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MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. SEPTEMBER, 1893. No. 9.

ACCIDENT INSURANCE — See Insur., Accident.

ACTION.

LIMITATION OF — WHEN ACTION "COMMENCED."

An action is deemed commenced at the date of the summons which is served on the defendant, and, although a demurrer is sustained, to the petition, and leave given to amend, the action remains "commenced," and the averment as to the discovery of the fraud within four years before the action was brought may be supplied in a subsequent amendment to the petition. — *Zieverink* v. *Kemper*, Ohio, 34 N. E. Rep. 250.

AGENCY — See Principal and Agent.

APPEAL.

TO PRIVY COUNCIL.

LEAVE TO APPEAL IN CRIMINAL CASE REFUSED — INDIAN PENAL CODE, S. 511.

Although in very special and exceptional circumstances leave to appeal in criminal cases may be granted, misdirection by a judge, either in leaving a case to a jury where there is no evidence or founded on an incorrect construction of the penal code, even if established, is insufficient for that purpose, especially where no miscarriage of justice has resulted. *Ex parte Macrea.* [1893] Appeal Cases, 346.

ASSAULT — See Damages 1.

ASSESSMENT AND TAXES.

TELEGRAPH POLES ASSESSED AS REAL PROPERTY — R. S. O., 18 7, c. 180, s. 6 — R. S. O., 1887, c. 193, s. 7.

An appeal by the company, from the judgment of a Court of Revision affirming an assessment for $500 real property.

Senkler Co. J. The appellants are assessed for $500 real property. The particular property thus assessed is stated by the assessor to be the plant of the company, meaning poles, wires, and instruments. It is contended by the appellants that under the judgment of the Court of Appeal in Toronto Street R'y Co. *v.* Fleming, 37 U. C. R. 116, this property is not liable to assessment.

In answer to this it is pointed out that the words "all land and personal property" in sec. 6 of R. S. O. 1877, c. 180 have been changed in s. 7 of R. S. O. 1887, c. 193 to "all property, and it is urged that this change was made to meet the suggestion of Mr. Justice Patterson on p. 127 of the report just cited, as to there being a general law that all property should be assessed.

Having carefully read and considered the judgment in that case, I am of opinion, although not by any means free from doubt, that this change in the wording of the action does not warrant the assessing of this property as real estate. Many of the reasons in the judgment seem still applicable, especially those pointing out the want of any proceeding to enforce payment of the taxes by sale.

I therefore grant the appeal and

direct the clerk to alter and amend the roll by striking out the assessment for $500. *In re G. N. W. Tel. Co. and Town of Niagara*, Ontario. County Ct. of Lincoln, Aug. 1892, (Can. L. T.)

[See *In re* Can. Pacific Ry Co. and City of St. Catherines, 10 Can. L. J., on notes 269].

ATTORNEY AND CLIENT.

AUTHORITY OF ATTORNEY.

The mere employment of an attorney to foreclose a mortgage does not give him authority to receive from the sheriff money paid after foreclosure to redeem the property from a sale to the mortgagee. *Williams* v. *Grundysen*, Minn., 55 N.W. Rep. 557.

BAILMENT.

STOREKEEPER'S RIGHT OF GENERAL LIEN.

Where storekeepers stored goods under a condition specified in their invoices that "the goods are held subject to a lien by the storekeeper for his general balance against the same account,"

Held, that a general lien was thereby constituted against all goods held by them in name of the same customers, and not merely a lien over the balance in their hands of any particular lot for the storage dues of that lot. *Morris* v. *Whyte & Mackay*, Sheriff Ct. Rep., 9 Scot. Law Rev. 111.

BANK AGENT, POWER OF TO START CRIM. PROSECUTION — See Principal and Agent.

BANKS AND BANKING.

BANKER—CUSTOMER — STOCKBROKER PAYING INTO CREDIT OF HIS OWN ACCOUNT — MONEY OF CLIENT.

The appellants, who held as trustees fifty shares in the Commercial Bank of Scotland, instructed a stockbroker in Edinburgh to sell the shares and to deposit the proceeds in certain colonial banks in the names of the appellants. The shares were sold by the broker in the ordinary course of business, the dealing being between him and another member of the Stock Exchange who knew him only in the transaction, and accordingly gave in payment for the shares in the ordinary way a cheque payable to the broker or order. This cheque was paid by the broker to the credit of his account with the respondent bank. At the time when the cheque was paid in the broker's account with the respondent bank was overdrawn to an amount exceeding the amount so paid. The broker having become insolvent, the appellants claimed to be entitled to have the amount of the cheque repaid to them by the respondent bank. After the date of the receipt of the cheque some small amounts were drawn upon his account by the broker, but the amount so drawn was much less than the sum paid in. The respondent bank were aware that the cheque was the proceeds of the sale of the shares, but did not know, and had made no inquiry, whether the money paid in was in the broker's hand as agent or otherwise.

Held, affirming the decision of the Court of Session (18 Ct. Sess. Cas. 4th Series [Rettie], 751), that the respondent bank was entitled to retain the money in discharge *pro tanto* of the debt due to them from the broker. *Thomson* v. *Clydesdale Bank, Limited*, [1893] App. Cas. 282.

BILLS AND NOTES—SEE ALSO PRINCIPAL AND SURETY 1.

AMERICAN CASES.

1. MATERIAL ALTERATION.

In an action on a note by a purchaser before maturity, defendant pleaded an unauthorized alteration in the note. Plaintiff filed a general denial to the answer, and on the trial placed the note in evidence and rested. Defendant showed that the payee had made unauthorized alterations by filling in interest blanks left by defendant: *Held*, that the burden of proving that defendant was guilty of such negligence in leaving the blanks in the note as would estop him from denying liability was upon plaintiff, and that plaintiff did not assume the burden. *Conger* v. *Crabtree*, Iowa, 55 N. W. Rep. 335.

2. SURETY—ALTERATION.

A note delivered by a surety, with all blanks filled, including blank for the payee, who is named, merely as an individual, cannot afterwards be altered, without the surety's consent, by writing "cashier" after the payee, thus making it payable to a bank. *Hodge* v. *Farmers' Bank of Frankfort*, Ind., 34 N. E. Rep. 123.

3. ENDORSER AFTER MATURITY.

An indorser of overdue notes is not liable thereon in the absence of demand on the maker within a reasonable time after the indorsement and notice of non payment. *Beer* v. *Clifton*, Cal. 33 Pac. Rep. 204.

4. DEFENSES.

Where defendant gave his notes to the agent of a foreign insurance company, individually, for the renewal of premium notes previously given, and the agent advanced his own money to the company for defendant, it is no defence, in an action on the notes, that the company had not complied with the provisions of law, so as to entitle it to do business in the State. *Russell* v. *Jones*, Ala., 13 South. Rep. 145.

5. PROMISSORY NOTE.

Where, after the maturity of a note, there are independent business transactions between the maker and payee, which are unsettled at the time action is brought on the note, the fact that there was a balance due the maker on such transactions, which ought to have been indorsed on the note, does not constitute a partial payment thereon, so as to prevent the running of the statute of limitations against the note prior to the time that such transactions ceased, in the absence of any agreement by the maker that it should be so indorsed. *Sears* v. *Hicklin*, Colo., 33 Pac. Rep. 138.

6. CHECK — FRAUD — CUSTOM AND USAGE.

Where a check is payable to a named person as bearer, and the payee indorses it in blank, and delivers it to a bank, and receives credit for it, in an action by the indorsee against the maker, evidence that, by a custom among bankers, where a check is drawn on a bank and presented to another bank, it is passed to the credit of the customer, but that the credit so given is treated as a receipt for the check, and not as payment, is inadmissible, as the indorsement and check evidence the agreement between the payee and indorsee, and the transfer of the check is governed by the law merchant. *Shaw* v. *Jacobs*, Iowa, 55 N.W. Rep. 333.

7. PROMISSORY NOTE—WHAT CONSTITUTES.

Held, that a written obligation that "on or before May 1st, 1888, I promise to pay H, or order, one thousand Mex. Silv. Dollars," properly signed, is a negotiable promissory note. *Hogne* v. *Williamson*, Sup. Court of Texas, 22 S. W. Rep. 580.

We are of the opinion that the instrument in question is a promissory note. It is such in form and in substance, unless the fact that the sum payable is expressed in Mexican silver dollars should make a difference. Speaking of the sum for which a bill of exchange must be drawn, Mr. Chitty says: "It may be the money of any country." Chit. Bills, 160. Judge Story says: "But, provided the note be for the payment of money only, it is wholly immaterial in the currency or money of what country it may be payable. It may be payable in the money or currency of England or France or Spain or Holland or Italy or of any other country. It may be payable in coins, such as in pounds sterling, livres, turnoises, francs, florins, etc., for in all these and the like cases the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency with reference to the par." Story, Prom. Notes, § 17. The same rule is distinctly laid down in 1 Daniel, Neg. Inst. § 58, and in Tied. Com. Paper, § 296. In view of the opinion of these eminent text writers, it is remarkable that we have found but two cases in which the question is discussed or decided. In Black v. Ward, 27 Mich. 191, it is held that a note made in Michigan, payable in Canada "in Canada currency," is payable in money, and is therefore negotiable. But in Thompson v. Sloan, 23 Wend. 71, a note made in New York, and payable there in "Canada currency," was held not negotiable. The Court, however, say: "This view of the case is not incompatible with a bill or note payable in money of a foreign denomination being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings, and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such instrument is to aver and prove the value of the sum expressed in our own tenderable coin."

This decision was made in 1840, and it is to be inferred that at that time the dollar was not a denomination of the lawful money of Canada. We also infer that when the Michigan case arose this had been changed, and the denomination of Canada money corresponded with that of the United States. Upon this theory it would seem that the cases may be reconciled. The language quoted from the opinion in Thompson v. Sloan, *supra*, indicates clearly that, if the money named in the note had been a denomination of Canada money, the ruling would have been different, unless, perchance, the word "currency" would have affected the question. The note we have under consideration is for Mexican silver dollars — coins recognized by the laws of the United States as money of the republic of Mexico. Rev. St. U. S. § 3567. We conclude that the note sued upon in this case was a negotiable promissory note, and that when the plaintiff offered it in evidence, and proved the value of the Mexican dollar at the time of its maturity, he had made a *prima facie* case; and our opinion will be certified accordingly.

ENGLISH CASES.

8. BILL OF EXCHANGE — VALIDITY —BILL MADE PAYABLE TO "——ORDER" —BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT. C. 61), SS. 3, 5, 7, 55).

By the Bills of Exchange Act, 1882, s. 3: "A bill of exchange is an unconditional order in writing addressed by one person to another.....requiring the person to whom it is addressed to pay ..... a sum certain in money to or to the order of a specified person, or to bearer," and "an instrument which does not comply with these conditions ..... is not a bill of exchange."—By s. 5: "A bill may be drawn payable to, or to the order of, the drawer."—By s. 7: "Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty":—*Held*, that an instrument which was made payable to "—— order," the blank never having been filled in, must be construed as meaning that it was payable to "my order"—that is, to the order of the drawer, and that, having been indorsed by him, it was a valid bill of exchange. *Chamberlain* v. *Young and Tower*, C. A. [1893] 2 Q. B. 206.

9. BILL OF EXCHANGE — DRAWN ABROAD ACCEPTED PAYABLE IN LONDON — LIQUIDATION OF ACCEPTORS— PROTEST FOR NON-PAYMENT — PROTETS FOR BETTER SECURITY — COMMISSION—NOTARIAL EXPENSES—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT. C. 61), S. 51, SUB-SS. 2, 5; S. 57, SUB-S. 1 (*c*); SS. 65-68, S. 97).

A bank of Rio de Janeiro drew bills of exchange on a bank in London, and they were duly accepted by such bank.

The London bank went into liquidation before the bills matured, and, after the stoppage of the bank, the holders had them protected for better security, and they were accepted *supra* protest for the honour of the drawers by the drawers' London bankers.

The bills were duly presented for payment to the acceptors and were protested by the holders for non-payment. They were then presented to the bankers of the drawers, who paid the principal money due on the bills together with the notarial charges thereon, which consisted partly of the expenses of protest for better security. The bankers of the drawers also charged the drawers a commission for accepting the bills.

The drawers were admitted to prove in the winding-up of the London bank for the amount of the bills, and they claimed to prove also in respect of the notarial charges and commission. This claim the liquidator rejected:—*Held*, upon summons for leave to prove in respect of the latter claims that the applicants were entitled to prove for the expenses of protest for non-payment, as being expenses falling within sect. 51, sub-sect. 2 and sect. 57, sub-sect. 1, of the Bills of Exchange Act, 1882, but that they were not entitled to prove in respect of the expenses of protest for better security nor for the commission, as under sect. 57 such expenses only as are "necessary" are recoverable. "The protest" mentioned in sect. 68, sub-sect. 6, means the protest for non-payment which is necessary. The Act not only does not give but excludes the expenses of the protest for better security. *In re English Bank of the River Plate. Ex parte Bank of Brazil* [1893] 2 Ch. 438.

FRENCH CASE.

10. CHEQUE — NO FUNDS — SUBSEQUENT DEBT — FRENCH LAW.

A cheque is void where the party on whom it is drawn has no funds for its payment.

Consequently, it cannot transfer to the bearer moneys which may subsequently become due by the drawee.

A cheque void for want of provision cannot be used as a bill of exchange, unless the parties thereto intended it to be as such, and it contains all the requirements of a bill of exchange. *Cassa Maritima* v. *Syndic Catuogno.* Ct. of Appeal, Lyons, 14 May 1890. Dalloz 1891, 2, 180.

BLASTING—See Neg. 2, 9.

BRIDGES—See Mun. Corp. 2.

BROKER—See Banks and B'kg.

BUILDER—See Contracts, 5—Evid.

CANADA TEMPERANCE ACT — See Intox. Liquors.

CARRIERS.

OF GOODS.

1. CONNECTING CARRIERS.

In an action against the last of several connecting carriers, to recover for goods shipped over the lines of such carriers by through bill of lading, and lost, the burden is on defendant to show that such loss did not occur on its line, and the presumption is not rebutted by showing that its preceding carrier loaded such goods into one of its sealed cars, which had no end windows or other means of entering except through the doors, where it was not shown that the seal remained as put on. *Faison* v. *Alabama & V. Ry. Co.*, Miss., 13 South. Rep. 37.

2. UNLAWFUL DISCRIMINATION IN RATES.

In an action by a shipper to recover damages under a statute forbidding discrimination in freight rates, the railroad company cannot set up, in justification of the lower rates, a contract with the party in whose favor they were made, whereby, in consideration of the lower rates, such party releases the railroad company from an unexplained, indefinite, and unadjusted claim for damages arising from a tort; for to allow such a defence would practically emasculate the law.

Nor can the lower rate be justified on the ground of the cost of mining coal to the company in whose favor the rate is made, and any evidence as to the cost of mining is irrelevant. *Union Pacific Ry. Co.* v. *Goodridge*, Supreme Court of the United States, Brown, J., May 15, 1893, 13 Supreme Court Rep., 970.

OF PASSENGERS.

3. LIMITED TRAINS.

A person who buys a ticket from a railroad company is entitled to offer the same as fare only on a train which is scheduled to stop, for the purposes of receiving and discharging passengers, at the place mentioned in the ticket as his destination; and the fact that at such place there is a railroad crossing at which all trains are required to stop does not change this rule. *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Lightcap*, Ind., 34 N. E. Rep. 243.

4. CONTRACT OF CARRIAGE.

The written extension of the time to return on a ticket indorsed before it had expired will be given effect unless it is established that the extension was subject to certain conditions or contingencies. *Randall* v. *New Orleans & N. E. R. Co.*, La., 13 S., W. Rep. 166.

5. NEGLIGENCE—RAILROADS—INJURIES TO PASSENGERS.

It is not negligence for a passenger to leave a railroad car at the rear platform.

Where the rear platform of a car is not at a safe place for passengers to alight, failure on the part of the carrier to warn passengers of that fact is negligence, though it was safe to alight at the front platform. *McDonald* v. *Ill. Cent. R. R. Co.*, Supreme Court of Iowa, 1893, 55 N. W. Rep., 102.

6. CONTRACT OF CARRIAGE—IMBECILE EMIGRANT—UNITED STATES LAW—OBLIGATION TO CARRY BACK TO PORT FROM WHENCE HE CAME.

Circumstances in which it was *held* that an enactment of the United States ordaining shipowners to carry imbe-

cile and pauper emigrants who had come with their vessels back from New-York to the ports from whence they came could not be enforced in this country, and was complied with where an emigrant whose contract was to be carried from Bremen via Glasgow to Philadelphia was taken back only to Glasgow. *Wallace, &c.*, v. *Allan*, Sheriff Ct. Rep. 9 Scot. L. Rev. 174.

7. STREET RAILWAYS — INJURY TO CHILD.

While the degree of care which a street railway company owes to a trespasser upon its cars is not more than ordinary or reasonable diligence, yet, where such trespasser is a child of tender years, due regard should be paid to the known indiscretion of childhood, and the inability of children to exercise proper precautions for their own safety. The duty resting upon the company to employ the proper precautions to avoid injury to children entering its cars would comprehend the exercise of reasonable diligence to guard and shield from danger a child not of the age of discretion to understand and appreciate the peril of riding in an unsafe and exposed position. *Wynn* v. *City & Suburban Ry. Co. of Savannah*, Ga., 17 S. E. Rep. 649.

8. LIABILITY FOR STEAMBOATS IN CONNECTION WITH TRAINS.

A railway company issued return tickets for a day's excursion from certain stations in Scotland to Belfast; and they did so, on one day, much in excess of the number of passengers that could be carried by the steamer usually running in connection with the train. Extra steamers were put on, but these not being so swift, passengers carried by them were unable to return the same day to their respective stations in Scotland. In an action of damages at the instance of one such passenger against the railway company, in respect of the loss, &c., resulting from detention, *held* that the railway company were not exempted from liability by having had conditions printed on the ticket stating that "the holder by accepting it agrees "that the respective companies or "owners are not to be liable in any "loss, injury, damage, delay, or deten- "tion caused or arising off their res- "pective railways, coaches, or steam- "boats." *Miller* v. *Caledonian Railway Co.*, Sheriff Ct. Rep. 9 Scot. Law Rev. 127.

9. WHO ARE PASSENGERS.

Deceased asked a freight conductor on defendant's railroad to carry him free to a certain point, saying that he had formerly been a railroad man, and was a cripple. The conductor refused. After the train had proceeded some distance, however, the conductor found deceased in the caboose. There were also in the caboose several persons travelling with stock, as well as a fireman seeking employment, none of whom were provided with transportation, or paid fare. The conductor, not liking to put deceased off late at night in the open country, allowed him to ride. It was held, that deceased was not a passenger, within Mills' Ann. St. § 1508, furnishing a right of action for injuries to passengers in certain cases. *Atchison, T. & S. F. R. Co.* v. *Headland*, Supreme Court of Colorado.

(The Court) An examination of the case cited as opposed to the conclusion that deceased was not a passenger shows that they are readily distinguishable from the present case. In Dunn v. Railway Co., 58 Me. 187, the injured party, although riding in the caboose of a freight train contrary to the rules of the company, was treated by the conductor as a passenger, and first class fare collected from him. In Cleveland v. Steamboat Co., 68 N. Y. 306, the plaintiff was injured before the boat upon which he was a passenger had left its wharf, and before he had an opportunity to pay fare; and the court held that the carrier owed him the duty of a carrier to passengers, although no fare had been paid. In Jacobus v. Railway Co., 20 Minn. 125; Gil. 110, the plaintiff received a personal injury through the negligence of the defendant's servants in charge of a passenger train, upon which plaintiff was traveling on a free pass; and the court held that the same degree of care was required of defendant as if plaintiff had been a passenger for hire. Here the company had undertaken to carry, and the duty arose from this fact. In Railroad Co. v. Brooks, 57 Pa. St. 339, the plaintiff was a route agent riding upon a passenger train, and the court held that every one upon the car was presumed to be lawfully there as a passenger, having paid, or being liable, when called upon, to pay, his fare, and that the *onus* is upon the carrier to prove affirmatively that he was a trespasser. The case has no similarity to the one under consideration. In Creed

v. Railroad Co., 86 Pa. St. 139, it was held that "where one is traveling by a passenger train, and is not connected with the railroad company, the legal presumption is that he is a passenger, and traveling for a consideration"—a conclusion which we do not dispute. As to the criticism of Judge Thompson upon the decision in Eaton v. Railroad Co., to be found in his work on Carriers of Passengers, at page 344, it is to be observed that the criticism does not apply to the case before us. In that case the company was held not liable for an injury resulting from the gross negligence of its employees, although the injured party was invited to ride by the conductor. Here the deceased was refused passage by the conductor, and the recovery is based upon the claim that he was entitled to the care due a passenger. It not appearing that the deceased was a passenger upon the defendant's freight train, the plaintiff is not entitled to a recovery under the second subdivision of the statute, and the judgment must be reversed.

10. CARRIERS OF PASSENGERS—INJURY TO PASSENGERS—ALIGHTING AT EATING STATION.

Held, that where a train stops at an eating station, and there is a track between the train and the station, a passenger alighting from the train has the right to assume that the railroad company will so regulate its trains that its tracks between the car and the eating station plateform will be safe for him to pass over in going to and returning from the eating house, and his failure to look and listen for and approaching train is not negligence. *Atchinson, T. & S. F. R. Co.* v. *Shean*, 33 Pac. Rep. 108, Supreme Court of Colorado.

It is said by this Court in Railroad Co. v. Hodgson, 31 Pac. Rep. 956, 19 Colo: "The appellant, a common carrier, owed a peculiar duty to the deceased, a passenger for hire. It was bound to exercise the highest degree of care and skill reasonably practicable in the management of its trains. This duty did not cease upon the arrival of the train upon which the deceased was a passenger at the place of his destination. The company was still bound to furnish him an opportunity to safely alight therefrom, and to use the utmost care and diligence in providing for him a safe passage from the train to the platform of the depot." The same duty, we think, is imposed upon the company towards a passenger while, on a continuous journey, he is going to and returning from the eating stations provided by the company for the accommodation of passengers. While leaving the train for this purpose he does not cease to be a passenger, or lose the protection of those regulations, that the company is bound to provide for his safety while on its cars, or when rightfully upon its depot grounds. The same rules of law can be invoked for his protection under such circumstances as are afforded to passengers going to and from its cars. Their duty in the latter respect is well settled. Railroad Co. v. Hodgon, *supra*. It the case of Railroad Co. v. White, 88 Pa. St. 333, it is said: "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance, not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so. "That the deceased had a right to rely on the performance of such duty by the company, and proceed without taking the precaution to look and listen, and that the failure to do so is not negligence *per se*, is decided in numerous cases. To this effect Terry v. Jewett, 78 N. Y. 338; Brassell v. Railroad Co., 84 N.Y. 241; Archer v. Railroad Co., 106 N.Y. 589, 13 N. E. Rap. 318; Jewett v. Klien, 27 N. J. Eq. 550; Baltimore & O. R. Co. v. State, 60 Md. 449. In Baltimore & O. R. Co. v. State, 60 Md., at p. 463, it is said: "And though the deceased himself was required to exercise reasonable care, yet we may suppose that his watchfulness was naturally lessened by his reliance upon the faithful observance by the employees of the defendant of such precautionary rules and regulations as would secure to passengers a safe transfer; ..... and except in the presence of immediate, apparent danger, he was authorized to act upon such reliance." In the case of Jewett v. Klein, 27 N. J. Eq. 550, it is held "that a person who is passing from the depot to the train he was about to take, and was obliged to cross an intervening track, was not guilty of contributory negligence in that he did not, before approaching the train, look up or down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform to the station, and before his train had come to a full stop." By the foregoing and other well-considered cases it is settled that a passenger on a railroad, while passing from the cars to the depot, is not required to exercise that degree of care in crossing a railroad track as is imposed upon other persons, and that he has the right to assume that the company will discharge its duty in making the way safe; and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person not holding that relation; and this distinction is to be taken into consideration in determining the propriety of his conduct. Under all the facts shown in evidence and the circumstances surrounding the accident, whether the person injured was guilty of contributory negligence at the time is a question within the province of the jury to decide, and one that the Court cannot rightfully take from them. In addition to the cases above cited, see Warren v. Railroad Co., 8 Allen, 227; Gaynor v. Railroad Co., 100 Mass. 208: Parsons v. Railroad Co. (N.Y. App.), 21 N. E. Rep. 145; Wheelock v. Railroad Co., 105 Mass. 203.

CERTIORARI—See Intox. Liquors.

CHARITABLE BEQUEST—See Wills 1.

CHARTER PARTY—See Ships, etc., 2.

CHEQUES—See Bills and Notes 6, 10.

COMPANY LAW.

STOCK SUBSCRIPTIONS—FRAUD.

Where a subscription to stock of a corporation, and subsequent payment for the stock, are procured by fraudulent representations as to the purposes of the corporation and the amount of paid-up stock, the stockholder may recover back land and money with which he paid for the stock, notwithstanding the insolvency of the corporation; its creditors not being parties to an action for such relief. *Ramsey* v. *Thompson Manuf'g Co.*, Mo., 22 S. W. Rep. 719.

COMPENSATION IN ACTION OF DAMAGES—See Neg. 7.

CONDITION PRECEDENT—See Sale 5.

CONSTITUTIONAL LAW.

TAXATION OF CORPORATE STOCK.

The federal constitution will not invalidate a State tax imposed upon domestic corporations generally because it incidentally affects one that, under State authority, is engaging in interstate commerce. *Lumberville Delaware Bridge Co.* v. *State Board of Assessors*, N. J., 26 Atl. Rep. 712.

CONTEMPT OF COURT.

NEWSPAPER PUBLICATION.

A newspaper article implying that the Supreme court has been induced, by improper influence, to delay rendering a decision, will render the editor and manager of such paper liable to punishment for contempt. *People* v. *Stapleton*, Colo., 33 Pac. Rep. 167.

CONTRACTOR—See Neg. 2. 10.

CONTRACTS—SEE ALSO EVID.—MAST. AND SERVT.—SALE OF GOOD.

1. CONTRACT OF SALE—CONSTRUCTION.

A written contract for the sale of logs "boomed and delivered to tug" construed, in connection with the evidence, as meaning that the seller was to inclose the logs in a boom, so that a tug could fasten to them and tow them away. *Gasper* v. *Heimbach*, Minn., 55 N. W. Rep. 559.

2. CONSTRUCTION.

A contract by the defendant, upon whom rested no other obligation than that expressed, "to at once proceed to procure, and use all reasonable efforts to procure," from a specified person, a release of her interest in certain land, construed as not an absolute undertaking to procure the release, but only to make reasonable effort to do so. *Orme* v. *Mackubin*, Minn. 55 N. W. Rep. 560.

3. RESCISSION.

One whose mind has become enfeebled by epileptic attacks, and who has been induced to exchange land for stock in an insolvent corporation by false representations by the owner of the stock, who was the general manager of the corporation, as to the profits made by it, is entitled to a rescission of the contract, though he had an opportunity to examine the books of the corporation before the trade. *De Frees* v. *Carr*, Utah, 33 Pac. Rep. 217.

4. TO PROCURE INSURANCE.

If one party undertake to procure for another a policy of insurance against loss by fire upon the house of the latter for a sum named, and, through oversight of the undertaker, no policy is actually procured, and the house is consumed within the time covered by the proposed policy, the undertaker will be liable for no more than the value of the house, though that be less than the amount which was to have been named in the policy. *Lehneis* v. *Egg Harbor Commercial Bank*, N. J., 26 Atl. Rep. 797.

5. BUILDING—EFFECT OF CUSTOM OR USAGE OF TRADE.

A custom or usage of trade cannot alter the specific terms of a contract. By contract a builder undertook to erect a building, it being one of the conditions that "the stones were to be laid on the natural bed where practicable." The stones not having been so laid, but placed "on cant," *held* that the words "where practicable"

did not leave it in the builder's option to lay the stones on their natural beds wherever he thought proper, but that he was bound to lay the stones as provided in the contract so far as the formation or construction of the building rendered it practicable. *Craig, &c., v. Barclay*, Sheriff Ct. Rep. 9 Scot. Law Rev. 89.

6. Damages for Breach of—Prospective Profits.

Plaintiffs contracted with defendant to solicit orders for its electric protective system, and furnish all necessary appliances for use, in connection with such offices of plaintiffs as might be thereafter designated; plaintiffs agreeing to maintain such apparatus, and serve defendant's customers according to the contract between defendant and such customers, and to receive as compensation 50 per cent. of the rentals. The contract was for three years.

Held, that where defendant, after procuring several customers, refused to go on with the contract, though the profits were wholly prospective, plaintiffs were entitled to damages.

Evidence of the cost of running such business was competent, in estimating the amount of damages, to show whether or not any profits were made.

The contract provided that, at the expiration of the three year term, plaintiffs should have an option to renew it for five years.

Held, that there being no evidence that such option had been converted into a contract, it was error to allow damages for profits which might have accrued during the additional term of five years. *Ramsay* v. *Holmes Electric Protection Co.*, Supreme Ct. of Wisconsin, 1893, 55 N. W. Rep. 391.

Contributory Negligence — See Neg.

Corporations — See Company Law —Injunction.

CRIMINAL LAW.

1. Evidence—Res Gestæ.

On a prosecution for murder committed while resisting arrest, a remark of a bystander to an officer that "there is the man that did it" (*i. e.*, committed the offence for which the arrest was being made) is part of the *res gestæ*, and admissible in evidence. *State* v. *Duncan*, Sup. Ct. of Missouri, 1893, 22 S.W. Rep. 699.

2. Criminal Law — Arrest without Warrant — Homicide.

Resistance to an arrest may begin in the use of words which import defiance, and indicate a purpose to use violence if necessary; the words being followed up by the actual use of violence, terminating in the officer's death. After the use of such words the officer may instantly employ such degree of force as is necessary to reduce the party to submission, and accomplish the arrest. *Ramsey* v. *State*, Ga., 17 S. E. Rep. 613.

3. Criminal Law — Justifiable Homicide—Robbery.

If a trespass on the person or property of another amounts to a felony, the killing of the trespasser will be justifiable if necessary in order to prevent it; but a trespass which amounts only to a misdemeanor will not justify the killing. Where, therefore, a person stopped in the highway the wagon which another was driving, and took from it certain meat of the other, for the declared purpose of of settling a debt which he claimed was due him by the owner, and while proceeding with his pocket-knife to cut off enough of the meat to pay the debt, the owner sought to prevent him, and the trespasser cut at him with his knife to prevent interference, and the owner thereupon seized a fence rail — a deadly weapon — and without necessity struck the trespasser on the head, thereby causing death, the homicide was not justifiable if the claim of debt was made in good faith, and there was no intent to steal, but was manslaughter. If the blow was to prevent robbery, and was necessary for that purpose, the homicide was justifiable. *Crawford* v. *State*, 17 S. E. Rep. 628, Sup. Court of Georgia, 37 Cent. L. J. 144.

4. Justifiable Homicide.

Arp was convicted in July, 1892, at

the Alabama Circuit Court, of murder in the first degree, and was, accordingly, sentenced to death. He had murdered one Payne, in order to prevent him from appearing against him, and two other men, Buckhalter and Leith, charged with retailing whiskey without a licence. Arp's excuse for the homicide was 'that Buckhalter and Leith threatened to take his life unless he killed the deceased; that they were present, armed with double-barrelled shotguns, and threatened to kill him unless he killed the deceased, and that it was through fear and to save his own life he struck deceased with an axe.' On this phase of the evidence the Circuit Court was asked to give the following charge: 'If the jury believe from the evidence that the defendant killed Payne under duress, under compulsion from a necessity, under threats of immediate impending peril to his own life, such as to take away the free agency of the defendant, then he is not guilty.' The Court refused this charge, and the refusal was upheld by the Supreme Court in Error. *Arp.* v. *The State*, Supreme Court of Alabama, January 26, 1893.

5. GAMING — SELLING PROPERTY BY LOT OR CHANCE—R. S. C., c. 159, s. 2.

The defendant was summarily convicted before a police magistrate of an offence against S. 2 of R. S. C., c. 159, being the Act respecting Lotteries, Betting and Pool-selling.

The defendant's mode of operation was as follows:—He held a kind of concert in a certain hotel in Winnipeg and then proceeded to sell boxes of what he called "Parker's Pacific Pens." Before selling the pens he placed in an empty box 100 envelopes each containing a $1 bill, 10 envelopes with a $5 bill in each, 15 envelopes with a $10 bill in each of them and one envelope with a $50 bill, making altogether $250 in 116 envelopes. He also placed in the box 116 envelopes containing only blank pieces of paper. Every person paying one dollar for one box of pens was entitled to draw one envelope and persons paying $5 for a box of pens could draw eight envelopes, but he would not take more than $5 from any person, in order, as he said, to protect himself, because if one man took the 232 envelopes he would be $18 out of pocket besides the 232 boxes of pens. If the $50 bill was drawn before two-thirds of the pens were sold he would put another $50 bill in an envelope and fifty envelopes with blank papers. He said he did not sell the envelopes; he would not take $20 for one of them; but he sold the pens and distributed the money to advertise the pens. A box of the pens was worth not more than ten cents.

Held, that the defendant was offering for sale and selling a means or device for disposing of his pens, by a mode of chance, or he was selling the pens as a means or device for disposing of the property, viz.; money or valuable security enclosed in the envelopes, by a mode of chance. Both parties to the transaction, the defendant as seller, and the purchaser who bought, knew that the $1 was not paid for the pens. They were only the device, and the $1 was paid for the chance of getting one of the prizes contained in the envelopes. That was the transaction in its true light, and the professed declaration of the defendant at the time was only a scheme to elude the statutory provision. It did not appear that it was material to inquire whether the alleged object of the accused, the advertising of this particular kind of pens, was his real object or a subterfuge. An act constituting an offence under the statute would appear to be equally an offence if done to attract attention to particular wares or if the article disposed of had an intrinsic value which might be an inducement to purchase it. If the article sold was, in addition, a means for disposing by chance of the money, there would be a breach of the statute. As the box of pens carried with it the right, not otherwise obtainable, to draw an envelope and thus the chance to get some of the money, each such box appeared to have been, in addition to the utility of the pens, a means or device for disposing of the money in the envelopes and a means or device of a character similar to that of any

lot, card, or ticket the possession of which might carry a similar right to draw. The sale of lottery tickets would be equally an offence, whether a direct or an indirect profit be intended, or if no profit be sought or expected.

An application to quash the conviction was therefore dismissed with costs to the private prosecutor.

Regina v. *Parker*, Manitoba Q. B., July, 1893, (Can. L. T.)

CUSTOM AND USAGE—See Bills and Notes 6—Contracts 5—Insur. 7.

DAMAGES—SEE ALSO CONTRACTS 6—PARTNERSHIP 2—RAILWAYS.

1. This was an action of damages brought by an advocate, who alleged that the defendant struck him one evening at 11 o'clock on St. Lawrence street. The defendant denied that there was premeditation, and offered $10 as sufficient compensation. The court was of opinion that the tender was insufficient. It appeared that the defendant wished to be avenged for something which had occurred seven or eight years ago. The plaintiff was entitled to protection against such assaults. Judgment for $100 damages, with costs of action as brought. *Lanctot* v. *Bernier*, Superior Ct., Montreal, Sept. 9, 1893.

2. The plaintiff claimed damages for the death of Mary Reynolds, aged six years, who was killed on the 22nd February, 1892, by the falling of ice from the roof of the house occupied by the defendant on Young street. The defence was to the effect that a great quantity of snow had fallen shortly before the accident, and that it was impossible for the defendant to prevent what had happened. The court did not find that this statement was proved. The defendant was to blame for not having the roof cleared.—Judgment for $500 damages. *Reynold* v. *McShane*, Superior Ct., Montreal, Sept. 9, 1893.

3. On the 29th December, 1891, a little girl, aged ten, daughter of the plaintiff, was knocked down and injured, at the corner of Notre-Dame and Napoleon streets, by a vehicle belonging to the defendant, and which at the time was being driven by his brother, an employe. The court found on the facts proved, that the defendant was responsible, and judgment was given against him for $300 and costs. *Viau* v. *Languedoc*, Superior Court, Montreal, Sept. 9, 1893.

4. On the 13th February, 1892, the plaintiff slipped on the ice on the sidewalk in front of the house occupied by the defendant, at the corner of Notre-Dame and McGill streets. It was proved that the sidewalk, on the day of the accident, was in a bad state and judgment went against the defendant for $200 damages. *McKeand* v. *McCormick*, Superior Court, Montreal, Sept. 9, 1893.

DEED—SEE ALSO DELIVERY 2.

SCOTCH LAW—CONVEYANCE—SALE OF SUPERIORITY—GENERAL WORDS OF DESCRIPTION IN DISPOSITIVE CLAUSE—CONSTRUCTION—SUBSIDIARY CLAUSES—RIGHT TO COALS.

By the law of Scotland, the dispositive clause of a deed in implement of a sale of land rights is the governing clause, and if its terms are express and unambiguous they cannot be contradicted or cut down by inference drawn from other parts of the deed; but if the dispositive clause contains general words of description susceptible of more than one meaning, other clauses of the deed may be referred to as showing the sense in which these general words are used. *Orr* v. *Mitchell*, [1893.] App. Cas. 238.

DELIVERY.

1. WHAT CONSTITUTES—GIFT OF MONEY.

A. deposited from time to time with B certain sums of money. A. had no voucher for such deposits, but had in her possession a slip of paper containing a column of figures made by B, the sum total of which corresponded with the aggregate of such deposits. With the exception of a date there was no writing on the paper. A gave to C orally these moneys, and delivered to C the slip of paper in question. Held,

such gift was invalid on the ground that the subject of it was not legally delivered. *Cook* v. *Lum*, N. J., 26 Atl. Rep. 803.

2. What Constitutes—Deed.

Plaintiff executed a deed to her daughter, and, after having it recorded, placed it in a box in her room, where it remained for some months, till the daughter's husband took it, without plaintiff's knowledge or consent. The deed was never in the daughter's possession, nor did she claim any interest in the land, and after her husband obtained possession of it they rented the land from plaintiff, and paid rent therefor. The deed was to be signed by plaintiff's husband, which, she had been advised, was necessary to pass title, but this was not done: Held, that the deed was not delivered. *Hutton* v. *Smith*, Iowa, 55 N. W. Rep. 326.

Demurrage—See Ships, etc. 2.

Elevator—See Neg. 1.

Emigrants—See Carriers, of Passengers 6.

EVIDENCE—See also Criminal Law 1—Libel and Slander 3. 4.

Declarations — Building Contract.

The provision in a building contract that, if any dispute should arise as to the meaning of the drawings or specifications, it should be decided by the architect, does not render admissible, in an action for a balance due on the contract, admissions of defects in the work by the architect, made in the absence of the contractor. *Garnsey* v. *Rhodes*, N. Y., 34 N. E. Rep. 199.

Exhibits — Photographing — See Practice 1. 2.

Fire Insurance — See Insurance Fire.

Fraud—See Company Law.

Gaming—See Crim. Law 5.

Gift of Money—See Delivery 1.

Ice, Right to—See Lease.

INJUNCTION—See also Trade Marks 1.

Injunction—Corporation—Title to Sue—Misleading Use of Professional Designation — Chartered Accountants Entitled to Prevent Use by Other Accountants of Initials "C. A."

The members of three Societies of Accountants in Edinburgh, Glasgow, and Aberdeen, which were incorporated by royal charter, adopted the designation of "Chartered Accountant," and used the letters "C. A." after their names as an abbreviation of that designation. These initials were universally recognized by professional men and the public as the designation of members of the three chartered societies, and prior to 1891 no other persons had used these initials with the exception of a few persons practising in Scotland, members of the Institute of Chartered Accountants of England and Wales, incorporated by royal charter.

In 1891 a number of accountants who were not members of any of these chartered incorporations, and who had endeavoured without success to obtain a royal charter for themselves, formed themselves into a limited liability company, called "The Corporation of Accountants, Limited," and in their articles of association adopted the designation of "Corporate Accountant," and thereafter they made public use of the initials "C. A., and appended them to their signatures in the course of their professional employment.

Held, that three Chartered Societies of Accountants and the individual members of these societies had no interest to reduce the articles of association and the certificate of incorporation of the Corporation of Accountants, Limited, but were entitled to interdict the members of the Corporation of Accountants, Limited, from using for professional purposes or as a professional designation the letters "C. A." or any other letters or words, or abbreviation of words, calculated to lead the public to believe that they were members of one or other of the bodies of accountants in Scotland which were incorporated by royal charter. *Society of*

Accountants in Edinburgh v. *Corporation of Accountants*, 30 Scot. Law Rep. 677.

INSURANCE.

ACCIDENT.

1. NOTICE OF DEATH.

A certificate of membership in a co-operative accident insurance company provided that notice of any accidental injury must be given, "with full particulars of the accident and injury," within ten days after the injury or death; and that the insurance did not cover "disappearance or injury, whether fatal or non-fatal, of which there is no visible mark on the body of the insured."

Held, that where a large building, in which the place of business of insured is situated, fell, and it was three days before it was learned, by the recovery of his body, that he perished in the accident, a notice of death served eight days later, but eleven days after the accident, was sufficient. *Trippe* v. *Provident Fund Society*. N.Y. Sup. Ct., May 25, 1893.

FIRE—SEE ALSO CONTRACTS 4.

2. AUTHORITY OF AGENT.

An insurance agent who has been directed by a company which he represents to reduce a risk either by cancellation or by reinsurance cannot reinsure in another company, for which he is also agent, without assent of the latter company. *Empire State Ins. Co.* v. *American Central Ins. Co.*, N.Y., 34 N. E. Rep. 200.

3. PARTIAL ASSIGNMENT.

Where an insurance policy covers both real and personal property, and the personal property is conveyed to another, an assignment of the policy, so far as relates to the latter, made with the consent of the insurer, is valid, and thereafter the assignee may recover on the policy for loss of the personalty; and the assignor, for a loss on the real estate. *Harriet B. C. Bullman* v. *North British and Merchants Ins. Co.*, Mass., 34 N. E. Rep. 169.

LIFE—SEE ALSO PARTNERSHIP 3.

4. LIFE INSUR. PREMIUM NOTES—NON-PAYMENT—FORFEITURE—CONDITIONS.

The assured gave to the company to cover the first annual premium payable under a policy of assurance, containing no condition as to forfeiture for non-payment of premiums, two instruments in the form of promissory notes payable at 90 days and 180 days from the date of the policy, each containing a provision that if payment were not made at maturity the policy should be void. The first note was not paid at maturity, and while it was unpaid and before maturity of the second note, the assured died.

Held, Hagerty C. J. O. dissenting, that, without any election or declaration of forfeiture on the part of the company, the contract came to an end upon non-payment of the first note, and was not kept alive by the currency of the other note. McGeachie *v.* North Am. Life Ass. Co., 20 A. R. 187 and Manufacturers Life Ins. Co. *v.* Gordon ib. 309 applied. *In re Oliver and City of Ottawa*, Ontario Ct. of Appeal, June 21 1893. (Can. L. T.)

5. DEATH—DOCTOR—PROFESSIONAL SECRET—REFUSAL OF CERTIFICATE.

Where the beneficiary is bound under the terms of a life insurance policy to furnish the company with a doctor's certificate certifying as to the nature of the death of the insured, the same is held to have been complied with by his asking the doctor who attended deceased in his last moments, for the certificate, even where the doctor refused absolutely to give it on the ground of its being a professional secret. *Compagnie "Le Monde"* v. *Veuve Pigoury*, Ct. of Appeal, Paris 4 Feb. 1891. Dalloz 1891—2.—318.

6. FORFEITURE — FALSE DECLARATION—FORMER INSURANCE.

A life insurance company cannot plead forfeiture of the policy on the ground that the insured falsely declared that he had not applied for insurance to a former company without effect, where it happened, that all that occurred with the former

company was some overtures made by the agent of the company, and not a proposal to insure from the party himself.

Especially, where the replies to the questions presented by the second company were written by their agent, the insured being illiterate, and with difficulty affixing his signature to them; and the more so where the agent was the representative of both companies, the knowledge of the agent being the knowledge of the company. *Veuve Baltzinger* v. *Comp.* "*La Confiance*," Ct. of Appeal, Paris 21 Jan. 1891. Dalloz 1891—2.—318.

MARINE.

7. PROHIBITED WATERS—WARRANTY—CUSTOM.

In an action on a policy of insurance on a vessel, the plea alleged that the vessel was in waters prohibited by the terms of the policy. In reply, the plaintiff set up a custom in the City of St. John that the vessel must be lost in the prohibited waters in order to relieve the company; that the mere passing through or enterring prohibited waters did not void the policy.

Held, that the prohibition in the policy amounted to a warranty that the vessel would not enter the prohibited waters; and that a custom could not be given in evidence against a warranty. *Troop* v. *Union Insur. Co.*, Supreme Ct., New Brunswick, June 1893, (Can. L. T.)

MUTUAL BENEFIT.

8. CERTIFICATE.

Where, in an action against a mutual benefit association on a certificate issued by defendant to plaintiff's husband, payable to her on his death, it appeared that such certificate provided that a failure to pay an assessment within twenty days after notice thereof should forfeit it, and plaintiff's husband died on the last day within which payment of an assessment, of which due notice had been given him, could be made, without paying such assessment, no recovery could be had; evidence that defendant's officers had permitted him to pay prior assessments after the expiration of time for payment not showing a waiver of prompt payment of the assessment which he failed to pay. *Reichenbach* v. *Ellebre*, Mo., 22 S.W. Rep. 573.

9. JUDGMENT.

The by-laws of a mutual benefit insurance company provided that losses should be paid by bi-monthly assessments, that each loss should be payable *pro rata* out of the next assessment after proof of death, or if the claim were contested, and judgment recovered against the company thereon, the judgment should be paid *pro rata* out of the assessment next after its rendition. A claim having been contested and reduced to judgment in another State, suit was brought on the judgment.

Held, that the facts that the *pro rata* share of the assessment next after the judgment would amount to less than the judgment, and that the company had disputed the claim, believing it to be unjust, constituted no reason for not paying the judgment in full, since the extent of the company's liability was determined by the judgment. *People's Mut. Ben. Soc.* v. *Werner*, Ind., 34 N. E. Rep. 105.

INTOXICATING LIQUORS.

1. CANADA TEMPERANCE ACT—SUMMARY CONVICTION—EXCESSIVE COSTS JURISDICTION OF MAGISTRATE—CERTIORARI.

This was an application for a *certiorari* to remove a summary conviction under the Canada Temperance Act, on the ground that the magistrate who heard the case had taxed costs that were not allowed by the Summary Convictions Act. It was admitted that the costs allowed by the magistrate were in excess of those fixed by the Act.

Held, per Fraser, Tuck, and Hanington, JJ., that the fact of a magistrate having allowed costs in excess of those allowed by the Act was no ground for *certiorari* where the remedy by *certiorari* had been taken away by the Act.

Held, per Palmer and King, JJ., that

the justice in taxing the costs exercised a statutory power, and that in allowing fees other than those allowed by the statute he acted in excess of jurisdiction, and *certiorari* would lie. *Ex parte Howard*, Supreme Ct. of New Brunswick, June 1893, (Can. L. T.)

2. CANADA TEMPERANCE ACT—SUMMARY CONVICTION—SERVICE OF SUMMONS—MINUTES OF EVIDENCE—MAGISTRATE'S DISCRETION.

This was a motion for a *certiorari* to remove a summary conviction under the Canada Temperance Act, on the ground that the summons had not been served on the defendant a reasonable time before the hearing. It appeared from the minutes of the magistrate that the summons had been served personally on the defendant on the evening previous to the day fixed for trial, with certain other facts from which the magistrate decided that the service was sufficient and proceeded with the trial.

Held, Palmer and Fraser, JJ., dissenting, that the conviction must stand in this case, and the rule *nisi* for *certiorari* be refused, *Ex parte Gallagher*, Supreme Ct. of New Brunswick, June 1893, (Can. L. T.)

3. CERTIORARI — CANADA TEMPERANCE ACT — MOTION TO QUASH RETURN—LACHES.

The defendant was convicted on the 11th April, 1890, of a breach of the Canada Temperance Act. On the 22nd May following he obtained a writ of *certiorari* to remove the conviction into the Supreme Court. The return to the writ was made on the 16th June, 1890, but no further step was taken by the defendant in the matter until 14th May, 1891, when notice was given of a motion to be made in December to quash the return. A motion was made before the Court in Yarmouth in June, 1891, to quash the *certiorari*, which succeeded. On appeal from this:—

Held, that the defendant was guilty of laches, that the *certiorari* was rightly quashed, and that the motion to quash the return must be dismissed with costs.

Quære, whether the truth or falsity of a return can be inquired into on a motion to quash it. *Regina* v. *Nichols*, Supreme Court, Nova Scotia, 1893. (Can. L. T.)

4. CANADA TEMPERANCE ACT — SUMMARY CONVICTION—SERVICE OF SUMMONS — MINUTES OF JUSTICE SHOULD SHOW WHEN SUMMONS WAS SERVED.

This was an application for a *certiorari* to remove a conviction under the Canada Temperance Act, made by the police magistrate for the town of Moncton, on the ground that the defendant had not been served with the summons a reasonable time before the hearing. There was nothing in the minutes of the magistrate taken at the trial to show when or how the summons had been served, but it appeared by affidavit that the summons had been served on the defendant personally between eight and nine o'clock in the evening, requiring him to appear and answer to the charge the following morning at eleven o'clock.

Held, that something should appear on the minutes of the justice to show how and when the summons had been served; and also to show that he had exercised his discretion as to whether such service was sufficient. This not appearing, the justice would have no jurisdiction to proceed with the case, for it was his duty to decide whether or not a reasonable time had been allowed the defendant to prepare his defence after being served with the summons.

The Court therefore made absolute a rule for a *certiorari*. *Ex parte Hogan*, Supreme Court, New Brunswick, June, 1893. (Can. L. T.)

JURY, QUESTION UNANSWERED—See Street Ry. 2

LANDLORD AND TENANT—See Neg. 8.

LEASE.

RIGHT TO ICE.

Held, that a lease of a tract of land including half the bed of a stream gives the lessee whatever right the lessor has to cut and remove the ice. *Marsh* v. *Mc-*

Nider, Sup. Court of Iowa, 37 Cent. L. J. 144.

LIBEL AND SLANDER.

1. ISSUES—INNUENDO FROM FAILURE OF TRUSTEE TO PUBLISH ACCOUNTS—CHARGE OF PARTIALITY.

Held, (1) that, looking to an article complained of as a whole, to say of a trustee, "He gives the money, it is supposed, but whether he dispenses the whole of it or not is not known, as he has never proposed to publish a statement of how it is employed"—might bear the innuendo that "he is not a trustworthy trustee and administrator of a charitable bequest..... and is a person capable of appropriating the funds of the bequest to his own uses and purposes;" and (2) that a charge of partiality is not of itself actionable. *Falconer* v. *Doherty*, 30 Scot. Law Rep. 688.

2. PRIVILEGE—AVERMENT OF MALICE.

A pursuer in an action of reparation for slander averred that a bank agent had in the bank office, and in presence of the bank clerks, repeatedly accused him of forgery, and set forth circumstances tending to show that the defender, in making and repeating the charges complained of, had acted without due inquiry, rashly, and without taking any precaution to secure secrecy.

Held, (1) that the pursuer's record disclosed no case of privilege, and (2) that should a case of privilege emerge at the trial malice had been sufficiently averred. *Ingram* v. *Russell*, 30 Scot. L. R. 699.

3. EVIDENCE.

In an action for libel charging plaintiff with being "as big a rascal" as one M., evidence is not admissible to show what kind of a rascal defendant charged M. to be in the absence of any allegation to that effect in the complaint. *Cassidy* v. *Brooklyn Daily Eagle*, Court of Appeals of New York 1893, 33 N. E. Rep., 1038. Reversing 18 N. Y. Supp., 930.

4. JUSTIFICATION—FAIR COMMENT—PLEADING—EVIDENCE.

Under a defence of "fair comment," in a libel action, evidence of the existence of a certain state of facts on which it is alleged that comment was fairly made is admissible, but not evidence of the truth of the statement complained of as a libel. Wills v. Carman, 17 O. R. 225, discussed. Judgment of the Chancery Division, 23 O. R. 222, reversed. *Brown* v. *Mayer*, Ont., Ch. D. June 21, 1893, (Can. L. T.)

5. WHAT CONSTITUTES—RESIDENCE OF A CITIZEN OF THE UNITED STATES IN CANADA.

A complaint for libel set out the following publication: "Missing millionaire McDonald located. McDonald, Southern Ohio manager of the Standard Oil Company, until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada."

Held, that, in view of the fact that many of our countrymen, who expatriate themselves under such circumstances in Canada, are frequently fugitives from justice (a matter of common knowledge, which the Court may judicially notice), this publication is capable of a libellous interpretation, and, being properly pleaded, is good as against a demurrer. *McDonald* v. *Press Pub. Co.*, 1893, 55 Fed. Rep., 264.

6. WORDS LIBELLOUS PER SE—INNUENDO—USE OF WORD "INTIMACY"—PUBLICATION CONCERNING POSTAL OFFICIAL.

Where words are such that the common understanding of mankind takes hold of them, and without difficulty applies to them a libellous meaning, an innuendo is not needed, and if used may be treated as surplusage. If the words used are of dubious import, and their meaning is averred by innuendo, the truth of the innuendo is for the jury; but the quality of the alleged libel, either simply or as explained by averments and innuendoes, is a question of law, and the Court is bound to instruct the jury as to whether the publication is libellous, assuming the truth of the innuendoes. If the publication be defamatory, malice is an inference of law.

A newspaper publication concerning a superintendent of mails, as follows: "Complaints from outside parties were sent to the department, one asking for his dismissal. on account of intimacy with a well-known local elocutionist," is *per se* libellous. *Collins* v. *Despatch Publishing Co.*, Supreme Court of Pennsylvania, 1893, 31 W. N. C., 316; 152 Pa., 187.

7. NEWSPAPER CRITICISM CONCERNING PUBLIC OFFICIAL — MILITIA OFFICER.

In an action against a newspaper for libelling a public officer, it is for the jury to determine whether or not the publication was substantially fair and accurate, whether the defendant had reasonable and probable cause to believe in the truth of the matter, and whether the proper inquiries were made, and care used in the statement of that believed to be true. If the jury find the publication justified on either of these grounds the verdict should be for the defendant.

An official in the performance of a public duty is amenable to public criticism in the newspapers, and if there be probable cause for their comments, the publication is not a libel, even if the statements be exaggerated and not strictly true in every respect. The effect of such exaggeration and sensational comment, as evidence of malice, is for the jury. A militia officer is a public official within this rule. *Jackson* v. *Pittsburgh Times*, Sup. Ct. of Pennsylvania, 1893, 31 W. N. C., 389; 152 Pa. 406.

8. CANDIDATE FOR NOMINATION TO OFFICE — PRIVILEGE.

The privilege of commenting on and criticising the acts of public men does not justify the publication in a newspaper of an article which falsely asserts that a candidate for a party nomination to Congress "sold out" and transferred his supporters to a rival candidate; and when the truth of the facts stated in the article is in issue the jury is properly instructed that the facts which gave rise to the comments must be proved substantially as alleged; that it is no defence that the writer, when he wrote, honestly believed in the truth of the charges, if the charges were made recklessly, unreasonably, and without any foundation in fact; and that, in so far as the publication fell within the limits of criticism and comment, it was privileged, but in so far as it went beyond that the defence of privilege failed. *Hallam* v. *Post Publishing Co.*, 1893, 55 Fed. Rep., 456.

9. PRIVILEGED OCCASION — PUBLIC OFFICIALS.

A complaint in an action for libel alleged that defendant, who with two others constituted a town board of school trustees, before whom plaintiff's application for employment as a teacher was pending, filed his written protest before the board. objecting to plaintiff's employment in "false, malicious and libellous language." viz.; "For claiming wages not due her and making statements which, in my opinion, she knew to be false, in order to obtain them."

Held, that the complaint was demurrable because it disclosed that the occasion was privileged, and the allegation that the language was false and malicious is not sufficient, but in such cases the complaint must further show that the defendant acted maliciously in publishing it. *Henry* v. *Moberly*, Appellate Court of Indiana, 1893, 33 N. E. Rep., 981.

10. REPORTS OF COMMERCIAL AGENCIES.

A false publication by a commercial agency as to the solvency of a business firm is not privileged where the publication sheet is issued to all subscribers of the agency without regard to their being creditors of the firm. To publish "Mitchell, Smith & Co., of Sugar Loaf, Arkansas, assigned," is libellous *per se*. *Mitchell* v. *Bradstreet Co.*, Sup. Court of Missouri, 1893, 22 S. W. Rep. 358.

11. SOURCE OF INFORMATION — PUNITIVE DAMAGES.

In an action against a newspaper for publishing a libellous article received by it from a news agency, the jury were properly instructed that if they think that the fact that the article was received, in the ordinary

course of business, from a reliable and unusually correct news agency, is sufficient to excuse the defendant from inquiry and delay before publication, punitive damages should not be given, but that, if they think that the defendant was guilty of reprehensible negligence in publishing the article without verification of its truth, then punitive damages may be given. Morning Journal Ass'n v. Rutherford, 2 C. C. A , 354, 51 Fed. Rep., 513, followed. *Smith* v. *Sun Printing and Pub. Ass'n*, Circuit Ct. of Appeals, 1893, 55 Fed. Rep., 240.

12. SCANDALOUS RUMORS CONCERNING PRIVATE INDIVIDUALS.

It is no justification of the publication of a scandal concerning private individuals, not occupying a public position, or charged with any offence known to the laws, that the rumors to which reference was made in the publication have been for some time floating about in the neighborhood, and are known to a number of persons. *Commonwealth* v. *Place*, Sup. Court of Pennsylvania, 1893, 32 W. N. C., 153 Pa. 314.

LIEN—See Bailment.

LIFE INSURANCE—See Insur. Life.

LOTTERY—See Crim. Law 5.

MARINE INSURANCE — See Insur. Marine.

MASTER AND SERVANT— SEE ALSO NEGLIGENCE 12.

1. ENGAGEMENT TO SERVE AT PARTICULAR HOUSE — DESTRUCTION OF HOUSE.

A servant was engaged by the year to serve as head cook in a particular hydropathic. This establishment was accidentally destroyed by fire.

Held, that her contract came to an end in consequence of the fire. *Annett* v. *Glenburn Hydropathic Co.*, Sheriff Ct., Repts. 9 Scot. Law Rev. 66.

2. NEGLIGENCE.

Plaintiff, eighteen years old, who had been employed in the press room of defendant's printing house for over two years, was ordered by the foreman to remove a heavy cylinder from one of the presses. Generally the press was stopped by shifting a belt from a tight to a loose pulley by means of a lever, which stood beside the press. Plaintiff shifted the belt, got inside the frame, and, while removing the cylinder, accidentally struck the lever which reshifted the belt, and he was crushed in the press. There were three ways of preventing such an accident starting, with all of which plaintiff was familiar, and had seen each of them employed; and in some cases had himself assisted in securing the machine.

Held, as a matter of law, that plaintiff was guilty of contributory negligence. *Levy* v. *Bigelow*, Ind., 34 N. E. Rep. 129.

3. NEGLIGENCE — DEFECT IN MACHINE—VOLENTI NON FIT INJURIA.

In an action by a servant against a master to recover damages for injuries sustained by the plaintiff, owing to an accident which occured by reason of a defect in the machine which he was working, it appeared that the plaintiff knew of the defect and of the likelihood of an accident, and that he worked and continued to work the machine without help from any other person, and without any complaint.

Held, that the plaintiff was *volens* and could not recover at common law. *Poll* v. *Hewit*, Ontario, Q. B. D., June 10, 1893, (Can. L. T.)

4. NEGLIGENCE — RAILWAYS — EVIDENCE — SUFFICIENCY OF—NON-SUIT—NEW TRIAL.

The plaintiff was an assistant yardsman in the defendants' employment whose duty it was to marshall and couple cars subject to the orders of the conductor of a shunting engine, to whose orders the engine-driver was also subject. According to the plaintiff's evidence while attempting to carry out specific instructions received from the conductor, which the latter denied, as to coupling certain cars, the conductor negligently allowed the cars to be backed up, thus driving the cars together and injuring the plaintiff. The plaintiff had for a long time been in defendants' employment, was thoroughly experienced in his duties, had never

received specific instructions before, and knew before he went in between the cars that the engine was in motion backing up, and only eight feet distant. On a motion to set aside a verdict found by the jury for the plaintiff, the Court, though not satisfied with the verdict, was of opinion that there was evidence for the plaintiff to be submitted to the jury, and therefore refused to interfere either by granting a non-suit or a new trial.

This was confirmed in appeal, Burton J. A. dissenting on the ground that the plaintiff was not acting under Garland's orders. *Weegar* v. *Grand Trunk Ry Co.*, Ontario Ct. of Appeal, 21 June 1893. Confirming C. P. D. 23 O. R. 436.

5. Injury Caused by Negligence of Workmen — Common Servants of Common Employer.

An action to recover damages for injuries received by the plaintiff in an explosion while laying gas pipes for the defendants. The plaintiff was in the employ of W., a gas fitter and plumber, and was told he would have to go and do some work for the defendants, who were laying mains and making the connection in a highway. W. also told the plaintiff that the defendants' foreman would show him where to work and give him all necessary instructions and directions.

The plaintiff still remained in the employ of W. who paid him his wages. There was an accident at the work caused by the negligence of some of the Company's workmen in not shutting off the gas, which exploded and caused the injury compained of. The jury returned a verdict of $1,250, which was so entered.

Held, that the sole question to be determined was whether the plaintiff was in the employ and under the control of the defendants or not. If there were contractual relations between the plaintiff and the defendants, and he had either expressly or impliedly submitted himself to the defendants' control and accepted them as his masters, the defendants would not be liable under the rule of law that one employed by a common master with other workmen accepts the risk from peril resulting from the negligence of fellow-workmen. In this case the plaintiff had not voluntarily gone to work for the defendants, but had been sent there by his employer, who still retained control over him. There was no evidence that any contractual relations existed by which the plaintiff tacitly took upon himself the risk from peril from the acts of other servants. A motion for a new trial was therefore refused. *Hatfield* v. *St. John Gas Co.*, Supreme Ct. of New Brunswick, June 1893. (Can. L. T.)

6. Negligence — Lease of Steamboat and Crew — Accident — Who Responsible — Act of Devotion — Negotiorum Gestor.

The facts of this case are as follows: The Basse-Loire Navigation Company run a regular line of steamers between Saint-Nazaire and Nantes. In the month of July 1886, their steamer "Rapid" being in need of repairs, they hired from one Florney, with a view to keeping up the service, another steamer, the "Hercules" including the crew, which was composed of Mahé the Captain, a mechanic and some men. All that the company had to do was to put on a purser, one Paradis, and an express man.

Upon the departure of the boat on the 15th July from Saint-Nazaire, Marchais, the agent of the Basse-Loire Company at that place, noticed that the captain and his men appeared to be under the influence of liquor. However, he let the boat go, and confined himself to sending a telegram to the company's representative at Nantes notifying him of the state of affairs. About nine o'clock, at night, the "Hercules" having arrived at Basse-Indre, and being ready attach on to the wharf, Paradis, t..eir purser, who had already inconvenienced himself on account of the condition of the crew, undertook to put out the gangway onto the wharf. But the gangway fell into the water, carrying Paradis with it. Just then Mahé, the captain, gave the order to "Back," the effect being to draw Paradis under the paddle-wheels, the blades of which immediately crushed him to death.

In an action by the widow against the

captain, the Basse-Loire Company and Florney, Florney was condemned in warranty to the Basse-Loire Co. for the damages due by them to the widow.

On appeal by Florney to the Court of Cassation. *Held*: (1) That a river navigation company is liable in damages for the death of one of its employees, who, while attempting to put out a gangway, fell into the river, and, owing to an order of the captain at that moment to "Back water" was crushed to death by the paddle-wheels; the boat and the captain being at the time in the service of the company.

(2) This responsibility is incurred even where the employee had departed from the usual functions of a purser in putting out the gangway, the trial judge having found that he had acted under necessity, and from motives of devotion, the captain and crew being in an unfit condition to assure its being done, and further, that he had not shown any imprudent precipitation in accomplishing the act.

(3) The fact that the steamer in question, which belonged to another shipowner, had been temporarily leased to the navigation company, including the crew, could only have the effect of making the shipowner liable in warranty to the company for the damages, where the former had retained the right to issue orders to, and control its captain.

(4) Therefore the court below erred in holding the shipowner liable in warranty on the sole ground that the captain was his agent, without enquiring into the fact as to whether at the time in question the captain was or was not the agent of the company. *Florney* v. *Comp. de Nav. de la Basse-Loire etc.*, Ct. of Cassation, 5 January 1891. Dalloz 1891.—1.—7.

7. Master and Servant — When Relation Exists.

Attendants selected by the manager of defendant's bath house had the exclusive privilege of administering baths, and received as compensation for their services, including the assistance of bathers and keeping the bath rooms and halls between them clean and warm, fees paid by bathers. They were subject to dismissal by the manager, and the latter had the power of assigning them to any visitor who had not himself selected an attendant from among their number. It was held, that they were servants of defendant, and he was liable for their negligence in failing to properly attend bathers. Plaintiff, while taking a hot vapor bath at defendant's bath house, was burned because defendant's servant failed to remove him from the bath at the proper time. It was held, that defendant was liable for such injury, although plaintiff permitted the servant to absent himself, where such consent was on condition that he would promptly return on being called, which he failed to do. *Gaines* v. *Bard*, Supreme Court of Arkansas. 37 Cent. L. J. 123.

The Court: The exception reserved to the refusal of the court to give to the jury the first instruction requested by the defendants, and the exception taken to the rejection of their fourth prayer, raise, in effect, the same question; and the point made upon both of these exceptions is that, if the attendant, John Martin, acted under the plaintiff's direction or control while administering the baths, he was the servant of the plaintiff, and the defendants are not, therefore, liable for his alleged negligence. But we think the conclusion thus insisted upon is not, in a legal sense, deducible from the facts stated in the two instructions referred to, when those facts are considered in the light of all the other circumstances of the case. Martin was one of the several persons connected with the defendants' bath house in the capacity of attendant upon persons who desired their assistance in taking baths. These attendants were selected by the manager of the bath house, and during the period of their service enjoyed the exclusive privilege of administering baths and of receiving the fees allowed therefor. In consideration of this privilege they not only attended at the bath house for the purpose of performing their duties in assisting bathers, but kept the bath rooms clean, and made the halls between the rooms comfortable by keeping them properly heated. It resulted from the nature of their employment and from the supervision essential to the usefulness of the bath house that the attendants should be subject to the general control of the manager, and to dismissal by him for any sufficient cause. The manager had power to assign either of them to the service of any visitor who had not selected an attendant for himself, and they could earn no fees otherwise than by using the rooms and other bathing appliances belonging to the defendants. Their labors were all in furtherance of the business enterprise in which the defendants were engaged, and it was entirely inconsistent with the interests of the latter, and with the duty they owed to the public as lessees and proprietors of the bath house,

that attendants upon bathers should be allowed to pursue their calling as independent contractors, or as persons conducting a business not subordinate to the business of the defendants. This being so, we think the position of the attendants was such that the law, in affording a remedy to third persons for their negligence, will regard them as the servants of the defendants, whether they served under an actual contract with the defendants or not. Cooley, Torts, 623; Wood, Mast. & S. § 304. But we think they acted under a contract with the defendants, and it is not speaking accurately to say that the administration of baths was the only service they rendered for the fees they received. The fees were paid to them by permission of the defendants, and were accepted as compensating them for their labors at the bath house, including their services in keeping the rooms and halls in a cleanly and comfortable condition. That they received no compensation except as it came to them in fees paid by the bathers they were selected or assigned to wait upon, and that bathers had the privilege of selecting their own attendants, and paying the fees directly to them, are facts which go to show that the amount of the fees to be paid each attendant was uncertain and contingent; but such facts are entirely consistent with the proposition that the right to earn any fees at all grew out of a contract with the defendants. Martin's position, then, was similar to that of a servant at an hotel, to which reference is made by way of illustration in the case of Laugher v. Pointer, 5 Barn. & C. 579. In that case it was held that, where the owner of a carriage hired a pair of horses of a stable keeper to draw it and the stable keeper provided a driver, the owner of the carriage was not liable for an injury to a third person caused by the driver's negligence. "This coachman," said the court, "was not hired to the defendant. He had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the job man. It is true, the master paid him no wages, and the whole which he got was from the person who hired the horses; but that was only a gratuity. It is the case with the servants at inns and hotels. Where there is a great deal of business they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn or hotel, and yet they are not the less the servants of the inkeeper."

See, also, Quarmam v. Burnett, 6 Mees. & W. 497. This ruling, it will be noticed, does not make the payment or promise of wages a test of the existence of the relation of master and servant; nor do any of the authorities make the payment or expectation of compensation essential to the creation of that relation as to third persons. "The real test," as to such persons, says M. Wood, "is whether the act (causing an injury) is done by one for another . . . with the knowledge of the person sought to be charged as master, or with his assent, express or implied." Wood, Mast. & S. §§ 7, 304, 306; Color Co. v. Conlon, 92 Mo 221, 4 S. W. Rep. 922; Kimball v. Cushman, 103 Mass. 194; Heygood v. State, 59 Ala. 51. There are many cases of such familiar occurrence that it is needless to mention them in which the duty of a servant to his master can only be performed by acts done according to the direction of a third person, whose comfort, convenience, taste, habits, or physical condition determines the time and manner of doing them. If Martin had served for daily wages, paid directly by the defendants, it would still have been his duty to them to administer baths to the plaintiff according to the directions of the latter, who was guided in his wishes by the advice of his physician; and in such case the plaintiff would not have had less power to discharge Martin as an attendant at the bath house, or to regulate his general conduct there, than he had in the present case. In either case he could, for good cause, have refused the attendance of Martin; but he could not, without the consent of the defendants, have engaged the services of one whom they had not authorized to act as a regular attendant. Such being our view of the relation established between the parties by facts not in dispute, we think the court did not err in refusing to give the defendant's first and fourth instructions.

MUNICIPAL CORPORATIONS

1. ORDINANCES.

A city ordinance which makes it unlawfull for a railroad company "to make up any train across (a certain street) by switching or otherwise, at any time," construed to mean that the company shall not stop the cars on or across the street in the operation of making up a train, is valid as a reasonable exercise of municipal authority. *Mayor* v. *Alabama G. S. R. Co.*, Ala., 13 South Rep. 141.

2. DEFECTIVE BRIDGES.

A city is liable for injuries resulting from the falling of a bridge built by mill owners in a public highway, and by the side of a public bridge, where the public are allowed to use both indiscriminately, with notice, as to the private character of the one in question. *Detwiller* v. *City of Lassing*, Mich., 55 N. W. Rep. 362.

3. MUNICIPALITIES ACT OF 1867, S. 163—CONSTRUCTION—PRACTICE AS TO RAISING A NEW POINT—NEW SOUTH WALES.

Where by sect. 163 of New South Wales Municipalities Act of 1867, "land the property of Her Majesty and unoccupied or used or reserved,

or vested in trustees for public purposes" was exempted from rateability;

Held, that on its true construction lands not the property of Her Majesty, but occupied by a municipality for the purpose of water supply, were within the exemption.

It appearing that the point whether the land in question was in fact used for public purposes had not been raised in the Court below or in argument before the Full Bench held that it was too late to raise it before their Lordships. *Council of the Borough of Randwick* v. *Australian Cities Investment Corporation, Limited*, [1893] App. Cas. 322.

4. MUNICIPAL ELECTIONS—DISQUALIFICATION OF COUNCILLOR—CONSTRUCTION OF WORD "CONTRACTOR"—PROCEEDINGS ATTACKING ELECTION AND RETURN—51 V. c. 1, s. 50, s-s. c.—R. S., 5TH SERIES, c. 57, s. 48.

The Act, 51 V. c. 1, s. 50, s-s. c., disqualifies from election as mayor or councillor of an incorporated town, or continuing to act as mayor or councillor, "any person directly or indirectly by himself or his partner having a contract———with, by, or on behalf of the council."

Held, that the defendant, who was a surety on the bond of the inspector of licenses for the proper performance by such inspector of the duties of his office, and for the payment to the municipality of all money collected by him by virtue of his office, was a contractor with the municipality within the meaning of the Act, and disqualified to be elected or sit.

Application was made for leave to file an information in the nature of a *quo warranto* requiring the defendant to show by what right he claimed to exercise the office of a town councillor. The affidavit relied on merely stated that at the time of the defendant's election and return, he was a contractor, saying nothing as to his position when acting as a member of the council. The ground specified in the notice was disqualification by reason of having been a contractor at the time of nomination and election.

Held, that the election and return of the defendant could only be questioned by proceedings taken under the provisions of R. S., 5th series, c. 57, s. 48; and that as to his continuing to sit, the affidavit must be strictly construed; a violation of the law not expressly stated would not be assumed.

That the notice was insufficient. *Reg.* v. *Kirk*, Supreme Court, Nova Scotia, 1893. (Can. L. T.)

MUTUAL BENEFIT INSURANCE—See Insur. Mut. Benefit.

NAME, RIGHT TO AS TITLE — See Injunction.

NEGLIGENCE.—SEE ALSO CARRIERS OF PASSENGERS 5. 7. 9. 10—MASTER AND SERVANT—DAMAGES 2. 3. 4—SHIPS, ETC. 1—TELEGRAPH CO.

1. Riding on a freight elevator, with a portion of the body projecting beyond the edge of the platform, is negligence *per se*. 4 Mis. Rep. 160.

2. BLASTING.

A sub-contractor, having exclusive charge of blasting, and having agreed to pay any loss to person or property arising therefrom, is liable for damages for negligence in said blasting. 2 Mis. Rep. 312.

Where a sub-contractor assumes the responsibility in blasting rock, the work of blasting not being dangerous itself, and the damage resulting therefrom being the result of the negligent manner in which the work was performed by the sub-contractor, the contractors are not liable. Id.

3. FRIGHTENING HORSES.

A railroad company is not guilty of negligence in not erecting a screen or fence at its station between the driveway thereto and the tracks, so that horses standing at the station may not be frightened at approaching trains. *Flagg* v. *Chicago, D. & C. G. T. J. Ry. Co.*, Mich., 55 N. W. Rep. 444.

4. DUTY OF BRAKEMAN.

It cannot be assumed, in the absence of proof, that a brakeman on a freight train has been authorized to remove trespassers. *Farber* v. *Missouri Pac. Ry. Co.*, Mo., 22 S. W. Rep. 632.

5. CONTRIBUTORY NEGLIGENCE.

Where, in an action against a rail-

road company for the death of a person on its track, it is shown that the accident occurred at night, and no witnesses are produced who saw it, the mere fact that the company did not cause a bell to be rung or a light to be put up, as required by law, is not sufficient to relieve the deceased from the imputation of negligence, where it is shown that the train made a noise that could be heard at some distance, that the switchmen had lanterns that could be easily seen, and that the deceased was familiar with the track and its surroundings. *Gulf, C. & S. F. Ry.* v. *Riordan*, Tex., 22 S. W. Rep. 519.

6. INJURIES TO PERSONS ON TRACK.

In an action against a railroad company for personal injuries it appeared that plaintiff, while using the track as a footpath, heard a train approaching from behind, and stepped off to let it pass. After it had passed he stepped on the track, without looking back, and was struck by the rear section of the train, that had brokend loose. There was no evidence of negligence causing the break. There was evidence that there were two brakemen on the detached cars, trying to stop them by setting brakes, and that they did not see plaintiff. Plaintiff had used the tracks for a footpath for three years without objection. Held, that the company was not liable. *Louisville & N. R. Co.* v. *Schmetzer*, Ky., 22 S. W. Rep. 603.

7. DEFENCE OF BAR ON ACCOUNT OF COMPENSATION RECEIVED FOR THE SAME INJURIES IN A SEPARATE ACTION —RELEVANCY.

A dock laborer working in the hold of a ship lying next a quay, was injured by the fall of a plank dislodged by a workman crossing to the quay from a ship lying outside. He brought an action of reparation against his own master, on the ground that the plank was improperly placed, but this action he subsequently compromised, and granted a receipt in full satisfaction and discharge of all claims against the defender in respect of the accident. He then brought an action of reparation for the same injuries against the workman's master on the ground that he should have provided a gangway for his men crossing over the inside ship.

Opinions expressed (approving the judgments in the Sheriff Court) that the pursuer was not barred by his compromise in the previous action; but action *dismissed* as irrelevant, on the ground that the pursuer had failed to set forth any fault on the defenders' part. *Dillon* v. *Napier, Shanks & Bell.* 30 Scot. Law Rep. 680.

8. DANGEROUS PREMISES — BUILDING LET IN FLATS—STAIRCASE OUT OF REPAIR — LANDLORD, LIABILITY OF, TO PERSONS OTHER THAN TENANTS —IMPLIED UNDERTAKING TO REPAIR STAIRCASE.

The defendant was the owner of a building in the City, the different floors of which were let by him separately as chambers or offices, the staircase, by which access to them was obtained, remaining in the possession and control of the defendant. The plaintiff, who had in the course of business called on the tenants of one of the floors, fell, while coming down the staircase, through the worn and defective condition of one of the stairs, and sustained personal injuries. The plaintiff having sued the defendant in respect of such injuries,

Held, that there was by necessary implication an agreement by the defendant with his tenants to keep the staircase in repair, and, inasmuch as the defendant must have known and contemplated that it would be used by persons having business with them, there was a duty on his part towards such persons to keep it in a reasonably safe condition, and the action was therefore maintainable. *Miller* v. *Hancock*, C. A., [1893.] 2 Q. B., 177.

9. RAILWAY — CONSTRUCTION — STATUTORY POWERS —WANT OF PRECAUTION IN CONDUCTING DANGEROUS OPERATIONS — INTERDICT — RAILWAY CLAUSES CONSOLIDATION ACT 1845 8 VICT. C. 20, SEC. 16.

The Railway Clauses Consolidation Act 1845 by section 16 provides that it shall be lawful for the company for the purpose of constructing the rail-

way to do all acts necessary for making the railway, provided always that in the exercise of the powers granted, the company shall do as little damage as can be. Consequently *held* that contractors constructing a railway for a company, under statutory powers, whose blasting operations had done serious damage to adjoining property, and who had failed to show that any precautions had been taken or even considered, were not protected from interdict by said section. *Gillespie* v. *Lucas*, 30 Scot. L. Rep. 843.

Note.

See Port Glasgow Sailcloth Co. v. The Caledonian Railway, House of Lords, 1893. 30 Scot. L. Rep. 587.

10. INDEPENDENT CONTRACTOR — MUNICIPAL CORPORATION.

Where a person obtains from a city, by ordinance, license to lay pipes along its streets, he will be liable for injuries resulting from the negligent manner in which such work is done, even though the work is not done by himself, but by an independent contractor employed by him for that purpose. *Colegrove* v. *Smith*, 33 Pac. Rep. 115, Supreme Court of California, 37 Cent. L. J. 142.

Note.

See Gray v. Pullen, 5 Best. & S. 970. Bower v. Peate, 1 Q. B. Div. 321, 326. Pickard v. Smith, 10 C. B. (N.S.) 470. Chicago City v. Robins, 2 Black 418. Robbins v. Chicago, 4 Wall, 657. Water Co. v. Ware, 16 Wall, 566. Boswell v. Laird, 8 Cal., 469.

11. ACCIDENT OWING TO WORKING OF STEAM ROAD-ROLLER IN BURGH — PROPER PRECAUTIONS — CONTRIBUTORY NEGLIGENCE.

In an action for damages for injury to a pony carriage on account of the horse taking fright at a steam road-roller at work on a public road in the burgh, *held* that the Police Commissioners, having observed all the precautions laid down in the by-laws framed by the County Council for the regulation of traffic, though they had not adopted bye-laws for the burgh, were not sufficiently at fault to be liable; that it was unnecessary to close the road against vehicular traffic, even where such traffic could easily be diverted by another road; and that the driver of the carriage, having narrowly escaped a similar accident on another occasion with the same pony, should have exercised more care, and had himself contributed towards the accident.

Observed, that under the County Council by-law providing that one of the persons in charge of a locomotive shall, "in case of need," assist horses and carriages drawn by horses passing the same, the responsibility of judging whether such assistance is required lies upon the rider or driver of the carriage. *McFarlane* v. *Helensburgh Police Commissioners*, Sheriff Ct. Repts., 9 Scot. Law Rev. 157.

12. STEVEDORE AND SERVANT—COMMON EMPLOYMENT—NEW ZEALAND.

To an action to recover damages for injury caused by the defendant's servant, the defence of common employment is not applicable unless the plaintiff was at the time of the injury in the defendants' actual employment in the relationship of master and servant.

Where the defendants were stevedores, the plaintiff a servant of the ship-master on whose ship the injury was caused, and the person whose negligence caused the injury was a servant of the stevedores, *held*, that the defence of common employment was not available. *Johnson* v. *Lindsay*, [1891] A. C. 371) approved. *Cameron* v. *Nystrom* [1893] App. Cas. 308.

13. DANGEROUS MACHINERY—FENCING — CHILD KILLED BY STRAYING PAST INSUFFICIENT FENCE.

Before a house occupied by a miner there was a piece of vacant ground about 30 yards broad. On the other side of this ground, and opposite the house, stood the pumping machinery of the mine. It was surrounded by a strong fence three feet high, in which there was a lifting gate. The miner's daughter, accompanied by her brother of four years of age, went according to custom, to draw water from the trough which was connected with the pumping machinery. The trough being dry, she called to the engineman. He came, lifted off the gate, looked down the pump-shaft, and went to the engine to put on more power, leaving the gateway open. The girl led the child to

the house and telling him to go within, she turned aside to find water elsewhere. The child strayed back to the pump shaft, entered the gateway and was instantly killed by the pumping machinery. The miner having sued the mine-owners for damages, the defenders pleaded—(1) that the danger was seen and apparent, (2) contributory negligence of the pursuers or their daughter, (3) that the child was a trespasser.

Held that the pursuers were entitled to damages. The Lord Justice-Clerk and Lord Young were of opinion, (1) that apart from the removal of the gate there was no apparent danger, (2) that there was no contributory negligence in assuming that the protection was complete, and (3) that the child who was in immediate danger whenever it crossed the limit defined by the line of the gate was not a trespasser.

Lord Trayner doubting these grounds, was of opinion that in the special circumstances of the case it was the duty of the defenders to have such a fence that even strayers should not be exposed to the risk of injury, and that failure in this duty made them liable. *Hamilton* v. *The Hermand Oil Company, Limited*, 30 Scot. Law Rep. 854.

14. Street Railway's Rights on the Highways.

In Gilmore v. Federal Street and Pleasant Valley Pass. Ry. Co., 23 Pitts. Leg. Jour. 4, the Supreme Court of Pennsylvania held that street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars; the public have a right to use the tracks in common with the railway companies, and it is not negligence *per se*, for a person to be anywhere upon such tracks. Though a street railway which permits its cars to be run along a narrow and unlighted alley on a dark night at a high rate of speed that will not permit its stoppage is guilty of negligence if injury is caused thereby, yet it is not liable if it appears that the plaintiff, whose horse was injured, was guilty of contributory negligence by stopping his horse or vehicle upon the track and leaving the horse unguarded, to go into a building in the vicinity. In this case the defendant operated a line of electric street cars in the city of Allegheny, and one branch passed for a short distance through an unpaved alley, some twenty feet in width, known as Church alley. At the corner of this alley and Green street, plaintiffs had a stable. On the evening of November 3, 1891, after dark, the plaintiffs' driver drove up to the stable and stopped in the alley, upon the tracks of the railway company. He allowed his horse to stand there, unhitched, while he carried various packages or boxes into the stable. While so engaged the driver saw the car coming toward him. He testified that he first jumped on the wagon, and then off, and went to the horse's head and attempted to lead him out of the way, at the same time "hollering" at the car to stop. The motorman did not hear him, and did not see him until he was so near that before he could bring the car to a standstill, the car struck the hub of the wagon wheel, and threw the shafts and horse around against the side of the car, and the foreleg or foot of the horse was cut in some way. At the time of the accident the spot was in darkness, but shortly afterward the electric light was turned on. The wound on the horse's foot was slow in healing, and after letting the horse rest for a couple of months, and giving him some medical treatment, the plaintiffs sold the horse for $100, he having cost them when purchased $230, involving a loss to them of $130. There was also some injury to the wagon. Plaintiffs sued for the loss on the horse, and the expense of keeping and caring for him, and for the damage to the wagon. The whole matter was given to the jury to determine, and they found against the defendant in the sum of $252.70. From the judgment entered upon this verdict the defendant appealed. The assignments of error complained of the action of the court in refusing the two following points submitted by the defendant: 1. There is not sufficient evidence in this case of negligence upon the part of the defendant company or its employees to justify a verdict for the plaintiff. And 2. That under all the

evidence in this case, the verdict should be for the defendant. The court say, by Heydrick, J.: "There was abundant evidence to justify a jury in finding the defendant company guilty of negligence. Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even the use of their own tracks. The public have a right to use these tracks in common with the railway companies; and therefore, while the rights of the latter are in some respects superior to those of the former, as was said in Ehrisman v. Railway Co., 150 Penn. St. 180, it is not negligence *per se* for a citizen to be anywhere upon such tracks. So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence upon their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down; but there is no difficulty in saying that it is negligence to run a car along a narrow and unlighted alley, on a dark night, at a rate of speed that will not permit its stoppage within the distance conveyed by its own headlight. This, according to the testimony of the defendant's own witness, its motorman, it did the night of the accident by which the plaintiffs' horse was injured. But the plaintiffs' driver, according to his own testimony, was equally negligent. He left his horse and wagon standing unguarded upon the track, and went into a stable in close proximity. How long he was absent does not appear, nor is it material. It was his duty to exercise the same watchful care when upon the track that the law exacts of the railway company in running its cars. It is an unbending rule, to be observed at all times and under all circumstances, that a person about to cross the track of a street railway must look in both directions for an approaching car before attempting to cross. Ehrisman v. Railway Co., *supra*; Wheelahan v. Traction Co., 150 Penn. St. 187. But compliance with this rule would be an idle ceremony if a person might afterward stop his horse or vehicle upon his track, relax his vigilance, and, leaving his horse unguarded, go into a building in the vicinity, and there remain any length of time whatever. As well might a motorman desert his post of duty, and go into the car to speak to a passenger, or for any other purpose. For less negligence than that on the part of a gripman, this court recently sustained a judgment against a street railway company, the injured party being free from contributory negligence. For these reasons the defendant's points ought to have been affirmed. Penn. Sup. Ct. *Gilmore* v. *Federal Street and Pleasant Valley Pass. Ry. Co.* Opinion by Heydrick, J.

NEGOTIORUM GESTOR — See Mast. and Servt. 6.

NEW TRIAL—See Mast. and Servt. 4.

NOVATION — See Prin. and Surety 2.

NUISANCE.

ESCAPE OF RUBBISH FROM REFUSE HEAP TO THE INJURY OF CATTLE — LIMITS OF MAXIM "SIC UTERE TUO UT ALIENUM NON LŒDAS."

Held, (1) that it is necessary to prove fault or absence of due care in order to render a proprietor making lawful use of his own ground liable in damages in consequence of the escape from it of dangerous matter; (2) magistrates were not liable for the injury or death of cattle in a field adjoining a deposit of town refuse, although it was proved that the escape of certain articles which the cattle ate from the place of deposit was the cause of the injury to them, because it was not proved that the escape was due to negligence or want of care on the part of the magistrates. *Hendry's Trustees* v. *Magistrates of Kirkcaldy*, 9 Scot. Law Rev. 144 Sheriff Ct. Repts.

PARTNERSHIP.

1. PURCHASE OF INTEREST.

A person who buys the interest of one of the partners of a firm does not

thereby become personally liable on a prior obligation of such firm, in the absence of proof that he in some way assumed such obligation. *First Nat. Bank* v. *Simmons*, Cal. 33 Pac. Rep. 197.

2. SALE BY PARTNER NOT WITHIN SCOPE OF PARTNERSHIP BUSINESS—DAMAGES—REPLEVIN.

The defendant purchased a quantity of roofing gravel from H., who claimed to carry on a roofing business in co-partnership with the plaintiff. The evidence as to the existence of the partnership was contradictory, but it appeared that the gravel was bought and paid for by the plaintiff, that it was in his possession at the time of the sale, and that it was not part of the roofing business to sell gravel.

Held, assuming the existence of the partnership to have been established, as to which there was doubt, that the sale of the gravel was not within the scope of the partnership business, and that H. was not the agent of the plaintiff to sell.

There being no proof of special damage, the damages were reduced to the value of the gravel sold. *O'Regan* v. *Williams*, Supreme Court, Nova Scotia, 1893. (Can. L. T.)

3. LIFE INSURANCE—PAYMENT OF PREMIUM WITH PARTNERSHIP MONEY.

Decedent misappropriated money of a partnership of which he was a member, and applied a portion thereof to the payment of premiums on life insurance procured by him for his wife's benefit. The amount misappropriated exceeded the amount of the policies.

Held, that the surviving partner could recover such proceeds, the wife's insurable interest in the life of decedent not being property in the sense that it was mingled with the money converted so that only the amount of premiums could be recovered. *Holmes* v. *Gilman*, Court of Appeals of New York, June 6, 1893. 37 Cent. L. J. 128.

Note.

See also Phœnix Ins. Co. v. Penn. Co. (Ind.) 33 N. E. Rep. 970; Thompson v. Brannon (Ky.), 21 S. W. Rep. 1057; Mutual Life Ins. Co. v. Thompson (Ky.) 22 S. W. Rep. 57; Burnam v. White (Ky.), 22 S. W. Rep. 355; Hurst v. Mutual Life Ass'n (Md.), 26 Atl. Rep. 956; Currier v. Studley, (Mass.), 33 N. E. Rep. 709; Bullman v. North British, etc. Ins. Co. (Mass.), 34 N. E. Rep. 169; German Ins. Co. v. Eddy (Neb. 54 N. W. Rep. 856; Hastings v. Brooklyn Life Ins. Co. (N. Y.), 31 N. E. Rep. 289; Wilson v. N. W. Mutual, etc., (Minn.), 55 N. W. Rep. 626; Burke v. Prudential Ins. Co. (Penn.), 26 Atl. Rep. 445; Carpenter v. Allemania Ins. Co. (Penn.), 26 Atl. Rep. 781; and Colby v. Parkersburg Ins. Co. (W. Va.) 17 S. E. Rep. 303.

4. WHAT CONSTITUTES.

Defendant entered into a contract with one L by which L was to go on defendant's land, cut logs and bolts, market the same, receive the proceeds, pay the expenses of the undertaking, and pay defendant $1 per 1,000 stumpage, and 25 cents per cord for bolts. L was to have $20 a month for his services, and his wife was to have $3 a week for boarding the men. The balance of the proceeds of sales were to be divided equally between defendant and L as profits:

Held, that defendant and L were partners in such undertaking, and that defendant was liable for debts incurred by L in its performance. Montgomery and Hooker, JJ., dissenting. *Dutcher* v. *Buck*, Supreme Court of Michigan, June 23, 1893, 37 Cent. L. J. 110.

The Court: Much controversy has arisen over the conclusiveness of profit sharing as to the liability to third persons of such profit sharer. The authorities upon that question are not harmonious, even in our own State. All, however, agree that profit sharing is evidence tending to show partnership. It was held in Beecher v. Bush, 45 Mich. 188, 7 N. W. Rep. 785, and in Colwell v. Britton, 59 Mich. 350, 26 N. W. Rep. 538, that merely sharing in profits, where third persons have not been legitimately led to believe there was a partnership, does not create one as to them, unless there was one in fact. In both of those cases, however, the party sought to be charged as a partner received a percentage of the proceeds as a measure of compensation, —the one as rental, and the other as commission. Both come within the generally recognized exception to the rule laid down by a large number of authorities, that, as to third persons, profit sharing is conclusive as to liability. Smith v. Bodine, 74 N. Y. 30; Leggett v. Hyde, 58 N. Y. 278; Haas v. Roat, 16 Hun, 527; Greenwood v. Brink, 1 Hun, 227; Beudel v. Hettrick, 45 How. Pr. 198; Vanderburgh v. Hull, 20 Wend. 70; Heimstreet v. Howland, 5 Denio, 68; Everett v. Coe, *Id.* 180; Burnett v. Snyder, 81 N. Y. 550; Richardson v. Hughitt, 76 N. Y. 55; Eager v. Crawford, *Id.* 97; Ford v. Smith, 27 Wis. 261; Nicholaus v. Thielges, 50 Wis. 491, 7 N. W. Rep. 311; Smith v. Knight, 71

Ill. 148; Nicholl v. Dudley, 40 Ill. 406; Meserve v. Andrews, 104 Mass. 360; Haskins v. Burr, 106 Mass. 48; Mollwo v. Court of Wards, 4 Moak Eng. R. 121; Ross v. Parkyns, 13 Moak Eng. R. 834, note, 839; *Ex parte* Tennant, 22 Moak Eng. R. 831; Colly. Partn. §§ 170-172; Story, Partn. § 27; Smith v. Watson, 2 Barn. & C. 401; Heran v. Hall, 1 B. Mon. 159; Bartlett v. Jones, 3 Strob. 471; Whitcomb v. Converse, 119 Mass. 43; Harvey v. Childs, 28 Ohio St. 319. It is not necessary to rest the present case upon this naked rule. The court below, undoubtedly recognizing the rule laid down in Beecher v. Bush, that the test of partnership as between the parties is their intent, found there was no partnership in fact between Leclear and defendant; but in Cleveland Paper Co. v. Courier Co., 67 Mich. 152-158, 34 N. W. Rep. 556, it is held that as to third persons the liability of a partner is frequently imposed, though it was not the intention of the party sought to be charged to become one, and even though a partnership cannot have been made. Numerous authorities might be cited in favor of this proposition. It is held in Eastman v. Clark, 53 N. H. 276, that sharing profits in any other sense that sharing them in the capacity of a principal is not an absolute test of one's liability; that his liability depends upon whether he is a principal, bound by a contract made by himself, or his agent acting by his authority. Justice Bellows died pending consideration of the case, and extracts from his notes are printed with the opinions filed in the case. He said that the recognized test had been announced in various forms as "a community of interest in the profits;" "a participation in the net profits;" a participation in the profits as profits; "a specific interest in the profits with the right to an account;" that to constitute a communion of profits the interest in the profit must be mutual,—"there must be a common interest in them as a principal trader, and as distinguished from a right as a creditor to receive a sum of money out of the profits, or a sum proportioned to the *quantum* of profits, or even a share of the profits as compensation." In Loomis v. Marshall, 12 Conn. 69, Huntington, J., says: "This community of profits is the test to determine whether the contract be one of partnership; and, to constitute it, a partner must not only share in the profits, but share them as principal." In Cox v. Hickman, 8 H. L. Cas. 268-306, Lord Cranworth says: "It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This is no doubt in general a sufficiently accurate test, for a right to participate in profits affords cogent—often conclusive—evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case, he is liable on the trade obligations, and entitled to his profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf; *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." The doctrine of these cases is the ground-work of the opinion of Mr. Justice Cooley in Beecher v. Bush, where it is said that the elements of partnership are "community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent, even, of making one the sole agent of the others and of the business." In the present case the agreement was that both parties should be compensated, the one for the timber, and the other for services; each supplied a team of horses; help was to be employed, and the wife was to be paid a certain amount for the board of such help; the timber was to be converted into logs and bolts; Leclear was to market and to sell the logs and bolts, and pay the expenses, not only the stumpage and his own wages, and the board of the men, but all the expenses, including the wages of the men. The manner in which the business was to be conducted was regulated by the agreement. Leclear was left no option except such as might be exercised by a mere foreman. In December the only modification made in the agreement was that defendant, instead of Leclear, should market and sell the products, collect the proceeds, pay the expenses, and account for the balance. The character of the venture was not changed. Leclear was none the less agent of both when he was paying out their moneys for labor expended upon their logs and bolts, than was defendant after December. Although the agreement provided that Leclear should pay the expenses, it is evident that such expenses were to be paid out of the proceeds, and the contract provided that, at any time when Leclear could not from such proceeds pay the expenses, he should cease to work. The only provision lacking in this arrangement is one with reference to joint participation in losses. As between themselves the inference is, if any losses were sustained by an excess of expenses over proceeds, that Leclear should pay such loss. But to constitute one a partner as to third persons, it is not at all necessary that he should agree to share in the losses of the business. Sager v. Tupper, 38 Mich. 258-265. It is clear that these operations were carried on in behalf and for the benefit of both Leclear and defendant. When the timber was converted into logs and bolts, such products became the property of both. The labor was expended, reducing the timber to that condition, for the benefit of both, in order that

profit might be realized. Upon the sale of the products the proceeds belonged to both. In Beecher v. Bush it is said: "If either had failed to perform, the remedy of the other would not have been a suit at law, but a bill for an accounting;" but, in the present case, defendant would certainly have been compelled to resort to the latter remedy. Here were all the *indicia* of partnership relations, except, perhaps, that defendant was not to share in losses. The business was in no sense Leclear's independent business, carried on by him in his own way. The conduct of the business was restricted and regulated by the agreement. There was *community of property, community of interest and community of profits.* The venture was one launched for the benefit of both parties. Both were principals, and what was done for their mutual benefit must be deemed to have been done by an authority of both. Corey v. Cadwell, 86 Mich. 570, 49 N. W. Rep. 611; Purvis v. Butler, 87 Mich. 256, 49 N. W. Rep. 564. The judgment below is therefore reversed, and judgment entered here for the amount of the judgment in the justice's court, with interest from the date of said judgment, and costs of both courts.

Note.

See Fischer v. Sup. Ct. etc. (Cal.), 32 Pac. Rep. 875; McDonald v. McLeod, (Colo.), 33 Pac. Rep. 285; Curron v. Studley (Mass.), 33 N. E. Rep. 709; Webber v. Johnson (Mich.), 54 N. W. Rep. 947; Young v. Thresher (Mo.), 21 S. W. Rep. 1104; McIntosh v. Perkins (Mont.), 32 Pac Rep. 653; Lewis v. Loper, 54 Fed. Rep. 237; Newberger v. Heintz (Tex.), 22 S. W. Rep. 867; Sohns v. Sloteman (Wis.), 55 N. W. Rep. 158; Bosworth v. Hopkins (Wis.), 55 N. W. Rep. 424; and Bank, etc. v. Blanchard (Va.), 17 S. E. Rep. 742.

The law of the Province of Quebec on the subject is found in the following part of the article of the Civil Code: "Participation in the profits of a partnership carries with it an obligation to contribute to the losses."

Although this article appears to make *any participation* in the profits of the business the equivalent to partnership as regards third parties, yet it was held in the recent case of Reid v. McFarlane, 2 Q. B. Off Rep. 130, overruling Davie v. Sylvestre, M. L. R., 5 Q. B. 143, and McFarlane v. Fatt, M. L. R., 6 Q. B. 255: that participation in the profits of a business does not make the person participating liable as a partner toward third parties, unless the *intention* was to form a contract of partnership or unless he has been held out to the public as a partner.

The French jurisprudence is to the same effect. Thus it was *held*, that the essentials to the formation of a partnership are, the intention to contract one; common stock, and participation in the profits and losses.

Therefore, where a person agrees to furnish capital for the carrying on of an industry, and stipulates that, in addition to the legal rate of interest, he is to receive a share of the profits of the concern, it was held to be a loan and not a limited partnership, there being no capital stock, nor participation in the losses. Beurron v. Michal, Court of Cassation, 8 jan. 1872. Dalloz, 72—1—194.

See also Guillouard, Contrat de Société, No. 77. Alauzet Soc. No. 376.

In England the jurisprudence is to the same effect. *See* Cox v. Hickman, 8 H. L. Cas. 268, and more recently Badeley v. Consolidated Bank, 38 Ch. D. 238 [1888].

PATENTS.

1. PARTIES—CONSTRUCTION OF AMBIGUOUS CONTRACT — LICENSE FOR SALE IN FOREIGN COUNTRIES.

Where the owners of certain patents conveyed to the plaintiff an exclusive license in specified parts of the United States, and also the exclusive right to build the patented devices for sale in Europe, and thereafter transferred to the defendants all their remaining right, title and interest in the patent subject to the rights of the complainant.

Held, in an action by the licensee, that he may prosecute in his own name suit for infringement of the patent where the defendant is the owner of the legal title.

Held, also, that the grant of a right to manufacture within the specified territory for sale to the foreign trade was a substantive grant and enforceable by injunction.

Held, also, that evidence aliunde is admissible to explain the latent ambiguity in the contract, and that doubts apparent upon the face of the instrument must be resolved by the Court resorting, if necessary, to the rule that a grant expressed in doubtful words shall be construed most strongly against the grantor. *Adriance* v. *McCormick Machine Co.*, Circuit Court N. D. Illinois, 1893. 53 Fed. Rep., 288.

2. PATENT — MILKING MACHINE — WHETHER COMPETING INVENTION A MECHANICAL EQUIVALENT—ANTICIPATION.

A patent was granted in 1889 for "improvements in apparatus for milking cows." The milk was drawn off by indiarubber pipes, in which a vacuum was set up by an exhaust pump. Automatic regulation of the extent of vacuum was attained by placing in communication with the pipes a tube open at the bottom, and resting in a vessel of water, so adjusted that when

the vacuum drew up into the tube a column of water of a certain height, air found its way up the tube, and thus prevented the vacuum from becoming excessive.

The specification claimed, in the fifth place, a milk receptacle, which consisted of a can with nozzles to which the indiarubber tubes from the cow and from the exhaust pump were fixed, with a pane of glass let into the lid for inspection of the interior, and with a tap and branch for drawing off the milk.

In a patent of 1891 for "improvements in milking machines," automatic régulation of the vacuum was obtained by using an ordinary valve, with a lever held down by a weight, the amount of vacuum being regulated by the position of the weight on the lever. The weight held the valve against the external pressure, and prevented air from entering and diminishing the vacuum until a certain vacuum had been established by the exhaust pump.

The patentee of 1889 sought interdict against the patentee of 1891, on the ground that the respondents' weighted valve was simply a mechanical equivalent of his water valve, and consequently was an infringement of his patent. The respondents denied the infringement, and maintained besides that the complainer's fifth claim was bad, because anticipated by a prior patent of 1863, which described a milk reservoir practically the same as the complainer's receptacle, the only difference being that the reservoir of 1863 had a pane of glass on the side instead of on the lid, and that it had not a moveable lid, but a bung.

Held, that the complainer's claim for the milk receptable was invalid, and accordingly that the whole patent fell.

Opinion per Lord Justice-Clerk that the respondents' process was only a mechanical equivalent of the complainer's invention.

Opinion per Lord Low (Ordinary) *contra*. *Murchland* v. *Nicholson*, 30 Scot. Law Rep., 857.

PEDDLER.

WHAT CONSTITUTES.

Under a city ordinance which provides that any person who shall sell, or offer for sale, barter, or exchange, any goods or other articles of value, in any street or alley or other public place, or in wagons or other vehicles, or at private or public houses, shall be deemed a peddler, a person who delivers goods previously sold by another is not a peddler. *City of Stewart* v. *Cunningham*, Iowa, 55 N. W. Rep. 311.

PHOTOGRAPH OF DOCUMENTS — See Practice 1. 2.

PILOTS—See Ships etc. 1.

PRACTICE.

1. EXHIBITS—DISCOVERY — PHOTOGRAPHS OF DOCUMENTS—ORDER XXXI., R. 14 ; ORDER L., R. 3.

The Court has power to allow a party to an action to take photographs of documents in the possession of the other party. *Lewis* v. *The Earl of Londesborough*, [1893], 2 Q. B. 191.

2. But *held*, in Belgium, that there are not sufficient grounds for allowing parties to an action to take photographs of a contested will, and the documents filed by way of comparison. *Willems* v. *Heritiers Willems*, 29 June 1889, Ct. of Appeal, Gand (Belgium), Dalloz, 1891—2—61.

Note.

This is a much disputed question in France. The doctrine is ranged almost entirely on the side of the affirmative; but the jurisprudence is still divided.

The editors of Dalloz in a note to this case do not see any reasons for refusing this right where *in the opinion of the judge* the interests of justice would be substantially forwarded, and regard the above decision as one which must be viewed as simply applying to its own particular state of facts, and not as a general rule.

To prevent any mistake as to the authenticity of the photograph the court can order the notary to affix his signature to the copies so obtained (Trib. Seine, 18 March 1886 and 3 Feb. 1887), and if it is desired to prevent the multiplication of copies, it can limit their number and order the negative to be destroyed immediately after the operation and in the presence of the notary (ib. and Alger, 17 Sept. 1887). And to prevent the exhibits from leaving the hands of those responsible for them, the judge can order the whole operation to be performed in the presence of the notary (Trib. de la Seine, ib.) or in his office. (Bergerac, 11 Sept. 1868, D. P. 69—2—246, Caen, 29 July 1879, D. P. 80—2—201.)

PRINCIPAL AND AGENT

AUTHORITY OF BANK AGENT TO INSTITUTE CRIMINAL PROCEEDINGS AGAINST A DEBTOR OF THE BANK — EXCESS OF AUTHORITY — LIABILITY.

An action for damages for malicious prosecution. The plaintiff had obtained money on promissory notes from the agency of the defendants' bank at Campbellton, N. B.. upon representations which turned out to be false. When the notes matured at the bank the plaintiff went across the river into the Province of Quebec, ostensibly to avoid arrest on a civil process. In order to get the plaintiff within the province so that he might be arrested at the suit of the bank, the agent of the bank at Campbellton laid an information against the plaintiff for obtaining money under false pretences, upon which he was arrested and brought back to Campbellton, and on the hearing before the magistrate was discharged from custody, and the information was dismissed, whereupon he was immediately arrested on bailable process issued by the bank for the amount of the notes he had so discounted. The plaintiff then brought this action, and at the trial the judge directed a verdict for the defendants, on the ground that the agent of the bank had acted beyond the scope of his authority and of his written instructions in having the plaintiff arrested on a criminal charge, with leave reserved to the plaintiff to move the court to reverse the verdict.

Held, Palmer and Hanington, JJ., dissenting, that it was no part of the agent's banking business to start criminal proceedings; and that under the circumstances of this case the facts did not show that there was any exigency which would justify the agent in taking the steps he did. The object of the criminal proceedings was to bring the plaintiff within the jurisdiction of the courts of this province, and the written instructions of the bank to the agent did not contemplate such an improper or illegal proceeding. *Thompson* v. *Bank of Nova Scotia*, Supreme Court of New Brunswick, June 1893. (Can. L.T.)

PRINCIPAL AND SURETY.

1. NON-NEGOTIABLE NOTE.

A person, on being asked to lend money, was unable to do so, but filled in and signed a non-negotiable note as surety, making it payable to a definite person, and directed the maker to apply to him. The payee also was unable to make the loan, and the maker, in the payee's presence, delivered the note to plaintiffs, who advanced the money:

Held, in an action on the note, that, the note being non-negotiable, plaintiffs were bound to make inquiries, and were charged with notice that the purpose for which the surety signed it failed when the payee declined to make the loan, and the surety was not liable. *Janes* v. *Benson*, Penn., 26 Atl. Rep. 752.

2. NOVATION — RELEASE OF PRINCIPAL DEBTOR—DISCHARGE OF SURETY —TASMANIA.

Where a creditor relased his principal debtor and accepted a third party as full debtor in his stead, and the surety for the former debtor agreed to give him a guarantee until he did so, and then died without having given it.

Held, in an action by the creditor against his executors, that, the former debt having been extinguished by the release, the remedy against the deceased was gone.

Novation of debt operates as a complete release of the original debtor, and cannot be construed as a mere covenant not to sue him. *Commercial Bank of Tasmania* v. *Jones*, 1893, App. Cas. 313.

3. SURETYSHIP — DISCHARGE OF SURETY — CONCEALMENT BY CREDITOR OF MATERIAL FACTS.

A servant on two occasions failed to account to his employer for his intromissions, and was deficient in his cash account to the extent of about £70. His employer having agreed to retain his services on condition that he found security for his present indebtedness and future dealings, he informed certain friends falsely that he was about to obtain promotion in his employer's business, and that the security he

asked for was required in connection with his advancement. He thereby obtained from three persons a letter of guarantee by which they agreed to become his sureties "to the extent of £50 for his intromissions." The employer was not aware of the misrepresentations; he did not inform the sureties of the conduct of his servant, or the circumstances in which he had required the guarantee, and they asked for no information from him. The servant was again guilty of deficiencies in his cash account, and his employer dismissed him and sued the sureties for the amount in the letter of guarantee.

Held (Lord Young, diss.), that he was not entitled to decree against the defenders to whom he had failed to disclose the circumstances in which the guarantee was desired. *Cameron* v. *French*, 30 Scot. Law Rep. 83.

Lord Young (diss.): I hold that in such circumstances as we have here, the law laid down in Smith v. The Bank of Scotland, 1 Dow. App. 272, applies, viz., that if facts are not communicated to the surety which were known to the person taking the security, and which it was material to the surety should be communicated to him, the surety will not be bound, and that the motive for withholding the information is altogether immaterial.

PROMISSORY NOTES — See Bills and Notes.

RAILWAYS—SEE ALSO CARRIERS—MASTER AND SERVT.—NEGLIGENCE.

RAILWAYS—FENCES — CROSSINGS—GATES—51 V., c. 29, ss. 194-199.

It is the duty of a railway company to see that gates at farm crossings have proper fastenings, and the knowledge of the owner of the farm that the fastenings are insufficient and his failure to notify the company of that fact will not prevent him from recovering damages from the company if his cattle stray from his farm owing to the insufficiency of the gate fastenings, and are killed or injured.

Judgment of the County Court of Elgin reversed. *Dunsford* v. *Michigan Central R.W. Co.*, Ontario Ct. of App. 21 June, 1893.

SALE OF GOOD—SEE ALSO CONTRACTS 1—PARTNERSHIP 2.

1. ARTICLE NOT ACCORDING TO CONTRACT—LATENT DEFECT—TIMEOUS REJECTION.

A sealskin jacket, which was to have been of finest picked skins, showed signs of decay after three and a half months' wear, and the purchaser returned it.

Held, on the evidence, that the jacket should not have so given way, and that the rejection was timeous. *Debenham & Freebody* v. *Cowie*, Sheriff Court, Rep. 9 Scot. Law Rep. 68.

2. MACHINE—WARRANTY.

A contract for the sale of a harvesting machine recited that it was "warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to" the company, etc.

Held, that the warranty was not all embraced in the provision that it was "well made, of good material, and durable with proper care," but the contract warranted the machine to "work well." *McCormick Harvesting Mach. Co.* v. *Brower*, Iowa, 55 N. W. Rep. 537.

3. WARRANTY.

In selling a heating apparatus to defendant, plaintiff guarantied it to "give entire satisfaction in its operation," and agreed that, "should it prove unsatisfactory after a thorough and reasonable trial, we will remove it at our expense."

Held, in an action for the price, that it was error to direct a verdict for plaintiff if it had performed the contract according to specifications to its own satisfaction and that of the jury, as the contract required the apparatus to satisfy defendant. *Adams Radiator & Boiler Works* v. *Schnader*, Penn., 26 Atl. Rep. 746.

4. RESCISSION.

In an action by the receiver of a bank on a note given by defendant in payment of stock issued him, defendant could not set up fraud on the

part of the bank in procuring him to subscribe for such stock, in order to avoid the note, where he failed to elect to rescind the contract until after suit was instituted against him, and after the rights of the bank's creditors to its assets had attached. *Howard* v. *Turner*, Penn. 26 Atl. Rep. 754.

5. LIME JUICE SOLD "SUBJECT TO INSPECTION AND RE-GAUGING"—BUYER ENTITLED TO APPOINT HIS OWN GAUGER—MARKING OF CASKS WITH BUYER'S INITIALS, WHEN AN ACCEPTANCE—CONDITION PRECEDENT.

The defendant agreed to purchase a quantity of lime juice from the plaintiff, one of the conditions being that the casks containing the lime juice were to be subject to inspection and re-gauging. The lime juice was inspected at the defendant's instance by C., who placed the defendant's initials on several casks for the purpose of identifying them. C. had no authority to do anything further. Subsequently the defendant sent R. to the plaintiff's premises to re-gauge the casks selected. The plaintiff interfered and prevented R. from re-gauging the casks and the defendant thereupon declined to take the lime juice.

Held, that, as the re-gauging, which was one of the conditions precedent to the defendant's acceptance of the lime juice, was prevented by the plaintiff, the defendant was not bound.

That the defendant was entitled to have the re-gauging done by his own agent and could not be compelled to accept the work of a person appointed by the plaintiff.

That the marking of the goods with the defendant's initials did not, under the circumstances, constitute an acceptance within the Statute of Frauds. *Hart* v. *Anderson*, Supreme Ct., Nova Scotia, 1893, (Can. L. T.)

SHIPS AND SHIPPING.

1. NEGLIGENCE—WHO LIABLE FOR, IN A PECULIAR CASE—PILOT.

C, chartered a schooner to take on cargo, without guarantying any depth of water, nor agreeing to put a pilot on board to carry her out to sea, nor reserving any control over the vessel. The master of the schooner employed a tug to take her out to sea, and, upon the request of C or his agent, a pilot was put on the tug. The schooner was stranded on a bar, and lost, for want of proper pilotage.

Held, that the pilot was the servant of the tug, and not of C, and that C could not be held liable because the pilot was employed upon his insistence or request, or because the pilot was the captain of a boat in the employ of C. "*The Martin Kalbfleisch*," 1893, 55 Fed. Rep. 336.

2. DEMURRAGE—EXCEPTIONS TO POLITICAL CONSEQUENCES.

Libellant's ship proceeded to a Chilian port for cargo under a charter party, which provided for demurrage at a certain rate, "the act of God, political occurrences, fire,.....excepted." Civil war was progressing in Chili. The port was blockaded by the *de facto* government, and the agent of the charterers was unable to procure cargo because the sellers would not deliver, for fear of being compelled to pay a second export duty in case the government fell.

Held, there being no actual *vis major* encountered by the charterers, to prevent a loading, that they were not within the exceptions of the charter party, and were liable for demurrage. *McLeod* v. 1600 *Tons of Nitrate of Soda*, 1893, 55 Fed. Bep., 528.

SIC UTERE TUO UT ALIENUM NON LÆDAS—See Nuisance.

SOLICITOR TRUSTEE TO WILL—See Trustees 2.

STATUTORY POWERS—See Neg. 9.

STEVEDORE—See Neg. 12.

STREET RAILWAYS — SEE ALSO NEG. 7. 14.

1. ELECTRIC CARS.

Stringing a single wire along a street 20 feet above the surface is not an interference with the rights of the owners of lots fronting on such street. *Paterson Ry. Co.* v. *Grundy*, N. J., 26 Atl. Rep. 788.

2. NON-COMPLIANCE WITH STATUTE—JURY—QUESTIONS UNANSWERED.

The provisions of the Act respecting the Halifax Street Railway requiring the company to keep the roadway level with the rails, between them, and two feet outside, under the supervision of the city engineer, is not complied with merely by virtue of the engineer approving of what has been done, if the roadway is not actually level as required.

It is no objection to a verdict or findings that the jury have left some questions unanswered, if the point of the questions not answered is disposed of by others answered; Weatherbe, J., *dubitante*. *Joyce* v. *Halifax Street Ry. Co.*, Supreme Court of Nova Scotia 1893 (Can, L. T.)

SURETYSHIP — See Principal and Surety—Bills and Notes 2.

TAXATION — See Assessments and Taxes—Constit. Law.

TAXATION, EXEMPTION FROM — See Mun. Corp. 3.

TELEGRAPH COMPANY.

DELAY OF MESSAGE.

A telegraph company which has negligently delayed the transmission of a dispatch by substituting a wrong place of address cannot shield itself from liability because the message was not repeated, as required by the contract with the sender, since the repetition of a message is not a guard against delay. *Western Union Tel. Co.* v. *Lyman*, Tex., 22 S. W. Rep. 657.

TRADE MARKS.

1. INJUNCTION.

A merchant may acquire an exclusive right to the use of packages of the shape, style and dimensions in which he exposes his goods for sale, with the emblems, devices and other distinctive features delineated or impressed upon them, and the name adopted to represent their contents; and a rival merchant will be enjoined from using similar packages, where the resemblance is such that it is calculated to, and does, in fact, deceive the ordinary buyer making his purchases under the ordinary conditions prevailing in the particular traffic, although there is no single point of imitation which could of itself be regarded as adequate ground for equitable relief. *Fischer* v. *Blank*, Ct. of Appeals of N. Y., 1893, 33 N. E. Rep., 1040.

2. REGISTRATION—RECTIFICATION—OLD TRADE-MARK—USER ON PACKING-CASE—PERSON AGGRIEVED—PATENTS, DESIGNS AND TRADE-MARKS ACT 1883 (46 & 47 V,. c. 57) ss. 64, 90.

The words "Yorkshire Relish" were registered as a trade-mark for sauces by P., who claimed to have used them several years before 1875. He brought an action against the B. Company, which sold a sauce called "London Relish," to restrain them from using a label colourably resembling the label used by him for his "Yorkshire Relish," but not complaining of their violating hi registered trade-mark. The B. Company moved to expunge P.'s registered trade-mark "Yorkshire Relish," complaining that it embarrassed them in their trade; and that the words had not been used before 1875 as a trade-mark.

The applicants stated that although they did not now sell "Yorkshire Relish," they might possibly do so if the words were removed from the register. With respect to the user of the trade-mark before 1875, P. produced evidence to shew that he had been in the habit before that date of packing his bottle of sauce in packing-cases on which the words "Yorkshire Relish" were stencilled without any other device; that those words were recognised by the trade and the public as denoting his sauce and no other, and that he had used them as a trade-mark containing the words "Yorkshire Relish," with the device of a willow-pattern plate.

Held, (affirming the decision of Chitty, J.), (1), that the B. Company were persons aggrieved within the meaning of the Patents, Designs and Trade Marks Act 1883, s. 90, although no proceedings had been actually instituted against them for violation of P.'s registered trade-mark; and (2), that the words "Yorkshire Relish" had not been used by P. as a trade-mark before 1875, and ought to be

expunged from the register. *In re Powell's Trade-Mark*, C. A. [1893] 2 Ch. 388.

TRUSTEES.

1. Power of Trustee to Continue Business of Testator.

Where a testator authorizes and empowers the trustee named in his will to continue the business of the testator, and also authorizes him to sell any of his property, real and personal, and with the proceeds of such sale "to make such other investments, real and personal, and commence, conduct and carry on such other business for the benefit of the *cestuis que trustent* hereinafter mentioned as he may deem most advantageous," the trustee has power to sell only for a consideration for the purpose of investment and for the benefit of the trust. *Young* v. *Weed*, Supreme Ct. of Pennsylvania, Thompson, J., (Mitchell, J., dissenting), April 17, 1893, 32 W. N. C., 297, 154 Pa., 316.

2. Solicitor Trustee—Power to Charge for Professional Services and Trouble—Settlement of Accounts between Trustees.

A testator appointed B. and G. his executors and trustees, bequeathed to G. if he should accept the offices of trustee and executor £200, and declared that G. and every future trustee of his will who might be a solicitor, should be entitled to receive out of the estate his usual professional costs and charges for business transacted by him, including business not strictly professional, but which might or would have been performed in person by a trustee not being a solicitor. Considerable sums were charged by G. against the estate for business done by him, including charges for his trouble in matters not strictly professional:

Held, that G., although a legacy was given to him in his capacity of trustee, was entitled under the above clause to charge for his trouble as well as to make professional charges for business done by him as solicitor:

Held, also (reversing the judgment of Wright, J.), that in the absence of special powers in the will, trustees cannot settle the amount payable out of the estate to one of themselves, so as to bind the *cestuis que trust*, and that the residuary legatees were entitled to have G.'s costs and charges investigated. *In re Fish. Bennett* v. *Bennett*, C. A. [1893] 413.

Volenti Non Fit Injuria—See Mast. and Servt. 3.

Vis. Major—See Ships, etc. 2.

Warranty—See Sale of Goods.

WILLS—See also Trustees 1. 2.

1. Bequest to Ecclesiastical Officer—Gift to Pastor of Church Not a Charitable Bequest.

Testator, having bequeathed one-half of the residue of his estate to "the pastor of the St. John's R. C. Church of Altoona, Pa.," died before the statutory period necessary to sustain gifts to charitable uses had elapsed.

Held, in the absence of any evidence, facts or circumstances tending to fasten upon the legatee a trust for religious or charitable uses, the bequest is to be considered as a personal gift or bequest to the person filling the office described; in his own right; and therefore, is not affected by the death of the testator before the expiration of the period necessary to validate a charitable bequest. *Hodnett's Estate, Supreme Court of Pennsylvania* 1893. 26 Atl. Rep., 623; 32 W. N. C., 302; 154 Pa., 485.

2. Revocation—Revival by Codicil—Void Legacies—R. S. O., c. 109, s. 24.

The testator made a will on the 14th May, 1890, disposing of all his estate, giving to certain charities specific proportions of the residue, and naming three persons executors. In January, 1891, he made another will revoking all previous wills and making a number of specific devises and bequests, but leaving a large residue undisposed of. In March, 1891, he executed a codicil in which, after stating that "I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890," he revoked the appointment of one of the named executors "to be one of the executors

of this my will," and in his stead appointed another person "with all the powers and duties . . . in my said will declared." The attestation clause stated that this was signed, &c., by the testator "as a codicil to his last will and testament."

Held, Hagarty, C. J. O., dissenting, affirming the judgment of Robertson, J., that there was shown in this codicil an intention to revive the revoked will within the meaning of s. 24 of the Wills Act, R. S. O. c. 109.

But *held* further, reversing the judgment of Robertson, J., that the will so revived took effect as at the date of the codicil, and that, for the purpose of deciding as to the validity of the charitable bequests, it must be treated as if executed at that date.

Certain of the charitable bequests having therefore been held void, it was further held that those that were good were not increased but that the amount of the void bequests was distributable as in case of intestacy. *Purcell* v. *Bergin*, Ontario Court of Appeal, 21 June, 1863. (Can. L. T.)

WORDS "COMMENCED"—See Action.

WORDS "CONTRACTOR—See Mun. Corp. (Elections). 4.

[*The following cases were received too late for insertion in the alphabetical portion of* THE DIGEST.]

PROMISSORY NOTES — NEGOTIABILITY — NOTE PAYABLE TO A PARTICULAR PERSON— HOLDER IN DUE COURSE — BILLS OF EXCHANGE ACT (CANADA) 53 V., C. 33, SEC. 8, SUB-SEC. 4.

The defendants a few days after the coming into force of the Bills of Exchange Act 1890, gave a promissory note to P. upon a transaction calling for negotiable paper, but which was made by defendants and accepted by P., through deception on their part, in a form which under the old law would have been non-negotiable, but which under the new act sub-sec. 4, of sec. 8, is negotiable.

P. upon discovering its negotiability discounted it with the plaintiffs who were informed at the time by defendants that it was not intended as negotiable.

Held (Jetté, J.), that P. having a right to the note without any restriction as to its negotiability, and plaintiffs having become holders in due course, notice to them by the defendants as to its non-negotiability could not affect P.'s title to it or restrain its negotiability. *Quebec Bank* v. *Ward*, Superior Ct,, Montreal, June 14, 1892.

The facts of this case, which are rather peculiar, are shortly as follows:

Some time before the giving of the note in question the payee John Pinder had sold to defendants, one hundred puncheons of molasses which were to be settled for by a four months note. Defendants delayed giving this note for a considerable time and Pender was compelled to threaten them with legal proceedings to obtain it. A writ had actually been issued on behalf of Pinder to compel the performance of this undertaking, when defendants at length handed him the promissory note in question. Pinder took the note without examining it and deposited it in his safe for a few days. Subsequently he discovered that the note was made in a form which was then unusual, that is to say, it was not payable to his order but simply to "John Pinder & Co." Thinking that this interfered with the negotiability of the note, he expostulated with them when he met them. The defendants admit that they had twenty-five forms specially printed for the purpose of making out the note in question in this particular way so that Pinder might not be able to negotiate it and that they might be able to set it off against another claim which they had against Pinder arising out of different transactions, which claim was contested by Pinder. Pinder afterwards took the note to the manager of the Quebec Bank and asked him to advance money on it. The manager's attention was drawn by Pinder to the peculiar form of the note; but, after taking legal advice, the manager of the bank concluded that the note was perfectly

negotiable under the new Bills of Exchange Act and decided to advance $2,000 upon it. He first questioned Pinder as to the transaction for which the note was obtained and, on ascertaining that it was for a *bona fide* sale of goods to defendants, he had no further hesitation in advancing the money. The advance was made by discounting Pinder's own note for $2,000, and taking defendants' note as collateral security therefor, a letter of hypothécation being attached to the documents. It should be added that shortly before the making of this advance one of the defendants' firm had gone to the Quebec Bank, knowing it to be the bank with which Pinder dealt, and informed the cashier that they had given Pinder the note in this particular form with the intention of preventing him from negotiating it. Upon these facts it was held that the bank could recover.

E. Lafleur, for the plaintiffs.

Maclaren, Leet, Smith & Smith, for the defendants.

BILLS OF EXCHANGE — MINING AGENTS — SIGNATURE FOLLOWED BY LETTERS "MG. AGTS." — EFFECT OF — BILLS OF EXCHANGE ACT. 1890 (53 V., C. 33, S. 26).

L. R. & Co., a Montreal firm acting as agents of a London Phosphate Company, drew upon the company, in London, two bills of exchange payable to the order of B. to whom they were indebted, and following their signature were the letters "Mg. Agts." The bills were accepted and B. endorsed them for value to plaintiff. They were not paid at maturity.

In an action by plaintiff upon them, against L. a member of the firm, which had since been dissolved, L. pleaded that the bills were drawn by the firm in their capacity of *managing agents*, the letters "Mg. Agts." signifying *managing agents* and not *mining agents*.

Held, (1) that under sec. 26 of the Bills of Exchange Act 1890 the firm, in order to escape personal liability as drawers, were bound to sign for and in the name of principals disclosed in the instrument, and the mere addition to their signature of words or letters describing them as agents, did not exempt them from personal liability.

(2) The fact that the bills were drawn on the London Phosphate Company raises no presumption of law that they were their principals. The evidence showed that defendants were agents of many other companies and the fact of merely drawing, as agents, upon one of the numerous companies they represent, is no indication that they so drew as agents of the company drawee, rather than as agents of any of the other companies, or as agents of anybody else. *Bank of Ottawa* v. *Lomer*, (Taschereau, J., Superior Court of Montreal, May 10, 1893).

N. A. Belcourt, for the plaintiffs.

E. Lafleur, for the defendants.

TRADE NAME — PROPERTY IN — RIGHT OF WIDOW AS SUCCESSOR TO HER HUSBAND.

The trade name of an establishment is identical with it and descends to the heirs with the estate itself.

A widow who was common as to property with her husband and is tutrix to her minor child can carry on her husband's business under the same name as formerly, even where she marries again, and her second husband participates in the business.

And this right exists against a brother of the deceased who is engaged in a similar business in the same street and in the same name with the addition of "Junior." *Varnier* v. *Piton*, Court of Appeal, Paris, March 1890. Dalloz 1891—2—30.

TRADE NAME — PROPERTY IN — USURPATION — DISTANT TOWN — BRANCH.

The proprietor of a business cannot have such an absolute property in its trade name as to prevent any other person in any locality whatsoever from using the same name. The property in it is only relative and is coextensive with the interests of its owner.

Therefore a merchant in the Provinces has a right to adopt as his trade mark and as a name for his establishment the title "à la Belle Jardinière" in a town where a Parisian establishment of similar title has no branch, but symply customers, provided that

he adds his own name and address in conspicious characters.

But when this merchant sets up a shop on the other side of the street bearing the sign " A la Belle Jardinière, Branch " in large letters and in very small ones. " Entrance to the shop is across the street," as well as distributes " flyers " and advertises in the papers in such a manner as to lead to the belief that they relate to a branch of the Paris house, he is guilty of unfair competition and can be restrained from further doing so in such measure as the judge may think proper. *Bessand, Blanchard, Rochard & Cie.* v. *Godard*, Court of Appeal, Orleans, 12 Feb. 1891. Dalloz 1891—2- -371.

RIGHTS OF AUTHORS — NOVEL — ADAPTATION TO THEATRICAL PLAY— AGREEMENT.

The plaintiff entered into an agreement with defendants, husband and wife, whereby he was to compile by their permission a stage play from a novel, the manuscript of which had descended to defendant's wife, the understanding being that the adaptation should receive the approval of defendants and be subject to their amendments and corrections. The parties to this understanding could not agree as to the corrections, and the play was defective in style.

Held, that the defendants could restrain the plaintiff from presenting the play where the objections of the defendant's wife were based upon her regard for the memory of her deceased relative, and where it was not proved that her intention was to enable other parties to make a stage adaptation of the novel in question.

Held, also, that the plaintiff could present his play to a private audience, but not to one that lacked that character; for instance where strangers were admitted, and people not acquainted with each other, or representatives of the press; in short where it was no longer for domestic amusement but as a regular trial of the play, of a quasi-public nature. *Taylor* v. *Commanville*, Court of Appeal, Paris, 4 Nov. 1890. Dalloz 1891—2—303.

CONTRACTS IN RESTRAINT OF TRADE.

EPITOME OF THE COMMON-LAW DOCTRINE.

[From the opinion of Lord Justice Bowen in the case of Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt [1893] 1 Ch. 77. Law Times Reports Aug. 26, 1893 (see 1. M. L. D. & R. 455 for head note to this case).]

There was an early period in English history when the courts set their face apparently against all restrictions upon trade alike, whether limited or unlimited. This period has long since passed away, but it has been, in my opinion, the doctrine of the courts of common law ever since the reign of Queen Elizabeth that contracts in general restraint of trade are void as being contrary to public policy. Contracts in general restraint of trade may be defined as those by which a person restrains himself from all exercise of his trade in any part of England. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade. It is necessary to insist on this distinction, which is imbedded in the reports and text-writers of the last three centuries; since it is through not preserving the exact meaning of

the term "in general restraint of trade" that some confusion has apparently at times arisen. The common law is as precise as it can be on the point. Contracts unlimited in area, although they may be limited in time, are, as a rule, held bad on the ground of public policy. The broad principle is to be found as far back as the year 1614, in Rogers v. Parry, 11 Jac. 1; Bulstrode, 136, and in Broad v. Jolyfe (1620), Cro. Jac. 596. It is reaffirmed explicitly by Parker, C. J., in the leading case of Mitchel v. Reynolds (1711), *ubi supra*, where "general restraint of trade" is explained and defined. The doctrine is assumed to be unquestioned in Chesman v. Nainby (1726), 2 Ld. Raymond, 1456 (4th ed.), by Bayley, and in Clerke v. Comer (1726), Cas. temp. Hardwicke, 53. "Any deed," says Best, C. J., in Homer v. Ashford (1825), 3 Bing. 322, 326, "by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom would be void." A note to Hunlocke v. Blacklowe, 2 Wms. Saunders, 460, sufficiently states the reason why a convenant does not cease to be in general restraint of trade merely because the time is limited. "The principle," says the learned editor, "on which restraints of trade partial in point of space have been supported, has not been applied to restraints general in point of space, but partial in point of time; for that which the law does not allow is not to be tolerated because it is to last for a short time only." A similar explanation is given by Parke, B., in Ward v. Byrne (1839), *ubi supra*, where a covenant indefinite as to the area of restraint of trade, but limited to nine months after the end of the covenantor's employment, was held void in law. He said (5 M. & W. 562: "When a general restriction limited only as to time is imposed, the public are altogether losers for that time of the services of the individual, and do not derive any benefit whatever in return: and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a total restriction on trade limited only as to time." An ambiguous expression as to limits in respect of time in the case of the Gunmakers' Company v. Fell, Willes, 384, 383, is explained by Parke, B., and is due probably to an oversight. The judgment of Rolfe, B., is on the same lines as that of Parke, B. "Partial restrictions" he says, "have always left things in this state, that, when allowed, a portion of the public is not injured at all; that portion of the public to which the restriction does not extend remains exactly as it did before the restriction took place. But in this case"—viz., in a case of general restraint for a time certain—"the whole of the public is restrained during the period in question." Ward v. Byrne was followed, in 1840, by Hinde v. Gray, 1 Scott N. R. 123. In Proctor v. Sargent (1840), Tindal, C. J., said (2 Man. & G. 33): "Where we once hold a restriction to be unreasonable in point of space, shortness of the time for which it is imposed will not make it good." The truth is that the classification which seems to distinguish restraints which are limited in point of space from restraints which are limited in respect of time is a cross division. The antithesis between time and space looks so plausible that some text-books, and more than one judge in the last few years, have lapsed into the mistake of supposing that it corresponds in any way to the line of cleavage upon which general restraints and partial restraints are divided.

"In respect of space," says Lord Campbell, in Tallis v. Tallis, 1 E. & B. 411 (1853), "there must be some limit." Since the reign of Queen Elizabeth, the common-law authorities are really all one way. Scores of cases have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the Judgments and opinions of an uncounted number of unanimous common-law judges. Distinguished from these general restraints which the English law discountenances, are partial or limited restraints, or, as they are sometimes termed, particular restraints, which, upon certain conditions, the English law permits and enforces. An agreement in " particular " or " partial " restraint of trade may be defined as one in which the area of restriction is not absolute, but in which the covenantor retains for himself the right still to carry on his trade either in some place or for the benefit of some persons, or in some limited or prescribed manner. Particular restraints, according to the language employed in Mitchel v. Reynolds, *ubi supra*, are those in which there is some limitation in respect of places or persons short of an absolute and total restriction. But there is also a third kind of limitation which the law will sanction under reasonable conditions—namely, a limitation in respect of the mode or manner in which a trade is to be carried on. The above are the three kinds of partial restraint recognized by the law. The English rule, which strikes indifferently at all general restraints in trade, makes the validity of a partial restraint depend on the circumstances of each case. A partial restraint will be binding in law if made in good consideration and if it is reasonable. Collins v. Locke, 41 L. T. Rep. (N. S.) 292 ; 4 App. Cas. 687. In the history of the application to partial restraints of this test, the courts of common law from time to time have been driven by good sense, and by altered social circumstances, to make gradual advances in the direction of toleration and indulgence. Judges as far back possibly as the reign of Henry V, and certainly during the reign of Queen Elizabeth, appear, as has been already stated, to have considered that even partial restraints of trade were uniformly bad in law. But as trade progressed, it was necessarily discovered that a doctrine so rigid must be injurious to the State itself. In the same way and at about the same date by-laws which were in mere regulation of trade came to be distinguished by the courts from those which were in unlimited restraint of it. Nevertheless, as late as the year 1596, in Colgate v. Bacheler, Cro. Eliz. 872, the Court held that it was against law to prohibit or restrain "any to use a lawful trade at any time or at any place." This severe view is recorded in a *dictum* of Croke, J. (1613), in Rogers v. Parry, *ubi supra*, though it was repudiated by Coke, C. J., and the remainder of the court. One reason for the adoption of a more elastic doctrine appears from a judgment delivered in Broad v. Jolyfe (1621), Cro. Jac. 596. In London and other large towns it had become usual already for traders to let their shops and wares to their servants when they were out of their apprenticeship; and for the servants to covenant that they would not use that trade in such a shop or in such a street. The courts, yielding to the progress of industry and commerce, finally decided that a man might restrain himself voluntarily and upon valuable consideration from using his trade in a particular place. The *onus* however at this time still lay on the covenantee to show that the

covenant on which he was insisting had been made for good consideration, and that it was reasonable. The law is so expounded in Mitchel v. Reynolds (1711). "A particular restraint is not good without just reason and consideration." In 1726, Chesman v. Nainby, *ubi supra*, the House of Lords affirmed the doctrine and the qualification, and their decision was followed in Clerke v. Comer (1736), *ubi supra*; Davis v. Mason (1793), 5 T. R. 118; and Bunn v. Guy (1803), 4 East, 190. The reason for favoring such partial restraints is enforced also in Homer v. Ashford (1825). "It may often happen," says Best, C. J. (3 Bing. 326), "that individual interest and general convenience render engagements not to carry on trade or to act in a profession in a particular place, proper." Down to as recent a period as Young v. Timmins (1831), 1 Tyrr. 226, it was still however considered to be for the person propounding a contract in partial restraint of trade to satisfy the Court of the adequacy of the consideration. It was only in 1837, in Hitchcock v. Coker, *ubi supra*, that a fresh step forward was taken in reference to partial restraints of trade. The Exchequer Chamber there for the first time decided that in case of partial restraint the examination of the adequacy of the consideration was not properly for the Court, but for the parties, although the burden remained as before upon the covenantee to show that there was some good and valuable consideration. The cases of Wallis v. Day (1827), *ubi supra*; Leighton v. Wales (1838), 3 M. & W. 545, and Archer v. Marsh (1837), 6 A. & E. 959, were determined on the amended principle. By this date the idea was fully recognized that all partial restraints of trade which satisfied the conditions of the law as to reasonableness and good consideration were not an injury but a benefit to the public. Ward v. Byrne (1839), *ubi supra*; Proctor v. Sargent (1840), *ubi supra*; Rannie v. Irvine, 7 M. & G. 969 (1844), per Maule, J.; Mallan v. May (1843), *ubi supra*. A further progress in the views with which the law regarded partial restraints was made in Tallis v. Tallis (1853), *ubi supra*. It was then at last resolved that the *onus* lay upon the person who attacked a covenant in partial restraint of trade to displace the consideration, a change in the position of the parties which is illustrated by the language of Erle, C. J., in Mumford v. Gething (1859), 7 C. B. (N. S.) 305, 319. "Contracts in partial restraint of trade are beneficial to the public as well as to the immediate parties." See also Harms v. Parsons, *ubi supra*. Cases where the contract still leaves to the covenantor a right to trade with particular persons fall, as has been pointed out, under the same head as those where the restraint is partial in respect of space. In both instances alike the restriction upon the trade is not general but limited in area, and such contracts, if reasonable and for good consideration, will be supported by the law. The trader, it is true, is prohibited in such cases from serving a portion of the public, but trade in another quarter is still left open to him. "Where one party," says Lord Lyndhurst in Young v. Timmins, 1 Turr 236, "agress to employ another in the way of his trade, and the other undertakes to work exclusively for him, that is a particular restraint of trade which may be supported by proof of adequate consideration." The covenant in Wallis v. Day, *ubi supra*, was of this description, and was pronounced good by the Court, although its validity was not in fact a necessary condition to the plaintiff's success

in that description of action. "It cannot be said," according to Lord Abinger (2 M. & W. 281), "to be a contract in absolute restraint of trade when he (the contractor) "contracts to serve another for his life in the same trade." Instances where one trader covenants not to supply the customers of another—Rannie v. Irvine, *ubi supra*, fall within this category. "It is to be observed," says Tindal, C. J. (7 M. & G. 976), "that this is not a general restraint of trade, but only restricts the defendant from trading with a very limited number of persons." So also Pilkington v. Scott, *ubi supra*. Lastly, a covenant ceases to be referable to the class of general restraints of trade which only regulates or confines the manner in which the trade is to be worked. Such contracts are contracts in partial restraint of trade only, and are recognized accordingly as valid if reasonable and for good consideration. (See Collins v. Locke, *ubi supra*.) Jones v. Lees, *ubi supra*, is an illustration of this branch of partial restraints. The plaintiff, who was the owner of a patent, had sold to the defendant a license to use a patented invention, the defendant covenanting in turn that he would not make any machine in future without applying the invention to what he so made. If the defendant covenanted, on the one hand, not to sell the machine without the patented invention, he obtained the privilege, on the other hand, of selling the same machine with that improvement to all England. This, as is pointed out in 2 Wms. Saunders, 156c (note), is a restraint which affects the mode of exercising the trade, and which is therefore partial. The only real question that remained, on such a view of that particular bargain, was whether it was a reasonable one, as to which point the remark that the privilege was commensurate with the restraint appears conclusive. The case is similar to those in which rules regulating trade have been distinguished from rules made in restraint of it. Freemantle v. Silk Throwsters' Company (1668), 1 Lev. 229; Wannel v. Chamberlain of London (1725), 1 Str. 675; Bosworth v. Hearne (1737), Andr. 91; Harrison v. Godman (1756), 1 Burr. 12: Rex v. Harrison (1762), 3 id. 1328. The inquiry as to the reasonableness of the restraint in any particular instance is however one that appertains only to the case of partial restraints. It is no objection necessarily to such partial restraints that they are sometimes to continue during the life of the covenantor, who may possibly survive the covenantee, for such an arrangement enables the good-will of the busines to become the object of purchase and sale. Atkyns v. Kinnier, 4 Exch. 782: Pemberton v. Vaughan, 10 Q. B. 87, 89. Such is a *résumé* of the history of the common-law doctrine as to restraint of trade. The first cloud upon the clear sky of the common-law narrative comes in the equity decision of Lord Langdale in Whittaker v. Howe (1841), *ubi supra*—a decision all the more inexplicable since it was given within three or four years of Hitchcock v. Coker, Wallis v. Day, Leighton v. Wales, Archer v. Marsh, Ward v. Byrne, Hinde v. Gray, and Procter v. Sargent, from a careful study of which cases alone the broad doctrine of the law as I have above described it may be gathered with perfect ease, The case of Whittaker v. Howe was one in which a solicitor, for valuable consideration, agreed not to practice as a solicitor in any part of Great Britain for twenty years. Everything appears clear in the case except the judgment of the Court. The covenant was not a covenant in

partial, but in general restraint of trade; and, the restraint of trade being a general one, the Court had nothing to do with the reasonableness of the transaction. Lord Langdale nevertheless begins by stating that the question was whether the restraint intended to be imposed on the defendant was reasonable; and he cites as a guide for himself the words of Tindal, C. J., in Horner v. Graves, 7 Bing 743. Yet Horner v. Graves is an instance of partial and not general restraint of trade, and Tindal, C. J., in giving judgment explicitly so states. Lord Langdale next refers in support of his conclusion to Davis v. Mason, 5 T. R. 118, which, again, is a case not of unlimited but of limited restraint. Lord Langdale thus appears to miss the whole point of common-law classification, and treats the matter before him under the wrong category. It is to be observed however that Whittaker v. Howe was merely a decision upon an application for an interlocutory injunction and that Lord Langdale himself pears to have reserved the right to consider the matter at the hearing. "In the progress of the cause," he says (3 Beav, 395), "it may become necessary to consider further the points which have been raised, but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received the consideration is at least so far doubtful that he ought not to be permitted to take the law into his own hands." As Patterson, J., points out in Nicholls v. Stretton, 10 Q. B. 353, the decision in Whittaker v, Howe cannot be reconciled with Ward v. Byrne, or indeed, with the whole stream of common-law authority. In 1869 the case of Leather Cloth Company v. Lorsont, *ubi supra*, occurred before James V. C. To the soundness of the actual decision in that case of the illustrious equity lawyer who tried it I have no objection to urge; but his language seems calculated in several passages to confuse and not to throw light upon our conceptions of the established common-law doctrine. The vice-chancellor's expressions are at times colored by the same kind of misapprehension of the common law as that which pervades the judgment of Lord Langdale in Whittaker v Howe The defendant in Leather Cloth Com- v. Lorsont had sold to the plaintiff company certain letters-patent for the manufacture of American leather cloth together with all the processes of manufacture. He covenanted in return not to carry on in any part of Europe the manufacture which was the subject of the patent, and not to communicate to any person or persons the means or processes of such manufacture so as in any way to interfere with the exclusive enjoyment by the plaintiff company of the benefits agreed to be purchased. This was nothing but the sale of a secret process with a corresponding covenant not to use it or divulge it; and the sale, moreover of a process which could not be used without being divulged. Sales of secret processes are not within the principle or the mischief of restraints of trade, at all. By the very transaction in such cases the public gains on the one side what is lost on the other; and unless such a bargain was treated as outside the doctrine of general restraints of trade, there could be no sale at all of secret processes of manufacture. In order to justify such an obvious exception it was not necessary to deny the existence of the common-law rule against general restraint of trade. Yet the vice-chancellor observes that a man may enter into any stipulation, however restrictive, provided that the restriction, in the judgment of the court, is not unreasonable,

having regard to the subject-matter of the contract. In so saying he apparently ignores the distinction that had been drawn for more than two hundred and fifty years between general and partial restraints of trade. The text he suggests as the true one in all cases entirely leaves out of sight the interests of the public, on the consideration of which interests the rule against general restraint of trade is built. In Allsopp, v. Wheatcroft (1872), *ubi supra*, Wickens, V. C., restated and reaffirmed the common-law doctrine as to general restraints of trade, and explained the decision in Leather Cloth Company v. Lorsont, as an exception due to the character of the subject-matter. Some years later, in Rousillon v. Roussillon, *ubi supra*, Fry, L. J. (then Fry, J.), in one of the many striking and brillant judgments for which the profession will long admire him, proclaimed his disbelief in the existence of the rule of the common law, and laid down the proposition that there is no absolute doctrine that a covenant in restraint of trade is void merely because it is unlimited in regard to space. The question in each case, he held, was whether the restraint extended further than was necessary for the reasonable protection of the covenantee, and that if it did not do so, the performance of the covenant would be enforced even though the restriction was unlimited as to space. This broad negation of the rule appears to me to destroy the distinction, illustrated at length in Mitchel v. Reynolds, *ubi supra*, which always has subsisted between general and partial restraints of trade. In destroying it Fry, L. J., appears to me to overlook the principle which underlies the entire doctrine of the unlawfulness of general restraints of trade, that the interests of the contracting parties are not necessarily the the same as the interests of the commonwealth. Rules which rest upon the foundation of public policy not being rules which belong to the fixed or customary law, are capable on proper occasion of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce. But it is one thing to say that an occasion has arisen, upon which, to adhere to the letter of the rule, would be to neglect its spirit, and another to deny that the rule still exists. The *dicta* which Fry, L. J., cites from Hitchcock v. Coker, *ubi supra*, from Tallis v. Tallis, *ubi supra*, and from Mallan v. May, *ubi supra*, are all *dicta* in cases of partial restraint, where the reasonableness of the particular contract necessarily came under consideration. The necessary protection of the individual may in such cases be the proper measure of the reasonableness of the bargain. When Fry, L. J., passes on (42 L. T. Rep. [N. S.] 682; 14 Ch. Div. 363) to examine the question of the existence of the common-law rule, he assumes, as it appears to me, without sufficient justification, that complete protection of the individual is the only reason which ought to lie at the root of the doctrine. But the reasonableness of the legal principle which forbids general restraint altogether is not the same thing as the reasonableness (as between the parties) of the bargain in any particular case. With regard to the argument that the rule, if it existed, would be an artificial one, and would therefore admit of no exceptions, the judgments of the judges and of the House of Lords in the case of Egerton v. Brownlow, 4 H. of L. Cas 1, illustrate, I submit, the distinction between a fixed rule of customary law and a rule based on

reason and policy. The latter may admit of exceptions, although the former may not. Nor does the lord justice, to my mind, sufficiently allow for the weight of a multitude of decided cases when he states that there are (42 L. T. Rep. [N. S.] 684; 14 Ch. Div. 367), "undoubtedly cases in which it has been said that the restraint must not be universal," and illustrates this by reference to Ward v. Byrne, *ubi supra*, Hinde v. Gray, *ubi supra*, and Allsopp v. Wheat-croft, *ubi supra*, The entire history of the subject of restraint of trade proceeds surely on the basis of the existence of the rule in question. With Whittaker v. Howe, *ubi supra*, I have already dealt. Jones v. Lees, *ubi supra*, was, as I have pointed out, a case of partial restraint in respect of the mode of manufacture. "I consider," says Fry, L. J., in conclusion (42 L. T. Rep. [N. S.] 684; 14 Ch. Div. 369), "that the cases in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable." Is it not a truer view that the courts have never even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area? In Davies v. Davies, *ubi supra*, opposite opinions on the subject of the common-law rule were expressed both by Cotton, L. J., and by Fry, L. J., but the matter did not call for decision. The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not by itself convert a general restraint into a partial one. "That which the law does not allow is not to be tolerated because it is to last for a short time only" 2 Wms. Saund. (6th ed.), 156b, *n.* In considering however the reasonableness of a partial restraint the time for which it is to be imposed may be a material element to consider. Such, I think, is a *resumé* of the common-law doctrine up to this day. * * * Exceptions to rules which are not "artificial," but based on reason and public policy, ought themselves to be instances in which to apply the letter of the rule would be to violate its true meaning, and in which the very reason on which the rule is based militates in favor of the exception. One instance of an exception to the rule which discourages general restraints of trade is admitted to exist in respect of the assignment of trade secrets, and it may here be useful again to allude to the ground upon which such dispositions of property are excluded from the operation of the ordinary doctrine. In the case of the assignment of a trade secret there arises a conflict between two ideas, both of which are developments in opposite directions of the larger principle that English industry and trade ought to be left free. The first of the two seemingly antagonistic corollaries to which this larger principle leads is the maxim that no one should be allowed to contract himself out of his liberty to trade. The second, which appears to conflict with the first, is that every man should be at liberty to sell the good-will of his trade on any terms that are neither oppressive to himself nor injurious to the State.

These two antinomies are well contrasted by James, V. C., in Leather Cloth Company v. Lorsont, *ubi supra*. The history, indeed, of the entire doctrine as to restraint in trade is itself nothing but a narrative of the continual efforts of the English law, amidst all the changing conditions of English industry and commerce, to adjust and harmonize these two opposite points of view. It has been in the process of such gradual adjustment that the more indulgent law as to partial restraint of trade has been evolved. The laxer rule as to partial restraint is thus itself an exception, the definition of which again expanded from time to time as society required it. The law as to trade secrets, like the law of partial restraint, is an exception too. Before the manufacturer or trader sells his trade secret he is the sole possessor of it. If he is to sell it to advantage, he must of necessity be able to undertake not to retain the right to use it or to communicate it to others. A covenant that he will not destroy the value of that which he himself is handing over causes in such a case no diminution in the supply of commodities to the world, but tends, in nine cases out of ten, to stimulate it. There is no tendency in such a transaction to create a monopoly, for the monopoly existed *ex hypothesi* already. Trade cannot suffer by the substitution of one possessor of a secret for another.