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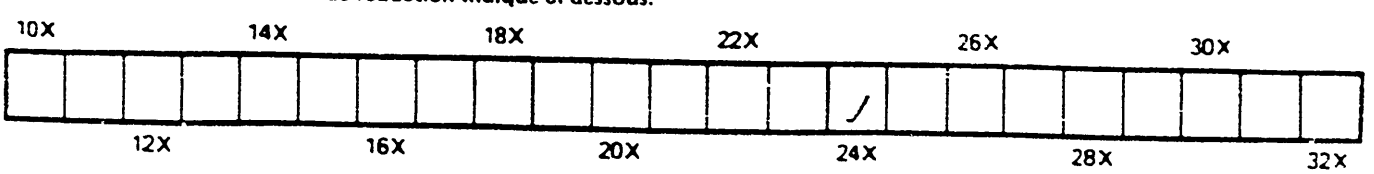

MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. FEBRUARY, 1892. No. 2.

ABUTTING OWNERS—See Mun. Corp. 3.

ACCEPTANCE—See Sale 4.

ACCOUNTING—See Partnership 2.

ACCOUNT STATED—COMPOUND INTEREST—AGREEMENT.

Judgment was given in favour of the plaintiffs in an action on an account stated. On appeal it was shown that one of the items making up the account stated was for compound interest, and that, deducting this item, the amount due the plaintiffs was below the jurisdiction of the Court. No agreement to pay compound interest was proved, nor could such an agreement be inferred from the previous course of dealings. The appeal was allowed with costs. *Hart* v. *Condon*, Supreme Court Nova Scotia.

ACTION, FORM OF—See Carriers 4.

ACTION ON PROMISSORY NOTES—DEFENCE OF AGREEMENT TO INSURE AND LOSS OPERATING AS DISCHARGE OF MAKERS—COUNTER-CLAIM NOT NECESSARY—VERBAL AGREEMENT TO INSURE VALID, IN ABSENCE OF STATUTE — PLEADING—EVIDENCE — COSTS—R. S. c. 104, ss. 2, 4, 5, 7, 12.

The plaintiff agreed to advance the defendants a sum of money to pay for fitting out their vessel, the "May Bent," on the defendants giving four promissory notes for the amount with interest at seven per cent., payable in three, six, nine and twelve months, notes to be secured by a mortgage of the interest of one of the defendants in the vessel, and an insurance policy on the vessel for the amount advanced. At or about the time the mortgage was given, the plaintiff made a verbal proposal to become his own insurer on being paid the same premium as would be paid an insurance company. This was assented to and the plaintiff was paid the premium he required. The vessel was lost at sea shortly after the first note was paid, and the plaintiff having sued on the remaining notes:

Held, reversing the decision of the trial Judge with costs, that the defendants were not liable, the agreement to insure having operated as payment. That, in the absence of statutory enactment, neither a contract of insurance nor a contract for insurance need be in writing. That the subject matter of insurance being defined, the amount of indemnity and duration of the risk definitely fixed, and the premium or consideration determined, the terms of the agreement were sufficiently explicit. That it was not necessary for the defendants to counter-claim to avail themselves of the agreement to insure as a defence to the action, the matters alleged constituting an equitable right which a court of equity would have the right to enforce, and to which the Court must give effect under the provisions of the Judicature Act, R. S. c. 104, ss. 2, 4, 5, 7 and 12. That parol evidence was admissible notwithstanding part of the contract was in writing. *McKay* v. *O'Neil*, Supreme Court, Nova Scotia.

ADMIRALTY—COLLISION—VESSEL AT ANCHOR—INEVITABLE ACCIDENT — STEAM STEERING GEAR —

LATENT DEFECT—REASONABLE CARE AND SKILL — BURDEN OF PROOF — PRACTICE—EVIDENCE OF NEGLIGENCE.

In an action of damage by collision, the plaintiffs, in their statement of claim, in substance alleged that their vessel was at anchor when the defendants' steamer ran into her in broad daylight.—The defendants, in their pleading, made no charge of negligence against the plaintiffs, but alleged that the collision was caused by the steering gear of their vessel not acting in consequence of some latent defect or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on their part, and that the collision and damage were caused by inevitable accident:

Held, that the onus to disprove negligence lay on the defendants, and, therefore, that they must begin.—At the hearing, the defendants proved that the steam steering gear used was good of its kind, that it had been tried before the vessel left her anchorage to proceed on her voyage, that it was found to be in good order, that it had not previously failed to act, and that the cause of the defect in the machine, or obstruction in the working, could not be discovered by competent persons:

Held, that the defendants were not liable to the plaintiffs for the damages occasioned by the collision, as they had satisfied the onus of proof cast upon them to disprove negligence, and were not bound to go further and shew what was the cause of the defect or obstruction. *The Merchant Prince*, [1892,] P. 9.

ADVERSE POSSESSION—See Stat. of Limitations.

AGENT—See Bills and Notes 11.—Real Estate Agent.

ALIBI—See Crim. Law 6.

ANIMALS — VICIOUS DOGS — *Scienter*.

Held, that one, who in a city enters the back yard of another through an open gate on lawful business and is bitten by ferocious dogs running loose in the yard, of which he has no notice, has a right of action against the owner if the latter knew that the dogs were accustomed to bite, and nevertheless permitted them to run loose in such yard with the gate of the same standing open. *Conway v. Grant*, Supreme Court of Georgia.

Notes.

As general authorities on the subject, see *Brock* v. *Copeland*, 1 Esp. 203; *Sarch* v. *Blackburn* 4 Car. & P. 297; *Curtis* v. *Mills*, 5 Car. & P. 489; *Loomis* v. *Terry*, 17 Wend 496; *Pierret* v. *Moller*, 3 E. D. Smith, 574; *Kelly* v. *Tilton*, 42 N. Y. 263; *Sherfey* v. *Bartley*, 4 Sneed, 58; *Woolf* v. *Chalker*, 31 Conn. 121; *Laverone* v. *Mangiante*, 41 Cal. 138; notes to *Knowles* v. *Mulder*, (Mich.) 41 N. W. Rep. 896; Cooley, Torts, *345; Bish. Non-Cont. Law, 1235 *et seq.*; 1 Thomp. Neg. p. 220, § 34; *Muller* v. *McKesson*, 73 N. Y. 195; *Rider* v. *White*, 65 N. Y. 54.

APPEAL—SEE ALSO JURISDICTION—SOLICITOR.

1. RIGHT OF

Held, that, if on an action brought against a municipal corporation, for the purpose of quashing a by-law of such corporation, judgment be rendered in favour of defendant, by the Court of Queen's Bench (Appeal side), and since the rendering of such judgment, and while the plaintiff is still within the delays to appeal to the Supreme Court, the by-law is repealed: the right of appeal is taken away by the repeal of the by-law, only a question of costs remaining. *Martineau v. Ladouceur*, Supreme Court of Can. Nov. 11. 1891. 21 Rev. Leg. 272.

2. APPEAL AS TO COSTS ONLY — SUPREME AND EXCHEQUER COURTS ACT. s. 24.

After the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:

Held, that the only matter in dispute between the parties being a mere question of costs, the appeal should be dismissed: Supreme and Exchequer Courts Act. s. 24. Appeal dismissed with costs. *Moir* v. *Village of Hunting-*

don, Supreme Court of Canada, Nov. 11 1891.

3. QUESTIONS OF FACT—INTERFERENCE WITH DECISION OF TRIAL JUDGE.

In an action for payment for services alleged to have been performed by H. on a retainer by B. to procure a subsidy from Parliament and bonuses from the municipalities of Sarnia and Sombra in aid of a railway projected by B., the giving of which retainer B. denied :—

Held, that the question for decision being entirely one of fact, the decision of the trial Judge, who saw and heard the witnesses, in favour of H., confirmed as it was by the Court of Appeal, should not be interfered with by the Supreme Court. *Hawkins* v. *Bickford*, Supreme Court of Canada, June 22, 1891.

APPEAL BOND—See Principal & Surety.

APPRENTICESHIP—See Infancy.

ARCHITECT — SUBMISSION OF PLANS—CONTRACT—DAMAGES.

The plaintiff, an architect, in response to a public advertisement, offered plans in competition for a public building about to be erected by the defendant, on being assured by the president of defendant's board that all the plans sent in would be submitted to disinterested experts before a choice was made. The plans were not submitted to experts, and those finally adopted were submitted by an architect who was not a competitor within the terms of the public advertisement.

Held, that the plaintiff was not entitled to damages, it being evident that the defendant was not bound to adopt the plans which might be recommended by the experts, and no partiality or bad faith in the selection being proved. *Walbank & Protestant Hospital for the Insane*, Q. B. (In Appeal) Mont. Nov. 26, 1891, M. L. R., 7. Q. B. 166.

ARSON—See Crim. Procedure 8.

ASSAULT & CARNAL KNOWLEDGE—See Crim. Law 8, 9.

ASSAULT—See Crim. Procedure 2.

BANKRUPTCY—NEW PROMISE.

Defendant, after a discharge in bankruptcy, wrote to plaintiff, saying, "When I come to B. I will call and see you. I mean right. I will also pay something on account;" and again, "I shall pay you something as soon as possible." After writing the letters, and before suit, defendant was in B., and had the ability to pay the account.

Held, that the letters did not constitute a new promise to avoid the effect of the discharge. *Bigelow* v. *Norris*, S. C. Mass., Feb. 27, 1885.

Notes.

1. An acknowledgment of the existence of the debt is not enough to prevent a defendant from relying on his discharge. *Pratt* v. *Russell*, 7 Cush. 462, 464.

2. Neither is a part payment on account. *Institution* v. *Littlefield*, and *Merriam* v. *Bayley*, 1 Cush. 77.

3. The words "on account" simply admit the existence of the original debt unsatisfied, and apply the payment to it. They do not in terms waive any defence, and the implication of a new promise is excluded by the promise which is expressed.

4. The words "I mean right" neither amount to a sufficient promise of themselves, nor enlarge the effect of the following words. *Society* v. *Winkley*, 7 Gray, 460; *Allen* v. *Ferguson*, 18 Wall. 1.

BANKS & BANKING.

1. DEPOSITS.

A bank which receives from a depositor a check drawn on itself by another person, and gives the depositor credit therefor, thereby pays the check, and cannot afterwards deduct the amount of such check from the depositor's account without his consent. *American Exchange Nat. Bank* v. *Gregg*, Ill., 28 N. E. Rep. 839.

2. CLEARING HOUSE RULES — RETURN OF UNACCEPTED CHEQUE — USAGE.

Held, that a custom of trade in derogation of the common law must be strictly proved. And where a bank sought to excuse itself from taking back an unaccepted cheque on another bank, which had been sent into the clearing house in the morning, on the ground that by a rule of the association a cheque for which there were no funds should be returned to the pre-

senting bank before noon of the day of presentation, whereas the cheque in question was not offered back until 3.30 p.m., and it appeared that the rule in question was of a temporary character only, and was not usually followed by the banks which belonged to the clearing house association, it was held that such a rule could not derogate from the ordinary rule of law as to the return of cheques for which there are no funds. *La Banque Nationale* v. *The Merchants Bank of Canada*, Mont. Law Repts., 7 S. C. 336.

Notes.

1. To hand in a cheque to a bank creates no obligation on its part to notify the holder that it will not be paid. The duty lies upon the latter to call and enquire. *Jeune* v. *Ward*, 2 Stark, 326. *Overman* v. *Hoboken City Bank*, 1 Vroom, 61; 2 Vroom 563; Chitty, Bills, 175; 2 Parsons, Bills & Notes, 284; 1 Morse, Banking, 409.

2. In *Bellasis* v. *Hester*, 1 Ld Raym. 280, twenty-four hours was not thought too long for a bank to investigate its accounts before answering whether it would pay or return. See also *Kilsby* v. *Williams*, 2 Barn & Ald. 515; *Boyd* v. *Emerson*, 2 Ad. & E. 184.

3. BILL OF LADING — PROMISE TO TRANSFER — ACQUISITION OF GOODS ATTACHED BY PROCESS IN FOREIGN COUNTRY BEFORE BILL OF LADING DELIVERED — CONFLICT OF LAW — PROOF OF FOREIGN LAW.

A customer of a bank in Ontario arranged with the bank to make advances to him with which to purchase cattle for exportation and sale in England, and undertook to forward the cattle to Montreal and place them in the hands of the shippers for England, who were to make out the bills of lading in favor of and forward them to the bank.

After the cattle were in the hands of the shippers (the company), but before the bills of lading were made out, a judgment creditor of the customer in the Province of Quebec caused a writ of *saisie-arrêt* to be served on the company, the effect of which, by Quebec law, is to order the party served to hold the property for the benefit of the judgment creditor.

The company, however, made out the bill of lading to the bank and forwarded the cattle, and at the trial of the action the Quebec judge held that the writ attached on the cattle before the bill of lading was made out, and judgment was given against the company for the value of the cattle, which the company were obliged to pay.

In the winding-up proceedings of the bank in Ontario, the company sought to prove a claim for the amount of the judgment.

On an appeal from the Master, it was *held* (affirming the Master), that the bank acquired some interest in the cattle when placed on board the steamship good against the customer and the company, and that under the agreement the possession and a special property passed to it; and the company so receiving the cattle held them for the bank.

It was contended that the law of Quebec, by which a vendor of goods without actual delivery only acquired the *jus ad rem* and not the *jus in re*, should prevail.

Held, that if there was any difference between the law of Quebec and of Ontario it should be proved like any other fact, which was not done here, and that under the circumstances in this case it must be found as a fact that it was the intention of the bank and its customer that their agreement should be governed by the law of Ontario; and as the bank had not only a right to, but a property in and the possession of the cattle, the writ of *saisie-arrêt* was not effectual.

Held, also, following *Suter* v. *The Merchants Bank*, 24 Gr. at p. 374, that to acquire by anticipation a property in a non-existing bill of lading is to acquire by anticipation some right or title of the previous owner to the goods of which it is but the symbol before the date of the acquisition of symbol.

Held, also, that the bank became entiled to the bill of lading as soon as the cattle were received by the company, and could not be prejudiced by delay in the manual operation of filling up and signing the form and delivering it, and so had "acquired" it before they actually "held" it, and the ap-

peal was dismissed with costs. *Re Central Bank, Canada Shipping Co's., Case*, Ontario, Ch. D., Dec. 1, 1891.

4. PAYMENT OF FORGED CHECK — LIABILITY TO DEPOSITOR.

(1) Where a bank allowed over three months to elapse before it returned to a depositor a forged check drawn on his account and payable to "currency or bearer," that it had paid without requiring the bearer's indorsement or identification, and there was no evidence that the bank could have retrieved its loss if notified of the forgery, the depositor's neglect within a reasonable time after the return of his cancelled checks to examine them, and give notice of the forgery, was not a defence to recover the money paid on such check; and hence the bank was not prejudiced by an erroneous instruction to the effect that the depositor was not guilty of negligence in failing to examine the checks and bank-book, and that he became bound to give notice of the forgery only after he had discovered it. Paterson, J., dissenting.

(2) The jury were properly instructed to find for plaintiff unless defendant was deprived of an opportunity to save itself from loss by his failure to examine the checks and bank-book, and to give notice of the forgery. *Janin* v. *London & San Francisco Bank*, Supreme Ct. California, Nov. 19, 1891.

Notes.

1. It is well settled that a bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction. *Crawford* v. *Bank*, 100 N. Y. 50, 2 N. E. Rep. 881; *Bank* v. *Risley*, 111 U. S. 125, 4 Sup. Ct. Rep. 322.

2. All unauthorized payments, such as upon forged checks, are made at the peril of the bank, and it is not justified in charging them against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. This view of the law cannot be well questioned, and finds abundant support in the decisions of courts. *Shipman* v. *Bank*, 126 N. Y. 318, 27 N. E. Rep. 371; *Hardy* v. *Bank*, 51 Md. 562; *Weinstein* v. *Bank*, 69 Tex. 38, 6 S. W. Rep. 171; *Bank* v. *Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657.

3. A bank being bound to know the signature of its customer, pays a forged check at its peril. *First Nat. Bank* v. *State Bank*, 22 Neb. 769, 3 Am. St. Rep. 394; *Price* v. *Neale*, 3 Burr. 1355; *Jenys* v. *Fawler*, 2 Strange, 946; *Wilkinson* v. *Lutwidge*, 1 Strange, 648; *Barber* v. *Gingell*, 3 Esp. 60; *Smith* v. *Chester*, 1 Term Rep. 655; *Bass* v. *Clive*, 4 Moore & S. 13; *Forster* v. *Clements*, 2 Camp. 17.

4. A depositor owes no duty to a bank which requires him to examine his bank-book or vouchers with a view to the detection of forgeries of his name. 2 Lawson's Rights, Remedies and Practice, page 931; *Weisser* v. *Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Frank* v. *National Bank*, 37 N. Y. Super. Ct. 26; *Welsh* v. *German-American Bank*, 73 N. Y. 424, 29 Am. Rep. 175.

5. He has a right to assume that the bank before paying his checks will ascertain the genuineness of his signature. *Welsh* v. *German-American Bank, supra*; *Salt Springs Bank* v. *Syracuse Sav Inst.*, 62 Barb. 101.

6. Where the loss can be traced to the fault or negligence of the drawer (or holder) it will be fixed upon him. 3 Am. & Eng. Ency. of Law, page 223; *De Ferret* v. *Bank of America*, 23 La. Ann. 310; *Smith* v. *Mechanics' Bank*, 6 La. Ann. 610; *First National Bank* v. *Ricker*, 71 Ill. 439; *National Bank* v. *Bangs*, 106 Mass. 441; *Rouvant* v. *San Antonio National Bank*, 63 Tex. 610.

BARRATRY—See Insurance 19.

BILL OF COSTS—See Solicitor.

BILLS OF EXCHANGE AND NOTES—SEE ALSO ACTION ON PROMISSORY NOTES.

1. LIABILITIES OF INDORSER.

In an action against an indorser of a note, where demand of payment was not made at its maturity, the plaintiff must show that defendant, having knowledge that she was discharged of all liability, had renewed her liability by payments or subsequent promises to pay. *Parks* v. *Smith*, Mass., 28 N. E. Rep. 1044.

2. FRAUD.

The payee named in a note procured the maker, who could not read, to sign it by fraudulently representing that it was payable to another person, to whom the maker was indebted:

Held, the note in the hands of the payee was void. *Schaller* v. *Borger*, Minn., 50 N. W. Rep. 247.

3. WILL.

A written instrument acknowledging the receipt of money and promising to repay it a certain time after the promisor's death is a contract in the nature of a promissory note, and not an attempted testamentary disposition of property. *Wolfe* v. *Wilsey*, Ind., N. E. Rep. 1004.

4. PAYMENT.

In an action to recover upon a note which the plaintiff claimed had been cancelled by mistake without being paid and delivered to the defendant, and the defendant claimed that he had paid the same, two of the instructions given were inconsistent with each other as to the burden of proof, and therefore erroneous. *Farmers' Bank* v. *Harshman*, Neb., 50 N. W. Rep. 328.

5. EXTENSION.

Under the provision of a note that, at its maturity, the maker should have the privilege of extending the time of its payment, by giving the holder written notice of his intention, the giving of the notice at time is essential to the right of extension. *Houston* v. *Newsome*, Tex., 17 S. W. Rep., 603.

6. CONSIDERATION.

A note payable to a missionary society, which recites that the maker is "desiring to advance the cause of missions, and to induce others to contribute to that purpose," shows that it is given upon sufficient consideration. *Garrigus* v. *Home, etc. Missionary Soc.*, Ind., 28 N. E. Rep., 1009.

7. NATURE AND REQUISITES — INDORSEMENT—PRESUMPTION.

An instrument executed by the vendee of personal property, by which he promises to pay therefor a certain sum at a time stated, but which expresses that the sale is upon condition, and may be rescinded by either party, is not a negotiable promissory note, since it does not require the payment to be made absolutely and at all events. *First Nat. Bank* v. *Alton*, Conn., 22 Atl. Rep., 1010.

8. EVIDENCE.

In an action against the maker and indorser of a promissory note the evidence tended to show that the payee received no consideration for its transfer, but there was no evidence that the note was obtained from the maker, or by the subsequent holders by fraud:

Held, that these facts did not impose on the holder the burden of showing that he became the owner of the note in good faith, before maturity, and for a valuable consideration. *Galvin* v. *Meridian Nat. Bank*, Ind., 28 N. E. Rep., 847.

9. QUANTUM MERUIT.

In an action on a note for $500 by an assignee, defendant answered that the consideration of the note was the payee's promise to appear in court and defend the maker on a criminal charge, and that, the payee not fulfilling this promise, the consideration had failed. In answer to special interrogatories, the jury found that services rendered by the payee were of the value of $50:

Held, that such finding was not incompatible with proof that the attorney failed in an important part of his duty, through his own fault. *Schaffner* v. *Kober*, Ind., 28 N. E. Rep., 871.

10. PROMISSORY NOTE — TRANSFER WITHOUT ENDORSEMENT—WARRANTY —LACHES.

Held, (1). Where a note of a third party is transferred for valuable security, being given in payment of goods purchased and the note is not endorsed by the transferor, a warranty is implied that the maker is not insolvent to the knowledge of the transferor.

(2). If it be proved that the maker of the note was insolvent to the knowledge of the transferor, the party who received it is entitled to offer it back and claim the amount from the transferor, without asking for the rescission of the contract *in toto*.

(3). Art. 1530 C. C., does not apply to such a case, and there being no time fixed by law for offering back such note, it is in the discretion of the Court to determine whether there was laches, and whether the transferor was prejudiced by the delay. *Lewis & Geffery*, Court of Q. B. Montreal. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn JJ., June 17, 1875.

11. BILL OF EXCHANGE — PAYMENT AND DISCHARGE-CANCELLATION WITHOUT AUTHORITY—LIABILITY OF AGENT EMPLOYED TO COLLECT BILL.

Where an agent is employed by the holder of a bill to receive payment of it from the acceptor, and receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, the agent is not entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition.

The agent of a bank offered to try to obtain payment of a bill which had been protested for non payment, and the holders accepted the offer. The acceptors offered to pay the bill, and the protest charges on the condition that they should not be called upon to pay interest and expenses. The bank's agent communicated this condition to the holders and without waiting for authority took payment of the bill and protest charges, marked the bill paid and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the conditions on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, and received back the bill cancelled. They then raised an action against the acceptors for the amount of the bill, with interest, and for the expenses of the action, and obtained decree, but the acceptors became bankrupt. The holders thereupon raised an action against the bank concluding for the amount of the bill, with interest, and for the expenses of their action against the acceptors:

Held, affirming the decision of the Court of Session (16 Ct. Sess. Cas. 4th Ser. Rettie, 1081), that the bank was liable; but was entitled to an assignation of the rights of the holders against the drawers of the bill. *Bank of Scotland* v. *Dominion Bank* (Toronto) 1891, App. Cas. 592.

12. BILL OF EXCHANGE — ACCEPTANCE, WHETHER QUALIFIED — WORDS PROHIBITING TRANSFER — ACCEPTANCE "IN FAVOUR OF DRAWER ONLY" —BILLS OF EXCHANGE ACT, 1882 (45 & 46 Vict., c. 61), s. s. 8, 19, 36.

If the acceptor of a bill of exchange desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not if he acted reasonably fail to understand that it was accepted subject to an expressed qualification.

A bill of exchange was drawn by L. Delobbel Flipo payable "to order M." "L. Delobbel Flipo." The drawees stamped in printed letters across the face of the bill the words "accepted payable at Alliance Bank, London, for the drawees." Above these words the drawees wrote, "In favour of Mr. L. Delobbel Flipo only, No. 28." The word "order" was struck out, but when or by whom did not appear. In an action on the bill by indorsees for value against acceptors:

Held, Lords Bramwell and Morris dissenting, that looking at the position and collocation of the words as they appeared on a *fac-simile* of the bill, the words "in favour of Mr. L. Delobbel Flipo only" did not constitute a qualification of the acceptance, that the acceptance was a general acceptance of a negotiable bill, and that the action was maintainable.

Held, by Lords Bramwell and Morris, that the acceptance was not general but amounted to an acceptance payable to L. Delobbel Flipo only, and that the bill was not negotiable.

The decision of the Court of Appeal (25 Q. B. D., 343) affirmed. *Meyer & Co.* v. *Decroix, Verley et Cie.*, 1891, App. Cas., 520.

BILL OF LADING—See Banks and Banking 3.

BOND — SEE ALSO INFANCY — INSURANCE, 2, 7.

CONDITION OF — LIABILITY — CONTRACT—TENDER FOR—ACCEPTANCE—CONSIDERATION.

H., in response to advertisement therefor, tendered for a contract to build a line of railway, and his tender was accepted by the board of directors of the railway company, subject to his

furnishing satisfactory sureties for the performance of the work, and depositing in the Bank of Montreal a sum equal to five per cent. of the amount of his tender. H. subsequently executed a bond in favor of the railway company, which, after reciting the fact of the tender and its acceptance, contained the condition that if within four days of the date of execution H. should furnish the said sureties and deposit the said amount, the bond should be void. These conditions were not carried out, and the contract was eventually given to another person. In an action against H. on the bond :

Held, affirming the decision of the Court of Appeal (18 A. R., 415), that no contract having been entered into pursuant to the tender and acceptance, the bond was only an executory agreement for which there was no consideration, and H. was not liable on it.

Appeal dismissed with costs. *Brantford, Waterloo & Lake Erie Ry. Co.* v. *Huffmann*, Supreme Court of Canada, June 22, 1891.

BORNAGE—See Injunction 2.

BUILDING MATERIAL—See Sale of Goods 3.

BURDEN OF PROOF—See Admiralty.

BURGLARY — See Crim. Law 3.—Crim. Procedure 1.

BY-LAW—See Appeal 1. 2.

CALLS—See Conflict of Laws.

CAPIAS —SHIP CAPTAIN LEAVING FOR GREAT BRITAIN.

Held, the simple fact that the defendant is leaving the country without paying a debt does not constitute by itself a fraud on the part of the debtor, and it is necessary to prove an intent to defraud in order to maintain a *capias*. *Tremblay* v. *Graham*, Superior Court of Montreal, July 27, 1891.

CARETAKER — See Statute of Limitations.

CARRIERS

OF GOODS.

1. LIVE STOCK—SPECIAL CONTRACT.

Where a railroad company under a special contract, furnishes an entire car, in which stock may be fed and watered, to a shipper, who loads it with "emigrant moveables" and several horses, the contract requiring that he load the car and accompany it, and feed, water, and care for the stock at his own risk and expense, and exempting the company from liability for delays, and there is no agreement as to any layout along the route, the shipper does not, in the absence of a custom to that effect, acquire by such contract the right to have the car stopped and laid out so that he may rest his horses, and thus save them suffering and death, but can only secure such delay by abandoning the contract, or by contracting anew for the use of the car for a longer time. *Illinois Cent. R. Co.* v. *Peterson*, S. C. Mississippi, April, 1891.

Notes.

1. The cases *Railroad Co.* v. *Adams*, 42 Ill. 474, and *Railroad Co.* v. *Thompson*, 71 Ill. 434, raised an implied obligation on the carrier to throw water on hogs crowded in a car, because of the known custom of railroads to so apply water to that particular animal.

2. In *Kinnick* v. *Railroad Co.* (Iowa), 29 N. W. Rep. 772, the railroad company received a carload of hogs from plaintiff, and, after loading and starting them on their journey, there was such delay, by reason of the wrecking of another train, that a number of the hogs died; and the court held, as it was a natural propensity of hogs to struggle to get near to or away from the doors of a car, when it is left standing, and to "pile up" on each other in such struggles, and thereby produce injury or death, and as it appeared that the injuries complained of were attributable to the failure of the railroad company to give the animals any attention during the 12 hours during which the train was standing still because of the obstructing wreck, that the company was liable because of its negligence, in this extraordinary danger to the animals, in failing to do what the delay and consequent peril to the animals required should be done.

We fail to see any support in any of these cases for the proposition that there was an implied obligation in the case at bar upon the railroad company to lay out the car, which appellee had hired, for 24 hours, at Centralia. The contrary is involved in these decisions, as we understand them. (Opinion of the Court.)

2. EXPRESS COMPANY — LIMITING LIABILITY FOR LOSS.

The giving by an express company,

and the acceptance by a shipper, of a printed receipt valuing a package received for transportation at $50, and limiting the liability of the company for loss to that amount, unless the value was otherwise therein expressed, is, in the absence of an expression of greater value, a valid agreement as to the extent of the company's liability where the package was lost through the negligence of the company. *Ballow* v. *Earle*, Rhode Island, Supreme Court, July 25, 1891.

Notes.

1. The well-settled rule now is that in the absence of fraud, concealment or improper practice the legal presumption is that stipulations limiting the common-law liability of common carriers contained in a receipt given by them for freight were known and assented to by the party receiving it. *Belger* v. *Dinsmore*, 51 N. Y. 166; *Steers* v. *Steamship Co.*, 57 id, 1; *Harris* v. *Railway Co.*, 1 Q. B. Div. 515; *Germania Fire Ins. Co.* v. *Memphis & C. R. Co.*, 72 N. Y. 90; *Quimby* v. *Railroad Co.*, 150 Mass. 365; *Burke* v. *Railway Co.*, 5 C. P. Div. 1; *Maghee* v. *Railroad Co.*, 45 N. Y. 514; *Grace* v. *Adams*, 100 Mass. 505; *Insurance Co.* v. *Buffum*, 115 id. 343; *Hill* v. *Railroad Co.*, 73 N. Y. 351.

2. An express company cannot limit its liability for loss of goods occasioned by its own negligence. *Grogan* v. *Express Co.*, 114 Penn. St. 523; *Brown* v. *Express Co.*, 15 W. Va. 812; *Maslin* v. *Railroad Co.*, 14 id. 180, 191; *Newborn* v. *Just*, 2 Car. & P. 76; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344; *Snider* v. *Express Co.*, 63 Mo. 376, 383; *Express Co.* v. *Graham*, 26 Ohio St. 595, 598; *Railroad Co.* v. *Hale*, 6 Mich. 243; *Transportation Co.* v. *Newhall*, 24 Ill. 466; *Graham* v. *Davis*, 4 Ohio St. 362; *Muser* v. *Express Co.*, 1 Fed. Rep. 382; *Express Co.* v. *Seide*, (Miss.), 7 South. Rep. 547.

3. A common carrier may by special contract limit his common-law liability, but he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344; *York Manuf. Co.* v. *Illinois Central R. Co.*, 3 Wall. 107; *Railroad Co.* v. *Lockwood*, 17 id. 357; *Express Co.* v. *Caldwell*, 21 id. 264; *Railroad Co.* v. *Pratt*, 22 id. 123; *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174; *Railway Co.* v. *Stevens*, 95 id. 655.

OF PASSENGERS.

3. Railway — Carrier of Passengers—Strike—Rights of Season Ticket Holders.

Held, that a railway company is liable in damages for personal inconvenience and outlay incurred by a season ticket holder in consequence of a strike. *McNaught* v. *North British Ry. Co.*, 8 Scot. Law Review 21, (Sheriff Court Reports).

4. Carriers of Passengers — Defective Ticket—Ejection—Form of Action.

A passenger paid the price of a railroad excursion ticket from Detroit to Quebec and return, and accepted from the company's agent, without reading it, what the latter represented to be such a ticket. The agent, however, inadvertently, stamped upon the return coupon the word "Detroit" above the word "Quebec" instead of *vice versa*, as was necessary to make it valid. On the homeward journey the conductor refused to receive the ticket, notwithstanding the passenger's explanation, and the latter, having no means to pay the cash fare, was put off at a way station, and suffered much humiliation and inconvenience.

Held, that he was not restricted to *assumpsit* for the breach of contract, but might sue the company in tort for damages. *Poulin* v. *Canadian Pac. Ry. Co.*, Circuit Court of the U. S. (E. D.) Mich., Oct. 1891.

Notes.

1. As between the conductor and the passenger, the ticket has been held to be conclusive evidence of the rights of the passenger. *Frederick* v. *Railroad Co.*, 37 Mich. 342; *Hufford* v. *Railway Co.*, 53 Mich. 118, 18 N. W. Rep. 580.

2. Yet, as between the company and the passenger, the ordinary ticket is not regarded as conclusive evidence of the contract, but as a mere token or voucher to the carrier's servants, who have the conduct of the train, that the holder has paid his fare. *Quimby* v. *Vanderbilt*, 17 N. Y. 306; *Rawson* v. *Railroad Co.*, 48 N. Y. 212; *Van Buskirk* v. *Roberts*, 31 N. Y. 661; *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470; *Railroad Co.* v. *Harris*, 12 Wall. 65; *Peterson* v. *Railroad Co.*, 80 Iowa, 92 97; 45 N. W. Rep. 573.

3. While the defect of the ticket presented exempts the conductor from an action for expelling the passenger, or, at least, from exemplary damages, when he acts in good faith and without unnecessary force, it does not protect the company or its passenger agent from an action for a breach of the contract which the agent was authorized to

make, and did make, with the passenger. *Railroad Co.* v. *Pierce*, 47 Mich. 277; 11 N. W. Rep. 157; *Murdock* v. *Railroad Co.*, 137 Mass. 293; *Hufford* v. *Railway Co.*, 53 Mich. 118; 18 N. W. Rep. 580; 64 Mich. 631; 31 N. W. Rep. 544; *Railroad Co.* v. *Carr*, 71 Md. 135; 17 Atl. Rep. 1052.

4. The passenger agent was the company's *alter ego* for the purpose of making the contract of carriage, and for his mistake or negligence in the line of his duty his principal must respond. *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat. 326; *Bank* v. *Stewart*, 114 U. S. 228; 5 Sup. Ct. Rep. 845; *Railroad Co.* v. *Rice*, 64 Md. 63; 21 Atl. Rep. 97; Cooley, Torts, p. 538; Wood, Mast. & S. p. 640.

5. There was a clear violation of the duty of the carrier to the passenger—an invasion, to the latter's damage, of the right which he had purchased—in negligently subjecting him to the indignity, delay and discomfort which, on the facts alleged, followed his expulsion. *Railroad Co.* v. *Carr*, 71 Md. 141; 17 Atl. Rep. 1052. For these no recovery could be had in an action of *assumpsit*. *Goddard* v. *Railroad Co.*, 57 Me. 202; *Walsh* v. *Railroad Co.*, 42 Wis. 23.

6. It is well settled that, when the gist of the action is a tort that arises out of a contract, plaintiff may declare in tort or contract, at his election. The contract in such cases is laid merely as inducement, and as the foundation of the duty in respect to which plaintiff is said to be in default. 1 Chit. Pl. 152, 397; *Emigh* v. *Railroad Co.*, 4 Biss. 114; *Railroad Co.* v. *Constable*, 39 Md. 149; *Saltonstall* v. *Stockton*, Taney, 11, 18.

7. The recovery of the sum paid for fare and the expenses of detention are not adequate compensation for humiliating expulsion, the consequential delay and discomfort, and the more serious consequences to health which often follow exposure to the weather, and for which the courts allow recovery. *Yorton* v. *Railway Co.*, 62 Wis. 367, 21 N. W. Rep. 516, and 23 N. W. Rep. 401; *Railroad Co.* v. *Fix*, 88 Ind. 381, 389; *Craker* v. *Railroad Co.*, 36 Wis. 658.

CELLAR, FALLING INTO — See Negligence 4.

CEMETERY ASSOCIATION, POWERS OF —See Eminent Domain.

CHARITABLE CORPORATION — See Municipal Corporation 2.

CHARTER, FORFEITURE OF—See Insurance 1.

CHARTER-PARTY — SEE ALSO SHIP, 1, 3.

DEMURRAGE — "CARGO TO BE DISCHARGED WITH ALL DESPATCH AS CUSTOMARY" — EFFECT OF STRIKE — PORT OF DISCHARGE — EFFECT OF DEFAULT OF DOCK COMPANY.

By the terms of a charter-party, in which the port of discharge was specified, the cargo was "to be discharged with all despatch as customary":

Held, by Wright, J., that the effect of the charter-party was to render the charterers liable for delay occasioned by a strike of labourers at the port of discharge during the unloading of the cargo, but not for delay arising from the default of the dock company, which, according to the custom of the port, did the work of discharging for both shipowners and charterers, and whose dilatory conduct in the performance of such work was well known and taken into account by persons chartering their ships to the port in question. Hick v. Rodocanachi, (1891, 2 Q. B., 626), considered. *Castlegate Steamship Co., Limited* v. *Dempsey*, (1892), 1 Q. B., 54.

CHEQUE, RETURN OF UNACCEPTED— See Banks and Banking 2.

CHOSE IN ACTION, TRANSFER OF— See Conflict of Laws.

CITY—See Contract 1.

CITY OF MONTREAL—See Trees.

CLEARING HOUSE RULES—See Banks and Banking 2.

COLLATERAL SECURITY — See Companies 2—Pledge 1.

COLLISION—See Admiralty.

COMBINATIONS — See Conspiracy — Sale of Goods 5.

COMMITTAL—See Contempt of Court.

COMMON EMPLOYMENT—See Ship 2.

COMMERCIAL TRAVELLER — See Sale 4.

COMPANIES — SEE ALSO CONFLICT OF LAWS — VENDOR AND PURCHASER—WINDING-UP ACTS 1, 2.

1. INDIVIDUAL LIABILITY — JOINT STOCK COMPANIES.

The belief of a member of a joint stock company, at common law, that at the time he bought the stock the company was a corporation, will not

relieve him from individual liability for the debts of the company. Bradford Co., Ct., *Hallstead* v. *Coleman*, 10 Pa. Co. Ct. Rep., 434.

2. SHARES—COLLATERAL SECURITY—LIABILITY TO CONTRIBUTION—TRANSFER OF SHARES ONLY PARTLY PAID-UP AS FULLY PAID-UP—DIRECTORS—AGREEMENT—ABSENCE OF CORPORATE ACT—"ULTRA VIRES"—RATIFICATION BY MEETING OF CREDITORS.

An agreement was entered into between a company, certain of its shareholders, and the defendant, who was the vice-president of the company, whereby it was agreed that the shareholders should procure certificates for the amount of certain stock of the company held by them and said to be fully paid-up, and should transfer the same to the defendant, in consideration of advances of money to be made by the defendant to the company. One of the aforesaid shareholders having 188 shares of stock with 40 per cent. paid-up thereon, and being unable to pay up the remaining 60 per cent., it was suggested at a meeting of the directors that, for the purpose of enabling the agreement to be carried out, the payments upon the 188 shares should be wholly applied to 75 shares, which should then be transferred to the defendant as fully paid-up shares. This suggestion was acted upon by an entry being made in the company's books of the transfer to the defendant of the 75 shares as paid-up stock, but no resolution authorizing this appropriation was passed, nor was the company's certificate for such stock procured.

Held, in an action by judgment creditors of the company, reversing the judgment of the Chancery Divisional Court, 20 O. R., 86, that the intended appropriation was not made with the authority of the company by any corporate act, and that therefore there remained 60 per cent. still unpaid on the 75 shares for which the defendant was liable.

Held, affirming the judgment of the Court below, that shares only partly paid-up, which have been improperly recognized as fully paid-up by the directors, whose action in regard to them has been confirmed by a general meeting of the shareholders, must be treated as against creditors of the company as fully paid-up shares in the hands of a transferee for value without notice of the actual facts. *Town of Thorold* v. *Neelon*, Ontario C. A. (Ch. D.) Nov. 10, 1891.

3. PRELIMINARY EXPENSES—PROMOTION MONEY—LIABILITY TO ACCOUNT—PERSONAL BAR.

A public company, formed for the purpose of introducing a new system of tramways in Edinburgh, entered into an agreement with contractors for the execution of the works at a certain price, one provision being that the expenses of procuring the Act should be met by the contractors. M... and B..., the company's solicitor and engineer, who had also been its chief promotors, on the next day executed a second agreement with the contractors on their own behalf, by which they undertook to relieve the contractors of their obligation for expenses in consideration of a sum of £17,000.

The company having brought an action some years afterwards calling M. and B. to account for any moneys received by them under that agreement, the defenders pleaded, *inter alia*, that the transaction had been known to the company, or to all who were members of it at the time, and that the company therefore was barred from now challenging it.

Held, that the defenders' fiduciary relation to the company precluded them from deriving any private advantage from the agreement, and that they were bound to account to the company for sums received by them under it. *Edinburgh Northern Tramways Company*, pursuers, *G. V. Mann and another*, defenders, 18 Session cases, 4th Ser. 1140.

4. LIABILITY OF DIRECTORS—PAYMENT OF DIVIDEND OUT OF CAPITAL—STALE DEMAND.

This was an appeal from the decision of North, J. The action was brought by the liquidator of the above named

company, which was being wound up, against the personal representatives of two of the deceased directors, one of whom was Capt. Bennett, to recover from their estates certain sums of money alleged to have been improperly paid out of capital as interest or dividends, although the company had paid no profits. The articles of association contained the following clauses: "(5) The capital of the company shall be allotted by the company when and as they think fit. Every applicant for shares shall pay £1. per share on application. Interest at the rate of £5 per annum shall be payable half-yearly on all moneys paid on the shares until otherwise determined by the directors." "(116) No dividends or bonds shall be payable except out of the profits arising from the business of the company, including the income arising from the paid-up capital." The company was formed in 1868. Bennett became a director in 1869, and held the office till his death in 1883. The company never made any profits, but the directors made half-yearly payments at the rate of 5 per cent, on the amount of shares paid-up from July 1869 to July 1878, when the Board of Trade interfered, and the payments were discontinued. The company was wound up in 1886. The liquidator now sought to charge the representatives of Bennett with the money improperly paid out of capital.

North, J., *held*, that the defendants were chargeable with the money so paid, and that the delay was not such as to disable the liquidator to succeed.

The representative of Bennett appealed. Lindley, L. J., said that there was no doubt that the payment by the directors, of whom Captain Bennett was one, of the interest of the shareholders out of the capital of the company, was *ultra vires*, and that they were liable to make good the payments. The only question was whether the liquidator was barred from recovering the money from them, either by the Statute of Limitations, or by the fact that it was a stale demand. It had been decided and was well established that the directors were not mere agents, but were trustees for the shareholders, and he was, therefore, of opinion that no Statute of Limitations was a bar to the action. It was a more difficult question whether the claim of the liquidator was not what was called in equity a stale demand. He thought, however, on consideration of all the circumstances, that there had been no laches on the part of the liquidator, and that no such time had elapsed as would prevent him from recovering the money from the estate of Captain Bennett. The appeal must, therefore be dismissed.

Bowen & Fry, L. JJ., gave judgment to the same effect. *In re Bennett. Masonic & General Life Assurance Company* v. *Sharpe*, Eng. Court of Appeal, Ch. D., Dec. 18, 1891.

COMPLAINT—See Insurance 12.

COMPOUND INTEREST—See Account Stated.

CONDITIONS OF POLICY—See Insurance 13, 14.

CONFLICT OF LAWS—See also Banks and Banking 3.

TRANSFER OF CHOSE IN ACTION—SCOTCH ARRESTMENT — COMPANY — CALLS.

This was an appeal from a decision of North, J., (1891, 1, Ch. 536). The question for decision was whether the assignment of unpaid calls in the shares of the Queensland Mercantile and Agency Company, effected by an arrestment in certain proceedings in Scotland instituted by the Australian Investment Company was to be postponed to the charge of the Union Banks of Australia, who were debenture holders of the company which was domiciled in Queensland. Evidence was given that according to the law of Scotland the Australian Investment Company would be entitled to priority under the circumstances; and North, J., held that the Scotch law must govern, and gave judgment accordingly. The Union Bank of Australia appealed.

After the appeal was opened, some of the most eminent Scotch lawyers were consulted and their opinions were put in as further evidence of the Scotch law. They agreed in saying that accord-

ing to the Scotch law, and the *jus gentium* as administered by the Scotch Courts, the Australian Investment Company was entitled to priority.

Lindley L. J., said, that having regard to the terms of the orders made by North, J., and the Scotch judges, it was clear that their intention was that the English Court should decide the claim of the Australian Company as it would have been decided in Scotland, and the evidence as to the Scotch law left no room for doubt that the Scotch Courts would have decided the claim in favour of Mr. Crackanthorpe's clients. It was objected by the appellant that the Scotch Courts could only decide in that way by taking an erroneous view of international law, and that upon any question of International law this court ought to act upon its own view, and he relied upon *Simpson* v. *Fogo*, (1 H. & M. 195). But there the English Court refused to recognize a judgment of a foreign court, not because that court had taken an erroneous view of international law, but because it had disregarded every principle of international law altogether. The appellant's contention was founded upon a mistake. It was all very well to say that international law was one and indivisible, but it was notorious that different views were entertained in different civilized countries on many questions of international law, and it was not for this court to say that the Scotch Courts took a wrong view.

When international law was administered by the Scotch Courts it was as much a part of the Scotch law as the municipal law of Scotland. The appeal therefore failed.

Bowen & Fry, L. JJ., concurred. *In re Queensland Mercantile and Agency Company. Ex-parte Australian Investment Company. Ex-parte Union Bank of Australia*, Eng. Court of Appeal, Ch. D. Dec. 17, 1891.

CONSIDERATION—See Bills & Notes 6—Bond.

CONSPIRACY—COMBINATION TO KEEP UP RATE OF FREIGHT—RESTRAINT OF TRADE—EXCLUSION OF RIVAL TRADERS FROM COMBINATION.

The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and in consequence of such exclusion sustained damage:

Held, (by Bowen and Fry, L. JJ., Lord Esher M. R. dissenting), affirming the judgment of Lord Coleridge C. J., that the association being formed by the defendants with the view of keeping the trade in their own hands, and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable. *The Mogul Steamship Company Ltd.* v. *McGregor, Gow & Co. and others*, 23 Q. B. D. 598.

In the House of Lords (Lord Halsbury, L. C., and Lords Watson, Bramwell, Macnaghten, Morris, Field and Hannen) after consideration affirmed the decision of the Court of Appeal, Dec. 18, 1891.

CONSTITUTIONAL LAW—SEE ALSO EMINENT DOMAIN.

1. B. N. A. ACT, S. 91—INTEREST—LEGISLATIVE AUTHORITY OVER—MUNICIPAL ACT—TAXATION—ADDITIONAL RATE FOR NON-PAYMENT.

The Municipal Act of Manitoba, 1886, s. 626, as amended by 49 V., c. 52, provides that "in cities and towns" all parties paying taxes to the treasurer or collector before the 1st day of December, and in rural municipalities before the 31st day of December, in the year they are levied, shall be entitled to a reduction of ten per cent, on the same, and all taxes remaining due and unpaid on the 1st or 31st day of December (as the case may be)

shall be payable at par until the 1st day of March following, at which time a list of all the taxes remaining unpaid and due shall be prepared by the treasurer or collector (as the case may be) and the sum of ten per cent, on the original amount shall be added on all taxes then remaining unpaid.

Held, reversing the judgment of the Court below, Gwynne, J., dissenting, that the addition of ten per cent, on taxes unpaid on 1st March is only an additional rate or tax imposed as a penalty for default, and is not "interest" within the meaning of s. 91 of the B. N. A. Act, and so not within the exclusive legislative authority of the Dominion Parliament. *Lynch* v. *North North West Canada Land Co.; Municipality of South Dufferin* v. *Morden; Gibbons* v. *Barber*, Supreme Ct. Canada, 22 June, 1891.

2. CONSTITUTION OF MANITOBA—33 VICT., c. 3 (D.) — ACT RESPECTING EDUCATION — DENOMINATIONAL RIGHTS—SEPARATE SCHOOLS.

The act by which the Province of Manitoba became a part of the Dominion of Canada (33 Vict., c. 3 (D.)), gave to the province the exclusive right to legislate in respect to education, with the following limitation: "Provided that nothing in any such law (a law relating to education) shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons has by law *or practice* in the province at the union." The words "or practice" are an addition to, and the only deviation from, the words of the like provision in the B. N. A. Act, under which *ex parte Renaud* (1 Pugs. 273) was decided in New Brunswick.

In 1871, after the said union, an act relating to schools was passed by the Legislature of Manitoba, by which the control of educational matters was vested in a board, consisting of an equal number of Protestants and Catholics. A Protestant and a Catholic superintendent of education were to be appointed, and Protestant and Catholic school districts established, the legislative grant for schools to be apportioned to each. This act was amended from time to time, but the system it established continued until 1890.

By 53 Vict., cap. 38, passed by the legislature in 1890, a system of public schools was established in the province; the former system was abolished; the control of educational matters was vested in a department of education, consisting of a committee of the executive council, and all the schools were to be free, and no religious exercises to be allowed except as authorized by the advisory boards to be established under the provisions of the act. The ratepayers of the several municipalities were to be indiscriminately taxed for the support of the public schools.

A Catholic ratepayer of the city of Winnipeg moved to quash by-laws passed to impose a tax for school purposes, and in support of his motion an affidavit of the Archbishop of St. Boniface was read, setting forth the position of the Roman Catholic Church with respect to education and the control it always exercised over the same, and showing that prior to the admission of Manitoba into the union Catholics had their own schools, partly supported by fees from parents, and partly by the funds of the church.

Held, reversing the judgment of the Court of Queen's Bench, Manitoba (7 Man. L. R., 273), that this act, 53 Vict., c. 38, prejudically affected the rights and privileges with respect to denominational schools which Roman Catholics had *by practice* in the province at the union, and was therefore *ultra vires* of the provincial legislature. *Ex-parte Renaud* (1 Pugs., 273) distinguished. Appeal allowed with costs. *Barrett* v. *The City of Winnipeg*, Sup. Court of Canada, Oct. 28, 1891.

CONSTRUCTION.

Words "to" "till" and "until" are synonymous, and are to be construed as conclusive or inclusive, according as the subject-matter about which they are used, may show the intention in using the words to have been. *Gottlieb* v. *The Fred. W. Wolf Company of Illinois*, Ct. of App. of Md. Dec. 17, 1891.

CONTEMPT OF COURT.

COMMITTAL—ATTEMPT TO INTIMIDATE WITNESS.

Motion by the defendant for an order to commit the plaintiff to prison for a contempt of Court in endeavouring to intimidate one Corfield, a witness in the action, and to deter him from giving evidence in the action, and to deter the defendant from calling him as a witness, and to deter the defendant from continuing to defend the action and from prosecuting his counter-claim thereto.

The action was for wrongful dismissal. The defendant counter-claimed for damages for negligence and want of skill. The plaintiff had been personally served with notice of the motion; but he did not appear. Corfield was the general manager of the defendant's business. Evidence was now given that on the 3rd of November the plaintiff, accompanied by a police sergeant in uniform, went to defendant's office for the purpose of seeing Corfield, and that he then, in the presence of the police sergeant, produced a copy of Corfield's affidavit, and demanded of him in a threatening tone of voice what he meant by certain statements therein contained as to the plaintiff's having taken away plans and drawings, the property of the defendant, and that he went on to charge Corfield with having sworn a false oath. There was also evidence that anonymous letters of a threatening nature had been recently received by Corfield and by the defendant, and it was sworn that those letters were in the hand-writing of the plaintiff. Daniel Jones for the motion referred to *Smith* v. *Lakeman* (2 Jur., N. S., 1202), and *Shaw* v. *Shaw* (2 S. and T., 517).

North, J., made the order asked for, which, he said, appeared to be justified by the cases cited. *Bromilow* v. *Phillips*, Ch. D. (Eng.), Dec. 15, 1891.

CONTRACTOR—See Damages.

CONTRACTS — SEE ALSO ARCHITECT—BOND—INJUNCTION 1—INSURANCE 8 — MASTER AND SERVANT — PRINCIPAL AND AGENT — SHIP 2 — TELEPHONE COMPANY.

1. REWARD OFFERED BY CITY.

A mayor of a city officially promised a reward for the apprehension of a fugitive municipal officer, and on account of the absence of any authority in the mayor to bind the city there was no principal to respond:

Held, that by reason of this excess of his authority the mayor became personally liable for the performance of the contract. *Tinken* v. *Tallmadge*, N. J., 22 Atl. Rep. 996.

2. BREACH OF CONTRACT—LOSS OF PROFITS—DAMAGES.

A manufacturing company in this country (Scotland) entered into a contract for the sale of iron huts of a peculiar construction, for which they held patents, to a firm of merchants in South Africa, with a view to the huts being resold there by the merchants. The earlier consignment of huts sent in pursuance of this contract were sold by the merchants at a profit, but subsequent consignments were rejected as being disconform to contract.

In an action by the merchants against the manufacturers, it being proved that the pursuers were justified in the rejection of their huts, the Court in asssessing the damages due by the defenders for their breach of contract, *held* that the pursuers were entitled to payment of a reasonable allowance for loss of the profits which they would probably have made if the contract had been fulfilled. *Duff & Co.* v. *Iron & Steel Fencing Co.*, 29 Scot. Law Rep. 186.

3. CONSTRUCTION OF RAILWAY — STANDARD OF QUALITY—EVIDENCE.

McC. and R. were the contractors for the construction of a part of the Grand Trunk Railway, and sublet the masonry work to B. and S. In a conversation between McC. and S. before B. and S. began their work, S. understood that the second class masonry in his contract was to be of the same quality as that of the "loop line," another part of the Grand Trunk road,

and prepared his materials accordingly, on receipt of a letter from McC. instructing him to carry out his contract "according to the plans and specifications furnished by the company's engineer." After a small portion of the masonry work had been done, the sub-contractors were informed by the engineer in charge that the second class masonry required was of a quality that would increase the cost over thirty per cent., whereupon they refused to proceed until McC., who was present, said to them "go on and finish the work as you are told by the engineer and you will be paid for it." They thereupon pulled down what was built, and proceeded according to the directions of the engineer. When the work was nearly done, McC. tried to withdraw his offer to pay the increased price, but renewed it on the sub-contractors threatening to stop. After completion of the work, payment of the extra price was refused and an action was brought therefor.

Held, affirming the judgment of the Court of Appeal, that the conversation between McC. and S. prior to the commencement of the work, as detailed in the evidence, justified the sub-contractors in believing that the standard of quality was to be that of the loop line; that the promise to pay the increased price was in settlement of a *bona fide* dispute, which was a good consideration for such promise; and that B. and S. were entitled to recover. *Barry* v. *Ross*, Sup. Court of Canada, June 22, 1891.

4. CONSTRUCTION OF A PUBLIC WORK — DELAY IN EXERCISING CROWN'S RIGHT TO INSPECT MATERIALS — INDEPENDENT PROMISE BY CROWN'S SERVANT, EFFECT OF — GOVERNMENT RAILWAYS ACT 1881—ESTOPPEL.

It was a term in the suppliant's contract with the Crown for the construction of a public work, that certain timber required in such construction should be treated in a special manner, to the satisfaction of the proper officer in that behalf of the Department of Railways and Canals. By another term of the contract it was declared that the express covenants and agreements contained therein should be the only ones upon which any rights against the Crown should be founded by the suppliant.

The suppliant, immediately upon entering upon the execution of his contract, notified A. the proper officer of the department in that behalf, that he intended to procure the timber at a certain place and have it treated there in the manner specified before shipment. A. approved of the suppliant's proposal and promised to appoint a suitable person to inspect the timber at such place, within a given time. The inspector was not appointed until a long time after the period so limited had expired, and by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, and was compelled to carry on his work in more unfavourable weather and at greater cost, for which he claimed damages.

Held, on demurrer to the petition, that the Crown was not bound under the contract to have made the inspection at any particular place, and that in view of sec. 98 of the Government Railways Act 1891, and the express terms of the contract, A had no power to vary or add to its terms or to bind the Crown by any new promise.

(2) The suppliant's contract contained the following clause: "The "contractor shall not have or make "any claim or demand, or bring any "action, or suit, or petition against "Her Majesty for any damage which "he may sustain by reason of any "delay in the progress of the work "*arising from the acts of any of Her "Majesty's agents*; and it is agreed "that, in the event of any such delay, "the contractor shall have such "further time for the completion of "the work as may be fixed in that "behalf by the minister."

Held, that this clause covered delay by the Government engineer in causing a necessary inspection to be made of certain material whereby the suppliant suffered loss; and that the latter was estopped from claiming damages therefor. *Mayes* v. *Reginam*.

Exchequer Court of Canada, Nov. 28, 1891.

5. STOCK EXCHANGE TRANSACTION—GAMING—WHETHER CONTRACT REAL, OR FOR PAYMENT OF DIFFERENCES.

In an action for a balance alleged to be due upon certain transactions in stocks and shares, the defender alleged that these were gambling transactions for differences. It appeared that the capital of the parties was entirely disproportionate to the amount of the transactions, and that the parties contemplated that these might be fulfilled in the way of a re-sale, but the pursuer denied that the transactions were for differences, the defender could not prove such an agreement, and on the face of the documents the transactions appeared to be carried out in the ordinary course of stock exchange business, and might have been enforced at law by either party.

The Court *held*, that the transactions were real, and decerned in terms of the conclusions of the summons. *Lowenfeld* v. *Howat*, 29 Scot. Law, Rep., 119.

Notes.

Lord Adams said *inter alia*, "What I understand by a real transaction is a transaction in which the pursuer was to be seller or buyer as the case might be, and which could by law be enforced against the other party. If that be so, I think on the authorities, that the transactions in the present case are real transactions. If Mr. Howat could enforce delivery of any of the stocks he bought from Mr. Lowenfeld, that was a real transaction."

Lord McLaren said "On the merits of the case, I may say, as I said in the case of Shaw, that it will always be extremely difficult to reduce a Stock Exchange transaction, or one carried on in a similar manner to a Stock Exchange transaction, to the level of a gambling debt. I think one difficulty is this, that the dealer generally has no interest as to the particular mode in which the settlement should be effected. It is a matter of perfect indifference to him whether the account is to be closed by a re-sale or by a re-delivery of stock, because if his customer likes to take delivery of the stock, the broker has only to go into the market and supply himself at the market price of the day... The unsupported evidence of either party would never in ordinary circumstances be sufficient to displace the inference arising from the documents, when the evidence of the dealer, in accordance with his own interest, is that the transaction was a real transaction and in accordance with the documents. Therefore I must say that as regards Stock Exchange transactions carried out in the ordinary course of business, the distinction between contracts for differences and real transactions is of purely theoretical interest and does not afford mere speculators any available means of being released from their obligations."

CONTRIBUTION—See Insurance 11.

CONTRIBUTORY NEGLIGENCE — See Negligence 5.

CONVENTIONAL SUBROGATION.

WHAT WILL EFFECT — ART. 1155, S. 2—ERRONEOUS NOTING OF DEED BY REGISTRAR.

Conventional subrogation under Art. 1155, s. 2, C. C., takes effect when the debtor borrowing a sum of money declares in his deed of loan that it is for the purpose of paying his debts, and in the acquittance declares that the payment has been made with the moneys furnished by the new creditor for that purpose, and no formal or express declaration of subrogation is required.

Where subrogation is given by the terms of a deed, the erroneous noting of the deed by the Registrar as a discharge and the granting by him of erroneous certificates cannot prejudice the party subrogated. Judgment below affirmed. *Owens* v. *Bedell*, Supreme Ct. Canada, June 22, 1891.

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CASTS OF FRUIT AND LEAVES — 54 Geo. 3, c. 56.

This was an action by a London firm of modellers, sculptors, and makers of casts to restrain the defendant, who carried on a similar business at Manchester, from making or selling casts alleged to be copied or only colourably differing from certain casts or models made by the plaintiffs. The plaintiffs had not registered under the Copyright act 13 and 14 Vic., c. 104, s. 6, or under the Patents, Designs and Trade-Marks act 1883. The learned judge *held*, that these was no evidence sufficient to support the allegation of the plaintiffs that the defendant had attempted to pass off his casts as casts

made by the plaintiff; and the question arose whether the plaintiffs' casts were entitled to protection under the act of 1814 (54 Geo. III., c. 56). That act enacts (section 1) as follows: "Every person or persons who shall make or cause to be made any new and original sculpture or model or copy or cast of the human figure or human figures or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso relievo representing any of the matters hereinbefore mentioned.....shall have the sole right and property of all and in..... every such new and original sculpture, model, copy, and cast of any subject being matter of invention in sculpture.... for the term of fourteen years from first putting forth or publishing the same."

The plaintiffs' casts were made from models of natural fruits and leaves; there was evidence that the casts were new and original when they were first published by the plaintiffs, which was less than fourteen years ago; and also that they displayed artistic taste in the selection of the objects to be moulded, judgment in arrangement, and skill in grouping.

Mathew, J., *held*, that the plaintiffs' casts were "new and original" "casts of" a "subject being matter of invention in sculpture" within the meaning of, and entitled to protection under, the Act 54, Geo. 3, c. 56. *Caproni* and another (trading as D. Bruciani) v. *Alberti*, Chancery Division, High Court of Justice, Dec. 9, 1891.

CORPORATIONS.

1. AUTHORITY OF PRESIDENT.

Where plaintiffs, in an action against a corporation for services rendered, introduce evidence that they were employed by defendant's president, who assumed to act in its behalf, the admission in evidence of defendant's by-laws to show that the president had no such authority will not work a reversal, as the jury must have been so instructed as matter of law had the evidence been excluded. N. H. Supreme Ct., *Wait* v. *Nashua Armory Ass'n*, 23 Atl. Rep. 77.

2. TRANSFERS OF STOCK.

Where stock is assignable only on the books of the corporation, the legal title does not pass by an assignment, which is neither made nor recorded on the books.

Where stock which is "assignable only on the books" of the corporation is assigned, and the assignment is not made nor recorded on the books, the assignee acquires only an equitable or executory right to the stock, and such right is not, under the statutes, attachable. R. I. Supreme Ct., *Lippitt* v. *Amer. Wood Paper Co.*, 23 Atl. Rep., 111.

COSTS—See Action on Promissory Notes—Appeal 2—Winding-up 2.

CO-TENANTS—See Statute of Limitations.

COUNTY COMMISSIONERS—See Mandamus.

CRIMINAL LAW.

1. THEFT OF DOG.

A dog may become the subject of theft, and, where he is shown to be worth at least $20, such theft is a felony. *Hurley* v. *State*, Tex., 17 S. W. Rep. 455.

2. ROBBERY—STEALING.

Held, that the charge of robbery includes the offense of stealing from the person without force and violence or putting in fear, and that under an information for robbery the accused may be convicted of stealing from the person. *Brown* v. *State*, Neb. 50 N. W. Rep. 154.

3. BURGLARY—LARCENY.

A person who, having entered any building under such circumstances as to constitute burglary in any degree commits the crime of larceny therein is punishable therefor as well as for the burglary, and may be prosecuted for each crime separately. *State* v. *Hackett*, Minn., 50 N. W. Rep. 472.

4. EMBEZZLEMENT — DEPOSIT WITH MASTER.

Where a clerk deposits money with his employer to be held as security for the faithful discharge of his duties, the employer's failure to return the money does not constitute embezzlement, since the deposit creates a debt, and not a trust. *Mulford* v. *People*, Ill., 28 N. E. Rep. 1096.

5. LARCENY.

A person obtains possession of a horse with the consent of the owner by falsely and fraudulently pretending that he wants to use him a short time for a temporary purpose, and will return him to the owner at a specified time, when in fact he intends to and does wholly deprive the owner of the horse and appropriates him to his own use, there is such a taking and carrying away as to constitute the offense of grand larceny. *State* v. *Woodruff*, Kan., 27 Pac. Rep., 842.

6. ALIBI.

On indictment for the theft of a cow, defendant introduced evidence to prove an *alibi*. The only charge on the question of *alibi* was as follows: "If the jury believe from the evidence that the defendants were at the place of B. at the time the witness F. says he saw them in the pasture in the afternoon, the defendant should be acquitted."

Held, that the burden being upon the State to prove defendant's presence at the place of the theft, the charge was erroneous. *Bennett* v. *State*, Tex., 17 S.W. Rep., 545.

7. INCEST — EVIDENCE.

On trial for incest, acts of sexual intercourse prior to the specific act charged in the indictment may be proved by the State. The decisions establish the doctrine that it is competent to prove previous acts of familiarity between the parties, although they culminate in the act of sexual intercourse. *State* v. *Markins*, 95 Ind., 464; *Ramey* v. *State*, 127 id., 243; *Thayer* v. *Thayer*, 101, Mass. 111; *State* v. *Bridgman*, 49 Vt., 202, and cases cited; *State* v. *Pippin*, 88 N. C., 646; *State* v. *Kemp*, 87 id., 538; Bish. Stat. Crim., § 680. Sup. Ct. Ind., Nov. 19, 1891. Lefforge v. State.

8. CROWN CASE RESERVED — INDICTMENT FOR ASSAULT AND CARNAL KNOWLEDGE — VERDICT OF GUILTY OF INDECENT ASSAULT — AGE — CONSENT.

Crown case reserved. The prisoner was arraigned upon an indictment charging that he "in and upon one A. R., a girl under the age of 14 years, feloniously did make an assault and her the said A. R. then and there feloniously did unlawfully and carnally know and abuse, against the form," etc.

It was proved that the girl was between eight and nine years old, and the acts complained of were committed with her tacit consent.

The jury found the prisoner guilty of committing an indecent assault upon the girl.

Counsel for the prisoner objected that the indictment charged an assault in addition to carnal knowledge, and not the statutory offence specified in the section substituted for the 39th section of c. 162, R. S. C., by 53 V., c. 37, s. 12, and would not support any verdict against the prisoner; also that under such an indictment the prisoner could not be convicted, if the act was done with the consent of the female; also that the indictment not charging, as was claimed, an offence within the section substituted for s. 39, the prisoner could not under it be convicted of an indecent assault; and also that the prisoner was not charged with or tried under an indictment for an indecent assault within the meaning of s. 7 of 53 V., c. 37, and that therefore her consent was an absolute bar to a conviction of the offence of committing an indecent assault.

The following questions were submitted for the opinion of the Court:

1. Was it open to the jury upon the indictment above set forth to find the prisoner guilty of the offence of committing an indecent assault upon the female therein named?

2. Was the consent of the girl a defence or bar to a verdict, upon the said indictment, finding the prisoner guilty of committing an indecent assault upon her?

Held, that the first question should be answered in the affirmative, and the second question in the negative; and the conviction should be affirmed. *Regina* v. *Brice*, Manitoba, Queen's Bench, Dec. 21, 1891.

9. CROWN CASE RESERVED--INDICTMENT FOR ASSAULT AND CARNALLY KNOWING — GENERAL VERDICT OF GUILTY.

Crown case reserved. The prisoner was tried upon an indictment charging that he "on 29th September, 1891, in and upon one Maggie Jacobs, a girl under the age of fourteen years, to wit of the age of thirteen years and six months, feloniously did make an assault, and her, the said Maggie Jacobs, then and there feloniously did unlawfully and carnally know and abuse, against the form," etc. The jury returned a verdict of guilty.

The evidence shewed that the girl was thirteen years of age in the month of April, 1891, and that there was on her part consent to anything done to her.

At the close of the trial the following question was reserved for the opinion of the Court of Queen's Bench:

Was it open for the jury to convict the prisoner by a general verdict of "guilty" upon an indictment framed as the indictment was in this case, when there was consent upon the part of the girl?

Sentence was passed, but the execution of the same was respited until the question should be decided by the Court.

On behalf of the prisoner it was contended that the indictment contained two charges, one for assault and one for carnally knowing, and that the general verdict of guilty could not stand, because it did not appear to which of the offences it applied; if it applied to the assault the consent of the girl was a defence, or a bar to the charge.

Held, that the question must be answered in the affirmative, and the conviction affirmed.

The words "feloniously did make an assault" in the indictment appeared to be simply prefatory or descriptive of the offence, and unnecessary. *Regina* v. *Chisholm*, Jacob's Case, Manitoba, Queen's Bench, Dec. 21, 1891.

CRIMINAL PROCEDURE

EVIDENCE.

1. BURGLARY.

Unexplained possession of the fruits of a burglary, immediately or soon after the crime was committed, is presumptive evidence of the guilt of the person having such possession. *Magee* v. *People*, Ill., 28 N.E., Rep., 1077.

ASSAULT.

2. In a trial for assault with intent to kill, where defendant claims that he acted in self-defence, he may testify as to threats made by the prosecuting witness, and as to assaults made by him on other persons. The State in rebuttal may show the general reputation of the prosecuting witness for peaceableness. *Bowlus* v. *State*, Ind., 28 N. E. Rep. 1115.

3. MURDER.

Upon a trial for murder of a girl in an attempt to kill her father, it is reversible error to refuse to allow the defendant to show that, on the day before the homicide, the girl's father armed himself and went to defendant's house with the avowed purpose of killing him while the defendant was concealed in the house, since such evidence is admissible as affecting the extent of the punishment to be inflicted. *Nowacryk* v. *People*, Ill., 28 N. E. Rep. 961.

4. HOMICIDE.

In a murder case, where the killing was admitted, and only the circumstances were in dispute, and the evidence showed that defendant was a comparative stranger to deceased and his affairs, without hatred or ill will towards him, the State may, for the purpose of showing motive, prove that a third person entertained hatred for deceased, and desired to get rid of him, and that he sent defendant to do the killing. *Story* v. *State*, Miss., 10 South Rep. 47.

5. HOMICIDE.

Defendant offered to prove that several hours before homicide alleged in the indictment he had a difficulty with one K, in which K sought to shoot him in the back with a pistol :

Held, that this testimony was irrelevant without evidence that defendant mistook deceased for K. *Sherar* v. *State*, 17 S. W. Rep. 621.

TRIAL AND PRACTICE.

6. Election.

A motion to require the prosecuting attorney to elect for what particular offense he will seek to convict is premature when made before it has been clearly shown by the evidence that more than one distinct offense of the kind charged has been committed by the defendant. *Squires* v. *State*, Ind., 28 N. E. Rep., 708.

7. Second Appeal — Res Judicata.

Where a judgment and sentence in excess of the statutory limitation has been modified on a writ of error, charging such excess, the reformed judgment is *res judicata* of all questions arising on the record previous to the judgment and sentence. *McDonald* v. *State*, Wis., 50 N. W. Rep. 185.

8. Arson.

Where an indictment for arson describes the house alleged to have been burnt as occupied by defendant and one H as tenants, there is no variance if the evidence shows that the owner of the house rented it to defendant, and that H jointly occupied it under an agreement with defendant. *Woolsey* v. *State*, Tex., 17 S. W. Rep., 546.

9. Keeping Disorderly House.

Under an indictment which charges a continuing offence of keeping a house of ill fame, resorted to for the purposes of prostitution by divers persons to the grand jury unknown, the State's failure to prove that the names of such persons were unknown to the grand jury will not invalidate a conviction on the ground that defendant is not protected from a second prosecution for the same offence. *Dutton* v. *State*, Ind., 28 N. E. Rep., 995.

10. Writ of Error — R. S. C., Ch. 174, S. 265.

Held, that the issue of a writ of error will interrupt a sentence which has been partially undergone before the issue of the writ, and in such case, where the offence is a misdemeanor, the prisoner may be admitted to bail. *Ex-parte Woods*, Court of Q. B., Montreal. In Chambers, Cross, J., Oct. 14, 1891.

11. Reserved Case—Amendment—Notice to Prisoner to Produce Document—Verbal Evidence.

Held, (1) That a reserved case will not be sent back to be amended by the judge who reserved it, upon the mere allegation of the prisoner or his counsel that the facts are not accurately stated therein.

(2) That a prisoner is not entitled to complain of short notice to produce a document at his trial, where it is shown that the document in question was in the possession of a person under the control of the prisoner and his counsel on the day of the trial.

(3) That the prisoner having in the circumstances declined to produce the document, secondary evidence was admissible. *Regina* v. *Bourdeau*, M. L. R., 7 Q. B., 176.

Crown, Obligations of — See Government Railway.

Customs Duties—See Revenue.

DAMAGES—See also Architect —Contract 2 — Discharge — False Imprisonment — Government Railway—Libel and Slander 3—Master and Servant — Negligence — Nuisance 1—Patents 1—Railway Companies 2—Riparian Rights—Trees.

Contractor—Responsabilité.

Held, That a contractor charged with the construction of a wall upon foundations made by another, is bound to assure himself of their sufficiency, and that, if the foundations are not sound, he has no claim for damages against the proprietor; but that he is not liable in damages to the proprietor if he refuses to carry out his contract upon foundations that do not offer the

necessary guarantees of soundness. *Cowan* v. *Evans*, 21 Rev. Lég. 285.

DEMURRAGE—See Ship 1.

DEPOSITS—See Banks and Banking 1.

DIRECTORS—See Companies 2, 4.

DISCHARGE.

NEGLIGENCE—REPARATION — DAMAGES FOR PERSONAL INJURY.

A commercial traveller, who had been injured in a railway accident, accepted a sum of £27 from the railway company, and granted them a receipt bearing that that sum was accepted by him "in full of all claim competent" to him in respect of injury and loss sustained by him in the accident in question. About eighteen months after granting this receipt he raised an action of damages against the company concluding for £5,000. The company pleaded that in respect of the terms of the receipt they were entitled to be assoilzied.

In a proof evidence was led — as to the pursuer's state of mind and body at the time of granting the receipt, and at the time of the proof—as to the intention of parties in giving and taking the receipt, and — as to the capacity of the pursuer to understand it. The pursuer at the time of granting the receipt had been visited by the railway company's surgeon, but not by any surgeon employed by himself. He had no external injuries, but had sustained a nervous shock. He had no legal advice, and the receipt was granted nine days after the accident. The Lord Ordinary awarded him £500, and to this judgment the Second Division adhered.

The House of Lords, being of opinion that the writing signed by the pursuer was a discharge, that there had been no attempt on the part of the railroad company to mislead the pursuer, that he was capable of understanding the meaning of the writing, and that there had been no understanding between him and the person who acted for the company that there was any reservation of claims made by the pursuer at the time the discharge was granted, *reversed* these judgments and assoilzed the defenders. *North British Railway Co.* v. *Wood*, 18 Sc. Sess. Cas., 4th Ser., 27 (H. L.)

"DISHONOURABLE CONDUCT"—See Libel and Slander 2.

DISORDERLY HOUSE — See Crim. Procedure 9.

DIVIDEND—See Companies 4.

DIVORCE—See Domicile.

DOCK COMPANY—See Charter-Party.

DOGS—See Animals—Crim. Law 1.

DOMICILE—HUSBAND AND WIFE — DIVORCE — JURISDICTION — SCOTLAND.

A Scotsman, who in 1862 had entered the Royal Navy; in 1866 married in Malta a native of that Island, where from 1867 till 1873 he was employed in a government office. He then retired, and after some months' residence in Great Britain he again returned with his wife and family, on account of his health, to Malta, where he remained until 1879; when he was appointed to an office there which he was entitled to hold for a period of twenty years. While abroad he maintained constant communication with his relatives in Scotland, and his sons were sent to this country for education. He had no property or residence in Malta other than his official appartments. In 1887 the spouses separated under an extra-judicial agreement, which by the law administered in Malta required judicial consent. The deed of separation provided that in the event of the wife's adultery the remedy of divorce "before the competent tribunals in England" would still be competent to the husband.

In an action of divorce on the ground of adultery, raised by the husband in Scotland, the wife pleaded no jurisdiction.

Held, diss. Lord Young—(1) that the defender had not proved that the pursuer ever intended to abandon his Scottish domicile; and (2) that even assuming the separation to have been judicial, it did not, for the purposes of this action, affect the defender's *status*

as the pursuer's wife, and further, that she was excluded by its conditions from pleading it in bar of action. *Low* v. *Low*, 29 Scottish Law Reporter 108.

DOMINION ELECTIONS — See Elections.

DWELLING HOUSE—See Nuisance 2.

EJECTION—See Carriers 4.

ELECTION—See Criminal Procedure 6.

ELECTIONS.

1. PETITION — PRELIMINARY OBJECTIONS—SERVICE AT DOMICILE—R. S. C., c. 9., s. 10.

Held, that leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household, during the five days after the presentation of the same, is a sufficient service under s. 10 of the Dominion Controverted Elections Act, even though the papers served do not come into the possession or within the knowledge of the respondent. The appeal was dismissed with costs. *In re* King's County Dominion Election. *Borden* v. *Berteaux*, Supreme Court, Canada, Oct. 29, 1891.

2. DOMINION — CONTESTED — NONSUIT.

Held, That an election petition is nonsuited by the terms of sec. 32, ch. 9, Revised Statutes of Canada 1886, 49 Vic., if proceedings have not been commenced within the six months from the date on which it was presented, notwithstanding that between the date of presentation and that fixed for a hearing a session of Parliament intervened, and that the preliminary hearing of defendant was deferred until after the session, and that six months had not elapsed between the date of the presentation of the petition and that fixed for a hearing, if in computing these six months, the time occupied for the session is not counted. *Gibeault* v. *Pelletier*, 21 Rev. Leg. 278.

Note.

See *Purcell* v. *Kennedy*, 14 Can. S. C. Repts 453; *Gazaille* v. *Audet*, 15 R. L. 604; *Hearn* v. *McGreevy*, 15 R. L. 609; *Caron et al* v. *Coulombe*, 15 R. L. 615; *Olivier et al* v. *Caron*, 15 R. L. 697.

3. PETITION — PRELIMINARY OBJECTIONS — R. S. C. c. 9, s. 63 — ENGLISH GENERAL RULES — MANITOBA — COPY OF PETITION — R. S. C. c. 9, s. 9 (H) — DESCRIPTION AND OCCUPATION OF PETITIONER.

Held, affirming the judgment of the Court below, that the judges of the Court in Manitoba not having made rules for the practice and procedure in controverted elections, the English rules of Michaelmas Term, 1868, were in force: R. S. C. c. 9, s. 63; and that under rule 1 of the English rules, the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the Court to be sent to the returning officer, and that his failure to do so is the subject of a substantive preliminary objection and fatal to the petitioner. (Strong and Gwynne, JJ., dissenting);

(2) Reversing the judgment of the Court below, that the omission to set out in the petition the residence, address, and occupation of the petitioner is a mere objection to the form, which can be remedied by amendment, and is therefore not fatal. *In re Lisgar Dominion Election. Collins* v. *Ross*, Supreme Ct. of Canada, Nov. 17, 1891.

4. APPEAL — PRELIMINARY OBJECTIONS — "STATUS" OF PETITIONER — "ONUS PROBANDI."

By preliminary objections to an election petition the respondent claimed the petition should be dismissed *inter alia*, "because the said petitioner had no right to vote at said election."

On the day fixed for proof and hearing of the preliminary objections, the petitioner adduced no proof and the respondent declared that he had no evidence, and the preliminary objections were dismissed. On appeal to the Supreme Court of Canada, the counsel for appellant relied only on the above objection.

Held, per Sir W. J. Ritchie, C. J., and Taschereau and Patterson, JJ., that the onus was upon the petitioner to establish his status, and that the appeal should be allowed and the election petition dismissed.

Per Strong, J., that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence the case should be remitted to the Court below to allow petitioner to establish his status as a voter.

Fournier and Gwynne, JJ., *contra*, were of opinion that the *onus probandi* was on the respondent, following the Megantic election case, S S. C. R., 169.

Appeal allowed with costs, and petition dismissed. *Stanstead Election. Rider* v. *Snow*, Supreme Ct. of Canada, Nov. 17, 1891.

5. PETITION — RE-SERVICE OF — ORDER GRANTING EXTENSION OF TIME —PRELIMINARY OBJECTIONS—R. S. C., c.9,s.10—DESCRIPTION OF PETITIONER.

When this petition was first served no copy of the deposit receipt was served with it, and the petitioner within the five days after the day on which the petition had been presented applied to a judge to extend the time for service that he might cure the omission. An order extending the time (subsequently affirmed on appeal by the court of appeal for Ontario) was made, and the petition was re-served accordingly, with all the other papers prescribed by the statute. Before the order extending the time had been drawn up the respondent had filed preliminary objections, and by leave contained in the order he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction in the court of appeal or judge thereof to extend the time for service of the petition beyond the five days prescribed by the act.

Held, that the order was a perfectly valid and good order, and that the re-service made thereunder was a proper and regular service; R. S. C., c. 9, s. 10.

The petition in this case simply stated that it was the petition of Angus Chisholm, of the township of Lochiel, in the county of Glengarry, without describing his occupation; and it was shown by affidavit that there are two or three other persons of that name on the voters' list for that township.

Held, affirming the judgment of the court below, that the petition should not be dismissed for the want of a more particular description of the petitioner. Appeal dismissed with costs. *Glengarry Election. Chisholm* v. *McLennan*, Supreme Ct. of Canada, Nov. 17, 1891.

6. PETITION—SUBSTITUTING PETITIONER.

Motion on behalf of Henry Reeve, a voter in the electoral district, for an order substituting the applicant as petitioner in lieu of the original petitioner, on the ground that the latter had not delivered particulars within the required time and did not intend to offer any evidence at the trial in support of the petition.

Falconbridge, J.—The only cases in which express provision appears to be made by the statute for the substitution of any person for the petitioner are, (1) By s. 32, ss. 2, whereby, "If at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner, on such terms," etc. In the present case the trial has been fixed for the 5th January, and this section does not apply.

(2) By s. 36, provision is made for the substitution of a petitioner on the hearing of an application for withdrawal of the petition. No application for withdrawal has been made in this case.

Section 2 of the act (s. s. j.), does not seem to confer any extraordinary jurisdiction on the Court or a judge so as to authorize *him in this regard* to go outside of the express and plain terms of the statute.

I am, *therefore, of the opinion that* I have no jurisdiction to entertain this application, and I dismiss it with costs. *In re* East York *Dominion Election. Woodcock* v. *Mackenzie*, Ontario High Court of Justice. Chambers, Dec. 19, 1891.

ELECTRIC LIGHT PLANT—See Nuisance 2.

EMBEZZLEMENT—See Criminal Law 4.

EMINENT DOMAIN.

POWERS OF CEMETERY ASSOCIATIONS—CONSTITUTIONAL LAW.

Act of Michigan, 1869, authorized the formation of stock companies to establish rural cemeteries, and provided for their regulation and maintenance.

Held, that an amendment passed in 1875 (How. Stat. Mich., § 4778), whereby such companies were authorized, on condemnation proceedings, to take other property to enlarge their cemeteries, is unconstitutional, in that it authorizes private corporations to exercise the power of eminent domain for private purposes. *Board of Health of Township of Portage* v. *Van Hoesen*, Mich., Sup. Ct., Oct. 9, 1891.

Notes.

1. The use of land for railways and turnpikes has been declared to be a public use, because it is open to all upon the payment of tolls which are regulated by law, and the law requires such ways to be kept open for use by the public impartially. (Opinion of the Court.)

2. It is for the court to determine whether or not the use is a public one. *In re* Deansville Ass'n, 66 N.Y., 569; *In re* New York, etc., R. Co., 77 id., 248; *City of Savannah* v. *Hancock* (Mo.), 3 S. W. Rep., 215; *Pittsburg*, etc., *R. Co.* v. *Benwood Iron Works*, (W. Va.), 8 S. E. Rep. 453; Tied. Lim. Police Powers, § 121*a*, p. 378; Cooley Const. Lim. 660.

3. The question whether the use is public or private depends upon the right of the public to use the property, and to require the corporation, as a common carrier, to transport passengers or freight over the same. *Kettle River R. Co.* v. *Eastern Ry. Co.* (Minn.), 43 N. W. Rep. 469; *De Camp* v. *Railroad Co.*, 47 N. J. Law, 47; *Phillips* v. *Watson*, 63 Iowa 33; *Clarke* v. *Blackmar*, 47 N. Y. 156; Lewis Em. Dom., § 166.

4. It has been held that condemnation proceedings cannot be resorted to to take lands for the construction of spur tracks which are made for the accommodation of individual shippers. *In re Niagara Falls & W. Ry. Co.* (N. Y.), 15 N. E. Rep. 429; *Railroad Co.* v. *Babcock* (N. Y.), 17 id. 678; *Railroad Co.* v. *Wiltse* (Ill.), 6 id. 49; *Pittsburg, etc., R. Co.* v. *Benwood Iron Works* (W. Va.), S. S. E. Rep. 453.

5. To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the State must have a voice in the manner in which the public may avail itself of that use. (Opinion of the Court.)

EVIDENCE—See Action on Promissory Notes—Bills and Notes 8—Contract 3—Crim. Law 7—Crim. Procedure 11—Expert Testimony 2—Insurance 19—Sale of Goods 1. 2.

EXECUTORS—See Insurance 5, 6.

EXPERT TESTIMONY.

1. NEGLIGENCE.

A medical expert may form and express an opinion of the nature of the malady or injuries of a sick or injured person, based in part upon the statements and complaints made by the patient, in relation to his condition, sufferings, or symptoms at the time, in the course of a professional examination into his case. *Johnson* v. *Northern Pac. Ry. Co.*, Minn., 50 N. W. Rep. 473.

2. OPINION—EVIDENCE.

On a prosecution for cruelly mutilating a horse by cuttting him with a knife, the defence being that the horse had the blind staggers, and that bleeding was the usual remedy, a witness who saw the horse at the time, and who states that he has had considerable experience with horses, that he has seen several horses afflicted with the blind staggers, and is familiar with the symptons, is competent to give his opinion as to whether the horse had the blind staggers. *People* v. *Bane*, Mich., 50 N.W. Rep., 324.

EXPRESS COMPANY—See Carriers 2—Railway Companies 1.

EXTENSION OF NOTE—See Bills and Notes 5.

FALSE IMPRISONMENT.

JUSTICE OF THE PEACE — ILLEGAL COMMITMENT OF WITNESS—MALICE — R. S. C. CAP. 178, S. 32—DAMAGES.

Held, That justices of the peace are responsible in damages where they act illegally and maliciously, e. g. in committing a person to gaol for refusal as a witness to answer a question at a trial which had taken place before them, the order of imprisonment being signed out of court some days after the termination of the trial, and under circumstances indicating malice. *Gauvin* v. *Moore et al*, Superior Court of Montreal, in review. June 27, 1891.

FIRE INSURANCE — See Insurance, Fire.

FOREIGN JUDGMENT — See Writ of Summons.

FOREIGN LAW — See Banks and Banking 3.

FORGED CHEQUE, PAYMENT OF—See Banks and Banking 4.

FRAUD — See Bills and Notes 2 — Insurance 18.

FRUIT AND LEAVES, CASTS OF—See Copyright.

GAMING—See Contracts 5.

GOOD-WILL—See Partnership 3.

GOVERNMENT RAILWAY.

DAMAGE TO FARM FROM OVERFLOW OF BOUNDARY-DITCHES — OBLIGATION OF CROWN TO MAINTAIN SAME.

The Crown is under no obligation to repair or keep open the boundary-ditches between farms crossed by the Intercolonial Railway in the Province of Quebec. *Morin* v. *The Queen*, Exchequer Ct. of Canada, Nov. 28, 1891.

GUARANTEE—See Insurance 7.

HOMICIDE—See Crim. Procedure 4, 5.

HUSBAND AND WIFE—See Domicile.

INCEST—See Crim. Law 7.

INDECENT ASSAULT—See Crim. Law 8.

INDIANS.

RIGHTS OF, HOW DETERMINED — MINORS—APPOINTMENT OF TUTOR.

Held:—1. That the rights of Indians are regulated and determined by the Indian Act (R. S. C., ch. 43), and not by the common law, which does not apply to them.

2. That a tutor to an Indian minor, should be appointed through the ministry of the Superintendent General of Indian affairs as indicated in said Act. (Sec. 20, Sub-Sec. 8), and such tutorship conferred by the prothonotary, in the ordinary way, is of no effect. *Tiorohiata ès-qual* v. *Tori waieri alias Barnes*, Montreal Law Reports, 7 S. C. 304.

INDORSER, LIABILITIES OF — See Bills and Notes 1.

INDORSEMENT— See Bills and Notes 7.

INFANCY.

COVENANT TO PAY PREMIUMS IN APPRENTICESHIP — NECESSARIES — EDUCATION—BOND.

The defendant, while an infant, entered into a bond by which he bound himself to pay the plaintiff a certain premium in respect of education in a trade. On an action thereon after he was of age:

Held, that education in a trade might be a necessary for an infant, and that the plaintiff was entitled to succeed, provided that the bond was a single bond, and the education had been supplied, and was necessary to the defendant, and the price charged for it was reasonable. *Walter* v. *Everard*, Eng. Court of App., April 24, 1891.

Note.

In *Cooper* v. *Simmons*, 7 H. & N., 719, there is an elaborate exposition of the law by Martin B., where all the authorities, beginning with Coke, are summed up, and it is laid down positively that the fact that a bond was entered into by an infant does not prevent it from being sued upon so long as the bond is a single bond, and is not relied upon as a bond preventing any inquiry into the consideration given for it or its reasonableness.

INJUNCTION. — SEE ALSO LIBEL AND SLANDER 4.

1. CONTRACTS — RESTRAINT OF TRADE.

Where a party to a contract, which stipulates the damages for its breach, practices medicine in a certain locality, contrary to the terms of the contract, the party injured has an adequate legal remedy by an action for the stipulated damages, and an injunction to restrain the breach will not lie. *Martin* v. *Murphy*, Ind., 28 N. E. Rep., 1118.

2. TITLE TO LAND—BORNAGE.

Held: — That when certain works which a proprietor objects, are being carried on at the limits of the properties of the respective parties, and there has been no legal settling of boundaries to determine the dividing line between the properties, an injunc-

tion will not lie. *The Anglo-Continental Guano Works* v. *The Emerald Phosphate Co.*, Q. B. (in Appeal), Montreal 26 Nov. 1891, 21 Rev. Lég. 288.

INSOLVENCY—See Bankruptcy.

INSURABLE INTEREST — See Insurance 19.

INSURANCE—SEE ALSO ACTION ON PROMISSORY NOTES.

GENERAL.

1. FORFEITURE OF CHARTER.

The repeal of a statute under which an insurance company is organized, by a subsequent act of the legislature, which declares the charter of such insurance company forfeited unless the company complies with the provisions of the repealing act within a limited time, does not work the cancellation of policies of said company outstanding at the time of the passage of the later act, though the company failed to comply with its provisions, and thus forfeits its charter. *Manlove* v. *Commercial Mut. Fire Ins. Co.*, Kan., 27 Pac. Rep. 979.

2. AGENT'S BOND — LIABILITY OF SURETY.

The bond given by an insurance agent to his company recited *verbatim* a certain clause in the agency agreement, but also stated generally that the agent owed other duties than those specified therein; and it was conditioned that he should pay over all moneys due the company "under said clause or otherwise."

Held, that the liability of the surety was not restricted to a default arising under such clause, but extends to any other default under the terms of the agreement.

The surety's liability extends to an indebtedness of the agent to the company which accrued after the execution of the bond, though the transactions out of which it arose had their inception before it was executed. *Prudential Ins. Co.* v. *Berger*, 16 N. Y. Supp. 515.

LIFE.

3. PLEADING.

A declaration on an insurance policy which provides that the beneficiary shall receive the sum represented by the payment of $2 by each member in Division A of the association, not exceeding $5,000, which does not aver the number of members in such division, is defective on a general demurrer. *Mutual Acc. Ass'n.* v. *Tuggle*, Ill., 28 N. E. Rep. 1067.

4. MUTUAL BENEFIT INSURANCE—NOTICE.

Where the laws of an association require notice of each assesssment to be given to each member, and provide that failure to pay such assessment within 30 days from the date of the notice shall be cause for suspension, a member cannot legally be suspended for non-payment of an assessment of which it is not shown that he was notified. *Supreme Lodge Knights of Honor* v. *Dalberg*, Ill., 28 N. E. Rep. 785.

5. DEATH OF INSURED BEFORE CHILDREN ARE BORN—EXECUTORS.

Held:—That where a policy of insurance on the life of a wife is made payable to her children, and she dies before any children are born, her executor cannot maintain an action at law for the amount of insurance. The court said: "The policy was obviously intended as a provision for such children as might be born of the marriage between Mr. and Mrs. Vail, and for no one else. The promise was to pay to the children; they were the beneficiaries. If Mrs. Vail had contemplated the possibility of death before she had given birth to any children, some provision would probably have been inserted in the policy touching the disposition of the insurance money in that event. What such provision would have been it is impossible to say, and it is useless to indulge in speculation on that subject, as the court is powerless to make a contract for the parties covering that contingency. It can only enforce such a contract as the parties have themseves made. Some stress is laid on the fact that according to the rule which prevails in some States, Mrs. Vail retained the power, so long as she held

the policy, to change the beneficiaries with the consent of the insurer. *Kerman* v. *Howard*, 23 Wis., 108; *Gambs* v. *Insurance Co.*, 50 Mo., 47. It is claimed that because she retained such power, her administrator may recover on the policy. I am unable to assent to that proposition. Even if she had a right to change the beneficiary, it was a mere power, to be exercised with the company's consent, and, as the agreed case shows, she never exercised it, or attempted to do so. The existence of such power, even if its existence be conceded, is not sufficient to make the policy a part of her estate, or authorize her administrator to sue thereon. Furthermore, it is said that by taking out the policy for the benefit of her children, Mrs. Vail constituted the defendant company a trustee for her children, and the trust having failed because she died childless, that the fund in the trustee's hands inures to the benefit of her estate, in the same manner that a fund left in trust for a given purpose will inure to the benefit of the donor or his heirs, if for any reason the trust cannot be executed. It is sufficient to say of this contention that if the principle invoked has any application to the case at bar, it is only applicable to the premiums actually paid up to the time of Mrs. Vail's death, and the interest accumulated thereon; and the remedy is in equity. Mr. Vail did not place $5,000 in the hands of the defendant company to be held for the benefit of or in trust for her children. She contracted to pay $39.60 quarterly, and up to the time of her death had paid only two quarterly instalments. The contract was entered into with the expectation that Mrs. Vail would live many years, and that the premiums paid in the meantime, with accumulated interest, would equal the face of the policy at the end of her expectancy. Under the circumstances, it cannot be maintained, even on the trust theory above outlined, that the defendant is liable to the plaintiff in the sum of $5,000, or in any other sum, in a strictly legal proceeding. *McElwee* v. *New York Life Ins. Co.*, 47 Fed. Rep., 798. 44 Alb. L. J., 516.

6. INSURANCE LIFE—INSURANCE IN FAVOUR OF WIFE—DEATH OF INSURED BY CRIMINAL ACT OF WIFE—ACTION BY EXECUTORS OF INSURED—PUBLIC POLICY — MARRIED WOMEN'S PROPERTY ACT 1882 (45 & 46 Vict., c. 75. s. 11.)

Appeal from the judgment of the Queen's Bench Division (Denman & Wills, JJ.), upon a point of law raised by the pleadings and ordered to be disposed of before the trial under Order XXXIV, rule 2.

The facts stated on the pleadings were substantially as follows: James Maybrick insured his life with the defendants for £2,000, to be payable to his wife, Florence Maybrick, if she survived him, otherwise to his legal representatives. He died, and his wife was subsequently indicted for and convicted of murdering him by poison. Her sentence was, however, commuted to penal servitude for life. After conviction she assigned the policy and her interest thereunder to the plaintiff Cleaver, and he was also appointed administrator of her estate under 33 & 34 Vict., c. 23.

The other plaintiffs were the executors of the will of James Maybrick, the insured. The question to be decided was whether, if it were proved that the insured died by poison intentionally administered by his wife, that would afford a defence to the action as against the plaintiff Cleaver, or against the other plaintiffs, the executors of James Maybrick's will. The Divisional Court held, that on grounds of public policy the action could not be maintained.

The Court (Lord Esher, M. R., Fry, L. J., and Lopes, L. J.), held that in such a case the policy was vested in the executors of the insured, that the trust of the policy money created under the Married Women's Property Act 1882, s. 11, in favour of the wife, became incapable of being performed, and neither the wife nor anyone claiming through her could take any interest in the policy money; that there was thereupon a resulting trust in favour of the husband's estate; that no question of public policy arose as between the executors of his will and the defendants; and that the action

was therefore maintainable by the plaintiffs, the executors of James Maybrick, but not by the plaintiff Cleaver. They therefore allowed the appeal. *Cleaver and others* v. *Mutual Reserve Fund Life Association*, Court of Appeal (Eng.), Dec. 8, 1891.

GUARANTEE.

7. GUARANTEE BOND — FAILURE TO GIVE NOTICE.

Held: — That an employer who is insured against the infidelity of his employee by a guarantee company, is bound to notify the company of any irregularities occurring in the account of his employee, as soon as they occur, as agreed in the conditions of the policy; and that if by neglecting to do so, the company is unable to protect itself, he has no recourse against it. *The Commercial Mutual Building Society of Montreal* v. *The London Guarantee and Accidents Co.*, Limited, 21 Rev. Lég., 275.

Note.

Where the condition of a guarantee bond required the employer to give notice immediately to the guarantor of any criminal offence of the employee entailing loss for which a claim was liable to be made under the bond, and the employer, although aware of a defalcation on the 25th, did not give notice thereof to the guarantor until the 27th, after the employee had fled the country; *held*, that the bond was forfeited. *The Molsons Bank v. The Guarantee Company of North America*, Mont. L. R., 4 S. C., 376.

FIRE.

8. SEVERABLE CONTRACT.

Where, in a policy of insurance, a separate valuation has been put upon the different subjects of insurance, as $300 on the dwelling-house, $175 on household furniture, $75 on barn, "$500 on horses, mules, and colts while in barn or on farm," etc., the contract is severable, and not entire and indivisible. *Phœnix Ins. Co.* v. *Grimes*, Neb., 50 N. W. Rep. 168.

9. LIMITATIONS.

A 12 months' limitation in a policy of fire insurance, within which the assured must sue for a loss, is not waived by conduct of the insurance company calculated to make the former believe that the loss will be paid, provided such conduct ceases, so as to leave a reasonable time within which to sue; and 7 months of the 12 is considered ample time. *Steel* v. *Phœnix Ins. Co. of Brooklyn*, U. S. C. C. (Oreg.), 47 Fed. Rep. 863.

10. WAIVER BY AGENT.

A forfeiture of an insurance policy having occurred from a breach of its conditions, an agent of the insurer, who has no knowledge or notice thereof, is not to be deemed to have waived the same by statements not intended to have such an effect, and where conditions do not exist constituting an estoppel. *St. Paul Fire & Marine Ins. Co.* v. *Parsons*, Minn., 5 N. W. Rep. 240.

11. CONTRIBUTION.

Where one is insured concurrently in seven companies, and makes claim for his whole loss against six of the companies, and the whole loss is thus settled, conformably to the terms of the policies, and paid, the seventh company is discharged as to him, and its liability, if any, is to the other companies for contribution. *Williamsburg City Fire Ins. Co.* v. *Gwinn*, Ga., 13 S. E. Rep. 837.

12. COMPLAINT.

A complaint in an action on an insurance policy, which does not set out the policy, or show either proof of loss, ownership, or value, but only states that the insured was damaged in a certain sum, and that he gave the company notice of the fire, is demurrable. *Emigh* v. *State Ins. Co.*, Wash., 27 Pac. Rep. 1063.

13. CONDITIONS.

Where a policy insures a building as a dwelling house only, a provision that the policy shall be void for any "increase of hazard by change of use or occupancy" is a continuing warranty on the part of the insured that the house shall be used for no other purpose increasing the risk, and a plea alleging that, without the consent of the underwriter, the building had also been used as a saloon, whereby the hazard was increased, presented a

question for the jury, and it was error to sustain a demurrer thereto. *Germania Fire Ins. Co.* v. *Deckard*, Ind., 28 N. E. Rep. 868.

14. CONDITIONS OF POLICY.

A policy of insurance purporting to run for one year described the insured property as a "two-story shingle roof building while occupied by assured as a store and dwelling house," and provided that the policy should be void if the insured property should become vacant or unoccupied. When the policy was written the assured occupied the building partly as a store and partly as a dwelling. Before the fire he ceased to occupy it as a dwelling, but continued to occupy it as a store.

Held, that the policy was not forfeited. *Burlington Ins. Co.* v. *Brockway*, Ill., 28 N. E. Rep. 799.

15. WHAT IS WITHIN THE RISK.

A policy of insurance upon a sugar refinery provided for indemnity against loss by "explosion and accident," and by a condition on the back thereof, declared that the term "explosion" included only a "rupture of the shell or flues of the boiler or boilers, caused by the action of steam."

Held, that where, in an attempt to extinguish a blaze originating in a starch kiln heated by steam pipes, a cloud of starch dust was stirred up, which came in contact with the flame and exploded, this was an "accident," within the meaning of the policy, and the insurer was liable for damage to the property caused directly by the explosion, and by a fire which resulted therefrom, notwithstanding a further provision that no claim should be made for "any explosion or loss caused by the burning of the building," or "for any loss or damage by fire resulting from any cause whatever." *U. S. Cir. Ct. N. D. Ill.*, *Chicago Sugar Ref. Co.* v. *Amer. Steam Boiler Co.*, 48 Fed. Rep., 198.

16. RE-INSURANCE — TRANSFERRED RISKS.

Defendant contracted with another company about to quit business to reinsure all the latter's members who were then in good standing. The written request for insurance made by one of such members to defendant showed that it was not an application for new insurance, and defendant, in the policy issued thereon, referred to insured's application to the other company, and made it a part of its contract. The insurance also was for the same amount.

Held, that the policy issued by defendant was a transferred risk. *Ky. Ct. of App. People's Mut. Assur. Fund* v. *Baesse*, 17 S.W. Rep., 630.

17. POWERS OF OFFICERS — POLICY TO SECRETARY.

The by-laws of a mutual fire insurance company provided that the president, vice-president and secretary should constitute an executive committee, one of whom must approve each application for insurance before a policy could be issued, and that every application taken by a duly authorized person should constitute a contract of insurance until the applicant was notified of its modification or rejection.

Held, that an application by the secretary for insurance on his own property, when approved by the vice-president, constituted a valid contract of insurance. *N.Y. Ct. of App. Pratt* v. *Dwelling House Mut. Fire Ins. Co.*, 29 N. E. Rep., 117.

18. FRAUD.

Held: — That an agent representing several insurance companies can, when a risk is refused by one of the companies he represents, transfer it to another, without informing that other of the refusal, and that such transfer cannot be considered as a fraud by the latter company. *Connecticut Fire Ins. Co.* v. *Kavanagh*, Q. B., (in appeal), Montreal, 26 Nov. 1891, 21 Rev. Lég., 320.

Note.

See to the same effect *Williams et al.* v. *The North China Ins. Co.*, 1 L. R. Com. Pleas. Dir. 757; *Giffard* v. *The Queen Ins. Co.*, 1 Hannay (N.B.), 432; *Ogden* v. *The Montreal Ins. Co.*, U. C. Com. Pleas., 497.

MARINE.

19. INSURABLE INTEREST. — THE

RISK — BARRATRY — EVIDENCE OF VALUE OF CARGO.

1. A partner may insure a cargo belonging to the firm in his own name, on account of whom it may concern, making the loss, if any, payable to himself; and, in the event of a loss, may sue on the policy without joining his copartners as plaintiffs.

2. The master of a vessel, conspiring with others, fraudulently loaded her in part with cases of dirt, and issued bills of lading for the same as valuable cargo, with intent to obtain insurance on the cargo, and abandon the vessel at sea. When off the coast he abandoned the vessel, with his crew, having first bored holes in her hull to insure her destruction. *Held*, that the loss of the cargo was within the risk of barratry of the master and mariners mentioned in defendant's policy.

3. The rule that the owner cannot commit barratry by conspiring with others to bring about the vessel's destruction at sea, for the purpose of defrauding an insurer, does not apply to the case of a master who is only part owner.

4. The testimony of the master that he had conspired with others to load a vessel with worthless cargo, and issue bills of lading therefor as valuable cargo in order to defraud an insurance company, was corroborated by the appearance of the cargo when removed from the vessel. *Held*, properly received on behalf of the company, notwithstanding a valuation of the cargo in the policy.

5. On the issue whether or not a vessel was loaded at a foreign port with valuable cargo, the court erred in admitting testimony of witnesses who had no knowledge in fact of the articles placed on the vessel, but answered wholly from their observation of and acquaintance with receipts and bills of lading of the alleged cargo, issued at the time of loading. *Voison* v. *Com. Mutual Ins. Co.*, 16 N.Y. Supp., 410.

INTEREST — See Constitutional Law 1.

INTIMIDATING WITNESS — See Contempt of Court.

INTOXICATING LIQUOR.

LICENSE—SUMMARY CONVICTION.

Held, that a by-law of a municipality prohibiting the sale of intoxicating liquors, passed under the Temperance Act of 1864, when it was in force, cannot be repealed by the legislature of Quebec. The Temperance Act and the Mining Act are not contradictory and can exist together.

That where in a municipality a prohibitory by-law exists, under the Temperance Act or the municipal code; the powers vested in the mining inspector of a mining division of granting licenses, ceases to exist. *La Corp. du Canton de Compton* v. *Simoneau*, 21 Rev. Lég. 265.

INUENDO—See Libel and Slander 2, 6.

JOINT STOCK COMPANIES—See Companies 1.

JURISDICTION—SEE ALSO WRIT OF SUMMONS.

APPEAL—FUTURE RIGHTS—TITLE TO LANDS — SERVITUDE — SUPREME AND EXCHEQUER COURTS ACT, S. 29 (B).

By a judgment of the Court of Queen's Bench for Lower Canada (appeal side), the defendants in the action were condemned to build and complete certain works and drains in a lane separating the defendants' and plaintiff's properties on the west side of Peel Street, Montreal, within a certain delay, and the court reserved the question of damages. On appeal to the Supreme Court of Canada:

Held, that the case was not appealable. Gilbert v. Gilman, 16 S. C. R. 189, followed.

The words "title to lands" in s.s. "b," s. 29, Supreme and Exchequer Courts Act, are only applicable to a case where title to property or a right to the title are in question. Wheeler v. Black, 14 S. C. R. 242, referred to. Appeal quashed with costs. *Wineberg et vir* v. *Hampson*, Supreme Court of Canada, Nov. 17, 1891.

JUSTICE OF THE PEACE—See False Imprisonment.

LACHES—See Bills and Notes 10.

LARCENY—See Criminal Law 3, 5.

LATENT DEFECT—See Admiralty.

LEGISLATIVE AUTHORITY—See Constitutional Law 1.

LIBEL AND SLANDER.

1. LIBEL—COMPLAINT.

In an action for libel a complaint alleging the wilful and intentional sale by defendant of a paper containing the libelous article is sufficient, and need not allege that defendant knew that the paper contained such article, as the absence of such knowledge is matter of defense. *Street* v. *Johnson*, Wis., 50 N. W. Rep., 395.

2. INUENDO—"DISHONOURABLE CONDUCT" — LANDLORD AND TENANT — SLANDER (Scotch law).

A landlord wrote to a tenant complaining that he had not implemented the award of an arbiter, and used these words — "I..... am surprised at your conduct, which you must see is very dishonourable."

In an action of damages for slander by the tenant, *held*, that the landlord's letter only addressed a remonstrance to the pursuer and appealed to his sense of honour, and that the words complained of were not actionable. Law v. Gibsone, 13 Sh., 396 followed. *Turnbull* v. *Oliver*, 29 Scot. Law, Rep., 139.

3. DAMAGES.

Where the proprietor of a newspaper publishes, without inquiry as to its authenticity, an item from a news agency, falsely stating that a certain named man and woman of high respectability have eloped, that the intimacy between them had for some time excited comment, etc., he is guilty of reprehensible negligence, and though not guilty of malice the jury may, in an action against him for libel and slander, award punitive or exemplary damages. The publication of the article was not prompted by any personal malice toward the plaintiff or the other persons mentioned. But the defendant was guilty of reprehensible negligence in publishing it without making any effort to verify its truth. The injury to the reputation of the plaintiff was probably insignificant, but the jury undoubtedly thought that a newspaper manager who would publish such an article, one in which the good name of a decent woman was trailed in the mire, without any attempt at independent investigation to ascertain whether it was true or false, was guilty of a wanton act, and that the facts warranted such a verdict as would be an example to deter other newspaper managers from similar conduct. Reckless indifference to the rights of others is equivalent to an intentional violation of them, and in actions of libel, where the facts show the publication of a defamatory article without any excusable motive, and without any attempt to inquire into the truth of the facts stated, the jury are authorized for the sake of the public example, to award punitive or exemplary damages. The present verdict ($4,000) is a severe one, and if it had been for a less amount would have vindicated the plaintiff and sufficiently punished the defendant, but questions of damages belong particularly to the jury, and the court will not set aside a verdict simply because it may be dissatisfied with the amount rendered. U. S. Circ. Ct., S. D. N.Y., July 15, 1891. *Rutherford* v. *Morning Journal Ass'n*, 47 Fed. Rep., 487.

4. LIBEL—INJUNCTION.

The High Court of Justice has jurisdiction, in an action of libel against the publisher of a newspaper, to grant an interlocutory injunction at any stage of the cause restraining the defendant from publishing the libel. The subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless

an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. The Court entirely approves of, and desires to adopt as its own, the language of Lord Esher, M.R., in *Coulson* v. *Coulson*, "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to beexercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the court would set aside the verdict as unreasonable. *Bonnard* v. *Perryman*, C. A., 65 L. T. Rep., (N.S.), 506.

5. PRIVILEGED COMMUNICATIONS — CHARGES AGAINST PUBLIC OFFICER.

A letter written by the defendant to the superintendent of the United States census, stated that the defendant thought himself entitled to recommend some of his political friends in the district in which he lived, and have them appointed as enumerators; that the supervisor however had paid no attention to his recommendations, but had appointed the plaintiff, a man who had since the war murdered two Union soldiers, and been instrumental also in defrauding the defendant out of his election to the Legislature. There was evidence that the charges were untrue, and that the character of the plaintiff was good. There was no evidence in reply, and the answer admitted that the object of the defendant was to secure plaintiff's removal from office.

Held, that the communication was one only of qualified privilege, and that as there was evidence tending to show malice the case should have been submitted to the jury. *Ramsay* v. *Cheek*, N. Car., Sup. Ct, Nov. 3, 1891.

Notes.

1. The burden was on the plaintiff to show that he wrote the letter with malice or without probable cause. *Briggs* v. *Garrett*, 111 Penn. St. 404; *Bodwell* v. *Osgood*, 3 Pick. 379.

2. "Malice," in this connection, is defined as "any indirect and wicked motive, which induces the defendant to defame the plaintiff. If malice be proved, the privilege attaching to the occasion is lost at once." Odger Sland & L. 267; *Clark* v. *Molyneux*, 3 Q. B. Div. 246; *Bromage* v. *Prosser*, 4 Barn. & C. 247; *Hooper* v. *Truscott*, 2 Bing. N. C. 457; *Dickson* v. *Earl of Wilton*, 1 Fost. & F. 419.

3. Proof that the words are false is not sufficient evidence of malice, unless there is evidence that the defendant knew at the time of using them that they were false. *Fountain* v. *Boodle*, 43 E. C. L. 605; Odger Sland. & L. 275. That the defendant was mistaken in the words used by him on such confidential or privileged occasion is, taken alone, no evidence of malice. *Kent* v. *Bongartz*, 15 R. I. 72.

4. To entitle matter otherwise libellous to the protection (of qualified privilege) which attaches to communications made in the fulfillment of duty, *bona fides*, or to use our own equivalent, honesty of purpose, is essential, and to this again two things are necessary; (1) That it be made not merely on an occasion which would justify making it, but also from a sense of duty; (2) that it be made with a belief of its truth. Cockburn, C. J., in *Dawkins* v. *Lord Paulet*, L. R., 5 Q. B. 102.

5. The malice may be proved by some extrinsic evidence, such as ill feeling, or personal hostility or threats and the like on the part of the defendant toward the plaintiff, but the plaintiff is not bound to prove malice by extrinsic evidence. He may rely on the words of the libel itself, and on the circumstances attending its publication, as affording evidence of malice. Odger Sland. & L. 277-288; 13 Am. & Eng. Enc. Law. 431.

6. REPARATION — INUENDO — IRONICAL MEANING ATTACHABLE TO WORDS.

A person who conceived that his reputation had been unfairly attacked through questions put by a Member of Parliament in the House of Commons, wrote to him, and sent to a newspaper a letter in which he denied the charges which he alleged against himself. He went on to put the case that he should induce one of the political opponents of the member addressed to put questions in the House of Commons implying that that member had had *delirium tremens*, and had been intoxicated in public. Such a course, the writer stated, would be as justifiable as the conduct of the Member of Parliament

had been to him. In his letter he also spoke of his illustrations of *delirium tremens* and drunkenness as "imaginary stories," adding, "it is doubtless painful for you to hear of these stories as it is painful for me to imagine them true for the sake of bringing home to your mind the impropriety of your unfair questions." In an action of damages at the instance of the Member of Parliament against the proprietor of the newspaper in which the letter was published.

Held, (*aff.* judgment of the First Division), that the pursuer was entitled to an issue whether the letter represented him as a drunkard; that meaning being capable of being put upon the letter, and it being for a jury to say whether there was or was not a libel. *Ritchie & Co.* v. *Sexton*, 18 Sc. Sess. Cas., 4th Ser., 20 (H. L.)

LICENSE—See Intoxicating Liquor.

LIFE INSURANCE — See Insurance, Life.

LIME-KILN—See Nuisance 1.

LIMITATIONS — See Insurance 9 — Statute of Limitations.

LIQUOR—See Intoxicating Liquor.

LIVE STOCK—See Carriers 1.

MALICE—See False Imprisonment.

MANDAMUS — SEE ALSO RAILWAY COMPANIES.

MANDAMUS TO COUNTY COMMISSIONERS.

Mandamus will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding, instituted to determine who was elected to such office, and who has also been ousted from the office by a judgment of the district court in proceedings in *quo warranto*. The peremptory writ of *mandamus* should not issue unless there is a clear and specific legal right to be enforced, and there is no other particular and adequate legal remedy. *Swartz* v. *Large*, Kan., 27 Pac. Rep., 993.

MANITOBA—See Constitutional Law 2 — Elections 3.

MARINE INSURANCE—See Insurance, Marine.

MARITIME LIEN.

WHARFAGE—SEIZURE "SUPER NON DOMINO" — MORTGAGOR AND MORTGAGEE.

Held:— (1) A contract by which the owner of a wharf leased it to the owners of a steamboat for a fixed rental, does not give the lessor a maritime lien for the rental, as wharfage, on the steamboat.

(2) A seizure of a vessel in virtue of a judgment against the mortgagor, after foreclosure of the mortgage, when she has to become the property of the mortgagee, is null as made *super non domino*. *Demers* v. *Baker*, and *Ross*, opposant. Superior Court of Quebec, Andrews, J., Oct. 19, 1891.

MARKET VALUE — See Customs Duties.

MASTER AND SERVANT — SEE ALSO SHIP 2.

CONTRACT OF HIRING — BREACH — DAMAGES.

Where a servant, after being discharged, sues for breach of the contract of hiring before the termination of the period covered thereby, he can recover damages up to, but not after, the time of the trial. *Mt. Hope Cemetery Ass'n* v. *Weidenman*, Ill. Supreme Court, Oct. 31, 1891.

MAYOR—See Contract 1.

MINERAL GAS—See Municipal Corporation 1.

MINORS—See Indians.

MORTGAGOR AND MORTGAGEE—See Maritime Lien.

MUNICIPAL ACT—See Constitutional Law 1.

MUNICIPAL CORPORATION —SEE ALSO APPEAL 1.

1. MINERAL GAS—R. S. O., c. 184, s. 565.

Natural gas is a "mineral" within the meaning of the Municipal Act, R. S. O., c. 184, s. 565.

Judgment of Street, J., 19 O. R. 591, affirmed. *In re Ontario Natural Gas Co. & Township of Gosfield, South Ontario*, C. A. (Ch. D.) Nov. 10, 1891.

2. STREET IMPROVEMENTS—LIABILITY OF CHARITABLE CORPORATION — EXEMPTION FROM TAXATION.

An ordinance of the City of Philadelphia of May 13, 1855, provides that "the footways of all public streets and highways * * * shall be graded, curbed, and paved, and kept in repair at the expense of the owners of the ground fronting thereon." It was held that a charitable corporation, exempt by law from all taxation, is not relieved of the duty to comply with this ordinance, as this obligation is not imposed by virtue of the taxing power, but is in the nature of a police regulation. *City of Philadelphia* v. *Contributors etc.*, 22 Atl. Rep. 744.

3. DEFECTIVE SIDEWALKS—LIABILITIES OF ABUTTING OWNERS.

The violation of a city ordinance which required the owner of property fronting on a street to keep his sidewalks free from snow and ice, and prescribed a penalty for such violation, does not make such owner liable to the city for damages paid by it to one who received injuries by reason of the property owner's failure to keep his sidewalk clean, *City of St. Louis* v. *Connecticut Mut. Life Ins. Co.*, Supreme Court of Missouri, Nov. 1891.

Note.

An abutting owner, as such, owes no duty to maintain the street or sidewalk in front of his premises, and is not responsible for any defects therein which are not caused by his own wrongful act. He may consequently, like any other person using the sidewalk in front of his premises, recover for an injury from a defect therein against the city, whose duty it was to keep it in repair. The fact that he violates a city ordinance, which requires abutting owners to remove snow and ice from the sidewalk in front of his premises within a certain time after their accumulation, does not render him liable to one injured by falling upon such snow or ice, nor to the city which had suffered judgment for the same injury. *Kirby* v. *Association*, 14 Gray, 249; *Vandyke* v. *Cincinnati*, 1 Disn. 532; *Heeney* v. *Sprague*, 11 R. I. 456; *Flynn* v. *Canton Co.*, 40 Md. 312; *Moore* v. *Gadsden*, 93 N. Y. 12; *City of Hartford* v. *Talcott*, 48 Conn. 526; *City of Keokuk*, v. *Independent Dist. of Keokuk*, 53 Iowa, 353, 5 N. W. Rep. 503; 2 Black, Judgm. s. 575; 2 Dill. Mun. Corp. (4th Ed.) ss. 1012, 1035.

MURDER—See Crim. Procedure 3.

MUTUAL BENEFIT INSURANCE—See Insurance 4.

NECESSARIES—See Infancy.

NEGLIGENCE—SEE ALSO ADMIRALTY — RES JUDICATA — DISCHARGE —EXPERT TESTIMONY—SHIP 2.

1. RESPONSABILITÉ—DAMAGES.

Held:—That the father of a two-year-old child, who, escaping from the house, and running on the street is there killed by a street car, has no claim for damages in the absence of special negligence on the part of the driver. *City Passenger R. R. Co.* v. *Dufresne* (Q. B., in appeal), 21 Rev. Lég., 270.

2. RAILWAY ACT—51 VIC., C. 29, S. 194 — 53 VIC., C. 28, S. 2 — ANIMALS KILLED ON TRACK WHILE STRAYING.

Held:—That cattle are not properly on a highway unless they are in charge of some one; and where cattle escape from the land of their owner, which is situated at a distance from the railway track, and while straying upon the highway, get upon the railway owing to the absence of cattle guards at the point of intersection, and are killed on the track without any negligence on the part of the company, the owner is not entitled to recover damages. *McKenzie* v. *Canadian Pac. Ry. Co.*, Superior Court, Sherbrooke, P.Q., Dec. 9, 1891.

3. INJURIES — PHYSICAL EXAMINATION OF PARTY.

This court has no power to compel physical examination of party in a negligence case. *Pennsylvania Co.* v. *Newmeyer*, Superior Court of Indiana.

Notes.

1. There are many cases which hold that the court may, in the exercise of a sound discretion, upon seasonable application, require the plaintiff to submit his person to a reasonable examination, by competent physicians and

surgeons, when necessary to ascertain the nature, extent, and permanency of his injuries. *White* v. *Railway Co.*, 61 Wis., 536, 21 N. W. Rep., 524; *Railway Co.* v. *Thul*, 29 Kan., 466; *Schroeder* v. *Railroad Co.*, 47 Iowa, 375.

2. On the other hand, there are numerous authorities holding that, in the absence of a statute upon the subject, the courts do not possess the power to order and compel such examination. *Stuart* v. *Havens*, 17 Neb., 211, 22 N. W. Rep., 419; *Railroad Co.* v. *Finlayson*, 16 Neb., 578, 20 N. W. Rep., 860; *Parker* v. *Enslow*, 102 Ill., 273; *Neuman* v. *Railroad Co.*, 50 N.Y. Super. Ct., 412; *Roberts* v. *Railroad Co.*, 29 Hun., 154.

3. In the case of *Railway Co.* v. *Botsford*, 11 Sup. Ct. Rep., 1000, the sole question presented for the consideration of the Supreme Court of the United States was the question of the legal right and power of the court trying the cause to make and enforce an order compelling the plaintiff to submit to an examination with a view of ascertaining the nature, extent, and permanency of the injuries on account of which damages were sought. After a careful examination of the authorities upon thesubject, it was held that the court under the common law did not possess the power and legal right to order and enforce such an examination.

4. Falling into Cellar—Injury to Licensee.

Where defendant passively allows plaintiff, not a passenger, to pass at her pleasure across its station grounds and platforms, plaintiff is not a trespasser.

The fact that the defendant made no attempt to prevent travel across the station grounds and platform, as a short cut between the public streets, was not an invitation to use them for that purpose. *Galligan* v. *Manufacturing Co.*, 143 Mass. 527; *Reardon* v. *Thompson*, 149 id. 267.

The general rule is that a bare licensee has no cause of action on account of dangers existing in the place he is permitted to enter, but goes there at his own risk, and must take the premises as he finds them. *Reardon* v. *Thompson*, 149 Mass. 268; *Parker* v. *Publishing Co.*, 69 Me. 173.

No duty is cast upon the owner to take care of the licensee, or to see that he does not go to a dangerous place, but he must take his permission with its concomitant conditions and perils, and cannot recover for injuries caused by obstructions or pitfalls. *Hounsel* v. *Smyth*, 7 C. B. (N. S.) 731; *Batchelor* v. *Fortescue*, 11 Q. B. Div. 474; *Sweeny* v. *Railroad*, 10 Allen, 368, 372.

The plaintiff cannot complain that the defendant, in lawfully using its station and appliances as they were apparently designed and adapted to be used, so changed their condition without her knowledge as to make the place dangerous to her when she attempted to use it in a manner inconsistent with the use which the owner chose to make of it. The defendant was under no obligation to her to light the place or put up a barrier, or to give warning that the condition of the door made it dangerous for her to attempt to pass. The opening was not a trap, but an ordinary and usual means of access to a cellar, and so far as the plaintiff was concerned, the defendant owed her no duty to keep it closed rather than open. *Metcalfe* v. *Steamship Co.*, 147 Mass., 66; *Heinlein* v. *Railroad Co.*, id. 136. Redigan v. Boston & M. R. Co. Sup. Jud. Ct. Mass., Nov. 25, 1891.

5. Accident at Railroad Crossing—Contributory Negligence.

A gate-keeper at a street crossing, while opening a switch for an approaching engine, left the open gate in charge of a bystander, who signaled to a street car driver to cross. The latter mistaking him for the gate-keeper, who was in the habit of so signaling when there was no danger, drove on, in violation of the street car company's rules that required the conductor, when the gate was open and the gateman absent, to first go forward, and report whether the track was clear. As the driver neared the crossing, but before he was aware of the engine's approach, he was told by the bystander to hurry up, and he did so. When the horses were within a few feet of the track, and the car was so near that he could not safely stop it, he discovered the engine and attempted to get across before it, but the engine and car collided, and he was injured.

Held, in an action by the driver against the railroad company for damages, that the defendant was negligent, since, when such gates are open the public have a right to presume, in the

absence of knowledge to the contrary, that there is no danger.

Whether or not, under all the circumstances, plaintiff was guilty of contributory negligence, was a question for the jury, and the court erred in directing a verdict for defendant. *Evans* v. *Lake Shore & Mich. So. Ry. Co.* Supreme Court of Michigan, Nov. 1891.

Note.

It has been frequently held that when gates are provided the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gatemen were properly discharging their duties, and that it was not negligent on their part to act on the presumption that they were not exposed to a danger which could only arise from a disregard of their duties by the gatemen. *Glushing* v. *Sharp*, 96 N. Y., 676; *Railroad Co.* v. *Schneider*, (Ohio Sup.), 17 N. E. Rep., 321.

NEGOTIABLE INSTRUMENT—See Bills and Notes.

NEW PROMISE - See Bankruptcy.

NEWSPAPER—See Libel and Slander 3, 4.

NOTICE—See Insurance 4, 7.

NOVA SCOTIA — See Actions on Promissory Notes.

NUISANCE.

1. LIME-KILN — ODOURS — ADJOINING PROPERTY — DAMAGES — PRE-OCCUPATION—PURCHASE PRICE.

Held :—1st. That a person can make any use of his property not prohibited by law, but in doing so he must not introduce upon or cause to pass over the adjoining property anything which might lower its value or sensibly modify the rights of proprietorship incident to the property.

2nd. That, although in thickly populated districts, citizens must expect to endure the greater inconveniences arising from the vicinity of manufactories, than from private dwellings, yet, such factories must take every precaution against annoying their neighbours, even to the extent of making pecuniary sacrifices if necessary.

3rd. That the proximity of a lime-kiln must be considered hurtful, dangerous or incommodious and calculated to injure the neighbouring properties.

4th. That the fact that the owner of a lime-kiln or other manufactory had set up and worked his industry before the plaintiff proprietor had come into possession of his property, does not free such owner from liability for the damages he may cause. This pre-occupation could at most only protect him from the suppression of his works under certain circumstances, and give to the courts a certain discretion in estimating the measure of damages.

5th. That in determining the measure of damages suffered by an adjoining proprietor under the above-mentioned circumstances, the fact that he may have acquired his property at a less a sum than its real value does not prejudice his right to damages, for he has a right, for all time, to derive the greatest possible benefit from his property of which it is capable. It is only in cases of *mala fides*, and the well ascertained intention of purchasing the adjoining property with a view to speculation, or for purposes of revenge that he would lose his right to damages. *Gravel* v. *Gervais*, Mont. Law Repts, 7 S. C. 326. (Translation).

2. NUISANCE — ELECTRIC LIGHT PLANT—DWELLING HOUSE.

In a suit to enjoin defendant from maintaining a nuisance by operating an electric light plant adjoining complainant's dwelling-house, the evidence showed that the plant was of great public utility, and the machinery of the best quality; that the officers and agents were skilful; and that the annoyances from smoke, soot, noise and vibrations had been materially lessened during defendant's ownership, one witness testifying that they were not one-hundredth part as great as formerly. The evidence in regard to the vibrations of the house, caused by the engine, was conflicting; and one witness testified that they were not greater than those usually caused by a passing dray.

Held, that the evidence did not prove more annoyance than is usually incident to a residence in a city, or such annoyances as could not be prevented by labor and money, for which there was redress at law. *English* v. *Progress Electric Light & Motor Co.*, S. C. Ala., Nov. 5, 1891.

ODOURS—See Nuisance 1.

OFFICERS, INSURANCE, POWERS OF —See Insurance 17.

"ONUS PROBANDI"—See Admiralty —Elections 4 — Partnership 1.

ORNAMENTAL TREES — See Trees.

PAROL EVIDENCE —See Action on Promissory Notes—Sale 1, 2.

PARTNERSHIP.

1. In an action to charge stockholders in a bank as partners, the burden is not on defendants to show that the bank was incorporated, or was a limited partnership, but is on plaintiff to show that it was a partnership, as alleged in his complaint. *Hallstead* v. *Curtis*, Penn., 22 Atl. Rep., 977.

2. ACCOUNTING.

Where two partners, whose joint business has been carried on for years in the name of one of them, agree in writing that all the property held by the managing partner shall be held to belong equally to both of them, the surrender of the right to an account is a good consideration for the agreement on the part of the managing partner. *McCullough* v. *Barr*, Penn., 22 Atl. Rep. 962.

3. SALE OF GOOD-WILL — RIGHT OF PURCHASER TO USE SELLER'S NAME.

G. & Co., a Paris firm, sold out to plaintiffs their business and good-will in New York, where they had a branch, and authorized plaintiffs to style themselves "G. & Co., K. & Co., successors."

Held, that the successors of G. & Co., in Paris had the right to establish a branch in New York, and advertise as "G. & Co., B. V. & Co., successors," though they could not hold themselves out as the successors of the business bought by plaintiffs. *Knoedler* v. *Boussod*, U. S. Cir. Ct. S. D. N. Y., Sept. 23, 1891.

Notes.

1. Although the vendor may set up a rival business in the same locality, he will not be permitted to hold himself out as carrying on the establishment of which he has sold the good-will. He may carry on a similar business, but must not represent it to be the same business. *Churton* v. *Douglass*, 1 Johns. Eng. Ch. 174; *Hogg* v. *Kirby*, 8 Ves. 214; *Cruttwell* v. *Lye*, 17 id. 335; Hall's Appeal, 60 Penn. St. 458; *Washburn* v. *Dosch*, 68 Wis. 436.

2. It was held in *Labouchère* v. *Dawson*, L. R., 13 Eq. 322, that the vendor, although at liberty to advertise that he is carrying on the new business, may not use any direct solicitation to a customer of the old business to induce him to transfer his patronage from it to the new.

3. In *Pearson* v. *Pearson*, 51 L. T. (N. S.) 311, and *Walker* v. *Mottram*, 19 Ch. Div. 355, the doctrine of *Labouchère* v. *Dawson* was questioned. See also *Leggott* v. *Barrett*, 15 Ch. Div. 308, and *Cottrell* v. *Manufacturing Co.*, 54 Conn. 122.

PASSENGERS — See Carriers of Passengers.

PATENTED DEVICE—See Telephone Company.

PATENTS.

1. DAMAGES FOR INFRINGEMENT.

When, in view of the prior state of the art, the entire commercial value of an infringing article is due to the use of the infringing feature, the profits awarded as damages should be calculated with reference to the entire infringing article, notwithstanding that it is made under a patent showing an additional feature, which feature, however, is not covered by the claims thereof. *Crosby Steam-gauge & Valve Co.* v. *Consolidated Safety Valve Co.*, U. S. S. C., 12 S. C. Rep. 49.

2. VALIDITY — PROVISIONAL SPECIFICATION — VARIATION FROM COMPLETE SPECIFICATION — NATURE OF INVENTION—PATENTS—DESIGNS, AND TRADE MARKS ACT, 1883 (46 & 47 Vict., c. 57, ss. 5, sub-s. 3, 26.)

It is, since the Patents, Designs, and Trade Marks Act, 1883, no less than before, an essential condition of a good patent that the provisional specification should describe the true nature of the invention, and that the invention there described should be the same as that claimed in the complete specification; and non-compliance with the condition is a ground for revocation of the patent.

The *dictum* of Halsbury, L. C., in *Vickers* v. *Siddell* (15 App. Cas. 496) applied.

The patentee of an invention for tapping beer-barrels, and preventing waste and leakage, described his invention in the provisional specification as a plug screwed into the barrel end with a valve, and spring and guide to keep the valve in its place. In the complete specification he added a description of a gauze strainer to keep impurities from escaping into the tap. It was proved that the gauze strainer was the only thing really novel or useful in the invention:

Held (affirming the judgment of Kekewich, J.), that the provisional specification did not describe the true nature of the invention, and that the patent was invalid. *Nuttall* v. *Hargreaves*, C. A. (1892) 1 Ch. 23.

PAYMENT—See Bills and Notes 4. 11.

PHYSICAL EXAMINATION — See Negligence 3.

PHYSICIAN.

PROOF OF SERVICES—R. S. Q. 5851.

Held:—That the oath of the physician or surgeon, which, under R. S. Q. 5851, makes proof as to the nature and duration of the services, can only be rebutted by the clearest and most precise testimony, which was not found by the Court in the present case, in which by the evidence of doctors who had not seen the patient before or during the illness, and who did not speak positively, it was sought to reduce a physician's account, for treating a case of fracture of the collar bone from $175 to $100. *Bourgeau* v. *Brodeur*, Q. B. (in appeal) Mont. Nov. 27, 1891, M. L. R., 7 Q. B. 171.

PLANS—See Architect.

PLEADING—See Action on Promissory Notes—Insurance 3.

PLEDGE.

1. COLLATERAL.

Where one of two obligors, who are jointly indebted as principals, pledges certain choses in action as collateral security for the joint debt, the pledgee may, with the consent of the pledgeor, accept less than the face value of such collaterals in settlement of the same, without making himself liable to account to the other obligor for more than the sum actually received by him. *Foltz* v. *Hardin*, Ill., 28 N. E. Rep. 786.

2. PLEDGE OF GOODS FOR PRE-EXISTING DEBT—TRANSFER OF BILL OF LADING—R. S. Q. 5646.

Held:—That the transfer of goods, then stored in New York, by a debtor apparently solvent, to his creditor, by endorsement of the bill of lading, as security for an antecedent indebtedness as well as for a note at the time discounted by the creditor, is valid, and the creditor may apply the proceeds of the pledge to the antecedent debt, and recover on the note discounted at the time. *Watson & Johnson*, Court of Q. B. Montreal. Dorion C. J., Tessier, Baby, Bossé and Doherty, JJ., Nov. 27, 1890.

POLICE MAGISTRATE — See Prohibition.

PRACTICE—See Admiralty.

PRINCIPAL AND AGENT.

MUTUALITY OF CONTRACT.

Where plaintiff agreed to act as sole agent and sell all of defendant's mineral water that he could in a certain territory, and defendant agreed to furnish the water and pay a certain part of plaintiff's advertising bill if the sales reached a certain amount in a given time, the contract was mutual. *Mueller* v. *Bethesda Mineral Spring Co.*, Mich., 50 N. W. Rep. 319.

PRINCIPAL AND SURETY.

PRINCIPAL AND SURETY—APPEAL-BOND.

The omission of the name of the surety from the face of an appeal-bond and from its recitals does not release him from liability if he signs the bond and justifies as surety. *Case* v. *Daniels*, Colo., 27 Pac. Rep. 886.

PRIVILEGED COMMUNICATION — See Libel and Slander 5.

PROHIBITION.

POLICE MAGISTRATE—WITNESS FOR DEFENCE.

Prohibition will not lie to a police magistrate to prohibit him from hearing witnesses on behalf of the defendant on an inquiry by him upon an information charging him with perjury. *Regina* v. *Jackson*, Ontario High Court of Justice. In Chambers. 11 Dec. 1891.

PROMISSORY NOTES—See Bills and Notes.

PROMOTION MONEY—See Companies 3.

PUBLIC OFFICER — See Libel and Slander 5.

PUBLIC POLICY—See Insurance 6.

PUBLIC WORKS—See Contracts 4.

QUESTIONS OF FACT—See Appeal 3.

"QUANTUM MERUIT" — See Bills and Notes 9.

RAILWAY COMPANIES—SEE ALSO CARRIERS 1, 3, 4—CONTRACTS 3—NEGLIGENCE 2.

1. RAILWAY ACT OF CANADA — JURISDICTION OF RAILWAY COMMITTEE — COMPLAINT OF EXPRESS COMPANY AGAINST RAILWAY COMPANY—"MANDAMUS."

Held :—1. That the Railway Committee of the Privy Council, created by section 8 of the Railway Act, has jurisdiction to inquire into a complaint of an express company against a railway company that the latter has not granted it equal privileges with other express companies.

2. That an adequate remedy being thus provided, a *mandamus* does not lie in such cases. *The Ontario Express and Transportation Company* v. *The Grand Trunk Ry. Company of Canada*, Mont. Law Repts., 7 S. C. 308.

2. CONSTRUCTION OF LINE UNDER CHARTER — MONEY ADVANCED AND CONTROL EXERCISED BY ANOTHER COMPANY — LIABILITY OF LATTER AS TO IT—TORT-FEASOR.

In an action by F. against the G. T. Ry. Co. for damages caused by the building of an embankment along a line of railway which cut off access to the highway from F.'s land, the company contended that the said line of railway was built by and under the charter of another company; that there was no statute authorizing the G. T. R. Co. to build it, and its construction by them would be *ultra vires*; and that though the officers of the G. T. R. Co. were also officials of the company constructing said line, and F. had sustained damages by its construction, the G. T. R. Co., as a corporation, could not be made liable therefor. On the trial, the evidence showed that the G. T. R. Co. had advanced the money to build the line; that its president and other directors owned nearly all the stock in the chartered company; and that the work was done under the control and direction of the G. T. R. Co.'s engineers.

Held, affirming the decision of the Court of Appeal, that the G. T. R. Co. were liable to F. as wrongdoers.

Appeal dismissed with costs. *Fitzgerald* v. *G. T. Ry. Co.*, Supreme Court of Canada, June 22, 1891.

RAILROAD CROSSING — See Negligence 5.

RATIFICATION—See Companies 2.

REAL ESTATE AGENT.

EXTENT OF AUTHORITY.

A letter authorizing agents to sell land for $2,200 "provided that the party could pay $700 down and the balance in one, two and three years," did not authorize them to sell for $1,000 down and the balance in one and two years. *Speer* v. *Craig*, Colo., 27 Pac. Rep., 891.

RE-INSURANCE—See Insurance 16.

REGISTRAR, ERRONEOUS NOTING OF DEED—See Conventional Subrogation.

RESERVED CASE — See Crim. Procedure 11.

"RES JUDICATA"— SEE ALSO CRIMINAL PROCEDURE 7.

NEGLIGENCE.

Where two brothers are at the same time killed by the collision of a railroad train with the team in which they were riding, a recovery for the negligent killing of one is not a bar to

an action for the negligent killing of the other, though the same person brings both actions as administrator, for the "party" plaintiff is different in the two actions. *Illinois Cent. Ry. Co* v. *Slater*, Ill., 28 N. E. Rep., 830.

RESPONSABILITÉ — See Damages — Negligence 1.

RESTRAINT OF TRADE — See Conspiracy—Injunction I.

REVENUE.

CUSTOM DUTIES—MARKET VALUE—VALUE FOR DUTY—COSTS.

The rule for determining the value for duty of goods imported into Canada, prescribed by the 58th and 59th sections of the Customs Act R. S. C. c. 32 is not one that can be universally applied.

When the goods imported have no market value, in the usual and ordinary commercial acceptation of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions. *Vacuum Oil Company* v. *The Queen*, 2 Ex. C. R. 234 referred to.

(2) The goods in question in this case were part of a job lot of discontinued watch-cases, and at the time of their sale were not upon the market of the United-States, and could not be purchased for sale or use there except at published prices, which were greater than any one would pay for them.

The claimants bought the goods for export for their fair value, being about half such published prices. They let their agent in Canada know the prices paid but withheld from him the fact that the purchase was made on the condition that the goods were to be exported. The agent, without intending to deceive the customs appraiser, represented that the prices paid were those at which the goods could be had in the United-States when purchased for home consumption there. The representation was untrue. On the question of the alleged undervaluation the court found for the claimants, but because of such misrepresentation, without costs. *Smith* v. *Reginam*, Exchequer Court of Canada. Dec. 9, 1891.

RIPARIAN RIGHTS.

RIPARIAN RIGHTS — DIVERSION OF WATER BY RAILROAD COMPANY — DAMAGES.

The owner of land through which flows a stream of water suitable for a mill site, but on which there is no mill, may recover from a railroad company which diverts the water, any actual injury he suffers therefrom in the enjoyment of his land, but cannot recover for the loss of water power which he has neither used nor attempted to use.

A railroad company has no right to take water from a running stream to the injury of riparian owners, without compensating them therefor, even though the use of such water is essential to the operation of the road. *Clark* v. *Pennsylvania R. Co.*, Supreme Ct. Penn., Nov. 1891.

Notes.

1. The rule of law is uniform and undoubted that every riparian owner is entitled, as an incident to his land, to the natural flow of the water of a stream running through it, undiminished in quantity and unimpaired in quality, subject to the reasonable use of the water by those similarly entitled, for the ordinary purposes of life; and any sensible or essential interference therewith, if wrongful, whether attended with actual damage or not, is actionable. *Philadelphia* v. *Commissioners*, 7 Pa. St. 363; *Philadelphia* v. *Collins*, 68 Pa. St. 116.

2. This principle applies to some extent whether the stream is public or private. *Haupt's Appeal*, 125 Pa. St. 224; *Lord* v. *Water Co.*, 135 Pa. St. 130.

3. The size and capacity of the stream is, of course, in all cases of this kind, to be considered. *Miller* v. *Miller*, 9 Pa. St. 74.

4. Every riparian owner, says Paxton, J., in *Railroad Co.* v. *Miller*, 112 Pa. St. 41, has the right to use the water of the stream passing over his land for ordinary domestic purposes, and if the stream be so small that his cattle drink it all up, while it may be a loss to the lower riparian owner, it is *damnum absque injuria*. But where the upper riparian owner diverts or uses the water, not for ordinary domestic purposes such as are inseparable to and necessary for the use of his land, but for manufacturing or other purposes, having no necessary relation to his use of his land, it is different.

5. In such case he has only the right, as against a lower proprietor, to use so much of the stream as will not materially or sensibly diminish its quantity. *Wheatley* v. *Chrisman*, 24 Pa. St. 298.

6. Any trespass or nuisance, which infringes upon the rights of the plaintiff, or which would abridge his present or potential use of his property, will justify an action, although it cause no present actual damage. Goul l, Waters, 401, 404.

7. There is an obvious distinction between the proper use of a stream by a riparian owner, which, although it neces-arily modifies the flow, infringes no right of other proprietors, and one which infringes their rights, although it may cause no damage. *Miller* v. *Miller*, 9 Pa. St. St. 74; *Canal Co.* v. *Torrey*, 33 Pa. St. 143; *Graver* v. *Sholl*, 42 Pa. St. 58.

RISKS—See Insurance 14, 16, 19.

ROBBERY—See Criminal Law 2.

SALE OF GOODS.

PAROL EVIDENCE.

1. A contract in writing, by which a party agrees to furnish another with "a No. 2 size refrigerating machine, as constructed by the party of the first part, to be put up in operation in the brewery of the party of the second part," is complete and unambiguous, and parol evidence is not admissible to show an alleged collateral warranty that the machine should maintain a given quantity of air at a certain temperature, as that would add another term to the written contract. *Seitz* v. *Brewer's Refrigerating Mach. Co.*, U.S., S. C., 12 S. C. Rep., 46.

2. PAROL EVIDENCE.

A written order for goods (elevator and engine) to be sent and put up, specifying the price and terms of payment, a condition as to the title remaining in the vendor until payment should be made, with other provisions —the property having been sent pursuant thereto, and appropriated and used by the purchaser,

Held, to be on its face a complete contract binding upon the purchasers, and excluding proof that the prior oral agreement was different therefrom. *American Manuf'g Co.* v. *Klarquist*, Minn., 50 N.W. Rep., 243.

3. BUILDING MATERIALS.

Held: — That the words "building materials" in a contract of sale of material to be removed from a certain lot of ground, do not include fixtures and appliances contained in the building, for supplying heat, for lightning by gas, and for the distribution of water. *L'Abbé* v. *Francis et al.*, Mont. Law Rep., 7 S. C., 305.

4. ORDER OBTAINED BY COMMERCIAL TRAVELLER — ACCEPTANCE.

Held:—In law, and by the custom of trade, the mere taking of an order for goods by a commercial traveller does not complete the contract of sale so long as the order has not been accepted by the principal. And where the latter refuses to accept the order, and gives notice to the person from whom the order was taken, he is not liable in damages. *Brock et al. & Gourley*, Court of Q. B., Montreal, Dorion, C.J., Baby, Bossé, Doherty, JJ., Nov. 27, 1890. M. L. R., 7 Q. B., 153.

5. PRICE FIXED BY TRADE COMBINATION—INSTRUCTIONS.

In an action for knives sold and delivered without any express agreement as to price, a price fixed by a combination of all the knife manufacturers in the United States, including the sellers, formed for the express purpose of controlling the price of the articles manufactured by themselves, is not entitled to rank as the "market price" of the knives binding on the purchaser, and he may show that the price so fixed is unreasonable. *Lovejoy* v. *Michels*, Michigan Supreme Court, Oct. 16, 1891.

Notes.

1. In *Acebal* v. *Levy*, 10 Bing. 376, cited in 1 Benjamin on Sales, 103, the court declared that when there was no express contract as to price, the price is to be a reasonable price—"such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. The price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various causes."

2. In *Kountz* v. *Kirkpatrick*, 72 Penn. St. 376, the court say; "Ordinarily when an article of sale is in the market, and has a market value, there is no difference between its market value and the market price, and the law adopts the latter as the proper evidence of the value.

3. The odious features of illegal monopolies are plainly apparent. These can absolutely control the prices which the public shall pay, and it is this monopolistic feature of such combinations to control prices which stamps them as odious, because they exercise the franchises of the monopoly without the legal right. These views were supported in the following cases: *Anderson* v. *Jett*, 89 Ky.—; *Railroad Co.* v. *Closser* (Ind. Sup.), 26 N. E. Rep. 159; *People* v. *Refining Co.*, 7 N. Y. Supp. 406; *Richardson* v. *Buhl*, 77 Mich. 632; *Carbon Co.* v. *McMillin*, 119 N. Y. 46; *Stanton* v. *Allen*, 5 Den. 434; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 173; *Arnot* v. *Coal Co.*, 68 N. Y. 558; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Association* v. *Koch*, 14 La. Ann. 168; *Denver, etc., R. Co.*, v. *Atchison, etc., R. Co.*, 15 Fed. Rep. 650; *Hilton* v. *Eckersley*, 6 El. & Bl. 47; *West Va. Trans. Co.* v. *Ohio River Pipe-Line Co.*, 22 W. Va. 600, 617; *W. U. Tel. Co.* v. *American Union Tel. Co.*, 65 Ga. 160; *Craft* v. *McConoughy*, 79 Ill. 346; *Raymond* v. *Leavitt*, 46 Mich. 447; *Faulds* v. *Yates*, 57 Ill. 416; *Wright* v. *Ryder*, 36 Cal. 342.

6. SALE WITHOUT RESERVE—SALE BY TENDER—RECEPTION OF TENDERS—"PEREMPTORILY CLOSED"—EXTENDING THE TIME—ACCEPTING HIGHEST TENDER, THOUGH PUT IN AFTER TIME.

A sale without reserve means that the vendor will not bid nor any one on his behalf, and the property will be sold to the highest bidder.

A sale by tender (not saying to the highest bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt.

Tenders for the purchase of an oil-refinery, etc., were advertised for, to be received by a referee appointed by the court within a certain time, when the sale was to be "peremptorily closed." At the time fixed one tender only was in and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train, and all three were opened, when a fourth was handed in by a person present. The referee directed that notice should be given to the other tenderers, and on a subsequent day accepted the last, which was the highest.

Held, that he was right in so doing. *In re* Sarnia Oil Company. Chancery Div. Ontario High Court of Justice, Oct. 20, 1891.

"SCIENTER"—See Animals.

SCOTLAND—See Domicile.

SEASON TICKET HOLDERS, RIGHTS OF—See Carriers 3.

SEPARATE SCHOOLS—See Constitutional Law 2.

SERVITUDE—See Jurisdiction.

SHAREHOLDER — See Vendor and Purchaser.

SHARES—See Companies 2.

SHIP CAPTAIN—See *Capias*.

SHIP—SEE ALSO CHARTER-PARTY.

1. DISCHARGE — CHARTER-PARTY—EXCEPTED CLAUSE—DEMURRAGE.

A charter-party allowed forty-eight running hours for discharging cargo "except in cases of..... strikes..... detention by railway.....or any other cause beyond the control of the charterers which may impede the ordinary loading and discharging the vessel," and stipulated for demurrage at the rate of 10s. per hour for any time expended over and above the forty-eight hours. The charterers failed to discharge within the stipulated time, and were sued by the shipowners for demurrage. The defenders alleged that the delay was due to the impossibility of getting railway waggons owing to a strike of railway servants.

Held:—That the delay was not due to any of the causes specified in the charter-party, and the defenders were liable in demurrage. *The Granite City Steamship Co.* v. *Ireland & Son*, 29 Scot. Law Rep., 115.

2. OWNER OF SHIP AND SEAMAN, CONTRACT BETWEEN — OBLIGATION OF OWNER UNDER MERCHANT SHIPPING ACT, 1876 (39 & 40 VIC., C. 80, S. 5)—"SEAWORTHINESS"—NEGLIGENCE—MASTER AND SERVANT — NEGLIGENCE OF CAPTAIN—FELLOW SERVANT—COMMON EMPLOYMENT.

The captain and crew employed in

the navigation of a ship by the owner are fellow-servants engaged in a common employment; and therefore the shipowner is not liable to an action for negligence of the captain by which one of the crew is injured or loses his life. —The Merchant Shipping Act, 1876, s. 4, makes it a misdemeanour—(subject to certain exceptions) to send a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, and s. 5 provides that, in every contract of service between the owner of a ship and the master, or any seaman thereof, there shall be implied an obligation on the owner of the ship that the owner of the ship and the master shall use all reasonable means to insure the seaworthiness of the ship for the voyage, at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same. — A ship, which is properly equipped for encountering the ordinary perils of the sea, does not become unseaworthy within the above enactment, because the captain negligently omits to make use of part of her equipment. A ship was constructed with an opening in her bulwarks for the purposes of a gangway, protected by a moveable railing, which could be speedily shipped or unshipped as occasion required. During a storm, the railing being unshipped at the time, one of the crew fell overboard through the opening in the bulwarks and was drowned.

Held:—That the ship being provided with sufficient means of closing the opening readily available, the fact that such opening was unprotected at the time of the accident did not make the ship unseaworthy within s. 5 of the above-mentioned Act; and therefore the shipowners were not liable to an action for breach of the obligation created by that section.

Query: — Whether a ship would be unseaworthy within the meaning of the above-mentioned sections by reason of a defect in her equipment which affected the safety of individuals on board from perils of the sea, but which did not affect the safety of the ship herself. *Hedley* v. *Pinkney & Sons Steamship Co.*, (Limited), C. A. [1892] Q. B., 58.

3. SHIP — CHARTER — FREIGHT — HIRE TO CEASE WHEN SHIP INEFFICIENT.

In a charter-party the charterer became bound to pay hire for a steam-vessel at a certain rate per month, and the owners to provide the officers and crew and stores.

It was stipulated that "in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

On the 30th Sept. 1887, on a voyage from the West Coast of Africa to Harburg, the high-pressure engine broke down, and the vessel put to Las Palmas in the Canary Isles, where she was pronounced to be unfit to proceed on her voyage. As repairs could not be effected in that port, the owners and charterers arranged to send from England a tug to bring the ship to Harburg, it being agreed that the cost should be treated as a general average.

The ship arrived at the port of discharge by the use of her low-pressure engine and with the assistance of the tug. The charterer paid £867 as his share of the cost of the tug.

In an action by the ship-owner against the charterer for £341 4s. 8d. as the hire of the ship from the time she left Las Palmas with the assistance of the tug till she was discharged:

Held, (1) (*diss.* Lord Bramwell, affirming judgment of Second Division) that the ship had not been "in an efficient state" *for completing her voyage* from the time of the accident, and that in terms of the charter-party the owner had no claim to hire for the subsequent voyage, but (2) (*diss.* Lord Morris) varying judgment of Second Division, that the charterers must pay hire for the full period during which she was engaged in discharging her cargo at the post of arrival, the ship being then in an efficient state for performing that part of the contract. *Hogarth* v. *Miller Brother & Co.*, 18 Sc. Sess. Cas. 4th Ser. 10 (H. L.)

SLANDER—See Libel.

SIDEWALKS, DEFECTIVE — See Municipal Corporation 3.

SOLICITOR.

BILL OF COSTS—PROCEEDINGS BEFORE TAXING OFFICER—EVIDENCE OF SETTLEMENT—APPEAL.

The executors of an estate took proceedings to obtain from a solicitor of the testator an account and payment of moneys in his hands due the estate. A reference was made to a taxing officer to tax the bills of costs produced by the solicitor, and in doing so the officer, subject to protest by the solicitor, took evidence of an alleged settlement between the executors and the solicitor, by which a fixed amount was to be paid the latter in full of all claims. The officer having reported a considerable amount due from the solicitor to the estate the solicitor appealed, urging that the order of reference did not authorize the officer to do more than tax the bills, and in doing so, as they had been rendered more than a year before the proceedings commenced, they should be taxed at the amount represented on their face. The officer's report was affirmed by the Divisional Court and the Court of Appeal.

Held, affirming the decision of the Court of Appeal, that the taxing officer not only could but was bound to proceed as he did, and the appeal should be dismissed.

Quære: As the matter in question relates only to the practice and procedure of the High Court of Justice in Ontario, and the conduct of one of its officers in carrying out an order of the court, is it a proper subject of appeal to the Supreme Court of Canada? Appeal dismissed with costs. *O'Donohoe v. Beatty*, Supreme Court of Canada, June 22, 1891.

STALE DEMAND—See Companies 4.

STATUTE OF LIMITATIONS.

POSSESSION—TENANCIES IN COMMON—CARETAKER OF ONE TENANT — PARTITION — ADVERSE POSSESSION AS TO CO-TENANTS—ACTS OF OWNERSHIP.

F. H. was the acting owner of certain land for some years prior to 1865, and O. was in possession under him as caretaker. In 1865, in a suit between F. H. and other members of his family, a decree was made declaring F. H. to hold as trustee for, and to convey certain proportions of the property to, the other members. O. continued in possession after this decree and took proceedings at different times against trespassers and others, but always represented that he did so by authority from F. H., and he did no act as asserting ownership in himself until 1884, when he fenced a portion of the land. In an action against O. to recover possession of the land:

Held, reversing the judgment of the Court of Appeal, 18 A. R. 529; that the effect of the decree in 1865 was not to alter the relations between F. H. and O.; that O. having once entered as caretaker, and having never disclaimed that he held as such for the necessary period to gain a title by possession, his possession continued to be that of a caretaker and he could not retain possession of the land against the true owners. Ryan v. Ryan, 5 S. C. R. 387, followed. *Heward* v. *O'Donohoe*, Supreme Court of Canada, Jan. 22, 1891.

STOCK EXCHANGE TRANSACTIONS—See Contract 5.

STOCK, TRANSFER OF—See Corporations 2.

STREET IMPROVEMENTS—See Municipal Corporation 2.

STRIKES—See Carriers 3—Charter-Party.

SUBROGATION — See Conventional Subrogation.

SUMMARY CONVICTION—See Intoxicating Liquor.

"SUPER NON DOMINO"—See Maritime Lien.

SUPREME AND EXCHEQUER COURT ACT—See Appeal 2—Jurisdiction.

SURETY, LIABILITY OF—See Insurance 2.

TAXATION—See Constitutional Law 1.—Municipal Corp. 2.

TELEPHONE COMPANIES.

DUTY TO FURNISH SERVICE — CONTRACT RESTRICTING USE OF PATENTED DEVICE.

The respondent, a telephone company, maintaining the only telephone exchange in a city which was connected with telephones in the places of business and residences of its subscribers, refused, on demand, to furnish telephone instruments to relator, a telegraph company, which was operating a telegraph line within the same territory, as part of a large system, except on condition that the instruments should not be used as an adjunct to the receiving and transmitting of telegraphic messages, although respondent had furnished such telephonic facilities to another telegraph company, a competitor with relator in the same city, without such condition. The court held that respondent was a common carrier, offering to the public the use of its telephonic system for the rapid conveyance of oral messages, and, as such, was subject to the duty of serving all persons alike, impartially and without unreasonable discrimination; and that the right to equal facilities for the use of such public system extended to telegraph companies as well as to individuals.

Respondent alleged that it was a mere licensee of the owner of patents for the telephones; that it was forbidden by the terms of its license to supply a telephone instrument to any telegraph company, to be used for telegraphic purposes, without the consent of its licensor; and that it had furnished a telephone to such other telegraph company under a general order from the owner of the patent, in pursuance of a contract between such owner and such telegraph company for an exclusive license to the latter for a term of years to use the telephone in receiving and transmitting messages. It was held that this was no justification for the refusal to comply with the demand of relator, such contract being void as against public policy. The patented device having been employed for a public use, by a common carrier, in the prosecution of its business, relator was entitled to use it on the same terms as others in the same class. *State* v. *Delaware & A. Telegraph & Telephone Co.*, 47 Fed. Rep. 633.

TENANTS IN COMMON — See Statute of Limitations.

TENDER—See Bond—Sale 6.

TICKETS—See Carriers 3, 4.

TITLE TO LAND— See Injunction 2—Jurisdiction.

"TO" "TILL"—See Construction.

TRADE COMBINATION — See Sale 5—Conspiracy.

TREES.

ORNAMENTAL — PUBLIC STREET — PROPERTY — DAMAGES — CITY OF MONTREAL.

Held, that ornamental trees planted on the roadways of Montreal, are the property of the owners of the lots abutting upon the street; and that these trees must be considered as an accessory of the property in said lot.

(2) That these proprietors have an action for damages against the city of Montreal for having cut down and taken away said trees. *Beauchamp* v. *Cité de Montréal.* Lynch, J. Superior Court of Montreal, April 28, 1891.

TRIAL JUDGE—See Appeal 3.

TUTOR, APPOINTMENT OF — See Indians.

"ULTRA VIRES" — See Companies 2.

"UNTIL" — See Construction.

USAGE — See Banks and Banking 2.

VENDOR AND PURCHASER.

UNPAID VENDOR, PRIVILEGE OF — OPPOSITION TO SALE OF IMMOVABLE SEIZED—ART. 657 C. C. P.—SHAREHOLDER—COMPANY.

Held:—(1) The privilege of *bailleur de fonds* does not give the unpaid vendor the right of opposing the seizure and sale of the immovable subject to it.

(2) The unpaid vendor is not entitled to ask for the resiliation of the

sale of an immovable unless there be a stipulation to that effect in the contract of sale.

(3) A shareholder of a company is not entitled to exercise the rights of the company in his own name, and cannot oppose the sale of an immovable belonging to the company.

(4) A promise of retrocession by the majority of the shareholders of a company is null, the company alone having the power to make such an agreement. *McNaughton* v. *Exchange National Bank*. Q. B. (in appeal) M. L. R. 7 Q. B. 180.

VICIOUS DOGS—See Animals.

WAIVER BY AGENT.—See Insurance 10.

WARRANTY—See Bills and Notes 10.

WATER, DIVERSION OF — See Riparian Rights.

WHARFAGE—See Maritime Lien.

WILL—See Bills and Notes 3.

WINDING-UP ACTS.

1. COMPANY — CLAIM FILED WITHOUT MENTION OF SECURITY — APPLICATION FOR LEAVE TO WITHDRAW — R.S.C. c. 129, s. 62 — RULE 71.

The claimant applied for leave to withdraw his claim already filed, and to file another, making mention of a security which he had, an alleged maritime lien on a steamer, for wages due to him as the master of the steamer, valuing that security.

The claim was put in without professional advice.

Held, that the claimant should have leave to withdraw his claim, and to file an amended one if so advised.

Although s. 62 of the Winding-up Act R. S. C. c. 129, is in the imperative form and says that a creditor holding security "shall specify the nature and amount of such security in his claim, and shall therein, on his oath, put a specified value thereon," Rule 71 provides that the general practice of the Court on its equity side is to apply to all winding-up proceedings, and this would include a power of amendment. *In re Lake Winnipeg Transportation Co. Bergman's Claim*, Manitoba, Queen's Bench, Nov. 30th, 1891.

2. COSTS—COMPANY—TWO PETITIONS PRESENTED BY CREDITORS—COSTS OF SECOND PETITIONER.

Two creditors, Blake and Henderson, filed petitions for winding up the company. Blake's was filed and served before Henderson's was filed. Both petitions were presented to the Court and came on for hearing together on 19th October, 1891.

An order was subsequently made for winding up the company.

A question arose as to the costs of the petition filed by Henderson.

Held, that the second petitioner, Henderson, should have his share of costs of creditors supporting a winding-up order, and the costs of his own petition up to and including presentation, when he first had notice of the former one. *In re Building Societies' Trust*, 44 Ch. D. 144 followed. *In re Manitoba Milling Co.* Manitoba, Queen's Bench, Dec. 14, 1891.

WITNESS, INTIMIDATION OF — See Contempt of Court—Prohibition.

WRIT OF ERROR—See Criminal Procedure 10.

WRIT OF SUMMONS.

DEFENDANT WITHOUT THE JURISDICTION—ACTION ON FOREIGN JUDGMENT—RULES 270, 271.

Motion by the defendants to set aside an order giving leave to the plaintiffs to issue a writ of summons for service upon the defendants without the jurisdiction. The action was brought on a judgment obtained in the Province of Quebec, and was instituted in Ontario for the purpose of realizing the plaintiffs' claim out of assets of the defendants in this province. The plaintiffs had a place of business in Ontario; but the defendants had none.

Held, that failure to pay the amount of the judgment at the plaintiffs' offices in Ontario was not a breach of contract within Ontario within the meaning of Rule (271 (*c*); and that there is no provision elsewhere in the Rules for the issue of such a writ under the circumstances indicated.

Held, also, that Rule 270 applies only to such actions as are properly brought in Ontario under other Rules; and cannot be relied on to enable a plaintiff to bring an action which otherwise would not lie in this Province.

Order accordingly, setting aside the former order with costs. *Banque Nationale* v. *South American Trading Co.*, Ontario High Court of Justice. The Master in Chambers, Dec. 11, 1891.

CONTRACTS

BY

CORRESPONDENCE.

COMMON AND CIVIL LAW DOCTRINES AS TO WHEN CONTRACTS BY LETTER OR TELEGRAPH ARE COMPLETE — REVOCATION—TIME ALLOWED FOR ACCEPTING — JURISDICTION — STATUTE OF FRAUDS.

The principal question suggested by the above general heading, is that of the moment when such contracts are complete. It is upon the determination of this that the others depend for a correct solution. We will commence by reviewing the principal common law decisions.

FIRST, AS TO CONTRACTS BY MAIL.—The leading case in England, and one which forms the basis of the present rule in that country, is that of Adams v. Lindsell, 1 Barn. and Ald., 681. In that case A. by letter offers to sell to B. certain specified goods, *receiving an answer by return of post*; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done; on the day following that when it would have arrived if the original letter had been properly directed, A. sold the goods to a third person. It was *held*, that there was a contract binding the parties, from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract.

Counsel for the defendant cited Cooke v. Oxley, 3 T. R. 653 in support of their contention that their could be no binding contract between the parties until the plaintiff's answer was actually received. But the Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs *ought not to be bound till* after they had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiff; and then the contract is completed by the acceptance of it by the latter. Then as to delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it must be taken as against them, that the plaintiff's answer was not received in course of post.

In the case of Dunlop v. Higgins, 1 H. L. Cas. 381, it was laid down, following Adams v. Lindsell, that a letter offering a contract does not bind the party to whom it is addressed, to return an answer by the very next post after its delivery, or to lose the benefit of the contract, but an answer posted on the day of receiving the offer is sufficient; that the contract is accepted by the posting of a letter declaring its acceptance; that a person putting into the post a letter declaring his acceptance of a contract offered has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office.

In the case of the British and American Telegraph Co. v. Colson, L.

R. 6 Ex. 108, the Court departed from the rule as laid down in Dunlop v. Higgins, and where the defendant applied for shares in the plaintiff's company, shares were allotted to him, and a letter of allotment was posted to his address, but was never received by him; it was *held*, that defendant was not a shareholder. But this case was overruled by the Household Fire and Carriage Accident Insurance Company (Ltd.) v. Grant, 4 Ex. Div. 216: where the defendant applied for shares in the plaintiff's company. The company allotted the shares to the defendant and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him: It was *held*, by Bagally and Thesiger, L. J. J., Bramwell, L. J,, diss., that the defendant was a shareholder. Thesiger, L. J., said "Leaving Harriss' case (L. R., 7 Ch. 587) for the moment, I turn to Duncan v. Topham, 8 C. B. 225, in which Creswell, J., told the jury, that if the letter accepting the contract was put into the post-office, and lost by the negligence of the post-office authorities, the contract will nevertheless be complete; and both he and Wilde, C. J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in Dunlop v. Higgins, 1 H. L, Cas. 381. That opinion, therefore, appears to me to constitute an authority directly binding upon us."

The doctrine of Adams v. Lindsell is the established law in the United States. (Parsons on Contracts, v. 1, p. 514, note p.). In a very strong case decided by the Supreme Court of the United States (Tayloe v. Merchants' Fire Ins. Co., 9 How. 390), it was held, that where there was a correspondence relating to the insurance of a house against fire, the insurance company making known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms; and the house having been burnt down while the letter of acceptance was in progress by the mail, the company were held responsible.

Gray in his work on "Communic ation by Telegraph", § 111, says: "The view that a contract by letter is complete when a properly directed letter of acceptance is mailed, has been rested on several grounds. It has been rested (1) upon the ground that the post-office is the agent of the offerer, and consequently that its receipt of the letter of acceptance completes the contract, upon the principle that *qui facit per alium facit per se* (Hebb's Case, L. R., 4 Eq. 9). But admitting that the post-office is the agent of the person who sends a letter, it can be his agent only to the extent to which it is to act,—to the extent of delivering the letter; it does not undertake, nor is it authorized, to go further, and as an agent effect the purposes for which the delivery of the letter is desired (Dickson v. Reuter's Tel. Co., 2 C. P. Div. 62, 69").

"The view at present under consideration has been rested (2) upon the ground that the offeree, in mailing the letter of acceptance, does an overt act signifying his acceptance of the offer, — does everything in fact, which he can do as a reasonable man to complete the contract. (Dunlop v. Higgins). But the mere performance of an overt act, signifying the wish or intention of the offeree to accept an offer has never in itself been held to complete the contract. Many such acts are necessarily done before the letter of acceptance is posted, yet it is at least only when that is done, that the

contract can be deemed complete. Admitting that the offeree, in posting the letter of acceptance, does all that he can reasonably be expected to do toward completing the contract, it does not necessarily follow that the contract is thereby completed. One who wishes to make or revoke an offer does all that he can reasonably be expected to do towards effecting that wish when he writes it out and mails it. But an offer or a revocation of an offer is effective only when it is communicated. In a contract of mutual promises the consideration for each promise is the counter promise. The contract is complete only when the promise of the offeree is made, and the promise is made in legal contemplation only when it is communicated to the offerer.

"A distinction apt to be forgotten, must be drawn between contracts consisting of mutual promises and those consisting of a promise by one party, and, as a consideration for it, the performance of an act, not the making of a counter promise, by the other. A contract of the latter class is complete when the act is performed. If, however, the performance of the act does not take place in the presence of the offerer, it may be the duty of the offeree to inform him of that fact within a reasonable time; a duty of this description is complied with if the offeree mails to the offerer within that time a properly addressed notice of performance. (Langdell's Summary of Selected Cases on Contracts, § 6). The reason why the letter of the offeree should become effective in one class of contracts only when it is delivered to the offerer, while it becomes effective in the other class simply when it is mailed to him, is well marked. In the former class of contracts the letter contains that which, upon communication to the offerer, becomes a counter promise,—the consideration for the promise of the offerer. In the latter class of contracts it contains simply information of the performance of the consideration—information, in other words, of the completion of the contract. A failure in the latter class of cases to mail the letter does not, in the absence of a stipulation to the contrary, prevent the formation of a contract, although it may defeat one already made; that is, the mailing of the letter is not the performance of a consideration, although it may be compliance with a condition subsequent.

"The view that a contract by letter is complete when a properly addressed letter of acceptance is mailed, has been rested (3) upon the ground that if the contract is not complete then, it can never been complete; for if to constitute an *aggregatio mentium* it is necessary that the offerer should know of the formation of the contract the moment the formation occurs, it must be equally necessary that the offeree should know of that fact at the same moment; and since communications by mail might go on *ad infinitum* without accomplishing this effect, a contract by mail could never be completed. (Adams v. Lindsell). But to constitute an *aggregatio mentium*, it is not necessary that both parties should know of the formation of the contract at the exact moment that the formation occurs. One who makes an offer by mail is presumed to be making that offer during every instant of the letter's transmission, and the contract formed in accordance with that offer is complete upon the performance of the consideration. If the consideration for the offer consists in the performance of an act, the contract is complete when the act is performed; if it consists in a counter-promise, the contract

is complete when the promise is made, and in *strict* contemplation, the promise is made only when it is communicated to the offerer."

SECONDLY, AS TO CONTRACTS BY TELEGRAPH.

A contract may be made and proved by mutual telegrams as well as by letter. Parsons (Contracts, Ed. 1883, vol. 2, p. 295), says: "But some years ago, the question came before the English Courts, and afterwards before our own, whether, when the acceptance was made by letter, the acceptance was complete when the letter was mailed, or not until the letter was received. It was not for a long time settled, if indeed it is fully so now, that the contract was complete when the letter of acceptance was mailed, the acceptor having then no knowledge of any withdrawal of the offer."

"Is this now the law in respect to contracts by telegraph? It certainly is not so settled. There is some adjudication on the subject, but it is contradictory, and leaves the question undetermined." (See, however, our notes *infra*).

"The reasons for not holding it may easily be stated. They in fact resolve themselves into two. One is, that the mail is a governmental institution. It is the agent of all the people and of every one of them, and may be considered, if not guaranteed to a certain extent by the government, still guarded as well as regulated by the power of the government. It is not so with the telegraph. Efforts are now making to place telegraphing in the hands of the government and put it on the same footing as the post-office. It may become so, but it is not so yet. State statutes do not require nor institute a telegraph, nor hold it as public property; they only permit it, and confer upon it certain rights, and lay upon it certain duties."

"Another reason is, that when a letter is delivered, it is perfectly certain that the assent of the accepting party, in precisely his own words, is, so far as the writer can do it, made known to the offerer. This can never be certain where the message is sent by telegraph; the operator or copyist, at either end, may make a mistake. Accuracy may be made extremely probable by returning the message; but never certain, while it is possible that the mistake in sending is corrected, perhaps by another mistake in returning the message." Those reasons given by this author, which are based on the non-governmental control of the telegraph system, would not apply to England, where the telegraph is controlled exclusively by the government.

In Trevor v. Wood, 36 N. Y. 306, it was held, that contracts made by telegraph are subject to the same rules as those made by letter; that the rule laid down in Mactier v. Frith, 6 Wend. 103, as to acceptance of an offer by letter, governed the present case; and that the contract became binding from the time the plaintiff's offer of acceptance was delivered to the operator. The Court say: "It was agreed between the parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies. Under these circumstances, the sending of the despatch must be regarded as an acceptance of the respondent's offer, and thereupon the contract became complete."

In the Minnesota Linseed Oil Company v. The Collier White Lead Company, 4 Dillon, 431, it was *held*, "that in contracts by telegraph the same rule as to acceptance prevails as in contracts by mail; the contract is completed when an acceptance of the proposition is deposited for transmission in the telegraph office. In case of a proposition by telegraph for the sale of certain goods, the market for which was subject to sudden and great fluctuations, an immediate answer should be returned, and an acceptance of such proposition telegraphed after a delay of twenty-four hours from the time of its receipt, was not an acceptance within a reasonable time, and did not operate to complete the contract." See also Perry v. Mount Hope Iron Co., 15 R. I., 66; Thorne v. Barwick, 16 U. C., Com. Pleas., 369; Marshall v. Jamieson, 42 U. C. Q. B., 120, all to the effect that an acceptance delivered to the telegraph company completes the contract by telegraph. Also see Stevenson v. McLean, 5 Q. B. D., 346 where contract was commenced by letter and concluded by acceptance through telegraph.

CIVIL LAW.

We will now examine the doctrine and jurisprudence of the civil law, as to the time when a contract by correspondence is complete. We shall see that it has been quite as much a vexed question with the civilians as with the common-law writers, but that the balance of jurisprudence is now in favour of the view that such contracts are complete at the moment of acceptance.

The writer from whom we will cite (Rousseau, Traité de la Correspondance par Lettres Missives, Paris, 1877), favours this view. He commences with those who favour the other side of the argument. (Transl.) No. 77. "A good many authors, whose doctrine has been adopted by the courts, assert that the contract is not complete until its acceptance has been made known to the offerer, and that the latter can retract his offer until its acceptance reaches him. The acceptance, they say, is of the same nature as the offer; it is the manifestation of the will of the proposer. Both should be governed by the same rules. Now, the offer does not bind the offerer until it has reached the offeree; hence the acceptance should not bind the acceptor until it has reached the offerer. It is not until then that the contract is complete. This system, say its defenders, is in keeping with the philosophical principles which govern the consent. Mr. Wurth in an address delivered at the opening of the session of the Court of Appeal, at Gand, examines the question from the latter point of view. We reproduce extracts and will discuss them later on. 'We 'can derive a solution of this question 'from an examination of what con- 'stitutes the consent, and renders it 'complete. Now, the Civil Code does 'not state under what conditions the 'consent is perfected. We must look 'then to science for a determination 'of these conditions; and to the meta- 'physics of law for a solution of the 'question.'

'We consider that Kant (Eléments 'Métaphysiques de la Doctrine du 'Droit, § 18) has perfectly defined 'personal rights, by saying that a 'personal right consists in the pos- 'session of the free-will of another 'person for the purpose of determining 'him, by my own will, to a certain 'action compatible with the laws of 'liberty. It is, indeed, this taking-in 'possession of the will of another per- 'son, which constitutes the acquisition 'of a personal right.'

'Peter wishes to lend me money at 'a certain rate of interest; he announces his intention to others than 'myself. He is not bound toward me; 'his will remains entirely free. I, on 'my own part, and at the same moment, 'wish to borrow from Peter the same 'amount, and at the same interest; I 'announce my intention to others than 'Peter; I am not bound toward him, 'my will remains free. There is, there-'fore, no contract although our inten-'tions co-existed, and manifested 'themselves upon one and the same 'object of law. Why? Because the 'personal right is only acquired by 'the taking-in-possession of the free-'will of the third person. In order to 'complete a contract, it does not suffice 'that two consents co-existed upon a 'certain point; there must further be 'a mutual recognition of the two con-'sents, for this interchange of inten-'tions is an indispensable element of 'the *duorum in idem placitum consensus*. 'It is through it that the reciprocal 'taking-in-possession of the free-will 'of the two contracting parties is 'brought about, as well as the form-'ation of the *nexus*.

'Neither the particular mind of the 'promissor nor that of the acceptor are 'sufficient to form an agreement; there 'is also needed a reunion of the two 'minds, and consequently, says Kant, 'their simultaneous declaration. But 'continues this author, this simulta-'neousness is impossible in the *acts* 'declaratory of intention, which *neces-'sarily succeed each other as to time*, and 'are never simultaneous. In effect, if 'I have made an offer, and the offeree 'now wishes to accept it, I might in 'the interval, however short, have 'repented of my offer, for I am still 'free until its acceptance by the 'offeree; to the same extent, the 'acceptor is not bound by his ac-'ceptance. Indeed, the external 'formalities (*solemnia*) such as a reci-'procal shaking of hands, or breaking 'together a straw (*stipula*) and all 'other mutual confirmations of the 'anterior declarations, prove the em-'barrassment of the contracting parties 'as to the manner of representing as 'existing simultaneously, declarations 'which are always necessarily suc-'cessive.'

'It appears to us that these con-'siderations at once so true and pro-'found, explain better than all the 'texts of ancient and modern law, the 'question as to the point of time when 'contracts by letter are complete. 'Indeed, if it is true that the *aggregatio 'mentium* externally manifested, is a 'purely abstract conception, but that 'in reality declarations are necessarily 'successive, the question is no longer 'an open one; for then the difference 'between contracts by mail and verbal 'contracts, will solely consist in this; 'that the interval of time which ne-'cessarily separates the declarations 'of the promissor and the acceptor, 'will be longer in the case of contracts 'by mail. Now, this more or less 'considerable interval of time, does 'not in any way change the terms of 'the problem. The latter remains the 'same whether it is a second or several 'minutes which separate the successive 'declarations. In contracts by mail as 'in verbal contracts, the two intentions 'must be mutually declared and re-'cognized; until then they are free. 'Thus it is not at the moment when 'the acceptance by letter is written 'and sent, but when the letter con-'taining the acceptance has reached 'the promissor, that the agreement is 'completed by the reciprocal taking-'in-possession of the free-will of each of 'the parties, and that they are bound 'toward each other by a legal 'tie.'

(No. 79). "The adherents of this system, who are so ably supported by this learned and philosophical dissertation, further maintain that the letter closing the acceptance fulfils the office of a mandatory; now, a mandate only takes effect upon its execution, and this mandate is only executed by letter at the moment it is placed in the hands of the person to whom it is addressed."

(No. 80). "Thus according to their opinion the promissor is at liberty to revoke his offer until the moment when he receives the notification of acceptance. Until the same moment the acceptor has the right to revoke his acceptance. (In this sense: Merlin, *Rep.* Vo. *Vente*, §1, art. 3, No. 11.—Troplong, *Vente*, Nos. 24-26; *Louage*, No. 105, Note 3. — Pardessus, vol. 1, No. 250. — Touillier, vol. 3, No. 29. — Gauthier La Chapelle, *Encyclopédie du Droit*, Vo. *Contrat*, No. 108. — Zacharie, Massé et Vergé, vol. 3, No. 553. — Larombière, vol. 1, art. 1101, No. 19. — Flandin, *Revue du Notariat*, vol. 1869; Pau, 17 April 1852, S. V. 52, 2, 205; Paris, 6 March 1865, S. V. 1866, 2, 145; Cass, 6 August 1867, S. V. 1867, 1, 400; Brussels, 25 February 1867, S. V. 1868, 2, 182, 183; Lyon, 27 June, 1867, S. V. 1868, 2, 182, 183)."

(No. 81). "However, some of the authors we have just cited, are of the opinion that, if the acceptor should die or become incapable after acceptance, but before it had reached its destination, the contract would none the less subsist. 'If these accidents of 'death, or incapacity, only happen 'after acceptance, but before the 'acceptance is made known, the con-'tract is none the less irrevocably 'formed; there is, in effect, a concur-'rence of the two minds. And of 'what account is it that the parties to 'the contract can withdraw, so long as 'the acceptance has not reached the 'person for whom it is intended! It 'is none the less true, that the con-'tract is only incomplete by reason of 'this faculty of retraction, but that in 'default of this retraction it is irrevo-'cably formed. Now, where either 'death or incapacity of one of the 'parties intervenes after the accept-'ance of the offer, the effect is to 'render retraction impossible on his 'part, and thus to consolidate the con-'tract on his side. As to the other 'party, it is indifferent whether he 'was able to withdraw so long as the 'acceptance was not known to him, if, 'knowing he had this faculty, he did 'not exercise it. There was on both 'sides a continuance of wills in de-'fault of retraction.' (Larombière, *loc. cit.*, No. 20)."

(No. 82). "This distinction does not appear to us well grounded and shows, we think, the frailty of their system. To be logical, there is *no possible* distinction. For it is either one of these; that the contract can never be complete until the arrival of the acceptance into the hands of the promissor, and in that case, the happening before that period, of the death or incapacity of the acceptor, *should* prevent the completion of the contract as much as a retraction, since there is no longer a co-existence of minds; or, on the other hand, the contract is complete even at the moment the offer is accepted, and in that case neither death, nor incapacity, nor revocation can render invalid the contract, which is irrevocably formed. This appears to us to be the logical view of the question. One must choose either one or the other of these two systems, but it is very difficult to admit the distinction proposed by the eminent author above cited (Demolombe, *Contrats*, vol. 1, No. 75.—Demante, *Thémis*, vol. 7, p. 377, 379)."

(No. 83). "Other authors, of no less an authority, consider that the contract is formed from the moment of acceptance, and before its arrival into the hands of the offerer. This system is followed by M. Demolombe, *loc. cit.* No. 75.—Aubry & Rau, vol. 3, § 343, Note 3.—Duvergier, *Vente*, vol. 1, 58 s. s.—Duranton, vol. 14, 15.—Mercadé, on art. 1108.—Alauzet, *Comm. du Code Comm.*, vol. 2, No. 1053, 2nd édit.—Massé, *Droit Commercial*, vol. 2, Nos. 1459 *et seq.*—Compare also Pothier, *Vente*, No. 32.—Serafini, *loc. cit.*, § 20.—This opinion has also our preference."

(No. 84). "In the first place, we reply to Mr. Wurth's dissertation that when the person to whom proposals are made, accepts them, the *consent* already exists in the *will*, in the *conscience*, and also in the very act of the proposition of the offerer. The effect of the acceptance is but to realize that which was eventual. The realization of the desire of the promissor intervenes without his knowledge, but not against his will; thus the consents co-exist and complete the *duorum in idem placitum consensus*. We consider that the example quoted by Mr. Wurth is not topical; for instance, he supposes two individuals under the common intention of contracting, but imparting their intentions to third parties without expressing them reciprocally. That is misstating the question; these two individuals could never contract an obligation, why? Because there has never been a conformity of offer and acceptance between themselves personally. But, if instead of imparting their intention to third parties, these two individuals spoke or wrote to each other, then they could contract. In spite of the talent of its author, the philosophic thesis we have reported does not convince us."

(No. 85). From a juridical point of view, our doctrine seems to be irrefutable. "A contract, says very truly 'Mr. Demolombe, is formed by the 'concourse of two minds; now the two 'minds have concurred from the mo- 'ment of the acceptance of the offer; 'hence, at that moment also the con- 'tract was complete. This syllogism 'is satisfactory, and its conclusion ir- 'resistible, unless some opposing text 'is brought to bear against it. They 'have invoked article 932, continues 'the illustrious professor, but this 'article is special to gifts *inter-vivos*, 'and of this there are two proofs; the 'first, is, that the provision which it 'embodies pertains to modern law, 'and that our ancient law did not 'require for the perfecting of a gift '*inter-vivos*, that the acceptance by the 'donee should be known to the donor; 'the second, is, that, neither does the 'modern law exact this condition ab- 'solutely; for it is only *with regard to* 'the donor, that acceptance by separate 'deed shall only have effect on the day 'when he shall have been notified; 'whence it follows that, with regard 'to all others it shall have effect as 'soon as it occurs, and independently 'of all modification.'

Thus the two chief arguments of the first system are victoriously refuted .... and so by the mere acceptance of the offer, the contract is completed, without there being any necessity that the acceptance be made known to the promissor."

Dalloz also supports the view taken by this author. In a note to a recent decision given in France upon this point, he states: "It has hitherto been a much disputed point, to determine whether a contract is complete upon acceptance, or whether it is further required that the acceptance should reach the offerer." After citing those

authors who are in favour of the latter view, he goes on to say: "This solution strikes us as being incorrect, and we prefer to decide, with the greater part of the jurisprudence, that a contract by correspondence is completed at the place where the bargain has been accepted; that is to say, at the place where the letter of acceptance was forwarded, and not at the locality where it was proposed." The case referred to above, came up upon a question of jurisdiction. The syllabus reads as follows. (Translation). "A contract by correspondence is formed at the place of acceptance, and not at the place where the offerer has information by letter of the acceptance of the other contracting party."

"Further; when, in the absence of a stipulation to the contrary, goods have been forwarded, and at the risk of the purchaser, delivery must be reputed to have taken place at the domicile of the vendor."

"Whence it follows, that if the contract by correspondence is formed at the same place, the tribunal of that place is competent." Duhamel c. Delpierre-Gournay, Court of Douai, 15th March, 1886. (Dalloz 1888, 2, 37).

But the question we are discussing, can now be considered quite as much settled by French as by English jurisprudence. The most recent French decision is that of the court of Poitiers, 21st Jan. 1891, which, says the author of an article in the "Journal du Droit International Privé" Nos. V-VI 1891, "supports the solution generally adopted by our courts," viz: that the contract is complete at the time and place of acceptance.

The importance of settling the question we propounded at the commencement, becomes evident when we consider the number of others depending entirely upon it for their correct solution; such as powers of revocation, as well as the time and place of completion of such contracts.

REVOCATION — TIME FOR ACCEPTANCE—STATUTE OF FRAUDS, ETC.

Having determined that acceptance completes the contract, the fact that the letter containing it never reaches its destination, does not in any way affect the completeness of the contract. (Household Fire Ins. Co. v. Grant, 4 Ex. Div. 216).

Revocation of the offer, to be effectual, must reach the offeree before he has posted his acceptance. (Adams v. Lindsell, 1 B. and Ald. 681); (Dunlop v. Higgins, 1 H. L. Cas. 381); (Potters v. Saunders, 6 Hare, 1): (Harris' Case, 7 Ch. 587).

The party accepting cannot retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor indeed, if it never be received. (Duncan v. Topham, 8 C. B. 225); (Potter v. Saunders, 6 Hare, 1); Household Ins. Co. v. Grant, 4 Ex. Div. 216). Likewise at French law, if a letter containing an offer has been despatched, and it is beyond the power of the offerer to recall it, he still has the right to retract the offer, either by a telegram, or by another letter, and if this letter reaches the offeree before he has accepted, the revocation is valid, and the contract cannot be effected. (Rousseau Corresp. par lettres missives No. 64).

Acceptance must be made within reasonable time, whether by letter or by telegram. (Minnesota Linseed Oil Co. v. The Collier White Lead Co., 4 Dillon 431). (Tel.) Where no time is limited, the offer must be accepted within a reasonable time, otherwise the proposer will not be bound. (Chicago etc. Ry. Co. v. Dana, 43 N. Y. 240; (Judd. v. Day 50 Ia. 247);

(Maclay v. Harvey, 90 Ill. 525). In Dunlop v. Higgins, it was decided that in the absence of the stipulation to the contrary, an answer posted on the day of receiving the offer is sufficient. The French law is similar to the English in this respect.

It is plain says Wharton (on Contracts) that, when the party addressed has a specific time within which to accept, a proposal falls if not accepted within the limit. The proposal, also, may fix a limit as to the place of acceptance.

So far as concerns the mode in which it is to be performed, the place from which the acceptance is sent is that which supplies the governing law. (Wharton on Contracts, vol. 1, § 20).

The time of the acceptance determines the date of the contract. Until such acceptance, the buyer has no insurable interest (Stockdale v. Dunlop, 6 M. & W. 224); (Seagrave & Marine Company, L. R., 1 C. P. 305); (Tayloe v. Jones, L. R., 1 C. P. D. 87) nor can he until acceptance maintain an action for injury to goods (Felthouse v. Bindley, 11 C. B. N. S. 869).

In contracts by telegraph, a message delivered *to* a company, satisfies the Statute of Frauds, if it contains the material and express terms of the contract signed by the sender—the party to be charged—or by his lawfully authorized agent. (McBlain v. Cross, 25 L. T. N. S. 804); (Trevor v. Wood, 36 N. Y. 307); (Goodwin v. Francis, L. R., 5 C. P. 295, *dictum*); (Howley v. Whipple, 48 N. H. 487, *dictum*).

It regard to a message delivered *by* a telegraph company, it satisfies the Statute if it contains the material and express terms of the contract and the signature of the sender—the party to be charged—written by the telegraph company, to the extent to which a telegraph company is the agent of its employer. (Goodwin v. Francis, L. R., 5 C. P. 295); (Dunning v. Roberts, 35 Barb 463); (Howley v. Whipple, 48 N. H., *dictum*); (Smith v. Easton, 54 Md. 138).

LIABILITY OF SLEEPING CAR COMPANIES.

Sise v. *The Pullman Palace Car Company.*

An interesting and important decision was given by Mr. Justice Tait in the Superior Court, Montreal, Jan. 30, 1892, in a case involving the responsibility of the proprietors of a sleeping car for the value of a bag and its contents stolen from the car. The question of the liability of sleeping car companies has recently received considerable discussion in the United States, and the authorities there are more or less conflicting as to the general liability of such companies in regard to missing baggage, etc. The facts of the present case are substantially as follows. On the 1st Oct. last the plaintiff purchased from the defendants in this city a ticket for the drawing-room section of one of their sleepers leaving Montreal that evening for Toronto. He arrived at Bonaventure station about twenty minutes before the departure of the train. The porter and the conductor were standing, in their proper uniforms, on the station platform near the steps of the car, where it was their duty to stand to receive passengers. When the plaintiff arrived he handed his travelling bag to the porter, and told him to put it in the drawing room, which he did. The plaintiff remained outside, walking up and down the platform, until the train was about to start, when, on going to the drawing-room, he asked for his bag, but upon

search being made for it, it could not be found. The value of the bag was $150, which is the sum the plaintiff claimed from the defendants.

Mr. Justice Tait starting with the civil law said, *inter alia*, " I am called upon to determine whether the responsibility attaching to defendants is similar to that of an innkeeper, or, if not, whether it is that of a common carrier, or if not whether they are responsible for the loss as having occurred through their own negligence, and finally, if liable at all, whether they are protected by reason of the admission made by plaintiff of his knowledge of the notice printed on checks received by him on previous occasions. The question whether defendants' responsibility is similar to that of keepers of inns, boarding-houses and taverns will require a somewhat extended discussion."

" The articles of our code material to this point are articles 1814 and 1815. Article 1814 enacts that ' keepers of inns, of boarding houses and of taverns are responsible as depositaries for the things brought by travellers who lodge in their houses. The deposit of such things is considered a necessary deposit.' Art. 1815 (as amended by article 5818 R. S. of Q.) provides that the persons mentioned in the last preceeding article are responsible if the things be stolen or damaged by their servants or agents or by strangers coming or going in the house. The article also says ' such persons are not ' responsible if the theft be committed ' by force of arms, or the damage be ' caused by irresistible force. Nor are ' they responsible if it be proved that ' the loss or damage is caused by a ' stranger and has arisen from neglect ' or carelessness on the part of the ' person claiming.'

" Our article 1814, differs from article 1952 of the French Code only in its being made to include boarding-house keepers, so that in considering the scope of the article, the decisions in France, as well as the remarks of the commentators on the French Code, are applicable. The latter are almost unanimous in their opinion that the provisions of article 1952 are not limitative. Several very distinguished authors, Mr. Merlin, Mr. Troplong, Mr. Sourdat and Messrs. Massé & Vergé are of opinion that they not only apply to persons who keep furnished rooms and public bathing houses, but also to persons keeping cafés and restaurants. Their opinion, however, so far as concerns these latter persons, is not concurred in by the majority of authors." (Here the learned Judge cited from a number of French authorities).

"This question has naturally received a great deal of discussion in the American courts. There is no doubt whatever that the great weight of judicial decision, has been against holding sleeping car companies responsible as innkeepers. In fact only one case has been cited to me where the contrary has been held. It is that of the Pullman Palace Car Co. v. Lowe, decided in December, 1889, by the Supreme Court of Nebraska, and reported in the American Law Register for 1890. In that case after discussing the relative duties of innkeepers and sleeping car companies, the court remarked " that so far as such services are rendered (by a sleeping car company) they are the same in kind as those rendered by an inn-keeper. And the security of travellers and as a means of protecting them, not only against the negligence, but also against the dishonest practices of the agents or employes of the sleeping car company, requires, that the company, so far as it renders services as an inn-

keeper, shall be subject to like liabilities and obligations." The plaintiff in that case went out to breakfast at the regular breakfast station, leaving his overcoat in an upper berth, where it had been placed by the porter. The breakfast occupied about fifteen minutes, and after that plaintiff stood on the rear platform of the sleeper smoking for about ten minutes, and when he reëntered the car the berth had been made up, but his coat was gone. The first court found as a conclusion of law that defendant was guilty of negligence in not properly guarding and taking care of the plaintiff's property during his necessary absence from defendants' car, and that plaintiff was not guilty of negligence in the matter, and this decision was affirmed in the Supreme Court."

"Now, as I have pointed out, by our law, keepers of boarding houses have the same responsibility as innkeepers and, in my opinion, keepers of mere lodging houses share it also, so that many of the differences mentioned by the American authorities would have no force with us, and amongst them that one which has reference to supplying of food. There is a difference, of course, between the construction of a car and a lodging house, but why should the proprietors of the former escape responsibility by building cars in such a way as to make the most money out of them, instead of in such a manner as to protect their guests? As a matter of fact, the plaintiff here had a separate compartment with doors which locked and, in all respects, similar to a furnished apartment, but, as regards the rest of the car, why could not some receptacle be provided for valuables, etc., and other means adopted to secure the safety of the property of guests? I have no doubt they have means to secure their own property such as bed linen, etc. The fact that a sleeping car company is limited to a certain class who are willing to pay the price demanded, does not distinguish them from inns, where all can be excluded who will not pay the price charged."

"In any event, the company which sells sleeping-car tickets to all first class passengers that may pay the price, to that extent stands in the same relation as an innkeeper who must, for hire, entertain those asking for entertainment."

"But I think that in judging of the responsibility of a sleeping car company we should not look so much to see whether it holds itself out as doing all and everything that an innkeeper as originally understood undertook to do, but whether what it does hold itself out to do so closely resembles an essential part of an innkeeper's business as to invite the same confidence and to render a deposit of similar character necessary."

"The changes in the habits and customs of the people resulting from the inventions of modern days render it necessary to extend the principles of law to cases not originally contemplated. A person would not be regarded as less responsible as an innkeeper to-day because he did not receive the horses of his guest; and the person who received horses to lodge, and not guests, would, according to our law, be subject to the same responsibility as an innkeeper. People now pursue a journey, day and night for a week at a time, on a sleeping car, having all the conveniences of an inn, and if meals are not served by the proprietors of the car, means are provided to get them. Large hotels are now conducted on what is called the European system, where a room is engaged at so much a day. No contract is made for meals; the guest

may get them at a restaurant connected with the establishment. It may be belonging to a different person, and at any rate under a different contract, just as they are obtained by a guest on a sleeping car, from some restaurants operated in connection with it. I know of no reported case in the States, but under French law there is no doubt that a proprietor of one of these hotels would be responsible as an innkeeper."

"I do not think it is necessary to pursue the enquiry any further in this direction, because I think that under our law, the question is whether there is any material difference between a lodging house and a sleeping car. In either case you secure a bed and toilet accommodation, with heat, light, etc.; in either case you have employees of the proprietor to wait on you, and, in fact, there is no material distinction except that the construction of the car is different. I think, however, that that fact ought to make no difference in their responsibility, for if they undertake to carry on a business of that kind they ought to be prepared to accept the responsibilities connected with it, and be required to protect the property of their guest as a keeper of a lodging house would be; for, to use Mr. Laurent's definition of necessary depositaries, they are those who receive persons having with them effects which must be guarded. These sleeping car companies invite the same confidence, the same necessity for accepting it and the same necessity for a deposit exists. Although American decisions are against holding sleeping car companies responsible, as innkeepers, there are numerous decisions holding that they are required to exercise ordinary and reasonable care and watchfulness to protect the personal effects of occupants of berths upon their cars and for negligence in this respect they will be held liable where loss results to the passengers at least to the extent of the value of such baggage if it be property such as is ordinarily carried by travellers upon sleeping cars, and the Law Register refers to a number of leading decisions by the different Supreme Courts where that doctrine has been held. I think the law upon this point was as well expressed in the case of Lewis v. N. Y. Sleeping Car Co., 143 Mass. 262, as in any other I have found. The plaintiff put his money in his vest, which he folded and placed under his pillow. It was stolen during the night. The porter of the car was found asleep at an early hour of the morning in a position from which no view could be had of that part of the car in which the passengers were asleep. Chief Justice Morton said, *inter alia*, 'while it (the sleeping car company) is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft, and if through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy and by the true interests of both the passenger and the company, and the decided weight of authority supports it.' The charge to the jury, which was to the same effect, was upheld, and the judgment of the first court was affirmed. In the case of the Pullman Palace Car Co. v. J. H. Matthews, 74 Texas Rep. (S. C.) 654, the plaintiff in that case was awakened about 5 o'clock in the morning and was informed that on account of a wreck ahead he would have to change cars. He left his pocketbook, containing $165, lying upon the bedding of his berth and went to the wash-room, from where, having finished dressing, he went out of the car and

forward to the wrecked train and immediately on arriving there he missed his pocket-book and went back to recover it. Search was made but it could not be found. When plaintiff paid his fare he was handed a check, upon which was printed the same words found upon exhibit B fyled in this cause. The plaintiff recovered and the company appealed from the judgment.

The next point to be considered is whether the defendants were guilty of negligence. Their employee accepted the plaintiff's bag, carried it into the car and put it in the drawing room. He might in this particular case have easily secured the safety of the bag by closing the door of that compartment, which he says, was self-locking. For some twenty minutes the car was left unguarded in a large public station where a large number of people congregate and where thieves and confidence men frequently resort, wholly unprotected by the presence of any employee of the defendants in the car. The porter, as I have already shown, admits that any one could have entered the car without his knowledge and have opened the window and thrown the bag out, and this is what, no doubt, happened. The plaintiff surrendered his bag to the porter and never saw it again. The porter did not warn him in any way that he should protect his bag by his own presence. I am disposed to think there was negligence. Here were two men attached to one car, a conductor and porter, who apparently had no other duties than to look after this car and to assist the passengers, and yet the car is left unprotected. It is admitted that it can be robbed with impunity while they are on duty. I think the nature of defendants' business calls upon them to exercise greater care and diligence than they did in this case."

"Now as to the protection afforded by the rule that baggage, etc., taken into the car will be entirely at owner's risk, and employees are forbidden to take charge of the same, article 1815, C. C., contains special provisions as to the way in which innkeepers, etc., may limit their responsibility, with which the defendants did not conform. As already pointed out there was no condition on the ticket excluding responsibility. It is only after the contract is made and the car is started that the check containing the notice is given to the passenger. I should think it extremely doubtful if the company could, after the contract has been made and after the journey has begun, force such a condition upon the traveller. It is true, plaintiff says that he received similar checks from defendants before, and was aware of their contents, but it appears evident that on this occasion his bag was taken into the car and was stolen before he received the check, for he missed his bag, the moment he went on board, so that the condition or notice on the check could not apply to that trip. It may be presumed that they intended to give him a similar check on this occasion, from the fact that they did give him one after his bag was stolen, but it cannot be said to be proved that he was under notice at the time the bag was lost, from the mere fact that on previous occasions he had received checks with this notice on them. Again it is clear that the defendants could not protect themselves from their own negligence by such a notice. If their responsibility is that of an innkeeper it is exceptional under art. 1815, where they are made liable for property, even above the value of $200, if it has been stolen through their default or neglect. In the case of Laurence and the G. N. W. Telegraph

Co., lately decided by he Court of Queen's Bench, it was held that a telegraph company cannot stipulate for immunity from the negligence of its servants. By art. 1676 carriers are not permitted to limit their responsibility so as not to be liable for their own fault, and the same principle would apply to innkeepers and others. —Arts. 989 and 990, 2 Sourdat, Nos. 995 and *seq.* I am therefore of opinion that defendants are responsible as necessary depositaries, and that they have failed to prove, what the law required them to prove, to be released from such responsibility. I am also of opinion that they were guilty of negligence, and that what has been proved regarding the notice on the checks does not protect them. Judgment must therefore go against them for the amount demanded with costs. I express no opinion as to defendants' responsibility as common carriers."

Notes.

We think it may not be out of place to take a glance at the source of our modern laws upon the responsibility of innkeepers and this class of bailees generally.

At Rome previous to the Edict *Nautæ Caupones Stabularii*, the liabilities of *nautæ* etc., were dependant on the ordinary principles of contract recognized in the civil law. This Edict has been incorporated into the French Code; mainly through the authority of Pothier, and it also lies at the root of the English law of bailments and the Scotch law of reparation so far as applicable to these and other persons in the like exceptional position of trust.

EXTRACTS FROM THE EDICT.

DIG. IV. IX—*Nautæ Caupones Stabularii ut recepta restituant.*

FR. 1. (*Ulpian on the Edict*).

(*Trans*).

The prætor announces: "I will grant an action against shipmasters, innkeepers, and stable-keepers if they fail to restore to any person any property of which they have undertaken the safe keeping."

3. Certain officers on a ship are appointed for the very purpose of superintendence—*e. g.*, pursers and stewards. If a person in such a position receives goods, I am of opinion that an action should be granted against the employer of the ship, because by appointing him to such duties, he sanctions the delivery of things into his charge, even though it is the practice of the employer or master to signal with his hands. Even if the sign is not given, still the employer will be liable for what he has received.

4. There is no express provision with reference to raftsmen and boatmen; but Labeo thinks the same rules should be applied, and that is the law now in observance.

6. The prætor's words are: "any thing of which they have undertaken the safe keeping;" that means any article or merchandise whatever which they have received. Hence an opinion is reported by Vivian that the edict covers everything which is accessory to the merchandise, such as clothes for use on the voyage and other every day necessaries.

8..... In my opinion the master undertakes the safe-keeping of everything put on board his vessel, and must answer for the acts of the passengers as well as of the crew.

FR. 3. (*Ulpian on the Edict*).

..... Pomponius also observes, that where the master has once accepted things, the risk is on him, though they have not been taken on board. but have perished on shore.

1. Under the edict, he who has received goods is responsible in every case for any loss or damage that ensues, though there be no fault on his part, except it be due to a *damnum fatale*. Accordingly, Labeo remarks, that where the loss is caused by shipwreck, or an attack by pirates, the master must in fairness be allowed to plead this defence, and the same is true of inevitable accident occurring in a stable or an inn.

FR. 6. (*Paul on the Edict*).

3. An innkeeper is responsible in the action on the case for all who make a stay in the inn; but he is not liable for one who is entertained in passing, as a traveller.

FR. 7. (*Ulpian on the Edict*).

.....*If the employer of the ship has given notice that all passengers are to take care of their own effects, and that he will not be responsible for loss or damage, and if the passengers have assented to the notice, no proceedings can be taken against him.*

DIGEST XLVII. 5.—*Furti adversus nautas caupones stabularios.*

1. (*Ulpian on the Edict*).

4. If the shipmaster or innkeeper undertakes the safe keeping of the thing, it is he, and not the owner of the other property who can bring the action for theft, because his undertaking makes him answerable for the safety of the thing.

Although these titles make no direct reference to the defence of contributory negligence on the part of the plaintiff, that is doubtless an accidental omission, for the doctrine on the subject was thoroughly elaborated by the Roman jurists—e. g. in the title: Ad legem Aquiliam (D. 19, 2).