, that the provisions of the clause in the original articles giving B. the option of purchasing A.'s share remained in force, and were applicable to the partnership at will carried on by them after the expiration of the original term. Neilson v. Mossend Iron Company (11 App. Cas. 298), Cox v. Willoughby (13 Ch. D. 863), and Yates v. Finn (13 Ch. D. 839), discussed. *Daw* v. *Herring* [1892] 1 Ch. 284.

3. Letters after Dissolution — Mandate — Order — Revocation — Right of Action.

Held, That, where two members of a partnership which had been dissolved and was being wound-up, placed in the hands of a third party a joint order to receive from the post-office all letters addressed to the former partnership; such order cannot be revoked by one only of the parties thereto.

Where the heretofore partners continue separately the same business, the one who acquired the book debts due to the firm has not the sole right to receive letters addressed to the old partnership; and even had he the right it would not afford him an action for damages against his former partner upon the latter's refusal to give his consent or an order to that effect, but only the right to an action to have it declared that he represented the firm in respect of these letters. *Bernard* v. *Allaire*, 17 Q. L. R. 198.

PATENT.

Co-Owners — Equitable Assignment of a Share—Registration—Documents of Title, Custody of—

— PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883 (46 AND 47 VIC. C. 57), SS. 23, 85, 87, 90—PATENTS RULES, 1883, RR. 65, 68, FORM L—CONTRACT—CONSIDERATION—PAST SERVICES.

An equitable assignment of a patent or a share or interest in it may be put upon the register. A. and B., joint owners of certain patents, wrote to C. as follows : " In consideration of your services as the practical manager in working both our patents... we hereby agree to give you one-third share of the patents, the same to take effect from this date." A. and B. afterwards deposited the letters patent with C. to assist him in effecting a sale of the patents, which however did not take place. C. registered the above letter, and claimed to retain possession of the letters patent as a co-owner of a third share therein :

Held, (affirming the decision of Romer, J.), that sec. 85 of the Patents, Designs, and Trade Marks Act only excludes notices of trusts ; and that the letter was an immediate equitable assignment of an interest in the patent, not defective for want of consideration, and was properly entered on the register. *In re Casey's Patents* ; *Stewart* v. *Casey*, [1892] 1, Ch. 104.

PENALTY—See Damages.

PHYSICAL EXAMINATION OF PARTY —See Discovery.

PICTURE—See Fixtures.

PLEDGE—SEE ALSO COMPANIES 3.

PLEDGE OF AN IMMOVEABLE, ARTS. C. C. 1966, 1967, 1970, 1975.

Held, that the proprietor of a railroad built by a contractor, who has agreed to leave the possession of it to the latter until he has been paid the price of his undertaking, can nevertheless obtain the precarious and temporary possession of the road for the purpose of continuing and completing it. *Baie des Chaleurs Ry. Co.* v. *MacFarlane*, Superior Ct., Montreal 1891. 21 Rev. Lég. 425.

POLICE OFFICERS' PRIVILEGE — See Evidence.

POWERS OF AGENT—See Insurance 1.

POWERS OF CITY — See Riparian Rights.

POWERS OF OFFICERS — See Insurance 12.

POWERS RELATIVE TO DEALING IN STOCK—See Corporations 3.

PRACTICE—See Mun. Corp. 3.

PRESCRIPTION — See Appeal 4 — Stocks 2.

PRESENTMENT FOR ACCEPTANCE— See Bills and Notes 2.

PRESENTMENT FOR PAYMENT — See Bills and Notes 4.

PREMATURE ACTION—See Insurance 5.

PREMIUM, FORFEITURE FOR NON-PAYMENT OF—See Insurance 13.

PRINCIPAL AND AGENT—See Charter-Party.

PRIVILEGE OF PARLIAMENT — See Bankruptcy.

PRIVILEGED COMMUNICATION — See Libel 1.

PROBATE—See Wills 1.

PROHIBITION, WRIT OF—See Constitutional Law 3.

PROMISSORY NOTE — See Bills and Notes 1. 4.

PROOF—See Bills and Notes 1.

PROOF OF LOSS—See Insurance 5.

RAILROAD ACCIDENTS — See Negligence 2. 9.

RAILROAD.

RIGHT OF A CITY TO EXTEND STREETS ACROSS RAILROADS ALREADY CONSTRUCTED.

(1) *Railroad not allowed expenses for constructing street crossing, etc.*

Held, in a case where a city institutes a condemnation proceeding to open or extend a street across a railroad already constructed, the company owning such railroad is not entitled to be allowed, as a part of its compensation, the amount of its expenses in constructing and maintaining the street crossing.

(2) *Construction of crossings—Police regulations.*—That the regulations in regard to fencing railroad tracks and

the construction of farm crossings for the use of adjoining land owners are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built, as well as to those to be thereafter constructed, and for the same reason applies here to a street crossing required to be constructed by a railroad company years after the construction of its road.

(3) *New street across existing railroad.*—That the language of the act includes also a railroad crossing created by running a new street across an existing railroad. The act of 1874 construed.

(4) *Extension of streets over Railroads—Lands not tracks.*—That in the extension of streets over other railroad lands than tracks or rights of way, and in the construction of sewers under or through the railroad rights of way, serious damage might be done which would require compensation or restoration. But where the approaches to the crossing are graded, and planks are laid between the rails to make an even surface for the passage of persons and teams, and gates are erected to delay such passage until a train pass, there is no part of the track, or right of way or land, to be restored to its former state, nor is the usefulness of the railroad in any way impaired.

(5) *For what no damages can be allowed.*—That the use of the crossing by the public may result in the stoppage or slower movement of trains, and in the increased danger of accidents, but it has been *held* by this Court, that no damages can be allowed for these inconveniences. *Chicago & N. W. R. R. Co.* v. *City of Chicago*, Supreme Ct., Illinois, Jan. 18, 1892.

Notes.

(1) Every railroad company takes its right of way, subject to the right of the public to extend the public highways and streets across such right of way. *Railway Co.* v. *Railway Co.* 30 Ohio St., 604.

(2) It is well settled that neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare. *C. & A. R. R. Co.* v. *J. L. & A. R. R. Co.*, 105 Ill., 388.

(3) The legislature can require railroad companies to fence their tracks, although there was no such requirement imposed by their charters, and the roads were already constructed and in operation. *O. & M. R. R. Co.* v. *McClelland*, 25 Ill., 140.

RATIFICATION—See Insurance 12.

REASONABLE TIME — See Sale of Goods 2.

RECEIVERS—See Trusts 1.

REGISTRATION — See Bank Stock—Crown Lands.

RELEASE—See Insurance 16.

REPARATION—See Negligence 8.

"RES JUDICATA"—See Parties to Action.

REVISING OFFICER—See Mandamus 2.

RIPARIAN RIGHTS.

NAVIGABLE WATERS — POWERS OF CITY—DOCK-LINE.

A city may not by ordinance, *under* authority of the Legislature, fix an arbitrary dock-line in a navigable river, in the bed of which the riparian owners have absolute property, subject only to the public right of navigation, without notice to such owners.

The fixing of such line, so as to pass across the natural bank of the river at certain points is unconstitutional, as taking private property for public use without compensation.

At a point in such river occupied by rapids, and thereby entirely unfitted for navigation proper, and where the centre of the stream only is useful for floating logs, a dock-line may not be fixed so as to prevent the riparian owner building out into the intervening waters, by reason of the fact that this is a point in a navigable river.

Such building may not be enjoined, in the absence of evidence that it will be a nuisance or injure any public or private interest. *City of Grand Rapids* v. *Powers*. Mich. Supreme Ct. Dec. 21, 1891, 45 Alb. L. J. 148.

RISK INCIDENTAL TO EMPLOYMENT—See Insurance 3.—Mast. and Serv't 2.

SALE OF GOODS.

1. SLIGHT VARIATION FROM CONDITIONS OF CONTRACT—SIGHT DRAFTS.

M. sold McB. ten car loads of peas, price payable by drafts at sight, with bills of lading attached. M., with the first car load, made a draft on demand instead of a sight draft, asking at the same time to be informed whether McB. wanted the rest at sight. McB. refused to accept the draft, or to take delivery of the peas, and repudiated the contract.

Held, that the slight difference in the drafts did not constitute a sufficient reason for McB. to repudiate the contract, as he might have accepted the demand drafts on condition that they would be payable only three days after acceptance; and moreover it appeared that he had repudiated the contract on a different ground before the drafts were presented. *McBean & Marshall*, M. L. R., 7 Q. B. 277.

2. CONTRACT FOR SALE OF BINDER—ACCEPTANCE—REASONABLE TIME.

In October, 1889, the defendant gave to plaintiff's agent an order for a binder for which he agreed to pay $190 by two promissory notes. The order contained a proviso as follows "this order is not binding on the Patterson & Bro. Co. (Ltd.) until received and ratified by them at Winnipeg." The plaintiffs entered the order in their books at Winnipeg as being accepted but did not communicate their acceptance to the defendant until August, 1890, when they wrote him that a binder was ready for him. Before receiving this letter the defendant had bought another binder and refused to accept one from plaintiffs or to give the notes. In an action for damages for non-acceptance,

Held, that the defendant was not liable, as the plaintiffs did not communicate their acceptance of the order to him within a reasonable time, and he was entitled to assume that they did not intend to accept. *The Patterson and Bro. Co.* v. *Delorme*, 7 Man. Repts. 594.

Note.

In Hebb's case L. R. 4 Eq. 9, Lord Romilly, M. R. said "I am of opinion that an offer does not bind the person who makes it until it has been accepted and its acceptance has been communicated to him or his agent." See also our article in February number of Monthly Law Digest and Reporter, "Contracts by Correspondence."

3. CHATTELS—WARRANTY BY SPECIAL AGENT—AUTHORITY OF AGENT.

A chartered bank employed an agent to sell certain agricultural machinery. He, without special authority in that behalf, warranted the machinery to work well and satisfactorily in the threshing of grain.

Held, that he was a special agent and could not bind his principals without express authority to warrant. *The Commercial Bank of Manitoba* v. *Bissett*, 7 Manitoba Reports 586.

Notes.

(1) As a general rule, a principal is answerable for the fraudulent representations of his agent in the ordinary course of his business, if he ratifies the contract by accepting the benefit derived from it; but the liability exists only when the agent has been acting within the scope of his authority. *Mackay* v. *The Commercial Bank of New Brunswick*, L. R. 5 P. C. 395.

(2) A buyer who takes a warranty from a known agent, or servant selling on behalf of his principal or master, takes it at the risk of being able to prove that the agent had the principal's authority for giving the warranty. *Brady* v. *Todd*, 9 C. B. N. S. 592.

(3) An action will not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine. *Radford* v. *The Merchants Bank*, 3 O. R., 529.

SALVAGE—See Maritime Law.

SCHOOL DISTRICT, ESTABLISHMENT OF NEW—See Mandamus 1.

SECRET AGREEMENT—See Composition.

SERVICE OF SUMMONS—See Appeal 4.

SHARES—See Banks and Banking 2.

SHARES IN TRUST—See Bank Stock.

"SHEBEEN"—See Libel 2.

SHIP—See Bill of Lading—Charter-Party.

SIGHT DRAFT—See Sale of Goods 1.

STATUTES 31 VIC., C. 17 (DOM.)—33 VIC., C. 50 (DOM.) Validity of—See Constit. Law 1. 2.

STATUTE OF FRAUDS—See Foreign Law.

STEAMBOAT OWNERS, LIABILITY OF —Negligence 7.

STOCKS—SEE ALSO CORPORATIONS 2. 3. 4.

1. STOCK EXCHANGE TRANSACTIONS.

Held (1) That a client has an action for damages against his stockbroker for refusal or default to deliver stocks which the latter has bought for him.

(2) The measure of damages is the difference in the market.

(3) The mandate must be regarded as strict and the purchase *bona fide*, where the client has already bought shares through the same broker, of which he took delivery; where he has paid a margin of twenty per cent. on the stocks claimed, which were sound and not subject to fluctuations, and where he has offered to take them over upon paying the balance of the purchase price, interest and commission, although this latter offer had been made but sixteen months after their purchase on 'change. *Ritchie* v. *Barclay*, Superior Ct. Montreal, 1891, 21 Rev. Leg., 421.

2. GAMBLING — INTERRUPTION OF PRESCRIPTION BY COMPENSATION — C. C. ARTS. 2260, 2227, 1188, 1927, 1928, 1131, 889, 890—STAT. CAN. 51 VIC., c. 42.

Held, (1) that a set off operating with the consent and to the knowledge of the debtor, interrupts prescription in the same manner as a partial payment.

(2) The sale of goods or of stock, without intention of transferring the property, or to make or take delivery, but with the intention of simply dealing in differences, constitutes a fictitious sale, and comes within the meaning of gambling and betting prohibited by Art. 1927 C. C.

(3) A broker has no right of action against his client for advances and commissions on stock transactions which amount to gambling, where he knew that his client had no intention of buying seriously.

(4) The proof as to simulation of the sale must be derived from circumstances, such as the social position of the parties, their business relations to each other, their incomes, the nature and extent of the transaction or series of transactions between them.

(5) Speculation in goods or stocks is legitimate in itself; every one is free to speculate; time, and marginal sales are not prohibited, neither are option and carried-over sales; but these sales often cover stock gambling transactions. The original intention of the parties must always be looked into, to ascertain whether the sale was a *bona fide* one or not.

(6) The defendant a bank clerk, with a salary of $900 and no fortune, who buys, resells and repurchases the same day or later, divers stocks amounting to $15,000 or $30,000 through the same broker, with whom he is personally acquainted, upon a minimum and insufficient margin (the broker advancing the funds and even keeping 200 shares of City Passenger Ry. Co. for a year, awaiting a rise which did not come) could have had no intention of taking delivery and was incapable of so doing; his transactions were fictitious to the knowledge of the broker. *Forget* v. *D'Ostigny*, 21 Rev. Lég. 387.

STOCKHOLDER'S RIGHT OF ACTION—See Corporation 4.

STREETS, CARE OF—See Mun. Corp. 2.

STREET RAILWAY — See Negligence 4. 6.

SUBSTITUTED PROPERTY—See Bank Stock.

SUICIDE—See Insurance 16.

SUNDAY PAYMENT OF FARE — See Carriers 3.

SUNDAY PREACHING IN PARKS—See Mun. Corp. 4.

SUPERINTENDENT OF EDUCATION—See Mandamus 1.

SUPREME AND EXCHEQUER CT. AMEND ACT. 1891—See Appeal 1. 2.

SURETYSHIP—See Contracts 4.

SURRENDER OF POLICY—See Insurance 14.

TAXATION—SEE ALSO CONSTITUTIONAL LAW 1.

1. ASSESSMENT AND TAXES—EXEMPTION FROM TAXATION—LANDS SOLD OR OCCUPIED — CROWN LANDS — LOCUS — MANITOBA.

By the charter of the C. P. R. Co. the lands of the company in the North-West Territories, until sold or occupied, are exempt from Dominion, Provincial, or municipal taxation, for twenty years after the grant thereof from the Crown.

Held, affirming the judgment of the Court of Queen's Bench for Manitoba:

(1) That an agreement to sell any of such lands, so long as it has not been completed and a conveyance executed, does not take away the exemption; to effect which the land must be actually sold.

(2) The exemption attaches to land allotted to the company before as well as after the patent is issued by the Crown.

(3) Lands situate in the North-West Territories do not lose the exemption by being afterwards incorporated within the boundaries of the Province of Manitoba on an extension thereof. *Rural Municipality of Cornwallis* v. *Canadian Pacific Railway Company*, Supreme Ct. of Canada, Nov. 16, 1891.

2. GAS COMPANIES — TAXATION OF MAINS AND PIPES.

A gas company paid all taxes assessed on its realty, and took a receipt therefor, but failed to pay a separate tax on its "mains and pipes," which were connected with the realty, but assessed as personalty. The town treasurer afterwards sold the realty, alleging that this tax was due thereon.

Held, that such sale was void, for the "mains and pipes" are but appurtenances to the realty, and by the treasurer's receipt all tax due on the realty had been paid. *Capital City Gas-light Co.* v. *Charter Oaks Ins. Co.*, 50 N. W. Rep. 579. Iowa, Supreme Court.

Notes.

(1) At French law, gas pipes under the street are considered as an integral part of the gas works, and are therefore immoveables by nature. Caen, 26 May 1886, Dalloz 1887, 2. 81.

(2) There is a recent Province of Quebec decision to the same effect, rendered by Mr. Justice Tait.

TELEGRAPH COMPANIES.

LIABILITY FOR FAILURE TO TRANSMIT.

Plaintiff, upon returning home after an absence of several days, found a telegram, dated two days previous, announcing that a surgical operation would be performed upon his mother and asking that he be present. He immediately telegraphed in response, asking if he was too late, but the message was never transmitted. After waiting seven or eight hours for a reply, he left home again, not returning for some days. He sent no other telegram and left no instructions that any telegram received should be forwarded. Had his own message been transmitted, he would have received the reply before leaving home. His mother having died from the effects of the operation, he sued the company, alleging that he was prevented from seeing her because the company failed to transmit his message with reasonable dispatch. *Held* that, as there was nothing in the petition to contradict the said allegation, it was sufficient, if true, to show that defendant's breach of contract was the proximate cause of the matter of complaint. An objection that the petition was insufficient because it showed that plaintiff failed to see his mother from "other causes" with which the defendant was in no way connected, was too indefinite, especially where such other causes were not mentioned in the pleadings. One of the towns which plaintiff visited after he left home was about half the distance on the road to where his mother was. He was allowed to explain, over defendant's objection, that the reason he did not go on from there was because it was understood between him and those who were taking care of his mother that the operation was not to be performed unless he was present, and that he "supposed" it had not been performed. There was a question made about his wish or inclination to see his mother. *Held*, that on this issue his supposition was a fact, which the jury were entitled to weigh.

INSTRUCTIONS.

An instruction that "if the agent knew of the importance of the prompt delivery of the message, or could have discovered it from the terms of the telegram, or from other telegrams in reference to the same matter," the defendant would be chargeable with knowledge of the fact, was a correct statement of the law. Although an instruction to find for plaintiff, in any event, the amount paid for sending the message, was not necessary, in view of the fact that the amount had been deposited in Court, and no verdict was therefore required upon it, it was not error to so charge. An instruction that if the acts or omissions of plaintiff "contributed in any appreciable extent" to the result of which plaintiff complained he could not recover, was properly refused, as not being the law of contributory negligence. The Court charged that "if on account of the failure of defendant to send and deliver plaintiff's telegram and on that account alone, he was prevented from seeing his mother in her last sickness," they should find for the plaintiff, in case other necessary facts were established. They were instructed that their verdict should be for defendant, "if the failure of plaintiff to attend his mother in her last sickness was due to his own carelessness, or voluntary act or omission, and not to the negligence of the defendant." The Court charged as requested by the defendant, that before the jury could find for the plaintiff they must believe "that the failure of defendant's agent to send the telegram was the proximate cause of his failure to see his mother," and that if his said failure was "caused by other things than the failure to send the telegram" their verdict should be for defendant. The Court refused to charge as requested by defendant, that if plaintiff, in neglecting to order any telegram that might be received to be forwarded to him, or to send other telegrams, contributed to the result complained of, he was not entitled to recover, notwithstanding the negligence of defendant. *Held*, that although the charges given did not specially indicate the duty of plaintiff, and were not as definite as the one requested, they comprehended all the law in the last named charge, and nothing more, therefore, could be required.

DAMAGES—A verdict for $667.56 is not excessive. *Erie Tel. &c., Co. v. Grimes*, Tex. Supreme Ct., 17 S. W. Rep. 831.

TESTIMONY OF LAWYER—See Libel 1.

TITLE TO LAND - See Appeal 2.

TORN WILL—See WILLS 2.

TRANSFER OF ASSURED'S INTEREST—See Insurance 4.

TRUSTS.

1. RECEIVERS — CORPORATIONS — EQUITY.

An insurance company deposited some of its funds with a trust company to be distributed among the certificate holders in case the insurance company made default in meeting its obligations. Afterwards the trustees of the insurance company petitioned for its voluntary dissolution, and a receiver was appointed.

Held, that the court had no power to compel the trust company, in the absence of any misconduct on its part, to turn the trust fund over to the receiver to be distributed by him instead of by the trust company.

A payment of such fund by the trust company to the receiver pursuant to an order of court, is not a voluntary payment that would prevent the trust company from moving for an order for the repayment of the fund.

Where the trust company waits ten months before moving for such order of repayment, the receiver, in accounting with the trust company, should be allowed for payments made by him in good faith out of said fund, under order of court.

Such payments, which have been made by the receiver to attorneys in the case for their fees, should be repaid by them to the receiver, and by him to the trust company. 15 N. Y. Supp. 211, reversed.

In re Voluntary Dissolution of Home Provident Safety Fund Ass'n of New

York. Ct. of Appeal of New-York, Dec. 1891.

2. ACTION BY TRUSTEE — ALLOWANCE OUT OF ESTATE.

(1) The G. railroad company conveyed all its property to the plaintiff in trust to secure its bonds, and afterward leased its said property to the plaintiff who assumed the bonds secured by the trust deed. The plaintiff then leased the property to the E. railroad company, upon condition that the company should assume plaintiff's obligation under the lease. The E. company having become insolvent and defaulted in the payment of its bonds, an action was brought against the plaintiff and the receiver of the company, which resulted in a sale of the property and a judgment for the deficiency. Afterward plaintiff commenced an action in his own name against the receiver, to enforce payment of the bonds, and a judgment was rendered which relieved the plaintiff from personal liability, but was also unfavorable to the bondholders in other respects. Plaintiff appealed and procured a judgment which again fixed his liability, and made the bondholders secure.

Held, that the litigation was not for the benefit of the plaintiff, but of the bondholders, and plaintiff was therefore entitled to an allowance for expenses and attorney's fees. Trustees v. Greenough, 105 U. S. 527, followed. (2) A trustee in discharge of duties which pertain to his trust should be allowed only the compensation which is usually awarded to executors and administrators. Dec. 1, 1891. *Woodruff* v. *New York, L. E. & W. R Co.* Opinion by Ruger, C. J. Earl, Peckham and O'Brien, JJ., dissenting, 10 N. Y. Supp. 305, modified. N. Y. Ct. of Appeals, Alb. L. J.

TRUSTEE, ACTION BY—See Trusts 2.

"ULTRA VIRES"—See Companies 3.

UNCERTAINTY—See Mun. Corp. 4.

UNREASONABLENESS—See Municipal Corp. 4.

USAGE—See Building Contract.

VAULT UNDER SIDEWALK—See Negligence 3.

VERDICT, EXCESSIVE—See Carriers 2.

VOIDABLE POLICY — See Insurance 12.

VIOLATION OF CONSTITUTIONAL RIGHT —Mun. Corp. 4.

WARRANTY AS TO LOAD CARRIED—See Insurance 18.

WARRANTY BY SPECIAL AGENT — See Sale of Goods 3.

WATCHMAN—See Insurance 10, 11.

WILLS.

1. WILL PROVED ABROAD—FRENCH LAW—PROBATE OF COPY.

The will of a British subject domiciled abroad at the time of his death had been proved in the French Courts and deposited with a notary, who by the law of France was forbidden to allow it to be removed from his custody :

Held, that probate might be granted of a copy of the original will properly proved, limited to such time as might elapse before the original itself should be brought in. *In the Goods of Lemme*, [1892]. P. 89.

2. TORN WILL — INCOMPLETE RESTORATION—COPY—GRANT.

The will of a testator was, after his death, torn into pieces by one of his sons while a copy was being made by the executor. Most of the pieces were recovered and gummed together ; but there were still some blanks left, and it was in an incomplete form when presented for probate, though the copy shewed what all the words omitted in the blanks had been :

Held, that probate might be granted of the incomplete will and the copy as together constituting the will of the deceased. *In the Goods of James Leigh*, [1892], P. 82.

WRIT SPECIALLY INDORSED — See Mun. Corp. 3.

CONTRIBUTORY NEGLIGENCE.

CIVIL AND COMMON LAW DOCTRINES COMPARED.

1*st Roman Law.*

In Roman law the term *culpa* is the equivalent of the negligence of the common law. *Culpa* is sometimes used to include all defects in the performance of duty, but when the term *dolus* is used in antithesis to the former, *dolus* includes an intentional, *culpa* an inadvertent fault. We have only to deal with *culpa*, of which there are two grades according to the classical jurists: *culpa lata* and *culpa levis*; according to the scholastic jurists, three grades, *culpa lata*, *culpa levis*, and *culpa levissima*. The latter division still lingers in some common law text books as a theory, but has been abandoned in its application to the jurisprudence owing to its utter impracticability from a common law point of view. This superfluous distinction arose from an erroneous view of the Roman Law taken by the scholastic jurists, but the discovery of the commentaries of Gaius and other causes, helped to throw a new light on the subject, and hence its rejection by the compilers of the French Civil Code. The only form of diligence known in the Code (art. 1137), as distinguished from the ordinary diligence of a common and inexperienced agent, is the diligence of a *bon père de famille.*

Dr. Wharton in the preface to the first edition of his work on negligence gives the following comparisons of the two schools on the subject of contributory negligence.

Scholastic Jurists	Classical Jurists
If th plaintiff's negligence, no matter how trivial, contributes to the injury, he is barred, on the theory of *culpa levissima* from recovery.	*Injuria non excusat injuriam.* No matter how negligent the plaintiff may have been, this does not excuse the defendant in negligently injuring him, if this injury could have been avoided by the exercise of the diligence good business men are accustomed to exercise in such matters. Nor can the plaintiff's *culpa levissima* bar his recovery. If it does, there is no plaintiff who can recover, for there is no human action to which *culpa levissima is* not imputable.

The principle affirmed by the Roman law in respect of contributory negligence, is thus stated by Pomponius (L. 203 de R. J., 50, 17): *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* The same view is taken concretely in several distinct passages in the Digest, and is repeatedly affirmed in the common law jurisprudence.

French Law.

In France the subject of negligence is treated of under the name of *responsabilité.* The nearest equivalent we can find in the common law for the French term is "Non Contract Law" in its relation to rights and torts which is the title adopted by Mr. Bishop in his work on rights and torts, and which when used in connection with the latter terms has a somewhat wider signification than the word "tort."

Responsabilité is divided into two general headings; offences and quasi-offences. It is the latter which correspond with our negligence. The former are intentional and the latter unintentional wrongs. The subject of responsibility has been very sparingly dealt with in the French Code, especially so in contrast to its immense importance. The Code of our province, following in the footsteps of the Code Napoleon has similarly erred in this respect. No mention is made of contributory negligence.

The French Code Civil reads thus: (translation).

DELICTS AND QUASI-DELICTS.

1382. Every act of man which causes damage to another, obliges him through whose fault it arose, to make reparation for it.

1383. Every person is responsible for the damage he has caused, whether by his positive act, neglect, or imprudence.

1384. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control, and by things he has under his care, etc., etc.

The articles 1053 and 1054 of the Quebec Code substantially include the above three, excepting that the first article contains the following addition after every person: "capable of discerning right from wrong."

This is nearly the whole of our positive law upon the subject of offences and quasi-offences, and owing to the absolute nature of its terms, it would be hard indeed to derive any support from it for a doctrine of contributory negligence. Also, it will not be hard to understand how the French courts, when confronted with the plea of plaintiff's contributory negligence have, and do still, differ as to the extent to which the same shall re-act upon article 1383 of their Code.

Sourdat in his work on *Responsabilité* at No. 641 thus describes quasi-offences. (Trans.) "We call quasi-offences all illegal acts of omission or of commission not included in the penal law, which result in damage to others, but which arise without any intention to harm." (This definition is derived from Merlin vo. *Quasi-délit*).

"The absence of all culpable or fraudulent intention is what distinguishes a quasi-offence from a civil offence so called, for in other respects they are identical."

In the French law the equivalent of our contributory negligence is *faute commune*, i. e. common fault.

Writing of this Sourdat says; (Trans.) "If the injured party has himself contributed to his injury by a personal fault, this is a bar to his action."

So far, this is quite in accord with the English doctrine of contributory negligence, but, owing to the qualification of this statement in the next sentence, the author must mean by personal fault, what at common law is called a "proximate cause" of the injury, for he says: "If the fault consists only in an imprudence, it is but fair that it should be set off against a like fault committed by the immediate agent of the injury" which means that if the plaintiff's contributory negligence is a more or less remote cause of the injury, then the doctrine of comparative negligence as practised in the State of Illinois, must apply.

Again, this writer says: "If, especially, there had been an invasion of another's rights, the one guilty of such invasion cannot invoke against the

author of the quasi-offence the principle of *responsability.*"

"In either case it can be truly said, that he who is first in fault loses his right to the application of the principles of sociability and the laws protective of the rights of each."

"It is not the same question here, as in the case of offences. He who, with malicious intention, commits a damageable act is responsible therefore, even though the damage be aggravated by the fault of the injured party. But the consequences of a mere imprudence can be completely absorbed by the greater negligence or even delict committed by the injured party, the imprudence or delict having given rise to the injury."

"In this respect the facts of each case must determine the question."

Comparative jurisprudence.

A coach collided upon the highway with the carriage of one Varin. The shock upset the carriage, and Varin was injured. He entered an action for damages against the postillion. The latter pleaded that the accident could not be imputed to his negligence or want of skill, but arose from the negligence of the Sieur Varin himself who, having omitted to light his carriage, caused the driver of the vehicle approaching from the contrary direction to be unable to perceive his approach, and consequently unable to make allowance for his passage by giving him one-half of the road-way according to the rule of the road; that for these reasons plaintiff had no sufficient grounds for damages owing to his contributory negligence. Action dismissed. (Douai, 14 Dec. 1846, S. 48, 2, 542).

Comparing this with common law cases of a like nature, one cannot doubt that under the latter jurisprudence the case would have been decided the same way. But to understand why the French Court came to the above conclusion instead of taking into account the comparative negligence of both parties, it must be stated that the evidence as to the postillion being on the wrong side of the road was not so clear, and being a little off his side, there might still have been room enough left to pass. Also the negligence of plaintiff in driving his carriage rapidly at night on a highway without a light was so palpable and gross as to throw the fault of the defendant completely into the shade. (See the leading English case of Butterfield v. Forrester).

No action can be maintained for an injury caused by the defendant's negligence in driving, if the plaintiff's own negligence most proximately contributed to the injury, and this rule applies as much where the defendant is in fault for being on the wrong side of the road as to other cases. (Hanover law of Horses 338. 1875); Kennard v. Burton, 25 Me., 39; Parker v. Adams, 12 Mete. 415; Bigelow v. Reed, 51 Me. 325; Newhouse v. Miller, 35 Ind., 463; Monroe v. Leach, 7 Metc, 274.

Here is another case where the *common fault* was still better characterized.

One Brossier applied at the office of a line of coaches for a seat in the next departure. The list being full, he was refused a place. However, Brossier succeeded in making a private arrangement with the conductor and took a seat in front, and afterwards on top of the coach. The vehicle was in bad condition, on account of which, and its already overloaded condition, it was upset in the road. Several of its occupants, and among them Brossier, were injured. They entered actions for damages against the proprietor and the conductor of the coach.

In regard to the action brought by Brossier, the court of appeal delivered itself as follows : (*Trans.*) " Whereas Brossier was not included in the list of passengers handed by Seguin (the proprietor) to his conductor Baseille ; and it appears that he applied at the office where a place was refused him ; — whereas in the course of the journey Brossier succeeded in procuring a seat with the other passengers, yet he was certainly aware that the coach already had its complement of passengers ; that if there was imprudence and an infraction of the rules on the part of the conductor, yet Brossier was accessory to this imprudence and infraction.

Therefore he is debarred from claiming damages for an act for which he is himself responsible." Lyon 17 January 1844 S. 44. 2. 401.

This decision was given in favour of the proprietor, whose fault only consisted in allowing the vehicle to go out in a poor condition and perhaps overloaded. " But the reasons set forth in this decree," says Sourdat, " were perfectly applicable to the action brought by Brossier against the conductor who allowed him to get on board. If the latter had appealed from the judgment of the court of first instance which had declared against both, there is no doubt he would have secured its reversal."

In a similar case, however, decided in the Court of Riom, 11 March 1851, it was held that the measure of damages should be moderated in proportion to the extent of the passenger's contributory negligence, but that the fault of the proprietor none the less subsisted, and called for condemnation. 53, 2, 76. But in still another case of the same kind it was held, that the court could not make allowance in fixing the damages due to the plaintiff for the latter's imprudence in taking a seat in the vehicle, knowing it was already full. This imprudence must be attributed directly to the conductor, and it also constituted on his part a contravention of one of the rules in admitting the passenger under the circumstances, which still further aggravated his case. Court of Lyons, 16 July 1862, D. 63. 5, 329. Mr Larombière (Obligation, t. 5, p. 709), also supports this view, but Mr Sourdat insists, that where the negligence of the victim is well defined and substantial, it should be a bar to his action.

The above cited cases of a passenger taking a seat in a coach which he knows to be overloaded, and against the rules of the company, would at common law have been probably all decided similarly to the last of those cited (Lyons 16 July 1862) viz., the contributory negligence of the passenger would not have been a bar to his action. These cases might be likened to riding in a baggage car. To do so certainly exposes the passenger to greater risk than he would be exposed to when seated in a car intended for passengers. But if he is in such a position of increased peril by the invitation or permission, expressed or implied, of the conductor of the train, he would be entitled to a recovery against the company, no matter how directly his position might have contributed to the injury. Carroll v. The Railroad, 1 Duer 571, and even when the riding in such car is against the rules of the company, of which the passenger is informed, if he is in it with the knowledge of the conductor, and without any attempt on his part to enforce the rule by removing the passenger, his presence there would not be such negligence as would exonerate the company from the consequence of its negligence or want of care. Jacobus v. The Railway, 20

Minn. 125; Washburn v. The Railroad, 3 Head 638; Carroll v. The Railroad *supra*; Philadelphia, etc. R. R. v. Derby, 14 How 468.

In France the Court of Cassation held in a case decided 20 August 1879 (D. 80. 1. 15.) that the responsibility of one whose negligence has resulted in an injury to another, is not limited to the case where the injury results uniquely and immediately from his own negligence. And an imprudence committed by the injured party does not relieve from all responsibility, one whose act was the proximate cause of the accident or rendered it more severe; it can only result in reducing the amount of damages which would otherwise have been awarded. Here then we have the highest court in France distinctly upholding the doctrine of comparative negligence.

But in considering the above decision, we must not forget the very absolute nature of art. 1382 of the Civil Code, which certainly does not encourage the doctrine of contributory negligence acting as a bar to an action. Perhaps the best thing the court could do in view of this article, was to adopt the doctrine of comparative negligence.

The facts of the case which gave rise to the above syllabus of the Court of Cassation were as follows. One Marquant was riding on the top of a street car which was crowded even to the platform and the steps which led to the top. Marquant several times asked the conductor to stop the car in order to alight, but the latter either refused or neglected to do so, whereupon the former risked getting down and off while the car was in motion, and in doing so his feet caught in those of one of the passengers, and tripping, he fell to the ground. In rendering judgment, the Court said, "that these facts which constituted an infraction on the part of the conductor, of the rules prescribed in the interest of public security, were of a nature to fix the responsibility upon the company whose agent he was, by reason that they contributed to the fall of Marquant, whatever may have been the extent of the negligence of the latter in descending while the car was in motion: whence it follows that the Court of Appeal, in refusing to allow proof of these facts — on the ground that the negligence or even contravention attributed to the conductor, although it might have given rise to ulterior claims, yet did not authorize Marquant in the face of his own imprudence to take advantage of negligence other than his own — has erred as to the legal consequence of the fault imputed to the agent of the company, and has thus overlooked articles 1382 and 1384 of the Civil Code. Wherefore the judgment of the court below is annulled." Thus, although Sourdat thinks that the contributory negligence of plaintiff when it is clearly a proximate cause of the accident, should be a bar to the action, yet the Court of Cassation clearly think that the above articles of the Code do not admit of such a doctrine as long as there has been a vestige of injury caused by the act of the defendant.

Comparing the above decision of the Court of Cassation with common law cases involving the same point, we see that they both arrive at the same conclusion. Thus, it is negligent to attempt to alight from a moving vehicle, *unless*, in consequence of the refusal of the carrier to stop, the passenger will be taken beyond his destination, or *unless* he is invited to alight by some employee of the carrier whose duty it is to see to the safe egress of passengers from the conveyance. Even when the carrier refuses to stop

and the passenger will be taken beyond his destination unless he leave the vehicle while in motion, he will not be justified in the attempt to do so if its speed is so great that the danger in alighting is great and apparent. A passenger would only be justified in the attempt to avoid such an inconvenience by leaving the vehicle while in motion, when the circumstances were such as to induce a person of ordinary prudence and caution to believe that no danger was to be apprehended from such a course, or when he had reasonable ground for believing that he was in peril, and that it was necessary for his safety. Hutchinson on Carriers, Ed. 1882, § 643, and cases there cited.

As the speed of a street car drawn by horses is usually not so swift but that a man can generally jump on or off while it is in motion without injury to himself, the presumption in the French case is, that the speed was not so great but that the passenger was justified in jumping off under the circumstances. Here also the overcrowding of the car was an additional fault on the part of the defendant.

In Schacherl v. St. Paul City Railway Co. 42 Minnesota 42, it was held to be not negligence *per se* for a person to get on or off a street-car, drawn by horses, while it is in motion. It depends upon the circumstances surrounding each case, and the question is ordinarily one of fact, to be submitted to the jury. See also McDonough v. Metropolitan R. Co. 137 Mass. 210; Conner v. Citizens Street Ry. Co. 105 Ind. 62, (4 N. E. Rep. 441 :) Eppendorf v. Brooklyn City & Newton R. Co. 69 N. Y. 195.

In a case arising from the neglect of a company's servant to light a certain street, it was held that, "a gas company is civilly responsible for accidents arising from its omission to furnish lights, through the negligence of its employees, in such places and at such times as it is bound to do. Their responsibility will not be extinguished by the negligence of the injured party who contributed to the accident by going through a dangerous passage in spite of the darkness. But this contributory negligence should at least be taken into consideration in ascertaining the amount due by the gas company for damages." Nimes 26 Aug. 1857, D. 58, 2, 5.

In a note to this case Dalloz says, "it is only where the imprudence of the injured party is the unique cause of his injury that the defendant can claim it as a complete set off to his act."

Thus, Sourdat puts the case of a person who, to avoid a circuitous route crosses the enclosed grounds of another, and that other while shooting on his property wounds the intruder whom he had no reason to suspect was there: the fault being entirely that of the intruder, he has no ground for an action against the proprietor. This would be the case even if the property were not fenced, provided there was not across it some beaten path to the general use of which the proprietor had consented or tolerated.

Again, if the proprietor injures a person by throwing a heavy object out of his window, without first ascertaining if any one is near at the time: he is not responsible if the adjacent land belonging to him is under no easement or servitude whether private or public. This view is supported by Proudhon 3, 1487; Larombière t. 5, arts. 1382, 1383, No. 29; Demolombe, Contrats, t. 8, No. 500.

It would be quite otherwise if the object were thrown on to the public highway. But how will it be if it were thrown on to the private land of another: Mr. Sourdat thinks there is no

doubt that, in doing so, the thrower is in fault and does an unlawful act. He should therefore, be held responsible for its results, even if he could not possibly foresee the consequences; but it would be otherwise if the party injured were trespassing on that land. And if he introduces upon his neighbour's land any matter which might injure the property itself, he is liable for the damages. Sourdat, vol. 1, p. 664.

This view has its parallel in the leading English case of Fletcher v. Rylands L. R. 3 H. L. 330, where A. was the lessee of mines. B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons,—an engineer and a contractor—to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts; and shortly after water had been introduced into the reservoir, it broke through some of the shafts, flowed through the old passage, and flooded A's mine. *Held*, by the House of Lords, affirming the Court of Exchequer Chamber that it was a case for the recovery of damages.

The determining feature in this case was, that the defendant's water was *artificially* collected.

Railroad Case.

The following French case has given rise to much discussion upon the point as to whether art. 1784 or arts. 1382 *et seq.* shall govern in a railroad accident case as to the burden of proof. The syllabus reads as follows:—

(*Trans.*) Art. 1784 of the Civil Code affecting the responsability of carriers, is but the application to the *necessary deposit* of things to be carried, of the general principle by which a bailee of a certain object must return the same in good condition, or show the extinction of his obligation.

This principle cannot be extended to persons; the terms of art. 1784 being limited to the carriage of goods and merchandise, the rules of civil responsibility are, as concerns *persons*, exclusively fixed by arts. 1382 *et seq.*

Consequently a passenger, plaintiff in an action for damages to his *person* arising from an accident, must establish the fault of the carrier.

Articles 1382 and 1383 of the Civil Code do not limit the responsibility of the originator of the accident, to cases arising immediately from his sole fault: the contributory negligence (being in this case a remote and not a proximate cause of the accident) of deceased will justify the court in mitigating damages, but not in freeing from all responsibility the person whose fault substantially contributed to the accident.

And consequently the negligent act of a passenger who, in alighting from the carriage, undertook to cross over the lines to get out of the station, at a time when, owing to an abnormal circumstance (the passing through of an *overdue* express i. an opposite direction to the in-coming train) the line was not clear, is not sufficient *per se* to exonerate the company from all responsibility, the employees of the company having been negligent in not signalling the danger and not taking proper precaution to protect passengers. Cass. 10, Nov. 1884, D. 85, 1, 45.

The law as laid down in this decision

does not meet with the approval of Mr Sourdat and a great many authors. The commentators think that art. 1784, which reads as follows : — (*Trans.*) "Carriers are liable for the damage or loss of goods confided to them, unless arising from *cas fortuit* or *force majeure*," — should apply *a fortiori* to passengers, and there have been two decisions to this effect, one at the Court of Paris 27 Nov. 1866, the other at the Court of Luxembourg 2 Aug. 1877, and in these cases it was held, that the burden of proof was upon the railroad company, to show the circumstances which might discharge it from liability, such as *cas fortuit* or *force majeure*.

At common law, a carrier of passengers, unlike a carrier of goods, is not an insurer. He is not held to warrant absolutely the safety of his passengers. The burden is upon the plaintiff (the same as decided in the above French case), to prove negligence on the part of defendants. Daniel v. G. N. Ry. L. R., 3 C. P., 216, 222. As to contributory negligence, the decided weight of authority is in favour of the rule that the burden is upon plaintiff in these actions to show his own freedom from contributory negligence, but there can be no inflexible rule in these cases, but that in some sort, each case, or each class of cases should be a rule unto itself. Beach. Contrib. Neg., p. 424.

Several American and English cases have been decided similarly to the French one in regard to the liability of the railroad company towards passengers who have to cross the track before entering or leaving the cars. The passenger has a right to assume that the track may be crossed safely, and the railway is liable if he be struck by a train moving on that track, when he is approaching or leaving the cars at a station. Rogers v. R. R. 26 L. T. N. S. 879; Warren v. F. R. R. 8 Allen 227; Gaynor v. O. C. & N. R. R. 100 Mass 208; Terry v. Jewett 78 N. Y. 338; Brassell v. N. Y. C. & H. R. R. R. 8 N. Y. 241.

At this point it will be interesting to examine a Province of Quebec case relating to a railway accident. The syllabus reads thus; (Trans.) "Where the injury has been caused by the negligence (quasi-délit) of the defendant, and there has been fault on both sides, the court must endeavour to ascertain the immediate and chief cause of the accident, and condemn its author to pay the damages suffered by the injured party." The Can. Pac. Ry. Co. vs. Cadieux, M. L. R. 3 Q. B. 315 (in appeal) Dorion C. J., in concluding judgment, said, "The majority of the Court is of opinion that judgment should not be changed although I am of opinion that, where both parties are in fault, damages should be apportioned between them. This was the rule under the Roman law; it is still so in France, and is also applied in England and elsewhere in Admiralty cases. However this rule has never been adopted in this country, although I think it is the better rule."

Quebec cases involving contributory negligence.

We will consider these cases in their order of date, selecting those which will best illustrate our topic.

In anti-codification days, it is evident that the English doctrine of contributory negligence had more sway than afterward. Thus : —

"When damage is done by a party in the exercise of his lawful rights the plaintiff must prove that the loss occurred without his fault, and by the neglect of the defendant. Though the defendant be guilty of gross negligence, causing damage to the plaintiff, yet, where the plaintiff was guilty of want of ordinary care, contributing essen-

tially to the injury, he cannot recover. Moffette v. Grand Trunk Ry., 16 L. C. R., p. 231." This judgment was delivered only a few months before the Code came into force, and the authorities cited were all English; among them, the leading one of Butterfield v. Forrester. The case was altogether a very much common law decision, and the learned judge did not even take umbrage in the leading case of Davies v. Mann, which, taken in conjunction with the former, makes the English rule come measurably near to that of comparative negligence, or even the French doctrine.

Coming down to post-codification times, we next have the case of Can. Pac. Ry. v. Cadieux, cited *supra*.

In another case:—Plaintiff, a carter, went to load wood at a wharf, in the port of Montreal, where the steamer was in the act of mooring, and a cable having snapped, the plaintiff was seriously injured by the recoil. There was evidence that plaintiff was aware of the danger. — Held, that there was contributory negligence on his part, and he could not recover damages. Q.B. Periam v. Dompierre, 1 L.N., p. 5.

Cross, J., for the majority of the Court, remarked that it was not as if Dompierre had been a passenger on board the steamer, and thus in the charge and keeping of the master. If the wharf was free to Dompierre to cart away wood, it was certainly equally free to Periam to moor his steamer. Dompierre himself had declared that the cable was dangerous, and yet he exposed himself to be injured by it. The proximate cause of the accident was his own failure to exercise proper caution. (Tessier, J., dissenting).

Here we have the common law doctrine in all its purity. Yet at the same time would not the case have been decided similarly in France or Illinois even under the comparative negligence doctrine? The French rule is stated and supported thus: Sirey, Codes annotés, vol. 2, p. 176, No. 10. (*Trans.*) "He who has received an injury by the act of another, has no ground for an action for damages against the latter when he occasioned the injury through his own fault. Douai, 14 Dec. 1846; S. 48, 2, 543; P. 48, 2, 492.—In this sense, Proudhon, *Usufr.*, t. 3, n. 1487; Aubry et Rau, t. 4, § 446, p. 755; Larombière, n. 29 et s.; Sourdat, t. 1, n. 660 et s.

But on the other hand, the circumstance that the victim of the accident contributed through his negligence to the injury, cannot entirely free the defendant from responsability: it simply empowers the judges to reduce the measure of damages. Cass. 20 Aug. 1879, S. 80, 1, 55—P. 80, 123—D. 80, 1, 15.

Thus the rule becomes qualified in proportion as the negligence of the defendant increases: or in other words, the amount of plaintiff's damages are reduced in proportion to the extent of his contributory negligence.

We think, however, that it is very hard to reconcile the next decision with the articles 1053, 1054 of the Quebec Civil Code, and it differs entirely from the spirit of the French decisions: it is in every sense a common law decision. Thus:—

A person carrying on a trade on his premises is bound to have the premises in a safe condition for persons and property coming there by implied invitation to give him their custom.

But although there may have been fault amounting to ordinary negligence on the part of such tradesman, he may relieve himself from damages caused by an accident, by showing that there was contributory fault on the other side, without which the accident would

not have occurred; and therefore where a valuable horse received an injury while being shod by a farrier, and it appeared that the accident was caused by the groom who accompanied the animal, striking him with a whip, the farrier was relieved from liability, notwithstanding the unsafe condition of the floor of his smithy, but for which no damage to the horse would have resulted. Allan v. Mullin, 4 L. N. 387. (Johnson, J.) 1881.

Take for instance the very words of the learned judge in the course of the judgment, how can they be reconciled with article 1053 C. C.? Thus he says, "I do not say that the defendant is not responsible for the defect in the floor; I say he is responsible. It was there—on his premises to which his customers were held by law to be invited by him, and no one else is responsible. *Res ipsa loquitur*—as the law says; but I say he is responsible not as for intentional mischief, but as for ordinary negligence, i. e. as for a thing which he might have known, and not for a thing which he must have known to be of such obvious and certain danger as is contemplated in the authorities and cases on the subject." The learned judge then goes on to state the common law doctrine of contributory negligence; citing from Campbell on "Negligence."

Now, art. 1053 reads as follows: "Every person capable of discerning right from wrong, is responsible for the damage caused by his fault to another, whether by positive act, imprudence, *neglect* or want of skill.

In another and later judgment delivered by the same learned judge, we find the case discussed purely in relation to the views of the French authors we have hitherto cited. This case was a tolerably clear one and belonged to that class in which, as we before pointed out, plaintiff would clearly have lost the case under either the common law doctrine or that of comparative negligence. In this case, (M. Willie v. Goudron) 30 L. C. J. 44 (1885) the fault of the defendant was really only *culpa levissima*, viz: allowing some iron in a sleigh to rattle (through an abnormal circumstance). The fault of the plaintiff was, that he left his horse on a public highway unattended. The rattling of the iron startled plaintiff's horse, and it ran away. The learned judge said *inter alia*: "The French rule is stated at Vol. 2, of Sirey's Codes annotés p. 177 No. 12. (Trans.) 'However, the circumstance that the victim of an accident was himself imprudent, cannot free from all responsibility the person whose fault contributed to the accident, *or rendered it more severe;* such a circumstance would only authorize the judge to reduce the measure of damages.' This then is not a case of contribution, but of occasioning or giving rise to injury on the part of the plaintiff himself, and, under the rule in No. 10, in Sirey, he cannot recover."

In a still later case (Wilscam v. The Montreal Street Railway Company, 32 L. C. J. 246) it was *held*, in the Court of Review (Montreal) :—"That where a passenger in a street car was obliged through overcrowding of such car, to stand on the step, and while there was injured by a passing vehicle, the Street Railway Co. was liable for the damage and injury suffered by such passenger." Here again the same learned judge delivered the judgment of the Court, and the author now relied on is Laurent, vol. 20, Nos 485 to 492, inc. (Trans.) "The question of responsibility presents still another difficulty; when there exists fault on the part of the injured person, should there be applied to the injured party the principle

which is applied to the originator of the damageable act? The latter is responsible for the lightest fault, the smallest imprudence, and the least negligence. Personal security requires this rigour; as between the victim and the wrongdoer, justice sides with the former, however slight may be the fault of the latter. One cannot appreciate with the same severity the imprudence or negligence committed by the injured party; he could not forestal all accidents; it is not his duty to prevent all accidents from having their natural consequences. The rule is, that if he acted as would the average person under the circumstances, it cannot be said that he was in fault. If, further, the so-called imprudence of the injured party has been exercised in pursuance of a right, all fault on his part disappears."

We have not sufficient space in an article of this length to give further comparisons on the same lines, but will now confine ourselves to the subject of injuries to children, concerning which both systems of jurisprudence have given conflicting decisions. Article 1384 of the French Code renders parents liable for the acts of such of their children as are under their immediate control. Article 1054 of the Quebec Code is to the same effect.

Contributory Negligence of children.

The following French decisions which we are about to give would, we know, be vigorously repudiated by common law judges.

Two children were playing together in a field. Each was about ten years old. One of them climbed up a tree and, cutting off a branch, threw it upon the other who was standing under the tree, the branch striking him in the face with the result of causing almost total blindness.

The father of the injured child entered an action against the parent of the other child in the sum of 20,000 francs, as being responsible for the child's fault. The court of first instance maintained the action, but took into account the circumstances of the case in fixing the damages, and allowed an annuity of 300 fr.

In the court of Appeal (Lyons 30 March 1854) the decision of the court below was confirmed. (Dalloz 1855 2. 1.

Judging from the contentions of appellant, one cannot imagine a clearer case of contributory negligence.

A child of ten years is generally *sui juris*. (Karr v. Parks, 40 Cal. 188), and has, therefore, sufficient discernment to be capable of contributory negligence. Appellant set forth that the accident arose from no fault on the part of her son; that it was established at *enquête* that the injured child came of his own accord and invited her son to go and cut sticks with him; that he solicited, and even forced him to climb the tree to cut a branch; that it was when trying to catch the branch with open arms, that it accidently struck him in the face:—It was also maintained by appellant that, even if there had been imprudence on the part of her son in throwing down a branch of the tree upon respondent's son, there was none the less imprudence on the part of the latter in standing under the tree with eyes upturned, waiting to catch the branch; that it was impossible under the circumstances to impute fault to one of these children more than the other.

In view of the absolute nature of articles 1382 and 1383, C. C. perhaps, to mitigate damages on account of plaintiff's contributory negligence, was all that the French judges could do, for there was doubtless *some* fault on the part of defendant's son and they had to take account of it.

In another French case, (Court of Nimes, 13 March 1855, D. 1855, 2, 161), it was held, that the liability of fathers and mothers for the damages caused by their minor children living with them, extends to accidents occasioned by them to other children of their age (eight years) in the course of play. In this case one boy was running after the other, and a stone thrown by the former hit the latter in the right eye, thereby damaging it : Damages 500 fr.

In a like case the same decision would result in a common law court. Thus : where a school-boy about twelve years of age discharged an arrow from a bow with which he and his fellows were playing, towards the plaintiff, a school-mate and thereby put out one of his eyes, it was held that the boy was liable to pay damages. Supreme Court of N. York, 1829. (Bullock v. Babcock, 3 Wend., 391).

Dalloz, commenting upon the above French cases, says (*Trans.*) : "The principle (that parents are responsible for the acts of their children) is not so absolute but that its appreciation can be modified by the rules of equity. Thus we conceive, that the duty of superintendence imposed upon the parents, only obliges them within the ordinary limits of human prudence, and does not extend to events which cannot be guarded against." We will now consider cases where children are allowed to stray upon the street and there receive injuries by passing vehicles, etc., and will commence with the recent case of Dufresne v. The City Passenger Ry. Co. This case first came before the Superior Court at Montreal (M. L. R., 7 S. C. 10-16). A child two years of age accidentally escaped from the surveillance of its mother, and straying on to the street, got in the way of an approaching street-car, and was thereby killed. The court thought there was proof of negligence on the part of defendants, in that the eyesight of the driver was defective. That the father of the child (a postman) being away at his work, could not watch over it. That blame could not be attached to its mother ; for the fact of the door being open for a moment and the child slipping out, was purely a "cas fortuit" ; that even if there was imprudence on the part of the child's parents, this would not clear the defendants of their negligence. Therefore judgment for the plaintiff.

On appeal to the Court of Queen's Bench (M. L. R., 7 Q. B. 214), this judgment was reversed. The Court thought there was no proof of appellant's negligence, that the eyesight of the driver was sufficiently good for the safe carrying on of his employment. The fault was on the side of respondent who allowed the child to stray upon the street. It was proved that the child had strayed one or twice before, and might, had it not been noticed by persons in the shop below, have wandered on to St. Catherine street, and been run over as it eventually was at a later date. Counsel for appellant submitted that the parents should have profited by the warning they had already received.

In a leading case of New-York State (Hartfield v. Roper 21 Wend. 615) it was held :—That where a child of such tender age (two years) as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a public highway without anyone to guard him, and is there run over by a traveller and injured, neither trespass nor case lies against the traveller, unless the injury was voluntary, or arose from "gross" negligence on his part.

In an action for such an injury, if there was negligence on the part of

the plaintiff contributing to the injury, there cannot be a recovery; and although the child, by reason of his tender age, was incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of such parents and guardians of such child furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult.

For an injury to a child of the most tender age an action may be brought in the name of the child. But this doctrine of imputability is denied by many common law courts and in a Vermont case, Robinson v. Cone, 22 Vt. 213, it was *held*, that where plaintiff is *non sui juris* all that is required of him, is, that he exercise care and prudence equal to his capacity, and that where a child of tender years is on the street, defendant must use the utmost circumspection and is bound to use a proportionate degree of watchfulness.

In England the rule of "imputability" in cases of injuries to children, dates from Waite v. North Eastern Railway Company, El. Bl. & El. 719 (affirmed in the Court of Exchequer chamber El. Bl. & El. 728) since which time there has been little or no adjudication directly upon the subject in that country.

In a recent case in Illinois (Chic. City Ry. Co. v. Wilcox, 27 N. E. Rep. 899 [1891] 33 Cent. L. J. 142, it was *held*:—that where a child of tender years is injured by the negligence of another, the negligence of his parents, even though present at the time of the accident, cannot be imputed to him so as to support the defence of contributory negligence to his suit for damages.

Where a child six years old, being about to cross a street on which there are two cable tracks, waits until a train on the track nearest him has passed, and then, going behind such train, is struck by another train, coming from an opposite direction, his failure to see and avoid the train which struck him, and which was probably hidden from his view by the other train, does not constitute contributory negligence.

In a very recent case in Massachusetts (Slattery v. O'Connell Mass. 26 N. E. Rep. 430, 153 Mass. 94), there was an action for the negligent killing of a child less than five years of age; and it appeared that the child's mother, who had just been confined, had kept him in bed with her until about 11 a.m. on the day of the accident, when he was partially dressed by a neighbour who came in from time to time to look after the mother and him, and was allowed to play about the room, but, in order to keep him from going out, he was not given his shoes and stockings; that the mother fell asleep, and the child went into the street, and was killed by defendant's cart. The father was a labouring man, unable to employ attendance for his wife, and absent at his work at the time. The court *held*, that the question whether the parents exercised due care in the custody of the child was for the jury.