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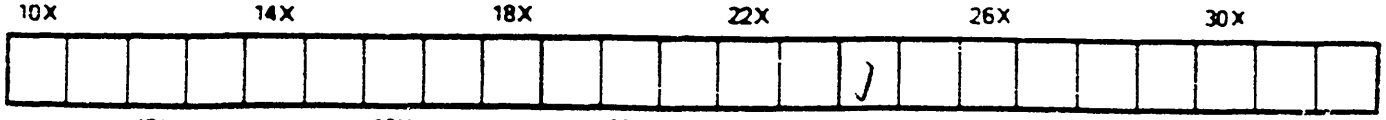

MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. NOVEMBER, 1893. No. 11.

ACCIDENT INSURANCE — See Insur. Accident.

ACTION CONFESSOIRE—See Servitudes.

AGENCY—See Prin. and Agent.

APPEAL—See Servitudes.

ATTACHMENT OF DEBTS—See Banks etc. 1.

BANKRUPTCY—See Insolvency.

BANKS AND BANKING—SEE ALSO BILLS AND NOTES 1.

1. ATTACHMENT OF DEBTS — RULE 935—GARNISHEE "WITHIN ONTARIO"—BANKING CORPORATIONS — HEAD OFFICE—BRANCHES.

Canadian banking corporations authorized by Parliament to do business in Ontario, although having their head offices in another Province, are to be deemed resident "within Ontario," within the meaning of Rule 935, and moneys deposited with them at branches within Ontario may be attached in their hands as debts due to the depositors. *County of Wentworth* v. *Smith*, Ontario, High Ct. of Justice, in Chambers, Sept. 1893.

2. SHARES — PLEDGE — POWER OF HUSBAND ACTING AS AGENT FOR HIS WIFE — ARTS. 1301—181—1483—1971 C. C.

A husband, proved to have had generally no means of his own and having so declared by notarial deed setting out also that all he possessed or might thereafter possess was and should be considered as his wife's property and as having been purchased with her money, while administering his wife's large fortune under a general power of attorney subscribes bank shares in his own name, the partial payment whereof can be traced as having been made with his wife's money and afterwards transfers the whole of said shares to his wife.

Held, that such a transfer is valid and does not fall within the prohibitions contained in articles 1483 and 1301 of the Civil Code. *Jodoin* v. *Bank of Hochelaga*, Queen's Bench in Appeal 30 Sept. 1893.

Geoffrion, Dorion & Allan, for Appellants.

Beique, Lafontaine Turgeon & Robertson, for Respondents.

SIR A. LACOSTE, C. J.—The appellants sue the respondent in their quality of testamentary executors of Dame Helene Jodoin, in her lifetime wife of Amable Jodoin, and claim from the bank one hundred shares belonging to the succession of the deceased, which respondent appropriated on the 31st December, 1879; and also the dividends on these shares since the above date, and interest on the dividends, less, however, a note of $2.000 which they acknowledge they owe respondent. Respondent pleads that the shares were subscribed for and paid by Amable Jodoin, and that the transfer subsequently made to his wife is null and without effect, being prohibited by art, 1483 of the Civil Code, which does not allow a sale from husband to wife, and by art. 1265, which forbids the consorts to confer benefits upon each other *inter vivos* during the marriage. In a second plea, the bank invokes prescription against part of the dividends and interest claimed. Lastly, in a third plea, it alleges that on the 31st December, 1879, when it appropriated the shares, Mr. and Mrs. Jodoin were indebted to the bank in a sum exceeding $25.000 on promissory notes, for the payment of which the bank had a right of pledge on the shares, and that the shares had been transferred to the bank with the knowledge and consent of Mr. and Mrs.

Jodoin in part payment of their debt, and that they had been subsequently sold by the bank and the proceeds imputed on the $25.000. The appellants' answer to the first plea that the transfer of the shares by the husband to the wife was not a sale, or a transfer for valid consideration in the nature of a sale, nor a benefit between consorts, but a mere formality to give the wife a title to which she had a right, seeing that the husband had in reality subscribed the shares for her and had paid for them with her money. To the second plea appellants' answer that prescription of the earliest dividends and interest on them had not been acquired because they served to extinguish the note of $2.000 and the sum of $302, balance of a note of $737, which they admit they owe the respondent, which notes were due at that time. In answer to the third plea, appellants deny their responsibility, except as to the note of $2,000 and the balance above mentioned on that of $737. They allege that the notes which make up the bank's claim were endorsed by Mr. Jodoin as attorney for his wife without right, and that the latter never consented to transfer the shares to the bank, which disposed of them illegally even supposing that it had a right of pledge on them. The court below came to the conclusion that the shares were the property of Madame Jodoin, but that the latter owed the amount claimed by the respondent, and that she had no interest to trouble the bank on the pretext that it had sold the shares without judicial formalities, as it was certain that they would never have realized a sum sufficient to discharge Mrs. Jodoin from that debt. The court did not pronounce on the plea of prescription, which was virtually abandoned, and properly so, in appeal. The evidence of record shows that Mrs. Jodoin's fortune, which was over half a million, was almost entirely lost in about ten years. Her husband had no property. In his quality of agent for his wife, who had given him a general power of attorney, he used her money to buy bank shares to qualify himself as a director. He carried on trade in his own name and seems to have been unfortunate in his undertakings. From time to time he made solemn declarations before a notary that he had no fortune; that all that he had acquired was acquired with his wife's money, and that his undertakings had been carried on with his wife's money and for her. Two of these declarations have been filed, one dated 19th of December, 1876. Mrs. Jodoin was not present at the first declaration (made previously), but she appeared in the deed which contains the latter, and she attested the sincerity of the declarations, and declared that she intended to profit by all the benefits accruing from the personal transactions of her husband, as well as to bear the losses resulting from them. The Superior Court correctly found that these declarations were sincere. They establish a state of things which really existed. Besides, the proof of absence of means on the part of the husband and of the large fortune of the wife is complete. In transferring the shares to Mrs. Jodoin, Mr. Jodoin was not selling them; he was not benefiting his wife; he was only stating the facts and making regular her title to the shares and giving her back the property which he had acquired with her money. Besides the declarations, the evidence shows that the wife's money was used to pay for the shares. The parties had admitted that on the 30th October, 1874, a note of $5.000 was given to the bank in payment for the balance due on the shares. A sum of $3.000 was paid on account of the note on the 2nd September, 1875, by a cheque drawn on Mr. Jodoin's personal account at the bank. Now, the same day a deposit of over $14.000 had been made to the credit of Mr. Jodoin, which sum was the proceeds of a loan of $15.000 effected by Mrs. Jodoin on the 15th August, 1875, and paid on the 31st of the same month. The balance of the note of $5.000 was settled by the note of $2.000 given by Mrs. Jodoin to the bank, and which is acknowledged by the appellants. Under the circumstances I do not think that the bank can contest the validity of the transfer which seems to be legitimate, and which it recognized and accepted by taking her note in payment of the balance of the shares. Appellants pretend that the husband was not authorized to endorse notes for his wife and get them discounted, and that this was in reality effecting loans for her. The power of attorney from Mrs. Jodoin to her husband was given to manage and administer his wife's fortune, and the power therein conferred on the agent to sign and endorse promissory notes is restricted to those required for purposes of administration. Being general, the power of attorney could be valid only as to administration. Art. 181 of the Civil Code declares this expressly. This court has already appreciated this power of attorney in the case of Jodoin and Lanthier, and it has restricted it to acts of administration. The bank could not be ignorant that loans so large were not necessary for the administration of the wife's property, and it has only itself to blame for not causing the wife to intervene personally. Another important question to which the judge in the court below gave special attention, is raised in the case. The pleadings do not specially mention this ground, which results from the repudiation by the wife's representatives of the debt, and which specially calls for the attention of the court because it is a matter of public order. The notes filed by the bank, with the exception of the two admitted and of that signed by Desmarteau, of which I shall speak later, are notes signed by A. P. Jodoin, son of Mr. and Mrs. Amable Jodoin, made payable to the order of Amable Jodoin, endorsed by him personally and afterwards by him in his quality of attorney for his wife. The husband could not transfer these notes to his wife for value received as alleged in the plea, for the law does not sanction a transaction of this nature between husband and wife. The evidence leaves it in doubt whether the husband received them from his son for valuable consideration; that he did so receive them must, however, be presumed from the form and nature of the document. However this may be, the wife contracted to the bank

a joint, obligation with that of her husband. She obliged herself with him. Now, under art. 1301 of the Civil Code a wife cannot so bind herself otherwise than as being common as to property. Unless the bank has clearly shown that the discount was obtained by the wife for her own affairs, it cannot hope for a condemnation against the wife. The jurisprudence of this province sanctions this doctrine. Now the bank has not established that the discount was for the wife. The circumstances of the case establish that it was the husband who usually obtained the discount and the proceeds of the discount. The bank claims on eight notes. Two of them are admitted by the appellants, viz., that of $2,000 signed by the wife, and that of $737 on which it received a sum on account. It is admitted by the parties that the bank accepted a certain sum on Desmarteau's note, which is one of those claimed, and that it gave him a discharge for the balance. Mrs. Jodoin, who was only an endorser, was thus released. There remain five notes, one of $3,250, dated 13th March, 1879; another of $4,000, dated 22nd March, 1879; a third of $2,250, dated 18th April, 1879; a fourth of $250, dated 20th March, 1879, and one of $5,000, dated 13th June, 1879. These notes were only renewals of previous notes, the history of which is given in the statements filed by the bank, by the witness Giroux, its employee, and by P. A. Jodoin, one of Mrs. Jodoin's testamentary executors. Giroux tells us that the note of $3,250 is part of that of $3,550 discounted on the 14th April, 1875, signed by the husband as attorney of his wife, and endorsed by him personally. The proceeds of the discount were placed originally to the husband's credit, who, alone at that time had an account at the bank. This note was rendered from time to time, but it would appear that the form was changed from time to time, by making P. A. Jodoin intervene, who signed as maker or endorsor. Finally, this note was reduced to $3,250, and it took its present form, that is to say, it was signed by P. A. Jodoin, endorsed by the husband personally, and afterwards by him, as attorney for his wife. Exhibit B. 3, of respondent, which gives the history of the note of $4,000. shows that this note was originally discounted on the 30th March, 1875, and carried to the credit of the husband. It was afterward renewed for $2,000, then increased to $4,000 in August 1876; the proceeds of the discount of the latter note were carried to the credit of Mr. Jodoin. then a cheque was given by the husband (attorney) to discharge the note of $2,000. The note of $2,250, was originally discounted on the 6th September, 1875, and carried to the credit of the husband. As to the note of $250 the witness, P. A. Jodoin. tells us that it was part of the note of $3,500, the proceeds of which had originally been carried to the credit of the husband. It was discounted on the day following that on which the note of $3,500 was renewed for $3,250. There remains only the note of $5,000, which was originally discounted on the 19th May, 1875, and carried to the credit of the husband. All these discounts were, therefore, really granted to the husband with the exception of a sum of $2,000, and this sum although carried to the credit of the wife was at her husband's disposal as attorney, who could at any time draw on his wife's account. I cannot come to the conclusion, in view of these facts, that the bank has proved that the discounts were for the wife and for her business. It has been said that the wife cannot be declared owner of the shares and also discharged from the notes. I do not understand the logic of this proposition. Not only has the bank not proved that the proceeds of the notes were used for the payment of the shares, but it has been established that the money was not used for that purpose. As I have said, the shares subscribed in 1873 were paid in 1874, the year which preceded the discounts of the old notes. The balance was settled on the 30th October, 1874, by a note of $5,000, on which $3,000 was paid on the 2nd September, 1875, probably out of the loan from the Trust and Loan company, and the balance was settled by the note of Madame Jodoin which appellants acknowledge that they owe the bank. Respondent pretended to draw from the husband's state of insolvency, and from the declarations made by the consorts, a presumption of law that the money had gone to the wife. All that the husband did, say they, was for his wife, he had no property, he was his wife's attorney, and she herself, in 1876, acknowledged these transactions as her own, she accepted the benefit and assumed the obligations, and it was for this reason that the shares were put in the wife's name and that the balance at the husband's credit in the bank was, in October, 1875, transferred to the wife's account. The wife could not in a general way assume the obligations of her husband. She could not have claimed the benefit of a particular transaction without bearing the charges of it, but how many transactions have there been by the husband in his own name and perhaps in his wife's name outside of his mandate, which have been a clear loss, since the wife's fortune disappeared in such a short time! Is it to be said that the husband's creditors could have a recourse against the wife? I do not think so, it would be a direct violation of the numerous provisions of our code enacted for the protection of the wife. The husband could dispose by gift of the proceeds of these discounts, he could lose them in unsuccessful personal speculations. The books of the bank show that there remained at Mr. Jodoin's credit on the 1st October, 1875, when the balance was transferred to Mrs. Jodoin, only a sum of $2,742.08. Already had the amounts obtained from the bank with the aid of the notes disappeared. The circumstances of the case show clearly, in my opinion, that the appellants had reason to repudiate the notes by invoking art. 1301 C. C. It has been said that Mrs. Jodoin had agreed to transfer the shares to the bank. The evidence of consent is very unsatisfactory. It is made by Mr. Brais, at the time clerk of the bank, who says he spoke about it to Mrs Jodoin when he visited her as a friend. But then why did they not have the transfer made by Mrs. Jodoin herself? Could she give this consent without the anthorization of her husband? There is not sufficient evidence of consent,

and if there were we would have to presume that she gave it because she believed herself liable for the notes. She was then still under marital authority, and her husband's authorization was necessary for this transfer. Assuming that Mrs. Jodoin was debtor, the bank could not have taken her shares without giving her thirty days' notice in the terms of the statute; it did not comply with this provision of the law. It disposed of the pledge in violation of art. 1971, C. C. The shares of the bank are on the market to-day, and the appellants may procure them to replace those of which it illegally took possession. The bank is above all bound to restore what it took; the debtor may claim back his pledge when the creditor abuses it. Respondent pretended that the action was instituted too late; but I do not know of any prescription which could extinguish the action unless there was acquiescence, and acquiescence has not been proved. Appellants are entitled to the dividends, less the amount which they admit they owe, but they are not entitled to interest on dividends. We condemn the bank to restore the shares, or to pay the nominal value, and we reserve any recourse which it may exercise for the recovery of the balance of the two notes of $2,000 and $757, but reserve appellant's recourse for damages which they may have suffered, and which may result from the illegal sale by the bank.

Judgment reversed.

(Note).—This case is going to the Privy Council.

BASE BALL—See Gambling.

BENEFIT SOCIETY—See Insur. Life 5.

BILLS AND NOTES.

1. CHECKS—PRESENTMENT FOR PAYMENT—REASONABLE TIME— DAMAGES —CUSTOM OF BANKERS.

On Saturday, the 31st day of May, 1890, about the close of banking hours, one M. indorsed in blank, and deposited to his credit in a bank of Wymore, Nebraska, certain checks drawn to his order by one B. on a bank in Courtland, Nebraska. Wymore, and Courtland are twenty-seven miles distant from one another, but connected by telegraph telephone and railroad lines; and a mail left Wymore at 6 p.m. daily, arriving at Courtland at 9 p.m. the same day. The Wymore bank made no inquiry of the Courtland bank as to whether the checks were good, nor did it at any time advise the Courtland bank that it held the checks, but on the day of their receipt mailed said checks to a bank in St. Joseph. Missouri, which bank sent them by mail to a bank in Omaha, Nebraska, and this latter bank sent them by mail to the bank in Courtland, at which they arrived on June 5, and were then protested for non-payment.

Held, that the Wymore bank dit not present the checks for payment to the Courtland bank in a reasonable time, and that the indorser, Miller, was thereby discharged.

An ordinary check is not designed for circulation, but for immediate presentment, and, to charge an indorser must be presented with all due dispatch and diligence consistent with the transaction of other commercial business.

Greater diligence is required in presenting ordinary checks for payment than in presenting bills of exchange. Whether an ordinary check has been presented for payment by the indorsee thereof in such a reasonable time as to hold the indorser must be determined from the facts and circumstances of each particular case.

No custom or usage among bankers as to the manner of presenting ordinary checks for payment will relieve them from the legal duty of presenting such checks for payment within a reasonable time. *First Nativnal Bank of Wymore* v. *Miller*, Nebraska, Supreme Court, June 30, 1893.

2. PROMISSORY NOTE—WARRANTOR —PROTEST.

Held, a warrantor *donneur d'aval* occupies the same position as an endorser, and is discharged by omission to protest. Hence a declaration in an action against a warrantor which does not allege that the note was protested is demurrable.

(2) An allegation in the declaration that the defendant acknowledged to owe, and promised to pay the amount of the note, is destroyed by an allegation also contained therein, that payment of the note was refused at the time of presentment and had always since been refused. *Emard* v. *Marcille*, Montréal, Superior Court, Wurtele J., Sept. 19 1892.

3. PROMISSORY NOTE — ACCOMMODATION — BAD FAITH OF HOLDER — CONSPIRACY—ONTARIO.

P. endorsed a note for the accommo-

dation of the maker who did not pay it at maturity, but having been sued with P. he procured the latter's endorsation to another note agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount, who took it to M., a solicitor between whom and the broker there was an agreement by which they purchased notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note, and an arrangement was made with the broker by which the latter was to delay paying over the money so that proceedings could be taken to garnishee it. This was carried out; the broker received the proceeds of the discounted note, and while pre tending to pay it over was served with the garnishee process and forbidden to pay more than the balance after deduction of the amount of the judgment and costs; and he offered this amount to the maker of the note which was refused. P., the endorser, then brought an action to restrain M. and the broker from dealing with the discounted note, and for its delivery to himself.

Held, affirming the decision of the Court of Appeal, that the broker was aware that the note was endorsed by P. for the purpose of settling the suit on the former note; that the broker and M. were partners in the transaction of discounting the note, and the broker's knowledge was M.'s knowledge; that the property in the note never passed to the broker, and M. could only take it subject to the conditions under which the broker held it; that the broker not being the holder of the note there was no debt due from him to the maker, and the garnishee order had no effect as against P.; and that the note was held by M. in bad faith, and P. was entitled to recover it back. Appeal dismissed with costs. *Miller* v. *Plummer*, Supreme Court of Canada, June 24, 1893.

CARRIERS—See also Railways 4 — Telegrahh Company.

1. Liability — Fire — Goods Destroyed at Station.

The question was whether the company was liable for the value of certain goods destroyed by a fire at their station before delivery had been made to the plaintiffs. The Court below held the company liable on the ground that the fire was the result of gross negligence in keeping gasoline near a stove. One expert testified that if it had been desired to produce a fire there could hardly have been a surer way to do it than this. The company pretended that plaintiffs were guilty of contributory negligence because they had not removed their goods sooner. This pretension was untenable. Judgment confirmed. *Simpson* v. *The Grand Trunk Ry. Co.*, Ct. of Review, Montreal, October 7, 1893. Ouimet, Davidson and Doherty, JJ.

2. Connecting Lines — Liability of for Damaged Freight.

A railway company in New York having connection at Prescott with the Canadian Pacific undertook to carry freight from New York to Quebec through the intermediary of the Canadian Pacific, and gave a receipt for the freight to the consignors to that effect. The charges were fixed by a bill of lading issued to the consignor by the agent of the Canadian Pacific at New York in exchange for the receipt given by the other company; the bill of lading stating that the goods were to be forwarded over the New York line to Prescott and from thence to Quebec over the Canadian Pacific. Each company stipulated in its agreement that it would only be responsible for the goods while in its possession.

The goods were shown to have been damaged on their arrival at Prescott and previous to their being shipped by the Canadian Pacific.

In an action of damages by the consignees against the Canadian Pacific Railway Company.

Held, confirming the judgment of the Superior Court that the defendants were not liable.

That there were two distinct and separate contracts with two different companies each limiting the liability of its own line.

Such limitation of responsibility is not prohibited by Art. 1676 Civil Code or by the Railway Act, Sec. 246, § 3.

That the terms of a bill of lading given to the consignor and forwarded by him to the consignee are binding on all the parties thereto. *Gauthier* v. *Canadian Pacific Railway Co.*, Quebec, Nov. 3rd, 1893. Queen's Bench in Appeal. Judgment delivered by Blanchet, J.

The plaintiffs is this case claim $870.40 damages from the Canadian Pacific Railway Co. for injury to goods carried by them from New York to Quebec.

The defendants pleaded that the goods were, by virtue of a contract dated 26 Sept. 1892, delivered at New York to the "New York, Ontario and Western" who by written agreement undertook to carry them to Quebec; that this road carried the goods over its line and that of the Rome, Watertown and Ogdensburg, one of their connections, and delivered them on October 3rd to the defendant company but in a damaged condition; that not being a party to the original contract and having delivered the goods in the same condition in which they were received, they were not liable for the negligence of the New York, Ontario and Western line.

The plaintiffs replied that the contract was made in New York the 20th December 1892 between Campbell & Co. and the Canadian Pacific, invoking as evidence thereof the bill of lading and freight receipt handed to the consignors by the company's agent.

The defendants in their special answer to this plea, state that the alleged contract contains, among others, the following conditions: that if the goods were damaged during their carriage, the company carrying them at the time of the damage should be liable therefor.

In the Superior Court, *Routhier, J.*, dismissed the plaintiffs' action on the ground that, according to the proper interpretation of the contract, the Canadian Pacific Company were only liable for the goods while on their own line and that the injury to the goods occurred before they came into their possession.

In Appeal this judgment was confirmed.

Blanchet, J., delivering the judgment of the court said: The evidence shows that the goods in question after having been received by the New York, Ontario and Western Company and carried by them to their terminus and then over the Rome, Watertown and Ogdensburg road to Prescott, were delivered in a damaged condition to the Canadian Pacific Company, who took them in hand and delivered them in the same condition.

These facts suffice to show, that in the absence of a special contract or agreement whereby the Canadian Pacific Co. might have bound themselves either principally or accessorily to carry the goods in question from New York to Quebec, they cannot be held liable for the damages claimed.

Is there such a contract?

On the 26th September, 1892, the vendors Campbell & Co., of New York, delivered the goods to the New York, Ontario & Western Co., who in return handed them a receipt wherein they undertook to carry the goods to Quebec, through the intermediary of another road, the rate to be fixed by the bill of lading to be exchanged for the receipt, subject to the conditions therein contained, one of which was to limit the liability of each company to damages caused while the goods were in its possession.

On the 29th September, Campbell & Co., handed in this receipt at the Canadian Pacific Co's agency at New York and received in exchange a bill of lading stating that the goods were to be carried on the line of the New York, Ontario & Western Co., to be delivered at Prescott to the Canadian Pacific Co., and by them taken to their destination at the rate of 48c. per 100 lbs. according to its tariff and regulations.

The appellants maintain that the receipt given by the New York, Ontario & Western Co., is not a complete contract, the rate of carriage not being entered thereon; that the receipt is simply evidence of the temporary deposit of the goods to be followed by a regular contract with another road, to whom the receipt was to be presented merely to give them possession of the goods; that the sole contract in the matter was the shipping bill given by the Canadian Pacific, for carriage of the goods by their company over the whole distance.

A careful examination of the two documents invoked, reveals that they contain all the elements of two distinct and separate contracts, entered into by the consignors with two different companies. The first undertake to carry the goods from New York to Quebec on their own and connecting lines.

Such a contract renders them liable both for their own negligence and fault and that of all their connecting lines. Chitty on Carriers, p. 199, No. 128. 8 Exch. 341. 7 H. of L. 194. Pardessus, Droit Commercial, Vol. 2, No. 576.

The second contract is only the accessory of the first, the second carrier undertaking, in execution of the former's contract, to carry out a part of its obligations by carrying the goods from Prescott to Quebec on the basis of a total rate, the fixing of which from New York to Quebec, the parties to the first contract agreed to leave to the second carrier.

There is no ambiguity in the terms of these contracts, and they have been executed in conformity with their tenor, by each of the railroad companies.

The result of these two documents is that the New York, Ontario and Western Co., alone undertook to carry the goods from New York to Quebec, and that the only obligation entered into by the Canadian Pacific, was the reception of the goods at Prescott and their conveyance to Quebec. Therefore the latter company cannot be held responsible for the fault and negligence of the former prior to the arrival of the goods at Prescott. Pardessus, Droit Commercial. vol. 2, p. 82, No. 576; Dalloz 31-1-193.

The fact that the Canadian Pacific Co. had an agency at New York for the purpose

of facilitating the uninterrupted carriage of their freight and passengers over American lines to their own connection, and of receiving the money collected therefor by arrangement with those lines, could not alter the conditions of the contracts in question. Supposing, for the sake of argument, that it did, then the stipulation in each contract, to the effect that either company would only be responsible for the damage happening to the goods while in their possession, would be sufficient ground for dismissing the action, for it is admitted that the goods were damaged before delivery at Prescott to the Canadian Pacific.

Such a limitation of responsibility is not prohibited by Art. 1676 C. C., or paragraph 3 of section 246 of the Railway Act which prohibits carriers from freeing themselves of the consequences of their fault or negligence. In this case each company stipulated that it should not be liable for the faults of the other. Such a stipulation is lawful. See Pardessus, vol. 2, p. 80.

The Supreme Court pronounced itself to this effect in 1889 in the case of Grand Trunk Ry. v. McMillan, basing their decision upon the House of Lords case the Bristol and Exetor Ry. v. Collins, 7 H. L. Cas. 194.

But, say the appellants, this condition of limited responsibility only holds where the carrier has communicated it to the consignor, citing Art. 1676 C. C., and Allan v. Woodward, 22 L. C. J. 315; Delorme v. C. P. R., 11 L. N. 106, also the opinion of Judge Best cited by Angell on Carriers, p. 224, No. 250.

This Court has already decided in the case of Mongenais v. Allan, 1 Off. Rep. Q. B., 181, that if carriers can limit their liability by notices which bind the parties having notice of them, they can with still greater reason, stipulate the same restrictions by contract, saving their immunity from fault, and a bill of lading under these terms delivered to the consignor and transmitted by him to the consignee, binds the latter. Judgment confirmed with costs. (*Translation*).

CHARTER-PARTY — See Ships and Shipping.

CHEQUES—See Bills and Notes 1.

CLUB—See Intoxicating Liquors 3.

COMBINATION OF WHOLESALERS — See Monopoly Law.

COMPANIES.

1. DEBENTURES — MINORITY, POWERS OF — TRUST.

A fund held under a trust for debenture-holders ordered to be returned on the petition of a minority of the debenture-holders, the Court holding that the objects had failed for which the fund had been created. *Collingham* v. *Sloper*. *Foreign and American Investment Trust* v. *Sloper*, [1893] W. N. 13; [1893] 2 Ch. 96.

2. DEBENTURES—MAJORITY—POWER TO BIND DISSENTIENT MINORITY—"COMPROMISE."—NOTICE OF MEETING—TIME.

The question whether the majority of debenture-holders can bind a dissentient minority by a compromise, depends on whether the rights given by the debentures can be easily enforced. If the rights are undisputed, and can be enforced without difficulty, the majority cannot bind the dissentient minority. *Secus* if, as in case, (A.) there was a real difficulty. Notice convening a meeting can be given by advertisement in the newspaper, unless the debenture deed requires some other form of notice. Meaning of "compromise" and "14 days before the date" of the proposed meeting, considered. (A.) *Sneath* v. *Valley Gold, Limited*, C. A. [1893], 1 Ch, 477. (B.) *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico*, C. A. [1893] 1 Ch. 484.

3. DEBENTURES–UNCALLED CAPITAL —"ASSETS."

Debentures secured on all "the property, assets, and revenues of the company," uncalled capital not being specifically mentioned.

Held. that uncalled capital was included in the word "assets." *Page* v. *International Agency and Industrial Trust*, [1893] W. N. 32.

4. DEBENTURES—PRIORITY — FIRST AND SECOND ISSUE—RE-ISSUE.

A second series of debentures was issued before all the debentures of the first series had been taken up. The second debentures were subject to "debentures already issued."

Held, that this meant, subject to all the debentures of the first series, and therefore debentures of the first series, excepting some which had been paid off and re-issued, had priority although issued after some of the second series. *Lister* v. *Henry Lister & Son*, [1893] W. N. 33.

5. DIRECTORS--FEES--UNPAID CALLS —SET-OFF.

Within three months before the liquidation of the company, the directors, by exchanging cheques with the company, paid calls owing by them out of the directors' fees owing to them by the company.

Held, per C. A., that considering the then position of the company, this was a fraudulent preference of themselves by the directors. The effect of set-off in bankruptcy and winding-up proceedings contrasted. *In re Washington Diamond Mining Co.*, [1893] W. N. 17, revers. by C. A. [1893] W. N. 103.

6. DIRECTORS — INTEREST IN CONTRACT.

Question as to setting aside contract in which it was alleged the directors had an interest apart from that of the company. *Rixon* v. *Edinburgh Northern Tramways Co.*, H. L. (S.) [1893] W. N. 110.

7. WINDING UP — LIQUIDATOR — REV. STATS. CAN., SEC. 31.

Held, the liquidator of a company must be specially authorized to institute an action for the recovery of a claim due the company, and a general authorization to recover all the company's assets, is not sufficient. *Freygang* v. *Daveluy*, Mathieu, J., 18 Nov. 1892, Montreal, Superior Court.

8. WINDING-UP OF BANKING COMPANY—APPOINTMENT OF LIQUIDATORS — COSTS OF CONTEST FOR APPOINTMENT.

A petition having been filed for the winding-up of a bank, and it appearing that it ought to be wound up, the application was adjourned, and directions were given under s. 98 of The Winding-up Act, R. S. C. c. 129, for the summoning of meetings of the creditors and shareholders of the bank, for the purpose of ascertaining their respective wishes as to the appointment of liquidators ; and the result of the voting at each meeting was certified to the court.

Held, that under s. 101 of the Winding-up Act, as amended by 52 V., c. 32, s. 17, the court is not only not bound by the result of the voting at the meetings held, but that, while it is confined to those nominated at the meetings, it is bound to exercise its own discretion in the selection of liquidators.

It was of importance that one of the liquidators, and particularly the one who was to have the chief management of the details, should be a man of direct and large experience in the management of banking business.

One of the proposed liquidators was formerly an official of the bank, and was largely indebted to it, though it was claimed the indebtedness was fully secured ; his principal support also was from those connected with the former management of the bank.

Held, that the objections to his appointment were most serious, and it was undesirable that the candidate of the former officials should be selected.

As to the costs of the contest respecting the appointment of liquidators, the rule laid down in *In re* London and Northern Insurance Co., 19 L. T. N. S. 144. that the court will in no case give the costs of a contest for the appointment of liquidators, should be followed.

There should be one set of costs allowed to the shareholders, and one to the creditors appearing on the hearing of the petition, save and except so far as these costs were increased by the contest respecting the appointment of liquidators ; costs should also be allowed to the bank and the petitioner. In the latter's costs might be included reasonable disbursements for procuring a place for the meeting of the creditors, and for secretaries and scrutineers, and otherwise properly incurred in the opinion of the Master in and about the meetings of creditors and shareholders. *In re Commercial Bank of Manitoba*, Manitoba Queen's Bench 1893. (Can. L. T.)

CONSPIRACY — See Bills and Notes 3 —Crim. Law 2—Monopoly Law.

CONTRACTS.

1. INJUNCTION—PERSONAL SERVICE.

In order to grant an injunction in aid of a contract of service, there must be, if no express negative clause, at least an express negative purpose. On the construction of certain letters the Court *held* there was a negative cove-

nant contained therein. *Star Newspaper Co.* v. *O'Connor*, [1893] W. N. 114; compromised on Appeal [1893] W. N. 122.

2. CONTRACT WITH LUNATIC, NOT KNOWING HIM TO BE A LUNATIC.

A contract entered into with a lunatic by a person who does not know him to be or suspect him to be a lunatic, cannot be set aside by the lunatic or the lunatic's representatives after his death, unless there has been some unfairness or fraud by the person who desires to uphold the contract, and mere insufficiency of consideration, if there be *bona fides* on the part of the person upholding the contract, does not amount to unfairness or fraud. *Tremills* v. *Benton*, 14 Aust, L. T. Rep. 127.

3. VALIDITY—PUBLIC POLICY—BIDDING FOR PUBLIC PRINTING—ENFORCEMENT.

B. and C., being the owner of a newspaper belonging to the same leading political party in a county, in which, under and by virtue of an act of the Legislature, the governor, secretary of State and comptroller, or the majority of them, were empowered to select in such county only one newspaper belonging to such political party, having reference, in such selection, "to the paper having the larger circulation," agreed in writing that, in order to allay and stop the antagonism and rivalry existing between them, that in case of the designation of either paper to publish the laws, the net amount received for this service should be equally divided between the newspapers, and that their newspapers should be alternately selected and designated for the purpose of publishing the laws.

Held, that the agreement contravened the provisions of the statute vesting the authority and power of such selection in the governor, secretary of State and comptroller, and was contrary to the policy of the statute, which required the publication of the laws in the newspaper having the larger circulation in such county, and thus was contrary to sound public policy, and void.

The court will not aid in the enforcement of an illegal contract, but will leave the parties to it just where it finds them. *Brooks* v. *Cooper*, New Jersey Court of Errors and Appeals, June 23, 1893, 48 Alb., L. J., 285.

4. SALE OF LAND — BUILDING RESTRICTION — DESCRIPTION — STREET BOUNDARIES — CONSTRUCTION OF COVENANT—ONTARIO.

The owners of a block of land in Toronto, bounded on the north by Wellesley Street, and west by Sumach Street, entered into an agreement with B., whereby the latter agreed to purchase a part of said block, which was vacant wild land, not divided into lots, and containing neither buildings nor street, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia Street. The agreement contained certain restrictions as to buildings to be erected on the property purchased, which fronted on the two streets north and west of it respectively, and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley Street produced.

A deed was afterwards executed of said land, pursuant to the agreement, which contained the following covenant: And the grantors covenant with the grantees that in case they make sale of any lots fronting on Wellesley Street or Sumach Street, on that part of lot 1 in the city of Toronto, situate on the south side of Wellesley street and east of Sumach Street, now owned by them, that they will convey the same subject to the same building agreements or conditions (as in the agreement).

The vendors afterwards sold a portion of the remaining land fronting on Amelia Street, and one hundred feet east of Sumach Street; and the purchaser being about to erect thereon a building forbidden by the restrictive covenant in the deed, B. brought an action against his vendors for breach of said covenant, claiming that it extended to the whole block.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the covenant included all the property south of Wellesley Street;

that the land not being divided into lots, any part of it was a portion of a lot of land fronting on Wellesley and Sumach Streets, and so within the purview of the deed; and that the vendors could not by dividing the property as they saw fit narrow the operation and benefit of their own deed.

Held, *per* Gwynne, J., that the piece of land in question did not front nor abut on either Wellesley or Sumach Streets, but on Amelia Street alone, and was not, therefore, literally within the covenant of the vendors. Appeal dismissed with costs. *Dnmoulin* v. *Burfoot*, Supreme Ct. of Canada, May 1, 1893.

CONVICTION — See Justice of the Peace.

CORPORATION LAW—See Companies —Taxation.

CRIMINAL LAW.

1. RAPE — RESISTANCE — EVIDENCE.

Defendant, a quack, pretending to cure by charms, after several times visiting a girl thirteen years old, who had for two years had epileptic fits, was placed in a room with her, at his instance, by her ignorant and credulous parents, where, on the fifth night, he called her to his bed, telling her he had something to tell her which would cure her. Her testimony that she tried to make him quit, but he would not, was uncontradicted.

Held, that there was not a failure to show sufficient resistance because she made no outcry, and concealed the crime committed on her. *Eberhart* v. *State*, Indiana Supreme Court, June 13 1893, 48 Alb., L. J., 267.

2. SPEEDY TRIALS ACT—BAIL SURRENDERING — RIGHT TO ELECT TO BE TRIED SUMMARILY—SUBSEQUENT INDICTMENTS QUASHED — SEVERAL OFFENCES—VALUABLE SECURITY.

The surrender of defendants out on bail, including the surrender by a defendant himself out on his own bail, committed to gaol for trial, has the effect of remitting them to custody and enables them to avail themselves of the Speedy Trials Act, 52 V. c. 47, and to appear before the County Judge and elect to be tried summarily; and where defendants had so elected, indictments subsequently laid against them at the assizes were held bad and quashed, even after plea pleaded, where done through inadvertence, s, 143 of R. S. C. c. 174 not being in such case any bar.

Two indictments were laid against the defendants, one for conspiracy to procure W. to sign two promissory notes; and the other for fraudulently inducing W. to sign the documents, representing them to be agreements, whereas they were in fact promissory notes.

Held, that several offences were not set up in each count of the indictments; that it was no objection to the indictments that the notes might not be of value until delivered to the defendants; and further that, under s. 78 of R. S. C. c. 164, an indictment would lie for inducing W. to write his name on papers which might afterwards be dealt with as valuable securities. Rex. v. Danger, 1 Dears. & B. 397; 3 Jur. N. S. 1011; Regina v. Gordon, 23 Q. B. D. 354, considered. *Regina* v. *Burk* Ontario, Com. Pleas June 1893, (Can. L. T.)

CRUELTY TO ANIMALS.

RABBIT COURSING — "DOMESTIC ANIMALS."

Persons who have captured and kept wild rabbits for coursing, and who have ill-treated the rabbits during the coursing, cannot be convicted of cruelty to animals, rabbits in this case not being "domestic animals." *Aplin* v. *Porritt*, Div. Court [1893] 2 Q. B. 57.

CUSTOM—See Prin. and Agent 4

DAMAGES, MEASURE OF—See Libel and Slander 4—7.

DAMAGES FOR INJURIES TO SHADE TREES—See Mun. Corp. 2.

DIVORCE, EFFECT OF — See Insur. (Life) 4.

EXECUTORS—See Trustees.

EXTRADITION — HABEAS CORPUS—INDICTMENT—VALIDITY.

Where one is arrested on an executive warrant in extradition proceedings the validity of the indictment under which he is charged by the demanding State will not be tried on *habeas corpus*. Court of Criminal Appeals of Texas. *Pearce* v. *State*, 23 S. W. Rep. 15.

FIRE INSURANCE—See Insur., Fire.

GAMING.

Held, (two of the judges dissenting) that baseball is a game of skill, within the meaning of a statute of that State making it a criminal offense to bet on such a game. *Mace* v. *State*, Supreme Court of Arkansas, 1892, 22 S. W. R. 1108.

GARNISHMENT—See Banks, etc., 1.

HABEAS CORPUS—See Extradition.

HUSBAND AND WIFE—See Banks, etc. 2—Insurance (Life) 4.

INDICTMENT—See Extradition.

INJUNCTION—See Contracts 1.

INSOLVENCY.

GAS SUPPLY.

Arrears of gas rents paid by a receiver to a gas company to prevent the supply of gas being cut off are not preferential payments which the trustee in bankruptcy can recover back. *In re Smith, Ex-parte Mason* [1893[, 1 Q. B. 323.

INSURANCE.

ACCIDENT.

1. VOLUNTARY EXPOSURE TO DANGER.

Attempting to cross a train of freight cars which obstructs a public crossing, by climbing over the drawbars, is within a stipulation of an accident insurance policy relieving the company from liability in case of voluntary exposure to unnecessary danger, where there was no attempt to ascertain how much longer the train would obstruct the crossing, and the train might have been passed by going around the end of it. *Bean* v. *Employer's Liability Assur. Corp.*, 50 Mo. App. 459.

2. TOTAL DISABILITY — ENGAGING IN FIGHT.

An injury to a lawyer, which does not prevent his being in his office, advising clients, and attending generally to their business, will not warrant a recovery under an accident policy insuring against loss of time resulting from injuries which shall "wholly and continuously disable from the transaction of any and every kind of business pertaining to his profession as an attorney at law," although it renders him unable to do any writing. Engaging in a fight, although an insured is not the aggressor, prevents recovery for injuries thereby, under an accident insurance policy which provides that it shall not cover injuries caused by fighting or wrestling. *United States Mut. Acc. Ass'n.* v. *Millard*, 43 Ill. App. Ct. Rep. 148.

FIRE

3. SUBROGATION OF RIGHTS OF INSURED—ARTS. 1155, 1156, 2584, 1053, C. C.

Where the insurer has paid the amount of the insurance in two instalments (the latter being by promissory note) to the insured; he cannot be subrogated conventionally in the rights of the latter when making the second payment, the terms of art. 1155 C. C. "This subrogation must be express and made at the same time as the payment" being opposed to it.

The insurer not coming under any of the five conditions of art. 1156 cannot invoke a legal subrogation in the rights of the insured against the person responsible for the fire.

The insured having transferred to the insurer none of his rights at the time of the payment of the insurance, the latter cannot invoke art. 2584 C. C. against the person responsible for the fire.

The insurer who has paid the amount of the insurance, in order to reimburse himself, has an action for damages under art. 1053 C. C. against the person causing the fire. *Cedar Shingle Co.* v.

Cie d'Assurance etc de Rimouski, Quebec June 20, 1893, Queen's Bench in Appeal.

LIFE.

4. AMOUNT PAYABLE TO WIFE—DIVORCE, EFFECT OF.

Held, Where an insurance is effected upon the life of the husband, the amount whereof is payable to his wife on a date named in the policy or on the previous death of the husband, and the parties are subsequently divorced, the wife ceases to have any claim to the amount of the policy, which reverts to the husband. *Hart* v. *Tudor*, Gill, J., Montreal, Dec. 12, 1892, Superior Court.

5. BENEFIT SOCIETY — EXPULSION OF MEMBER — FAIR TRIAL — REPORT OF COMMITTEE — EVIDENCE NOT BEFORE COMMITTEE—ABSENCE OF MEMBER.

The plaintiff, as executor for his deceased son, sued the defendants, an incorporated benefit society, to recover the money benefit accruing upon the death of a member. Before the death the defendants had passed a resolution removing the son from the list of members, on the ground that he had given untruthful answers to questions as to the state of his health put to him upon his admission. The complaints against him had been referred to the committee of management, who had reported in his favour, but the society at a meeting refused to adopt the report, and in the absence of the deceased, without any notice to him or opportunity of appearing, accepted an *ex parte* statement made by a member present at the meeting, which had not been before the committee, and acted upon it by forthwith passing the resolution referred to. By the rules of the society, it was provided that if it shall be established that a new member has not answered truthfully he shall *ipso facto* be excluded from the society; and also that if it is proved, after his admission, that he has not answered truthfully, he shall by reason thereof be struck off the list of members. The committee of management was the body appointed under the rules to take the evidence and find the facts, their report being subject to confirmation or rejection by the society.

Held, that, upon the principles governing such an inquiry, the person accused should not be condemned without a fair chance of hearing the evidence against him, and of being heard in his own defence; that the action of the defendants was contrary to these principles and to their own rules; and therefore the expulsion was not legally accomplished, and the plaintiff was entitled to recover. *Gravel* v. *L'Union St. Thomas*, Ontario, Q. B. D. June 1893.

MARINE.

6. CONSTRUCTION OF POLICY — "BURNT."

A ship is "burnt" within the meaning of the memorandum in a Lloyd's policy when the injury by fire is sufficient to cause an undue interruption in her voyage by the ship becoming temporarily unnavigable. *The "Glenlivet,"* [1893], P. 164.

INTOXICATING LIQUORS.

1. BONA FIDE TRAVELLER.

Held, that a railway porter, who to get to his duties was obliged to go more than six miles from his home, was, as far as reasonable refreshment went, a *bona fide* traveller. *Cowap* v. *Atherton*, Div. Ct. [1893], 1 Q. B. 49.

2. BONA FIDE TRAVELLER.

The test whether a man is a *bona fide* traveller, who may be served with drink during prohibited hours, is the object of his journey. If the object of the journey is solely to obtain drink which the man cannot obtain at home, he is not a *bona fide* traveller, even though he journey the necessary three miles; and the publican who served him, if, as in this case, he knew the man's object, may be convicted of the offence of selling during prohibited hours. *Penn* v. *Alexander*, Div. Ct. [1893] W. N. 27; [1893] 1 Q. B. 52.

3. PROPRIETARY CLUB — SELLING LIQUORS TO MEMBERS WITHOUT A LICENCE.

A. visited a proprietary club of which he was neither a member nor a shareholder, and asked for spirits. He was then and there elected an honorary member pending inquiries, and supplied with spirits.

Held, that the proprietors might be convicted for selling without a licence. *Bowyer* v. *Percy Supper Club*, Div. Ct. [1893], 2 Q. B. 154.

4. Action against Hotelkeeper for Selling Liquor to a Person when Warned not to do so—Art. 929 Rev. Stats. P. Q.

Held, (1) The remedy allowed by Art. 929 R. S. P. Q., against a hotelkeeper who sells liquor to a person when warned not do to so, is not in the nature of a fine or a penalty, but is simply a right to personal damages, which can and ought to be recovered through the ordinary courts.

(2) The fact of having alleged in a similar action, that defendant acted contrary to Stat. of Quebec 41 V., c. 3, sec. 96, instead of art. 929 which replaces it, does not constitute a fatal error. *Willet* v. *Viens*, Montreal, Jetté, J., 30 June 1892, Superior Court.

Joint Stock Companies—See Companies.

JUSTICE OF THE PEACE.

Summary Trials Act — Trial of Defendant for Felony without Consent — Summary Conviction — Quashing.

The defendant, on being charged before a stipendary Magistrate with felonious assault, pleaded guilty to a common assault but denied the more serious offense. The magistrate without having complied with the requirements of S. 8 of the Summary Trials Act R. S. C. c. 176 by asking the defendant whether he consented to be tried before him or desired a jury, proceeded to try and convicted the defendant on the charge of the felonious assault.

Held, that the defendant was entitled to be informed of his right to trial by a jury; and that the conviction must be quashed.

Where a statute requires something to be done in order to give a magistrate jurisdiction, it is advisable to show on the face of the proceedings a strict compliance with such direction. *Reg.* v. *Hogarth*, Ontario Com. Pleas June 1893.

LIBEL—See also Venue.

1. Privilege—Report of Judicial Proceedings.

The publication without malice of a fair and accurate report of proceedings in open Court before magistrates upon an *ex parte* application for a summons for perjury is privileged. *Kimber* v. *Press Association*, C. A. [1893] 1 Q. B. 65.

2. Slander — Special Damages, when must be Proven.

One who maliciously repeats a slanderous accusation is guilty and answerable in damages; the fact that he did not originate the slander will only go in mitigation of damages. Where special damage is claimed in an action of slander it should be distinctly averred, and where caused by the mere repetition of an accusation, the wrong-doing of the defendant, as the cause of the special injury, should be proven. *Wallace* v. *Roger*, Penn. Sup. Ct., May 22, 1893.

3. Pleading Truth.

Held, (1) that defendant, in an action of damages for libel, can plead the truth and notoriety of the facts constituting the libel.

(2) But it is otherwise with the character and general conduct of plaintiff. *Beauchene* v. *Couillard*, Quebec 4 April, 1893, Queen's Bench in Appeal.

4. Malice—Damages.

The judgment of the court below condemned the defendants to pay $500 damages for libel in an article published in 1891, which contained serious imputations on the character of the plaintiff, Dr. Cardinal. Mr. Justice Doherty, in rendering judgment, remarked that a more abominable libel had never come under his notice. It was no defence to say that the proprietor of the newspaper bore no malice against the plaintiff. They had published abominable charges against a pro-

fessional man, without any investigation as to their truth, and at the instance of a person who turned out to be an enemy of the plaintiff. Under the circumstances $500 was a moderate award. His honor added that in a recent case a jury, for far less serious aspersions upon a professional man, had awarded $3,000 damages. Judgment confirmed. *Cardinal* v. "*La Patrie*" *Company*, Court of Review, Montreal, Oct. 7, 1893.

5. DAMAGES—LIBEL IN PLEADING—JUSTIFICATION.

A party who, in a pleading, accuses another of fraud and collusion, will be held liable in damages, if the circumstances be not such as would produce on the mind of a cautious and prudent man an honest conviction of the guilt of the party he accuses.

In the present case, the defendant having been cognizant of the loan made to his debtor by the plaintiff, and having himself received the greater part of it, a charge by him that plaintiff, in taking security for the loan, by way of sale *à rèmére* of all the debtor's property, had acted collusively with such debtor to defraud him, the defendant, held libellous and actionable. (Casault, J., diss.) *Matte* v. *Ratté*, C.R., Quebec, Casault, Caron, Andrews, JJ., 31 May, 1893. (Legal News).

6. PRIVILEGED COMMUNICATION — WITNESS.

Defendant, whose store had been burnt, after giving his evidence before the fire commissioners, stated to them that certain goods had disappeared from his shop while the police were guarding it, and consented that a report of this accusation should be sent to the chief of police. The evidence showed that there were no grounds for this accusation. *Prairie* v. *Vineberg*, Montreal, Superior Court, Jetté, J., 28 June 1892.

7. FLIGHT AND BAD REPUTATION OF PLAINTIFF—MITIGATION OF DAMAGES.

Plaintiff, who claimed damages against a newspaper for libel, left the country and bore a bad reputation.

Held, that this could not be pleaded as a bar to the action where the libel was proved, but only in mitigation of damages. *Brunet* v. *Cie d'Imprimerie et Pub. du Canada*, Court of Review, Montreal 31 Jan., 1893.

8. SLANDER — REAL INTENTION OF SLANDEROUS WORDS — MISDIRECTION —NEW TRIAL.

Action of slander for saying of the plaintiff, "you are a perjured villain, and I can put you behind the bars; you are a forger, and I can prove it."

The trial Judge left it to the jury to say whether, in their opinion, the defendant was really charging the plaintiff with having committed the crimes mentioned.

Held, misdirection, and new trial ordered.

What should have been left to the jury was whether or not the circumstances were such that all the bystanders would understand that the defendant dit not mean to charge the plaintiff with the commission of crimes according to what he the defendant actually said—the undisclosed intention of the defendant in this respect having nothing to do with the question, and being wholly immaterial. *Johnston* v. *Ewart*, Ontario Chancery Div., Sept., 1893, (Can. L. T.)

9. BY NEWSPAPER — INTENT "BLOODLER."

This was an action of damages for libel. The parties were opposing each other as candidates at an election for the Quebec Assembly, and the defendant published both in English and in French, in a newspaper, the following:

"LE PREMIER BOODLER."

"M. Marchand est le premier qui ait fait un acte qui aujourd'hui est qualifié de 'boodlage,' en vendant au bénéfice du beau-frère de M. Joly pour $5,000 les réclamations que le gouvernement de Québec avait sur la ferme Gowan, et le pont Bickell, et qui se montaient à environ $17,000, faisant ainsi un don au beau-frère du premier-ministre d'alors d'une somme de $12,000. *C'était le premier boodlage* fait à Québec tel qu'il fut prouvé par un comité d'enquête."

The English version is a little different.

"THE FIRST BOODLER."

"There is a more significant point yet which entitles Mr. Marchand to be called the first boodler in Quebec. In the *cause célèbre* of the Gowan farm and Bickell bridge whereby Mr. Marchand, when a member of the Government, sold to a brother-in-law of Mr. Joly, for $5,000 a Government claim worth $17,000, thereby subjecting the province to a loss of $12,000. This affair was the subject of parliamentary enquiry at the time."

The defendant pleaded first a denial of the allegations; secondly, a peremptory exception admitting that he published the words complained of; but denying that he had ever pretended the plaintiff was not an honest man. That the Gowan farm and Bickel. bridge affairs were matters of public interest and discussion, and had been reported upon by a committee of the Assembly which found that there had been nothing in the slightest degree dishonest attaching to any one concerned — or to any member of the Government of which the plaintiff was then one, though there might have been error of judgment, and a better bargain made for the public; the committee, at the same time, expressing their conviction that the Government had acted in good faith and ought to be exonerated from all blame. The plea further admited that the parties were opposing candidates at the election where these matters were openly discussed, and finally it alleged expressly that the word "boodler is not synonimous necessarily and in all cases with "thief." There can be no doubt that all this was matter of proper public discussion at the time of the publication; but the essential thing that the defendant omits to allege in his plea is that what he published in the newspaper was true. In the absence of pleading the truth and justification, he had a perfect right to refer to the committee's report, which entirely acquits the plaintiff and everybody else of the slightest imputation of corruption, and he actually does so; but having done it, he had to go a step farther, and that step he does not hesitate to take, as we see, for he plainly asserts that "boodler" does not always mean thief, and is constrained to agree that it is not libellous. It may be feared that there are a good many others who think, or seem to think, like him. The court, of itself, might perhaps hesitate at affixing, *ex cathedra*, the precise signification of the words; but I really think that if common knowledge is supposed to belong to us, as it is to other people, it would be affectation to hesitate about it. We are not left in doubt, however; the evidence is unanimous and conclusive on the point. It is a term of modern popular slang, evidently affecting to harmonise the comical and the infamous, and far from not meaning "thief," I should say that it's real and apparently accepted import is to designate the very meanest class of thieves. The defendant then knew that the committee, far from saying or holding that the plaintiff was a "boodler," had distinctly said the very opposite. But it was argued for the defence that he did not mean directly to impute "boodling" to the plaintiff himself, but to the party who benefited by the bargain. Why then head the article with the words "the first boodler," except to proclaim what he meant, which he did in these clear words: "There is a more significant point yet which entitles Mr. Marchand" (not Mr. Gowan, who was not a candidate) "to be called the first boodler in Quebec." I think both the libel and the intention are beyond fair doubt or discussion. The defendant knew there was no ground for such an imputation, and he deliberately made it, notwithstanding. There is, of course, no question here of the right of public discussion. Free discussion does not include falsehood to the prejudice of another, and liberty does not imply groundless insult to political opponents. The public can have no interest to be told anything that is untrue. The judgment, which gave $500 damages and costs, is confirmed. *Marchand* v. *Molleur*, Montreal Nov. 4, 1893, Ct. of Review, Johnson, J.

LICENSE LAW—See Intox. Liquor.

LIFE INSURANCE — See Insurance Life.

LIMITATIONS, STATS. OF—See Practice.

LIMITATIONS OF ACTIONS.

ACKNOWLEDGMENT.

A writing "Received of plaintiff the sum of $700 at various times to date, which is hereby acknowledged" is not merely an acknowledgment that at certain times in the past, the signer had borrowed money from plaintiff but is an acknowledgment of a present indebtedness and hence sufficient to take the debt out of the statute of limitations, and that a promise to pay is implied from an acknowledgment of a debt as an existing debt. *Custy* v. *Donlan*, Supreme Judicial Court of Massachusetts, 1893.

LUNATIC—See Contracts 2.

MARINE INSURANCE — See Insur. Marine. See also Banks, etc., 2.

MARRIED WOMEN.

MARRIED WOMAN'S PROPERTY — SEPARATE ESTATE — CONTRACT BY MARRIED WOMAN — SEPARATE PROPERTY EXIGIBLE—C. S. U. C. c. 73—35 V. c. 16 (O.)—R. S. O. (1877) cc. 125 AND 127—47 V. c. 19 (O.) ONTARIO.

By the Married Woman's Property Act, 1887, of Ontario, (47 V., c. 19) a married woman is capable of acquiring, holding and disposing of real or personal property as if she were a *feme sole;* of entering into and rendering herself liable on any contract, and of suing or being sued alone in respect of such property; the right of the husband as tenant by the curtesy is not to be prejudiced by such enactment.

Held, reversing the decision of the Court of Appeal, that the property held by a married woman under this act is "separate property," and may be taken in execution for her debts, notwithstanding the reservation in favour of her husband. Appeal allowed with costs. *Moore* v. *Jackson*, Supreme Court of Canada, May 1, 1893.

MASTER AND SERVANT.

1. LIABILITY FOR ASSAULT BY SERVANT.

Held, that the manager of a theater is liable for an assault and battery on an inoffensive patron made by one employed as doorkeeper and special police. *Dickson* v. *Waldron*, Supreme Court of Indiana, 34 N. E. Rep. 506.

2. RISKS OF EMPLOYMENT — INCREASED RISK CAUSED BY MASTER'S NEGLIGENCE.

Plaintiff, an employee of defendant, engaged in loading dump cars with earth, was ordered by his foreman to go under an overhanging bank for that purpose, and thereupon called attention to the bank, asking if it was safe to work there. The foreman replied that it was; that the bank was supported by interlaced roots; and thereafter, going upon the top of the bank, he again said it was safe, and repeated his order. While obeying this order plaintiff was injured. The bank had been in that condition since the previous day, and the foreman had endeavored to throw it down with a crowbar.

Held, that there was not sufficient evidence of due care on the part of defendant to warrant the trial court to direct a verdict for him on the ground that the risk of the bank's falling had been assumed by plaintiff.

There was not sufficient evidence to warrant the trial court to direct a verdict for defendant on the ground of plaintiff's contributory negligence. *Haas* v. *Balch*, United States Circuit Court of Appeals, Eighth Circuit, July 10, 1893, 56 Fed. Rep. 984.

3. NEGLIGENCE OF VICE-PRINCIPAL.

The foreman of a crew engaged in driving piles for trestles for a railroad company whose business extends to many trestles and bridges and who has charge of all the men in the crew, including the trainmen, while actually co-operating with the other men in building and repairing trestles, is a vice-principal for whose negligence while in charge of such crew the company is liable to a member thereof who is injured thereby. *Bloyd* v. *St. Louis & S. F. Ry. Co.*, Supreme Court of Arkansas, 22 S. W. Rep. 1089, 37 Cent. L. J. 293.

(THE COURT).—All the authorities approve the doctrine that a master is exempt from liability to his servant for an injury to the latter resulting from the negligence of a fellow-servant, but there is great diversity of opinion as to the precise facts which make one person the coservant of another, in the sense essential to the exemption. Railway Co. c. Triplett, 54 Ark. 289, 15 S.W. Rep. 831, and 16 S. W. Rep. 266. And it seems that the Courts have been inclined to determine whether the relation exists, or does not exist, according to the circumstances of each case, as it arises, rather than to formulate any rule of general application. Beach, Contrib. Neg. § 333; Hunn v. Railroad Co., 78 Mich. 518, 44 N. W. Rep. 502; Randall v. Railroad Co., 109 U. S. 483, 3 Sup. Ct. Rep. 322; Railway Co. v. Ross, 112 U. S. 387, 389, 5 Sup. Ct. Rep. 184; Hough v. Railway Co., 100 U. S. 216; Railroad Co. v. Reynolds, 6 U. S. App. 75, 1 C. C. A. 636, 50 Fed. Rep. 728; Dobbin v. Railroad Co., 81 N. C. 446; Anderson v. Bennett (Or.), 19 Pac. Rep. 769; Railway Co. v. Triplett, 54 Ark. 289, 15 S.W. Rep. 831, and 16 S. W. Rep. 266; Railroad Co. v. May, 15 Amer. & Eng. R. Cas. 323; Darrigan v. Railroad Co., 52 Conn. 285; Kieley v. Mining Co., 2 Cent. Law J. 705.

On the facts of this case, the material question is whether Munden was a mere foreman, overseeing a gang of laborers, or was an agent of the company, clothed with its authority in the management and supervision of such part of its business as to make him the company's representative. If he occupied the former position the laborers had assumed the risk of his negligence; but in the latter case he was a vice principal, and if he was guilty of negligence in that capacity is liable. Dobbin v. Railroad Co., 81 N. C. 446; Fones v. Phillips, 39 Ark. 39. In some of the adjudged cases the distinction between the relations indicated by the words "foreman" and "vice-principal" is apparently made to depend more upon the extent of magnitude, than upon the nature, of the work of which the servant has charge. Taylor v. Railroad Co. (Ind. Sup.), 22 N. E. Rep. 876, 878; Borgman v. Railway Co., 41 Fed. Rep. 667; Hunn v. Railroad Co. 78 Mich. 513, 44 N. W. Rep. 502; Railroad Co. v. Baugh, 13 Sup. Ct. Rep. 914. Other Courts proceeding upon what we think a sounder principle, have attached no importance to the extent of the work, but have considered only whether it was such as required a skillful or careful supervision; and, where such supervision was necessary to the safety of the laborers engaged upon the work, they have held it was the master's duty to bestow it, and that if he appointed an agent to perform that duty he was responsible for his negligence. Darrigan v. Railroad Co., 52 Conn. 285; Railroad Co. v. Keary, 3 Ohio St. 201; Railway Co. v. Lundstrum (Neb.), 20 N. W. Rep. 198; Schroeder v. Railway Co. (Mo. Sup.), 18 S. W. Rep. 1094; Railroad Co. v. Peterson, 4 U. S. App. 574, 2 C. C. A. 157, 51 Fed. Rep. 182. See, also, separate opinion of Judge Shiras in Brogman v. Railway Co. 41 Fed. Rep. 667. In Railway Co. v. Ross, 112 U. S. 377, 5 Sup Ct. Rep. 184, it was held that the conductor of a railroad train, while acting as such, and having "the right to command the movements of the train, and to control the persons employed upon it, represents the company..... and does not bear the relation of fellow-servant to the engineer and other employees" on the same train. The rule established by that case, as it has been generally understood and applied by the Federal Courts, is that the relation of follow-servants "should not be deemed to exist between two employees, where the function of one is to exercise supervision and control over some work undertaken by the master, which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management" Railroad Co. v. Peterson, 4 U. S. App. 570, 2 C. C. A. 157, 51 Fed. Rep. 182. The Court from whose opinion this quotation is made has declared in another case that the rule, as thus understood, "is right in principle, and is supported by the weight of authority." Woods v. Lindvall, 4 U. S. App. 62, 1 C. C. A. 37, 48 Fed. Rep. 62. In approving the doctrine of the same case, a text writer of authority says: "What is the special attribute of the master? Is it the mere fact that he provides materials for the work, or that he selects the servants? Is it not, more than anything else, that in him is vested the right and duty of giving orders, and directing what work shall be done, and how it shall be done? If the master chooses to delegate this authority to some one else, on what possible principle can he be allowed to relieve himself from the responsibility of having proper orders given?" 1 Shear. & R. Neg. § 228. By another text writer the rule of the Ross Case is styled "the rule of humanity and justice." Beach, Contrib. Neg. § 331. "The real test," says Mr. Wood, by which to determine whether a general manager or foreman is the representative of the master, so as to make his acts the acts..... of the master, is to ascertain whether, in reference to the matter complained of, his will is at the time supreme; that is, is he authorized, as to the particular work in hand, to direct and control the servants under him as to the method of performing it, and are they bound to yield to his orders the same obedience as they are required to yield to the master himself?" Wood, Mast. & Serv. p. 865.

In Miller v. Railway Co., 19 S. W. Rep. 58, the Supreme Court of Missouri decided that "the conductor of a material train, having control of it, and its movements, and a foreman over a gang of men engaged in repairing a railroad track, having power to direct them what to do, and when to do it, are not fellow-servants of the men composing such gang." There the plaintiff's husband, who was one of the laborers under the foreman's control, was in the act of passing from one of the cars to another just as they began to move at a signal given to the engineer by the conductor, and the jar threw him between the wheels, where he received injuries resulting in his death. The evidence tended to show that the deceased was absorbed in his work, and that the train was moved without giving him any warning. Judge

Black, in delivering the opinion of the Court said: "The defendant seeks to be relieved from liability in this case on the ground that Miller lost his life by the negligence of of a fellow-servant, thus invoking the rule that the defendant is not liable to one servant for the negligence of a fellow-servant. The case made by the evidence stands on other and different grounds, as we view it. When the master gives to a person power to superintend, control, and direct the men engaged in the performance of work, such person is, as to the men under him, a vice-principal; and it can make no difference whether he is called a superintendent, conductor, boss, or foreman..... The conductor being a vice-principal, it became his duty to give due and timely warning of his intention to move the train." And in the same connection it is said to be one of the absolute duties of the master "to use ordinary care to avoid exposing the servant to extraordinary risks." This Missouri case—somewhat like the case at bar as to part of the facts on which the decision turned—is not different in principle from many other cases that might be cited. See Schroeder v. Railway Co. (Mo. Sup.), 18 S. W. Rep. 1094; Anderson v. Bennett (Or.), 19 Pac. Rep. 765; Taylor v. Railroad Co. (Ind. Sup.), 22 N. E. Rep. 876; Hunn v. Railroad Co., 78 Mich. 513, 44 N. W. Rep. 502; Railroad Co. v. May, 15 Amer. & Eng. R. Cas. 320, 324; Railway Co. v. Lundstrum (Neb.), 20 N. W. Rep. 198; Dobbin v. Railroad Co., 81 N. C. 446; Cowles v. Railroad Co., 84 N. C. 309.

In Railroad Co. v. Baugh, 13 Sup. Ct. Rep. 914, it is said that the ruling in Ross' Case was made upon the ground that the conductor whose negligence caused the injury was "clothed with the control and management of a distinct department," although his management extended to only one train. In the case just cited the Supreme Court held that the engineer of a locomotive which was running detached from any train could not be regarded as in control of a department of the railroad company's business, so as to make him a vice-principal, although he was in charge of the engine, and the rules of the company declared that under such circumstances an engineer should be regarded as a conductor. The Chief Justice and Judge Field dissented. The court distinguishes the case from Ross' Case on the ground that the running of an engine, by itself, could not constitute a separate branch of service, and on the further ground that the plaintiff—the fireman of the locomotive—was not injured by reason of his obedience to any order of the engineer. Baugh's Case being thus distinguishable from the Ross Case, the former is not an authority against treating the defendant's foreman, Munden as a vice-principal, for Munden had charge of such work as might well be called a separate branch of the defendant's business, within the rule of the Ross Case as that rule was explained by Judge Brewer, and applied by the Court, in Borgman v. Railway Co., 41 Fed. Rep. 667: and here there is also evidence tending to show that the injury to the plaintiff was received in obeying the foreman's order. It is held, however, in the Baugh Case that the question as to a master's liability to his servant for the negligence of another servant does not turn merely on the matter of subordination and control, but depends, rather, on whether the act of alleged negligence is done in discharge of some positive duty of the master to his servant. Railroad Co. v. Baugh, 13 Sup. Ct. Rep. 914. We have seen that the Supreme Court of Missouri regards it as one of the master's positive duties to exercise ordinary care in avoiding the exposure of his servant to extraordinary risks. Miller v. Railway Co. (Mo. Sup.), 19 S. W. Rep. 58. And that duty, it is plain, can only be performed, in many instances, through a proper supervision of the work on which the servant is engaged. That Judge Cooley considers such supervision an absolute duty is shown by the following extract from the opinion of the Court, delivered by him, in Mining Co. v. Kitts, 42 Mich. 34, 3 N. W. Rep. 240: "This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and, if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of his business. If there is negligence in this, the master is responsible for it, whether the supervision be by the master, in person, or by some manager, superintendent, or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority." The rule thus stated is quoted and approved in Hunn v. Railroad Co., 78 Mich. 513, 44 N. W. Rep. 502, where it was held that "a train dispatcher, who has absolute control over a division of a railroad, so far as the running and operating of trains are concerned, is not a fellow servant with other employees acting under his orders." In thus ruling the court said: "It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his own employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons." On the same subject the Supreme Court of Indiana, with reference to the liability of a railroad company for the negligence of a master mechanic, uses the following language: "It is also the master's duty to do no negligent act that will augment the dangers of the service. In this instance, Torrance was doing what the master usually and properly does when present in person, for he was commanding, and directing the execution of what he had commanded. By his own act he made it unsafe to do what he had commanded should be done. Acts of

the master were therefore done by one having authority to perform them, and the breach of duty was that of one who stood in the master's place." Taylor v. Railroad Co. (Ind. Sup.), 22 N. E. Rep. 876. The negligence for which the master is made liable by these decisions is that which Mr. Thompson describes as the "direct negligence of the master, or his vice-principal," where he "personally interferes, and either does, or commands the doing of, the act which causes the injury;" and for this, he says, "the master is answerable for damages, to the same extent as though the relation of master and servant did not exist." Thomp. Neg. 971, 972. An applicatiou of the rule thus stated is shown by the decision of this court in Telephone Co. v. Woughter, 56 Ark. 206, 19 S. W. Rep. 575.

MONOPOLY LAW.

COMBINATION OF WHOLESALERS.

Where a number of retail lumber dealers formed a voluntary association, mutually agreeing that they would not deal with any manufacturer or whole sale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard; and where they had provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale, the secretary should notify all the members of the fact; and where the secretary threatened to send notice of the fact that such a sale had been made, which notice was to be sent to all the members of the association.

Held, that such facts presented no ground for an injunction against such association.

Unless a person is under a contract obligation, or his employment charges him with some public duty, such a person has the right to refuse to work for or deal with any men or class of men as he sees fit, and this right lawfully exercised singly, may be exercised by any number of persons, jointly, without making it unlawful by reason of the number.

"Injury," in its legal sense, means damage resulting from an unlawful act, but if the act be legal, the fact that the actor may be actuated by an improper motive does not render the act unlawful.

The mere fact that the proposed acts of the defendant would result in plaintiff's loss of gains or profits, does not of itself render those acts unlawful or actionable; that depends on the fact whether the acts are in and of themselves unlawful.

Order of the District Court denying the motion to dissolve the temporary injunction reversed, and injunction dissolved. *Bohr Manufacturing Co.* v. *Hollis*, Minnesota Supreme Court, July 20, 1893.

(THE COURT).—The plaintiff is a manufacturer and vendor of lumber and other building material, having a large and profitable trade, at wholesale and retail, in this and adjoining States, a large and valuable part of this trade being with the retail lumber dealers. The defendant, the Northwestern Lumberman's Association, is a voluntary association of retail lumber dealers, comprising from twenty-five to fifty per cent of the retail dealers doing business in the States referred to, many of whom are, or have been, customers of the plaintiff. A "retailer," as defined in the constitution of the association, is "Any person who is engaged in retailing lumber, who carries at all times a stock of lumber adequate to the wants of the community, and who regularly maintains an office as a lumber dealer, and keeps the same open at proper times." Any wholesale dealer or manufacturer of lumber who conforms to the rules of the association may become an honorary member, and attend its meetings, but is not allowed to vote. The object of the association is stated in its constitution to be "the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers."

The object is more fully stated, and the means by which it is to be carried into effect are fully set out in sections 3, 3½, 4 and 6 of the by-laws, which are all that we consider material in this case.

The plaintiff sold two bills of lumber directly to consumers or contractors at points where members of the association were engaged in business as retail dealers. Defendant Hollis, the secretary of the association, having been informed of this fact, notified plaintiff, in pursuance of section 3 of the by-laws, that he had a claim against it for ten per cent of the amount of these sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff from time to time promised to adjust the matter, but procrastinated and evaded doing so for so lo[illegible] that finally Hollis threatened that unle[illegible] plaintiff immediately settled the matter he would send to all the members of the association the list or notices provided for by section 6 of the by-laws, notifying them that plaintiff refused to comply with the rules of the association, and was no longer in sympathy with it. Thereupon plaintiff commenced this action for a permanent injunction, and obtained *ex parte*, a temporary one, enjoining the defendants from issuing these notices, etc. This appeal is from an order refusing to dissolve the temporary injunction. It is alleged, and in view of the facts must be presumed to be

true, that if these notices should be issued, the members of the association would thereafter refuse to deal with the plaintiff, thereby resulting in loss to it of gains and profits.

The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go without interfering with the legal rights of others is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is perhaps danger that, influenced by such terms of illusive meaning as "monopolies," "trusts," "boycotts," "strikes," and the like, they may be led to transcend the limits of their jurisdiction and, like the Court of King's Bench, in Bagg's case, 11 Coke, 98a, assume that on general principles they have authority to correct or reform every thing which they may deem wrong, or, as Lord Ellsmere puts it, "to manage the State."

But whatever doubts or difficulties may arise in other cases presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong, and even exaggerated assertion, and in many words and expressions of very indefinite and illusive meaning, such as "wreck," "coerce," "extort," "conspiracy," "monopoly," "drive out of business," and the like. This looks very formidable, but in law, as well in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber yards in the various cities, towns and villages are not only a public convenience, but a public necessity; also that to enable the owners to maintain these yards they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade, in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade.

Now, when reduced to its ultimate analysis, all that the retail lumber dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers or manufacturers directly to consumers or other non-dealers, at points where a member of the association is engaged in the retail business, The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion or intimidation, either toward plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff for ten per cent on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of non-dealers at the same points it would probably conclude to pay; otherwise not. It cannot be claimed that the act of making this demand was actionable: much less that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association to prevent them from trading with the plaintiff. After they received the notices they would be at entire liberty to trade with plaintiff or not, as they saw fit.

By the provisions of the by-laws, if they traded with the plaintiff they were liable to be "expelled"; but this simply meant to cease to be members. It was wholly a matter of their own free choice, which they preferred—to trade with the plaintiff or to continue members of the association. So much for the facts, and all that remains is to apply to them a few well-settled, elementary principles of law:

1. The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are in and of themselves unlawful. "Injury," in its legal sense, means damage resulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet so far from being unlawful, they may be highly meritorious. Com. v. Hunt, 4 Mect. (Mass.) 111; Steamship Co. v. McGregor, 21 Q. B. Div. 544,

2. If an act be lawful—one that the party has a legal right to do—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be a legal wrong to another"; or, as expressed in another case, "malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful." Heywood v. Tillson, 75 Me. 225; Phelps v. Nowlen, 72 N. Y. 39: Jenkins v. Fowler, 24 Penn. St. 308.

3. To enable the plaintiff to maintain this action it must appear that defendants have committed, or are about to commit some unlawful act, which will interfere with and injuriously affect some of its legal rights. We advert to this for the reason that counsel

for plaintiff devotes much space to assailing this association as one whose object is unlawful because in restraint of trade. We fail to see wherein it is subject to this charge; but even if it were, this would not of itself give plaintiff a cause of action. No case can be found in which it was ever held that at common law a contract or agreement in general restraint of trade was actionable at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes called such contracts "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense merely of "void" or "unenforceable" as between the parties, the law considering the disadvantage so imposed upon the contract a sufficient protection to the public. Steamship Co. v. McGregor, 23 Q. B. Div. 598 (1892); App. Cas. 25.

4. What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks, apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons as if that of itself rendered their conduct actionable. Bowen v. Matheson, 14 Allen, 499; Steamship Co. v. McGregor, 23 Q. B. Div. 598 (1892); App. Cas. 25; Parker v. Huntington, 2 Gray, 124; Wellington v. Small, 3 Cush. 145; Payne v. Railway Co., 13 Lea, 507.

5. With these propositions in mind, which bring the case down to a very small compass, we come to another proposition, which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man, or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see any thing unlawful or actionable in it. Com. v. Hunt, *supra;* Carew v. Ruthford, 106 Mass, 1, Steamship Co. v. McGregor, *supra.*

Order reversed, and injunction dissolved.

MUNICIPAL CORPORATION.

1. OBSTRUCTIONS IN STREET — FAST DRIVING—ORDINANCE — NEGLIGENCE.

It is negligence for a city to maintain within the graded portion of a street a post over which the wheels of a carriage cannot pass in safety, and that the question of whether one injured by driving over a post in a street was guilty of contributory negligence is to be determined independently of the fact that he was driving at a rate of speed for which he was punishable as for a misdemeanor under an ordinance. *City of Pueblo* v. *Smith*, Court of Appeals of Colorado, 33 Pac. Rep. 685.

2. OWNERSHIP OF ROADS AND STREETS — RIGHTS OF PRIVATE PROPERTY OWNERS — OWNERSHIP AD MEDIUM FILUM VIÆ—R. S. N. S. 5TH SER., C. 45 — 50 V., C. 23 (N.S.) NOVA SCOTIA.

The act of the Nova Scotia legislature, 50 V., c. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the City of Halifax. The charter of the Nova Scotia Telephone Company authorized the construction and working of lines of telephone along the sides of and across and under any public highway or street of the City of Halifax, pro vided that in working such lines the company should not cut down or mutilate any trees.

Held, (Taschereau and Gwynne, JJ., dissenting), that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees in front of his property in working the telephone line. *O'Connor* v. *Nova Scotia Telephone Co.*, Supreme Court of Canada, June 24, 1893.

3. BY-LAW — STREET RAILWAY — CONSTRUCTION BEYOND LIMITS OF

MUNICIPALITY — VALIDATING ACT — CONSTRUCTION OF—ONTARIO.

The Corporation of the town of Port Arthur passed a by-law entitled, "a by-law to raise the sum of $25,000 for street railway purposes, and to authorize the issue of debentures therefor," which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, etc., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the rate-payers and passed, but none was submitted ordering the construction of the work. Subsequently an Act was passed by the legislature of Ontario in respect to the said by-law which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town ..... And for all purposes, etc., relating to or affecting the said by-law, any and all amendments of the Municipal Act ..... shall be deemed and taken as having been complied with.

Held, reversing the decision of the Court of Appeal, that the said Act did not dispense with the requirements of s.-s. 504 and 505 of the Municipal Act, requiring a by law providing for construction of the railway to be passed, but only confirmed the one that was passed as a mor ey by-law.

Held, also, that an erroneous recital in the preamble to the Act that the town Council has passed a construction by-law had no effect on the question to be decided. Appeal allowed with costs. *Dwyer* v. *Port Arthur*, Supreme Court of Canada, June 24, 1893.

NEGLIGENCE — SEE ALSO MAST. AND SERVT. 2. — 3. — MUN. CORP. 1. — RAILWAYS 1. — 2.

1. STREET RAILWAY — HEIGHT OF RAILS — STATUTORY OBLIGATION — ACCIDENT TO HORSE — NOVA SCOTIA.

The charter of a street railway company required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and the caulk of his shoe caught in the groove and he was injured. In an action by the owner against the company, it appeared that the rail, at the place where the accident occurred, was above the level of the roadway.

Held, affirming the jugement of the Supreme Court of Nova Scotia, that as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorized by statute, and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby. Appeal dismissed with costs. *Halifax Street Ry. Co.* v. *Joyce*, Sup. Court of Canada, June 24, 1893.

2. MINING COMPANY LIABLE IN DAMAGES TO ITS EMPLOYE FOR INJURIES CAUSED BY EXPLOSION OF POWDER MAGAZINE NOT PROVIDED WITH LIGHTENING-CONDUCTORS—R. S. P. Q., 876. —1011.

The plaintiff, an employee of defendant company, while returning from his work took refuge during a thunderstorm in one of defendant's buildings, and while there the lightening struck a neighbouring powder-magazine, also belonging to defendants, which was not built according to the requirements of the statute regulating the matter and was not provided with a lightening conductor. The lightening ignited the powder and the explosion partly destroyed the building in which the employee was sheltering, causing him some injuries.

Held, that the company not having complied with the requirements of the statute in the erection of the powder-magazine were guilty of negligence and therefore liable for the results of the explosion.

The law regulating powder-magazines R. S. P. Q. § 6, 1011 and the rules prescribed by the lieutenant-governor in council in conformity therewith apply to mining companies. *Garon* v. *Anglo-Canadian Asbestos Co.*, Court of Review, Quebec 31 May, 1893.

3. STREET RAILWAY COMPANY — COLLISION WITH RUN AWAY HORSE AND CART.

Where a horse and wagon are left standing on the street while the driver takes shelter from the rain under a shop awning, and the horse taking fright runs away and collides with a street car which was about twelve feet away at the moment of its taking fright, the rails being slippery and the grade a down grade and every effort being made to stop the car.

Held, that the street railway company were not liable. That it was an act of gross initial negligence on the part of the driver of the horse and cart to leave his horse standing alone and wholly unfastened in the midst of a violent storm. That it is a primary duty on the part of persons in charge of horses to keep out of the way of street cars. *Beauvais* v. *City Passenger Railway Company*, Montreal, Oct. 31, 1893, Court of Review, reversing judgment of Superior Court.

DAVIDSON, J.—At about 5 o'clock of the afternoon of August 10th, 1892, plaintiff's horse had his leg broken by one of defendants' open cars, and the present action is to recover for the damage sustained. The issues disclose charges and counter-charges of fault and negligence. By the judgment complained of plaintiff was awarded $70. The horse, harnessed to a delivery wagon, was left standing near the curb stone on Notre-Dame street, a little west of Chaboillez square, while his driver found shelter from a passing storm under a shop awning. Startled by the falling rain or the flapping of the awning, the horse reared and made a bolt into the middle of the street. The man followed and had just reached the horse's head when the side step of the car struck the foreleg and broke it. Four witnesses were present. Metra and Lavallee, the driver and conductor of the car; Meilleur, the owner of the horse, and Lapointe, a chance spectator standing at the opposite side. Lapointe swears that when the horse shied the car was an acre away and coming along at a very rapid rate. While agreeing as to the rapid rate, plaintiff's driver states that he instantly followed the horse, but at a moderate pace so as not to further frighten him; that just as he reached his head the collision occurred; that the distance he covered was ten or twelve feet and the time occupied a few seconds. This distance and time is in almost exact accord with the story told by the car driver, who noticed the horse standing on the side of the street, and when within about ten feet saw it suddenly bolt from fright to the edge of the track. He declares that the brakes were instantly applied and the speed checked, but that the distance and the few intervening seconds were too short to anable him to wholly stop. Through the curtains being down, the conductor saw nothing of the accident, but swears positively that the car was slowed up. They further unite in declaring that they were going at a moderate rate of speed. On the facts proven we have to find that plaintiffs have not maintained their charges of reckless and careless handling of the car. It was an act of gross initial negligence on the part of plaintiff's driver to leave his horse standing alone and wholly unfastened, in the midst of a violent storm. Lavallee's statement that the car was an acre away is destroyed not only by the evidence of the car driver, but of plaintiff's driver as well—a down grade and slippery rails made a sudden stoppage impossible. The cause and the result—that is the bolt of the horse and the collision, were almost instantaneous. There would have been no accident had the horse been secured. Two witnesses on one hand swear to a very rapid and two on the other to a moderate rate of speed. The contradiction between the witnesses of the defence is no greater and not as important as is that which exists between the plaintiff's witnesses. A car cannot turn to one side. It is fixed in its right and passage to the rails on which it runs. As a consequence it is a primary duty on the part of persons in charge of horses to keep out of the way of street cars. Here the horse dashed to the side of the track and the driver was guiltless of the resulting injury.

NEW TRIAL—See Libel and Slander 8.

NOTICE—See Trustees.

NUISANCE.

1. MUSIC.

The giving of musical lessons and practising held not to amount to a nuisance; the making of noises on musical instruments held to amount to a nuisance. *Christie* v. *Davey*, (1893) 1 Ch. 316.

2. OVERHANGING TREES—NOTICE.

Where branches of a tree overhang a right of way, constituting a nuisance, the railroad company may remove the projecting parts without giving notice, when the adjoining owner knows that the company claims they are a nuisance, and desires their removal, which he refuses.

The fact that the company offered him money to remove them does not give him a right to further notice. *Hickey* v. *Michigan Cent. R. Co.*, Michigan Supreme Court, July 25, 1893, 48 Alb. L. J. 268.

PARTNERSHIP.

ACTION AGAINST SECRET PARTNER —ART. 1836, C. C.

Held, where a person though not a registered member of a firm, must nevertheless be deemed to be a partner by reason of a private agreement involving participation by him in the profits and contribution to the losses of the firm, such person may be sued for a debt of the firm jointly and severally with the registered partners. *Carter* v. *Grant*, Taschereau, J., Montreal, Dec. 5, 1892, Superior Court. (Leg. News).

PATENT.

COMBINATION — OLD ELEMENTS — NEW AND USEFUL RESULT—PREVIOUS USE—ONTARIO.

In an application for a patent, the intention claimed was "in a seeding machine in which independent drag-bars are used a curved spring tooth, detachably connected to the drag-bar in combination with a locking device arranged to lock the head-block to which the spring tooth is attached substantially as and for the purpose specified." In an action for infringement of the patent, it was admitted that all the elements were old, but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new combination, and patentable as such.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the alleged invention being the mere insertion of one known article in place of another known article was not a patentable matter. Smith v. Goldie, S. C. R. 46, and Hunter v. Carrick, 11 S. C. R. 300, referred to. Appeal dismissed with costs. *Wishner* v. *Coulthard*, Supreme Court of Canada, June 24, 1893.

PLEDGE—See Banks 2.

POWDER MAGAZINE — See Negligence 2.

PRACTICE — SEE ALSO SERVITUDES.

RENEWAL OF WRIT—SETTING ASIDE ORDER FOR — STATUTE OF LIMITATIONS—ONTARIO.

A writ issued from the High Court of Justice for Ontario in June, 1887, was renewed by order of a Master in Chambers three times, the last order being made in May, 1890. In May, 1891, it was served on the defendants, who thereupon applied to the Master to have the service and last renewal set aside, which application was granted, and the order setting aside said service and renewal was affirmed on appeal by a Judge in Chambers and the Divisional Court. Special leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal, which also affirmed the order of the Master, Mr. Justice Osler, who delivered the principal judgment, holding that the Master had jurisdiction to review his own order; that he held that plaintiffs had not shown good reasons, under Rule 238 (*a*), for extending the time for service, and this holding had been approved by a Judge in Chambers and a Divisional Court; and that the Court of Appeal could not say that all the tribunals below were wrong in so holding. On appeal to the Supreme Court of Canada.

Held, that for the reasons given by Mr. Justice Osler in the Court of Appeal the appeal to this court must fail, and be dismissed with costs. Appeal dismissed with costs. *Howland* v. *Dominion Bank*, Supreme Court of Canada, May 1, 1893.

PRINCIPAL AND AGENT.

1. AGENT — APPOINTMENT OF SUB-AGENT.

An exception to the general rule that an agent has no power to delegate his authority to another was noted by the Supreme Court of North Carolina in the case of Luttrell v. Martin, 17 S. E. Rep. 573, in which it was held that a general agent of a corporation may delegate to another his authority to purchase supplies for the corporation.

2. AUTHORITY OF AGENT.

A travelling salesman selling by sample for credit or cash, to be paid on receipt of the goods, has no implied authority to collect the money agreed to be paid and that a custom in the town in which the goods were sold to pay such salesmen is not binding on

non-resident principals in the absence of evidence of notice to them of such custom. *Simon* v. *Johnson*, Supreme Court of Alabama, 13 South. Rep. 491.

3. AUTHORITY OF AGENT—BORROWING—PLEDGING TITLE-DEEDS—EXCESS OF AUTHORITY.

If A., the owner of deeds, places them under the control of B. and authorizes him to pledge them for a certain sum, and B. pledges them for a larger sum with a person dealing *bonâ fide* and without notice of the limit of his authority, A. can redeem only on paying the whole advance. *Brocklesby* v. *Temperance Permanent Building Society*, C. A. affirm Wright, J. [1893] W. N. 122.

PUBLIC POLICY—See Contrats 3.

RAILROADS — SEE ALSO CARRIERS.

1. LIABILITY OF—HORSES INJURED ON TRACK.

The plaintiff claimed $400 as the value of four horses belonging to him, which were killed on the 2nd December, 1890, in the parish of Laprairie, on the railway track. The defence was that the action was not attributable to the fault or negligence of the company or its employees, but was due to the fact that the horses had been allowed to wander free on the line, contrary to law. It appeared that on the day in question, some time before the passing of the train, the plaintiff's nephew had opened the two gates serving to connect the two parts of plaintiff's property, which is divided by the railway track. He intended to drive the four horses from one part of the property to the other, but after the horses had passed the first gate a sudden gust of wind blew the other gate to and the horses, not being able to pass through, dashed along the railway line and wandered on the track for some time until killed by the passing train. The court was of opinion that the company, under all the circumstances of the case, should be held responsible. The accident would not have occurred if the improved Westinghouse brakes had been in use, as the cars might have been stopped in time. Judgment against the company for $400, value of the animals. *Bourassa* v. *Grand Trunk Ry. Co.*, Montreal, Oct. 30, S. C., Mathieu, J.

2. CO-PROPRIETORS — FIRE CAUSED BY SPARKS FROM ENGINE—RESPONSABILITY.

Held, a railroad company having the management of a line of railway, of which it is joint proprietor with another company, is liable for damages caused by sparks from the engines of either company, saving its recourse against the other company. *Lemieux* v. *Cie. du ch. de fer Québec et Lac St. John*, Quebec 31 May 1893, Superior Court.

3. TITLE TO LAND—TENANT FOR LIFE—CONVEYANCE TO RAILWAY COMPANY BY—RAILWAY ACTS—C. S. C., c. 66, s. 11, ss. 1—24 V., c. 17, s. 1—ONTARIO.

By C. S. C., c. 11 (Railway Act) all corporations and persons whatever, tenants in tail or for life, *grevés de substitution*, guardians, etc., not only for and on behalf of themselves, their heir and successors, but also for and on behalf of those whom they represent .....seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company) all or any part thereof; and any contract, etc., so made shall be valid and effectual in law.

Held, affirming the decision of the Court of Appeal, that a tenant for life is not authorized by this act to convey to a railway company the interest of the remainderman in the land. Appeal dismissed with costs. *Midland Ry. Co.* v. *Young*, Supreme Ct. of Canada, 1893.

4. TRANSPORTATION OF LIVE STOCK — SPECIAL CONTRACT LIMITING LIABILITY—VALIDITY OF—51 V., c. 29, s. 346, SUB-SEC. 3 (D.)

The plaintiff, on shipping a horse by the defendants' railway, signed a document, called a "live stock transportation contract," which stated that the defendants received the horse for transportation at the special rate of $7.20; and in consideration therefor it was mutually agreed that the defen-

dants should not be liable for any loss or damage, etc., except in case of collision, etc., and should in no case be responsible for an amount exceeding $100 for each or any horse, etc., transported. In a collision caused by the negligence of the defendants the horse was killed.

Held, that the agreement constituted a special contract limiting the defendants' liability to the amount named; and that s. 246, s-s. 3, of the Railway Act, 51 V. c. 29 (D.), did not apply so as to prevent the defendants from claiming the benefit of the contract where negligence was proved. Vogel v. Grand Trunk Railway Co., 2 O. R. 197; 10 A. R. 162; 11 S. C. R. 612; and Bate v. Canadian Pacific Railway Co., 14 O. R. 625; 15 A. R. 388, considered. *Robertson* v. *Grand Trunk Railway Co.*, Ontario, Common Pleas, June, 1893. (Canada L. T.)

5. QUESTION WHETHER STATUTORY OBLIGATION TO STOP ALL ORDINARY TRAINS AT A CERTAIN STATION WAS TEMPORARY OR PERMANENT—TITLE TO SUE.

A railway company were taken bound by a clause in their Act in 1855 to "erect and maintain a temporary goods and passenger station" at a point to be agreed on on an estate which was to be intersected by their line of railway, on the narrative that the then proprietors of the estate had laid out a portion of it for feuing. The clause proceeded thus—"At the said station all ordinary trains shall stop for the purpose of traffic;" then came a proviso that if on the expiry of five years the traffic proved unremunerative the company should no longer be bound to maintain the said station, and that the question of the maintenance or abandonment of the station should be determined by arbitration.

A station was erected in accordance with the above enactment, and no proposal to abandon it was ever made.

In 1858 the same parties arrived at an agreement, which proceeded on a recital of the above clause, and provided that in consideration of certain prestations in favour of the railway company they should complete the station as a permanent station, and should thereafter maintain it in all time coming at their own expense.

Subsequently the estate was sold. In 1892 the then proprietor brought an action against the railway company to have it declared that they were bound to stop all ordinary trains, and in particular certain specified trains, at the said station on his estate.

Held, (reversed judment of First Division) that all ordinary trains must stop at the station. *Gilmour* v. *North British Railway Company*, 30 Scot. L. Rep. 947. House of Lords, June 27, 1893.

LORD CHANCELLOR—My Lords, this is an appeal from a judgment of the Inner House reversing a decision of the Lord Ordinary. The question turns mainly upon the construction of a clause in the East of Fife Railway Act 1855. The clause has relation to the erecting and maintaining of a station upon the line which was to be constructed under the Act upon a part of the estate of the Standard Life Assurance Company, who then owned the estate of Lundin; and the matter to be determined is whether there is an obligation created by that clause under which the railway company are at the present time bound to stop all ordinary trains at a station constructed on that line for the purposes of the traffic, or whether that obligation has in the events which have happened come to an end.

The clause begins by reciting that "the owners of the estate of Lundin, in the parish of Largo, have laid out a portion of the said estate on the proposed line of railway to be let in lots of feus for building," and then it enacts "that the company shall erect and maintain a temporary goods aud passenger station at or near to Sunnybraes, or at any other point on the said estate which may be agreed upon by and between the company and the owners of the said estate for the time; and at the said station all ordinary trains shall stop for the purpose of traffic." The question really to be determined is, what is the meaning of the words "the said station?" The contention on behalf of the respondents which found favour with the Court below is this, that "the said station" means "a temporary goods and passenger station" and that if the station, though on the line and at the place, ceases to be a temporary station and is one which is to remain there permanently the obligation to stop ceases, because it is not within the description "the said station."

Now, my Lords, that of course depends upon what is included in the words of reference "the said station." I cannot admit that it is a proposition universally true that where you find a substantive with several adjectives qualifying it, and you find a reference back to the substantive, preceded by the words "the said" the reference necessarily includes the substantive qualified by

all the adjectives which precede it in the previous part of the clause. That is a question to be determined really by looking at the agreement as a whole. It can hardly be contended, for example, that if instead of the word "temporary" upon which so much stress has been laid the word "wooden" had been substituted, or the word "covered" or "uncovered" the obligation to stop the trains would have ceased if, for example, an uncovered station were turned into a covered one, or a wooden station into a stone building. It would have been impossible, I should think, for anyone to contend then that it ceased to be "the said station" although upon the same line of railway because one adjective of the description was no longer applicable.

But it is said that the word "temporary" points to the station as lasting for a time only, and that therefore the words "the said station" in the latter part of the clause point to a station which is to last for a time only, and as soon as it ceases to be a station which is to last for a time only, and becomes a station that is to last in perpetuity, it ceases to be "the said station." Now, my Lords, the fallacy, as I respectfully venture to think, of the judgment which the respondents here seek to support lies in this, that the first part of this clause is treated as if it only provided for a station which was to last for a time. As I read the agreement as a whole, the word "temporary" cannot have been used in that sense. This never was a station which was to last only for a time. If the words which I have read had stood alone, without anything following them, it would have been difficult to say what was meant by the word "temporary," how long it was to last or in what sense that word was employed. But the words which I have read are followed by a proviso which commences with "but providing always." Now, I do not lay too much stress upon those words, but, nevertheless, I think it must be admitted that, ordinarily speaking, where you find such words they introduce a qualification of the obligation which without them would have been created by the words which precede. The proviso is, "that if upon the expiration of five years from the opening of the line of railway the traffic done at such station shall not be of sufficient extent to remunerate the company for the maintenance of the said station, the obligation to maintain the said station shall be no longer binding on the company."

Now, what is the effect of that? It is only this, that in a certain event to be determined by a question of fact, namely, the station paying or not paying (to put it shortly), in the event of the station not paying, the obligation which is treated as created by the earlier part of the clause is to be no longer binding. It, of course, assumes that an obligation has been created by the earlier part of the clause which lasts beyond the five years; otherwise it would be nonsense to speak of the obligation being no longer binding after the five years have elapsed, when the obligation had been only created for five years. Therefore it necessarily implies that the obligation created by the earlier part of the clause is an obligation lasting beyond the five years, but which in a certain event is to cease to be binding. Therefore it appears to me, with all deference to the learned Judges in the Court below, that the earlier part of the clause cannot be construed, giving full effect to the word "temporary," as creating an obligation which lasts only for a time. The obligation at the outset is an obligation permanent save in a certain event, and therefore when you find the words "temporary station" the word "temporary" must be construed in the same sense, and in this part of the clause which I have just been reading, the words "the said station" cannot refer back to that quality of temporariness, if I may so term it, because this is speaking of a time when the five years have elapsed and it speaks of the obligation to maintain the said station being no longer binding. "The said station" there can only mean this station at Sunnybraes, without reference to that quality of temporariness which it is suggested was imposed by the earlier part of the clause. I do not think that it would be according to the ordinary principles of construction to treat the words "the said station" in that part of the clause as referring to the station after the five years, and to treat the same words "the said station" occurring almost immediately before as qualified and restricted and limited to the term of five years.

My Lords, it appears to me that the word "temporary" there means no more than this—to "maintain a goods and passenger station subject to the provision as to time hereinafter contained." If it had been so worded, nobody, I think, could have contended that if in a particular event that station was to be permanent the words "the said station" only referred to it whilst it was doubtful whether it was to be temporary or permanent. That, my Lords, seems to me to be the strongest reason showing that the construction which the respondents have sought to maintain here really cannot be maintained.

It is said that it was natural that the parties should contract that all the trains should stop during the five years, inasmuch as it was right that there should be a full test of the question whether the station could be made to pay or not. No doubt that would be a very good reason for having provided, if the parties had so provided, that there should be that obligation for five year and no longer. Certainly in that case I should have expected to find the provision in the proviso, and in immediate connection with that part of the proviso which states that the obligation was not to be binding if the traffic did not pay for the five years—it would have been natural to find in connection with that the provision that during those five years all trains should stop. But this provision is not found in that part of the clause. It seems to me to be as much a quality of the station as that it should be a goods station or a passenger station. Of course one might speculate that the parties might have had such an intention as has been suggested, but it appears to me to be

impossible to deduce such an intention from the words used in the place in which those words are found, and it would be violating all the ordinary principles of construction if one were to treat the words "the said station" has having the very limited effect given to them by the counsel for the respondents and by the learned Judges in the Court below, when in truth you cannot give that limited interpretation to precisely the same words when they are found in the other part of the clause.

My Lords, for these reasons I think that the judgment appealed from must be reversed so far as it depends upon the construction of the 36th section.

But then it was contended that the parties having entered into an agreement in October 1858, about three years after the passing of the Act, have by that agreement put an end as between themselves to the stipulation upon which so much argument has been addressed to your Lordships. No doubt it was competent for them to do so, but they have not done so in terms. They agreed that the station from the outset should be completed as a permanent station. The agreement contained various other stipulations, but it did not provide, as one would have expected it to provide if that had been the intention, that the obligation to stop all trains should cease as soon as it had been completed as a permanent station. There is no such actual provision to be found, and I do not think it arises by necessary implication from the terms of the agreement. Upon this point I find myself in accord with the learned Judges of the Court below in the Inner House, who all came to the conclusion that if the obligation existed not qualified by the word "temporary" in the sense given to it under the 36th clause, it had not been abrogated by the agreement of September or October 1858.

For these reasons, my Lords, I move your Lordships that the judgment appealed from be reversed, and the interlocutor of the Lord Ordinary restored.

LORD WATSON — My Lords, the main question for our decision is, whether the agreement of 1858 wholly supersedes or merely qualifies the contract embodied in section 36 of the Act of 1855? The answer depends in my opinion upon the construction of that clause. It imposes an obligation upon the company to erect and maintain a temporary goods and passenger station at or near to Sunnybraes, or at any other point upon the estate of Lundin which may be agreed upon between the company and the owner of the estate for the time being. The obligation is immediately followed by the enactment that all ordinary trains shall stop for the purposes of traffic "at the said station."

What, then, is the station at which trains are to be stopped? Is it the station to be erected at Sunnybraes or elsewhere upon the estate of Lundin so long as such station exists and the company are bound to maintain it: or is it a station which is to be maintained by the company for five years only or until it becomes permanent? The Lord Ordinary selected the first of these alternatives and decided in favour of the appellants. Their Lordships of the First Division (with the exception perhaps of Lord M'Laren) preferred the second, and gave judgment for the respondents. Either of these conflicting decisions is, in my opinion, the logical result of the construction upon which it is founded.

The terms of the proviso which follows the obligations to erect and maintain a station and to stop trains appear to me to be conclusive in favour of the construction adopted by the Lord Ordinary. The proviso is framed on the assumption that an obligation had already been created, which unless qualified by the proviso would be of permanent force. It implies that the antecedent obligation to maintain was meant to include the station after as well as before it ceased to be temporary. For these and other considerations which have been suggested by the Lord Chancellor, I think it is clear that the word "temporary as it occurs in the clause relating to the erection and maintenance of the station, was not used in any sense which could restrict the obligation of maintenance in point of time, and that the reference back implied in the words "said station," as these occur both in the clause relating to stoppage of trains and in the proviso, is to the station to be erected on the estate of Lundin, whether it should prove to be temporary or permanent.

In that view of the statutory contract of 1855 it does not appear to me to be doubtful that the agreement of 1858 does no more than discharge the proviso, and leaves untouched the obligation to stop trains,

LORD ASHBOURNE—My Lords, I concur.

LORD MORRIS—My Lords, I concur in the judgment which has been moved.

I think the enacting part of the clause provided for a station which might not be permanent, and which the company were not to be bound to permanently keep up, but as long as it was kept up and lasted, all ordinary trains were to stop at it. What time the word "temporary" would cover was left indefinite. A proviso was added which in my opinion amounts to this—that it should last for at least five years, because it is provided that if then found unremunerative it was not to be kept up. If no trial took place at the end of the five years, or if it was found that it was remunerative, then matters reverted to the enacting part of the clause—that is to say, an incident was attached to it that it was not binding upon the company to keep it up permanently, but that as long as it was kept up the trains should all stop there.

This view is, in my opinion, fortified by the subsequent agreement, because as an indefinite time might attach after the expiration of five years, the agreement of the 29th September, 1858 was entered into by which for considerable consideration from the assurance company in the shape of contribution to the building of the station, the building of houses, the making of roads, &c., they agreed that the temporary character of the station was to be altered into a perma-

nent one, with the necessary incident that all ordinary trains should stop there.

LORD SHAND—My Lords, I have felt this to be a question attended with some difficulty. It is apparent that it is by no means absolutely clear, when we look at the division of opinion amongst the learned Judges in the Courts below, and at the reasons they have variously assigned for their opinions. But I have come to the conclusion, without doubt, that the view which your Lordships take is sound, and that the decision of the Court of Session ought to be reversed.

There has been much argument upon the meaning of the word "temporary" as it occurs in the opening part of this enactment, and I confess that if there had not been the proviso in the second part of the enactment I should have been very clearly of opinion that there was no lasting obligation upon the company to have a station there at all, and certainly none to have a station at which every train should stop. There might have been an obligation which they could not summarily bring to a close, but it would have been a temporary obligation in the ordinary sense of the term, and not an obligation which could have been made lasting against the company.

I think it equally clear, after all the discussion we have had about it, that the word "temporary" must be read in connection with the word "said" which we find in the second part of the clause; and it must be taken as if it had expressly said "the company shall erect and maintain a goods and passenger station temporarily in the sense hereinafter explained." Accordingly, going to the proviso, we see what is the meaning to be attached to the term. It is that there is an existing obligation to keep up the station, with the proviso that that obligation may ultimately turn out not to be permanent, for the clause is practically so expressed, "providing always that if after five years the traffic done at the station shall "not be sufficient to remunerate the company for the maintenance of it, the obligation to maintain the station shall be no longer binding upon the company." The result of that simply is, that the obligation which the company have undertaken in the earlier part of the clause may be determined in one event only—otherwise that obligation as originally expressed remains permanent in its character. My Lords, if the obligation remains permanent, it is the obligation as a whole in the terms in which it was originally expressed. If it turns out that the station is unremunerative, and the arbiter named gives a finding to that effect, the obligation as a whole flies off. But that obligation as a whole, as contained in the first part of that clause, appears to me either to remain permanently as an obligation as a whole, or the company are relieved of it as a whole. But the case is in the position that no such event occurred. The station has not been found to be remunerative, and therefore the obligation as originally contracted remains.

Now, what is that obligation? My Lords, it seems to me that there are four qualities or incidents of it. I do not care which expression is used, but when I use the expression I mean it to cover essential points with reference to which the company undertook the obligation. One of those refers to the place where the station is to be. It is to be at the point named or in some other position convenient to the parties on the estate of Lundin—the estate now possessed by the appellant. In the second place, it is to be a station for passenger traffic. In the third place, it is to be a station for goods traffic. In the fourth place, it is to be a station at which all the ordinary trains shall stop. My Lords, as I have said, I think the obligation applicable to all these points or incidents remains as a whole; and I think the company are no more entitled to get rid of the obligation to stop all their ordinary trains there than they would be entitled to say, "this shall not be a passenger station" or "this shall not be a goods station."

Upon these grounds, my Lords, I concur with your Lordships, and I entirely agree in the views which have been already expressed by your Lordships who have preceded me.

The House reversed the decision of the Court of Session, and allowed the appeal with costs, holding that all ordinary trains must stop at the station in question.

RAPE—See Crim. Law 1.

RESTRAINT OF TRADE—See Contracts —Monopoly Law.

SALE OF LAND—See Contracts 4.

SERVITUDE.

ACTION CONFESSOIRE—REAL SERVITUDE—APPARENT—REGISTRATION—44 AND 45 VIC., CH. 16, SECS. 5 AND 6, (P.Q.)—ART. 1508, C.C.—PROCEDURE —MATTERS OF, IN APPEAL—QUEBEC.

By deed of sale dated 2nd April, 1860, the vendor of cadastral lot No. 369 in the Parish of Ste-Marguerite de Blairfindie, district of Iberville, reserved for himself as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent, as assignee of the owner of lot 370, continued to enjoy the use of said carriage road, which was sufficiently indicated by an open road, until 1887 when he was prevented by appellant Cully from using the said road. C. had purchased the lot 369 from one McD. without any mention of any servitude, and the original title deed created by the servitude was not registered within the delay prescribed by 44 and 45 Vic. (P.Q.) ch. 16, secs. 5 and 6.

In an action brought by F. against

C., the latter filed a dilatory exception to enable him to call McD. in warranty, and McD. having intervened, pleaded to the action. C. never pleaded to the merits of the action. The judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada.

Held, affirming the judgment of the court below, that the deed created a real apparent servitude, which need not be registered, there being sufficient evidence of an open road having been used by F. and his predecessors in title as owners of lot No. 370.

Held, also, that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait et cause* for C. with his knowledge, and both courts had held them jointly liable, this court would not interfere in such a matter of practice and procedure. Appeal dismissed with costs. *McDonald* v. *Ferdais*, Supreme Ct. of Canada, May 1893.

SLANDER—See Libel and Slander.

SHIPS AND SHIPPING.

CHARTER-PARTY — DELAY IN TAKING DELIVERY—RESCISSION.

By charter-party dated 3rd July 1891 the owner of a steamer then being fitted out in the Clyde for the summer traffic, agreed to let her to a charterer till 30th September. The charter-party provided that the charterer should "pay for the use and hire of the said vessel at the rate of £425 per month, commencing the day of delivery..... whereof notice shall be given to the charterer..... payment of the hire to be made in cash monthly, in advance,..... first month's hire to be paid before the steamer leaves the Clyde. Charterer agrees to give a banker's guarantee for the due payment of the hire money."

As soon as the charter-party was signed the owner began, through his broker, to press the charterer for the bank guarantee. The charterer replied that he was not bound to give the guarantee until the vessel was ready to be handed over. The broker assented to this, but continued from 6th to 10th July to press the charterer daily to give the guarantee. The charterer made no answer to any of these communications until the 10th, when he replied that he was prepared to give the guarantee on delivery of the vessel. On 13th July the broker telegraphed that the vessel would be delivered in Glasgow on the 15th. The charterer replied that he would leave Hastings for Glasgow on the night of the 15th to take delivery, but without notifying the owner he postponed his departure for a day, and did not reach Glasgow until the morning of the 17th, when he found that the owner had chartered the vessel to someone else.

Held, (affirmed the judgment of the First Division) (1) that the charterer had not committed a breach of contract by failing to take delivery on the day fixed; (2) that the charterer's conduct had not been such as to justify the owner in believing that he did not intend to fulfil his contract; and therefore found the charterer entitled to damages. *Carswell* v. *Collard*, 30 Scot. Law, Rep. 939, House of Lords, June 15, 1893.

SOLICITOR AND CLIENT.

SALE BY SOLICITOR TO CLIENT—DUTY OF SOLICITOR.

A solicitor, having been asked by his client to make a safe investment of certain money for her, induced her to purchase with that money certain shares belonging to him in a land company, of which he was a director. There was no fraud on the part of the solicitor. The company not having turned out a success, and having gone into liquidation, *held*, that an action would lie by the client against the solicitor. A solicitor, selling his property to his client, is bound either to put himself at arms' length, or if the contract between them is afterward questioned, he must show that he had made a reasonable use of the confidence reposed in him, or that he had given an ample and correct advice and information as another solicitor, free from all interest or bias, might

have been reasonably expected to tender. The test whether such a contract can stand is not whether the solicitor obtained any benefit, but whether he has furnished such full disclosure and sound advice and used such diligence as his duty demands. The equitable view of the transaction is that the solicitor volunteered to prove that the shares were a safe investment, and to make good his representations by pecuniary compensation or indemnity, or both, if they turned out unsafe. The right of the client is to be replaced as far as possible in the same position as she would have been in if she had not entered into the contract, provided that nothing in her conduct has deprived her of that right. *Robinson* v. *Abbott*, 14 Aust. L. T. Rep. 277.

SPEEDY TRIALS ACT—See Crim. Law 2.

STATUTE OF LIMITATIONS — See Practice.

STATUTORY OBLIGATIONS—See Negligence 1.

STREET RAILWAY—See Mun. Corp. 3.

SUBROGATION—See Insur. (Fire) 3.

SUMMARY TRIALS ACT—See Justice of the Peace.

TAXATION.

OF FOREIGN CORPORATIONS DOING BUSINESS IN STATE OF NEW YORK.

A foreign corporation having its charter and local habitation in another State may not be taxed as doing business in this State, merely because it keeps a hired office here for the convenience of itself and patrons, when it has no property in this State and disburses no money here. *People, ex rel. Harlan and Hollingsworth Company*, v. *Frank Campbell, Comptroller*, New York Court of Appeals, October 3, 1893.

TELEGRAPH COMPANIES.

AGREEMENT RESTRICTING LIABILITY.

As a common carrier, a telegraph company cannot legally refuse to accept and transmit an offered message because the person offering it will not sign an agreement that such carrier shall not be liable for damages in any case where the claim is not presented, in writing, within sixty days after the message was filed with the company for transmission. While such an agreement, when freely made, is binding, the carrier cannot exact it as a condition precedent to the discharge of his duty as such common carrier. So. Dak. *Kirby* v. *Western Union Tel. Co.*, 55 N. W. Rep. 760.

TITLE TO LAND—See Railways 3.

TRUSTEES.

WILL—EXECUTORS AND TRUSTEES UNDER—BREACH OF TRUST BY ONE—NOTICE—INQUIRY—ONTARIO.

W. and C. were executors and trustees of an estate under a will. W., without the concurrence of G., lent money of the estate on mortgage and afterwards assigned the mortgages, which were executed in favour of himself described as "trustee of the estate and effects of" (the testator). In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same.

Held, reversing the judgment of the Court of Appeal, that in taking and assigning said mortgages W. acted as a trustee and as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees inasmuch as the breach of trust consisted in the dealing with the securities themselves, and not in the use made of the proceeds. *Cumming* v. *Landed Banking & Loan Co.*, Supreme Ct. of Canada, June 24, 1893.

TUTORSHIP.

The plaintiff, as tutor *ad hoc* to Celina Theriault, his minor daughter,

claimed from the defendants $500 damages suffered by her in an accident that occurred in delendants' factory, where the girl was employed. The defence was that the accident was attributable to the fault of Celina herself. The court dismissed the action on an objection not affecting the merits of the case. It appeared that no tutor had ever been appointed to Celina. A tutor *ad hoc* had merely been named for the purpose of bringing this action. Under article 304 of the Civil Code, actions belonging to a minor are brought in the name of his tutor. Article 269 does not recognize tutorship *ad hoc* except in cases where, during the tutorship, the minor has interests which conflict with those of his tutor. A tutorship *ad hoc* to a minor who has no tutor is null. The court referred to Rattray v. Larue, 15th Supreme Court reports, p. 102, and to St. Norbert d'Arthabaska v. Champoux, 1st Quebec Law Reports, p. 376, as having settled the points. Action dismissed. *Theriault* v. *Globe Woollen Mills Co.*, Montreal 30th Oct. 1893, S. C., Mathieu, J.

VALUABLE SECURITIES—See Crim. Law 2.

VENUE.

CHANGE OF — FAIR TRIAL — PREJUDICE — HOSTILE FEELING AGAINST PLAINTIFF IN COUNTY WHERE CAUSE OF ACTION AROSE.

Action of slander. The defamatory words were alleged to have been spoken by the defendant at a public meeting in the town of Woodstock, in the county of Carleton, where both the plaintiff and defendant lived. The words were alleged to have been spoken of the plaintiff in reference to a certain information laid before him as a justice of the peace, and charged him with misconduct in his office as such.

The plaintiff laid the venue in the county of Victoria, and the defendant moved to change it to the county of Carleton, making an affidavit in which he swore that the cause of action arose in the latter county ; that he intended to plead denying that he used the words charged in the declaration and justifying the words he did use ; that the words were spoken in the presence of hundreds of persons ; that it would be necessary for him to call at least fifty witnesses, all from the county of Carleton ; and that the plaintiff was not possessed of any property, except possibly a small amount of furniture.

The plaintiff in his affidavit in answer swore that the words were spoken by the defendant concerning the plaintiff in the discharge of his duties as a justice of the peace, for having taken an information and issued a warrant for perjury against a complainant and witness in various prosecutions under the Canada Temperance Act, which prosecutions and the prosecution and arrest of such persons had caused a very bitter feeling in the county of Carleton, which still existed ; that the great majority of the inhabitants of the county of Carleton were in favour of the Canada Temperance Act, and personally opposed to and prejudiced against the plaintiff, for having taken the information and issued the warrant; and he therefore believed that he could not obtain a fair trial of his action by a jury taken from that county.

In reply the defendant filed his own affidavit and those of two others, to the effect that the facts stated were known only to the people of Woodstock ; that only a few persons in the county were seeking to enforce the Act, and a much larger number were hostile to it and actively engaged in preventing its operation ; and that the majority of the inhabitants of the county were indifferent as regarded the Act and its enforcement.

Blair, A.-G., for the defendant.

C. E. Duffy, for the plaintiff.

Fraser, J.—I cannot distinguish this case from Cossham v. Leach, 32 L. T. N. S. 665..... The change of venue cannot surely depend upon the Judge's determining what proportion of the inhabitants are supporters of the Canada Temperance Act, and what proportion are hostile to it, and what number of them are neutral, even if he had the facts to enable him to form a judgment in the matter..... No such principle as that should enter into the question. As stated by Lord Coleridge, C.J. " What is wanted in the jury is impartiality, and impartiality is not

arrived at by two sets of opposing prejudices."

Then again the cause, if tried in Carleton county, would be tried at Woodstock; true, not in the town of Woodstock, but in the parish of Woodstock; but the town and parish are divided only by a conventional line, and the jurors and witnesses would probably during the trial reside in the town, where, it has been shown, a strong feeling exists against the plaintiff, all of which would operate to prevent an impartial trial between the parties.....

I might also refer to the case of Shroder v. Myers, 31 W. R. 261.....

Upon the whole, therefore, I am of opinion that I must refuse the change of venue. *Queen* v. *Appleby*, Supreme Ct. New Brunswick, Aug. 1893, (Can. L. T.).

WILLS — SEE ALSO TRUSTEES — WORDS.

1. WILL NOT EXECUTED AS THE STATUTE DEMANDS IS INVALID.

A will is inoperative and worthless to dispose of real estate in the State of New York unless executed and attested in the manner prescribed by the statute of this State, even though it was identified and authenticated formally according to the laws of Bavaria, and deposited in a public office in that country. *Maria Anna Vogel, Respondent*, v. *Maria Lucia Lehritter et al., Respondents, and Charles Lehritter, Appellant*, 48 Alb., L. J. 305.

2. FORM OF—WILL MADE ABROAD—LEGACY — INTERPRETATION — PROCEDURE — INTERVENTION — CHARITABLE INSTITUTION.

The French law in force in this province before the promulgation of the Civil Code, only recognized wills made abroad in so far as they were in conformity with the law of the country in which they were made, according to the maxim "*Locus regit actum.*"

As the laws of New York in 1865, allowed strangers to make wills according to the forms authorized by the laws of their domicile, a holograph will made there at that time by a person domiciled in Quebec, is valid.

A will providing as follows: "I hereby will and bequeath all my property, assets and means of any kind to my brother Frank who will use one half of them for public Protestant Charities in Quebec and Carluke, say, the Protestant Hospital Home, French Canadian Missions, and amongst poor relations, as he may judge best;" is valid and cannot be attacked as vague and uncertain for not sufficiently designating the beneficiaries, nor as being left to the discretion of the legatee Frank Ross.

In an action to annull a will containing a legacy in favour of individuals (at the choice of the universal legatee) belonging to designated classes or categories, all those upon whom the choice might legally fall have sufficient interest to be allowed to intervene in the action.

An educational establishment is a charitable institution in the meaning of the above mentioned provision of the will. *Ross* v. *Ross*, Quebec, 4 May 1893, Queen's Bench in Appeal.

WINDING UP COMPANIES—See Companies 8—9.

WORDS.

1. "CEASE TO CARRY ON THE BUSINESS."

A testator gave his leasehold factory and business to his sons, but provided that if his sons should "cease to carry on the business" then the factory should sink into the residue. The sons turned the business into a limited company of which they were managing directors and principal shareholders.

Held, they had ceased to carry on the business within the meaning of the proviso in the will, and the factory fell into the residue. *In re* Sax. *Barned* v. *Sax*, [1893], W. N. 104.

2. "NOW IN MY OWN OCCUPATION"—SPECIFIC DEVISE OF HOUSE AND LANDS.

In April, 1873, A. devised certain lands "now in my own occupation;" in September he purchased certain adjoining lands; in October he, by a codicil, confirmed his will.

Held, that the lands purchased in

September passed under the devise. *In re* Champion. *Dudley* v. *Champion*, Noth, J., affirm. by C. A. [1893] 1 Ch. 101.

" ASSETS "—See Companies 3.

" BURNT "—See Insurance (Marine) 6.

" CHARITABLE INSTITUTION "—See Wills 2.

" COMPROMISE "—See Companies 2.

" DOMESTIC ANIMALS "—See Cruelty to Animals.

" REASONABLE TIME " — See Bills and Notes 1.

" TEMPORARY "—See Railroads 5.

" TRAVELLER "—See Intox. Liquors 1—2.

[Owing to the care which has been bestowed upon the following case both in its preparation and in the elaborate judgment rendered by Mr. Justice Tait, we have thought it best to report it at length ; although the case will eventually find its way to the Privy Council.]

Trade Mark—Good-will—Injunction to Restrain Use of Name.

TAIT, J.—This case comes up for judgment as well upon the merits of a preliminary plea and demurrer filed to the plaintiffs' petition for injunction as upon the merits of the petition itself. The case was argued at great length before me recently. It is very voluminous and presents some points of difficulty, and, although I have been greatly assisted in investigating it by the elaborate and able arguments laid before me, both orally and in writing, by the counsel engaged, still as the case was entirely new to me, until the argument took place, a careful examination of it, especially the evidence, has necessarily involved considerable labor.

The following are the circumstances that have given rise to this litigation:

About 1880, Mr. William Johnson began doing business here as agent for Lewis Berger & Son (Limited), of England and J. W. Masury & Sons, of Brooklyn, N. Y., in manufacturing and selling paints in their names ; this business was sold to James Goodall in April 1884, who did business under the name of Wm. Johnson & Co. Goodall wound up and liquidated the business by selling the manufactured goods to John Baillie. and the plant and fixtures in July, 1884 to W. B. McGinnis, who did business under the same name of Wm. Johnson & Co., It appears, however, as if during the time of Goodall & McGinnis the business was pratically William Johnson's, anyway he purchased it from McGinnis in October, 1884 and continued it under the same name until the 10th January 1889, when he sold it to the Johnson Magnetic Iron Paint Co. by the deed of sale of that date. It is upon this deed that the case of the plaintiff mainly rests and the dispute between the parties has waxed hot as to the interpretation to be given to its provisions.

By this deed Johnson sold to said company the real estate and premises where he had carried on his business, and also amongst other things.

" 2. The receipts and recipes for articles manufactured by the said William Johnson which he binds himself forthwith to communicate to the said company, together with the full instructions and secrets necessary for the manufacture of the said articles. "

" 4. The good will of the business

heretofore carried on by the said William Johnson, either in his own name or otherwise within the Dominion of Canada, together with the lease of the premises now occupied by the said Wm. Johnson in St. John street, in this city with warranty that the rental thereof is paid, except as appears in the said list B."

The deed of sale also contained the following clauses :—

1. "That the said company shall and they do hereby engage the said William Johnson as manager with such powers and duties as may from time to time be delegated by the said directors for the term of five years, and to be accounted from the fifth of November last (1888) at a salary from said date of three thousand dollars per annum, for the first three years, and at three thousand five hundred dollars per annum for the remaining two years : it is, however, especially agreed that the said directors shall have the right at any time to terminate this agreement, by giving to the said William Johnson six month's notice in writting, and he shall have no claim for damages on account of such termination."

2. "That the said William Johnson shall not engage in any business for the sale or manufacture of paints, oils and colors, or in any business similar to that carried on by the said company, within the Dominion of Canada, for the term of five years, to be accounted from the first day of November last, unless sooner dismissed from the said company as aforesaid, when the said William Johnson shall be at liberty to engage in such business in his own name."

The name of the Johnson Magnetic Iron Paint Co. was subsequently changed to the "William Johnson Company."

On March 2nd, 1892. The William Johnson company sold to the plaintiffs, a newly organized company, for $188.-384.05, its land, buildings, stock, machinery, etc., and in addition the following :—

1. The good will of the business of the said The William Johnson Company, including the good will acquired from William Johnson under deed of sale of date the 10th of January, 1889, in favor of the said The Johnson Magnetic Iron Paint company passed before McLennan, N. P., the purchasers acknowledging to be aware that the engagement of the said William Johnson as mentioned in said deed is now cancelled, and that the said William Johnson is entitled to resume business in his own name, as provided in said deed."

2. "All formulæ, brands, labels," (of which latter over two millions were transfered) "and trade marks registered or otherwise in possession of or owned by the vendors, etc. (Plaintiffs' exhibit No. 2.)

The plaintiffs were organized for the purpose of taking over the respective businesses of "The William Johnson Co." the "A. G. Peuchen Co.," and of Messrs. Fergusson, Alexander & Co., all engaged in the paint trade, and since their organization plaintiffs have carried on business throughout Canada as paint manufacturers. William Johnson having left the employ of the Wm. Johnson Co., at the time of the sale to the plaintiffs, commenced business at the same time in Montreal in his own name at Mill street, and continued such business until he sold out to the defendants, who were organized in England for the purpose of taking it over, and who have been carrying it on since December last in the Dominion of Canada in their corporate name.

The plaintiffs, complaining that the

defendants, by the adoption of their corporate name and by using the trade names and marks, cards and labels formerly used by the old business, whose good will plaintiffs acquired, and by other fraudulent devices set forth at great length in their petition, have misled and are misleading the public into the belief that the defendants are really these old businesses and that they are successors thereof, and have acquired the good will thereof, and that the goods which they, defendants, manufacture and sell are really manufactured by plaintiffs—by all which they, plaintiffs, have been, in a great measure, deprived of the good will they so purchased, and have been greatly damaged—presented a petition to a judge in chambers on the 26th day of July last, for a writ of injunction under Art. 1033, (*a*) C. C. P., supported by an affidavit of their managing director, deposing in general terms that the allegations of the petition were true, and, after hearing the parties, a writ was ordered to issue, ordering defendants "to refrain from "and to suspend all acts, proceedings, "operations or works respecting the "matters in dispute in this cause, and "more especially all and every the "acts, proceedings and operations "mentioned in aforesaid petition and "its conclusions."

This order meant that defendants were enjoined from doing everything which plaintiffs, by the conclusions of their petition, asked that they might be restrained from doing, and without at the present repeating in detail all these things, I may say that, amongst others, defendants were enjoined from doing business in the Dominion of Canada under their corporate name; from prefixing the word "Johnson's, to the terms and designations employed by them, as descriptive of the paints and colors manufactured and sold by them, or otherwise using the word in the transaction of their business; from using and circulating certain cards and labels, and from advertising for sale certain paints under certain descriptions which plaintiffs claim they alone can use.

The defendants moved to have this provisional injunction dissolved before the learned judge who granted it, but the motion was refused.

His Honor then disposed of the preliminary pleas, which were dismissed.

Proceeding now to the real merits I will take up first that part of plaintiffs' demand which asks that defendants be restrained from using their corporate name. It is claimed that it is so similar to those of William Johnson, William Johnson & Co., and the William Johnson Company as to lead persons using ordinary care into the belief that defendants are either William Johnson, or one of these companies, or the successors in business, and the purchasers of the good will of some one of them, and that on account of this similarity plaintiffs have been, to a great extent, deprived of the benefit of the good will of William Johnson and of these firms by these persons, believing defendants to be successors of these parties, and purchasing large quantities of goods from them, which they would otherwise have purchased from plaintiffs, causing plaintiffs $5,000 damage. Plaintiffs further assert that defendants fraudulently adopted the name in order to induce such belief, which they have succeeded in doing. They, defendants, specially deny all these allegations; they say that Johnson, after recommencing business, did not claim to be the successor of the old business, that he succeeded in establishing a large business

independently without seeking to rely on connections of the old firm ; they deny that the similarity is such as to be misleading, or that it ever did mislead or that it was adopted with that view ; they say that it was well made known in every way by defendants that they had no connection with plaintiff's or with the business of Wm. Johnson & Co., or the William Johnson Company. I may here mention that Johnson at first opposed the sale to the Johnson Magnetic Iron Paint Co. of 10th January, 1889, but on being paid dollar for dollar on its par value of his stock in the William Johnson Co., amounting to $93,500.00 while the other stockholders only got 50 cents, he withdrew his opposition, and addressed a letter to the president of that company, dated February 9th, 1892, saying : " I beg to say that I " understand that I have no right to go " into or carry on business in the name " of William Johnson & Co. and I now " expressly bind myself not to do so," and then he proceeds to say that he ratifies and consents to the sale. The Johnson Magnetic Iron Paint company therefore became, with the consent of Johnson, proprietors of the good will of the business, previous to 10th January, 1889, carried on by Johnson either in his own name or otherwise within the Dominion, and he expressly bound himself that he would not do business under the name of Wm. Johnson & Co.

Johnson, however, having been dismissed as manager, after about three years' service, had the right, under the terms of the deed of 10th January, 1889, to engage in the business of selling and manufacturing paints—that is in a business similar to that carried on by him previous to the execution of that deed, not, of course, the identical business he had sold out, but a similar business, and this he had a right to do in his own name and he had a right, of course, to sell to defendants his new business, with the good will thereof and the privilege of using his name. I have been referred to a great many cases and authorities where the courts have restrained parties from violating contracts disposing of good will and from imitating trade names and marks, to many of which I shall have occasion to allude. What is covered by the sale of the good will of a business is well settled. A couple of citations will suffice :—

Lindley-Partnership, pp. 444-445.—"The right to continue the use of a partnership name is frequently the most important element in the good will and is governed by principles similar to those applicable to it. The purchaser of the good will of a business acquires the right not only to represent himself as the successor of those who formerly carried it on, but also to use the old name and to prevent other persons from doing the like."

Churton, vs. Douglas. Johnson's Rep. p. 174—In that case the plaintiffs and defendants had done business in partnership under the name of John Douglas & Co. Defendant retired from the firm and sold his interest in the good will to his partners, the plaintiffs, who continued the business in their own names with the addition "late John Douglas and Co." The defendant having started a business of the same kind, under the firm name of John Douglas and Co., was enjoined from the use of such name. On p. 188, Lord Hatherlay says :

"Good-will, I apprehend, must mean every advantage, if I may so express, it, as contrasted with the negative advantage of the late partner not carry-

ing on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business.

" The name of a firm is a very important part of the good will of the business carried on by the firm. And when you are parting with the good will of a business, you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it."

These principles were approved and applied by our Court of Queen's Bench in the case of Thompson vs. MacKinnon (3, Dorion, 12). Plaintiffs, besides citing Churton and Douglas, also cited in this branch of the case Myers vs. Kalamazoo Buggy company (54 Mich.) Lee and Haley (5 Ch., App. 155), and Holmes, Booth and Hayden vs. the Holmes, Booth and Atwood Manufacturing company (37 Conn. 278). In Churton and Douglas the defendant, who, as already stated, sold his good will to his partners, recommenced business next door to the old firm, taking the identical name, and not only this, but he clandestinely got away three of the principal employes of the old firm and took them into the new business, and sent out letters intended to lead people to believe that he was carrying on the old business.

Myers vs. Kalamazoo Buggy company was also a case where partners sold out their interest in the good will of a business called the Kalamazoo Waggon company, after which they started a rival business in the immediate vicinity of the old, under the name of the Kalamazoo Buggy company, which name they were restrained from using. The other cases were not ones where there was any contract between the parties.

In Lee vs. Haley the plaintiffs did business at Pall Mall under the name of "The Guinea Coal company," and their business had acquired a considerable reputation. The defendant, who had been their manager, set up a rival business in Beaufort buildings, Strand, under the name of "The Pall Mall Guinea Coal company," but shortly afterwards removed to No. 46 Pall Mall. This was in August, and in November following plaintiffs, finding that many persons had been misled into giving orders to the defendant in the belief that his concern was that of the plaintiffs, filed a bill to restrain him from trading under the above style. Vice-Chancellor Mallins granted an injunction restraining the defendants from using the name "The Pall Mall Guinea Coal company" in Pall Mall, and in Appeal this judgment was maintained.

Gifford, L. J., remarked : " The defendant first of all sets up as " The Pall Mall Guinea Coal Company " in Beaufort buildings. That was not found, and indeed, was not calculated, to induce persons to deal with him under the supposition that they were dealing with the plaintiffs. All persons, of course, going to Beaufort buildings would know perfectly well that they were not dealing with the company carrying on their business in Pall Mall. He then proceeds to set up under the same name in Pall Mall, and that is the proceeding which is now complained of. " * * * I quite agree that they have no property in the name, but the principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a

fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. * * * When he removes from Beaufort buildings to Pall Mall, the circular which he sends to his customers of the old firm is headed, "The Pall Mall Guinea Coal Company," and upon a strip of paper pasted over the original address, so that it cannot be seen where the original place was, are the words, "Removed to No. 46 Pall Mall." I say that this was calculated, and I believe intended, to induce persons to believe that the business which the defendants carried on was the plaintiffs' business, removed from one part of Pall Mall to another. It was under these circumstances that the injunction issued, the defendant taking the whole name by which plaintiffs were known and trying to make people believe his business was plaintiffs. And even then the injunction was limited to restraining defendants from doing business in Pall Mall. He was at liberty to use the name he had so taken in any other street in London, and, therefore, had he remained in Beaufort buildings, he would not have been restrained.

In the case of Holmes, et al., the facts were that three men named Holmes, Booth and Hayden lent their names to a corporation which was organized under that name, in which they were shareholders, and the corporation had their manufactory at Waterbury, and stores in Chambers street, New York, and Federal street, Boston. Holmes & Booth had been long in the brass business and their skill was well known. Holmes & Booth and others formed a new corporation to carry on the same business, and called it the Holmes, Booth & Atwood Manufacturing Company. The latter corporation also carried on business at Waterbury and opened stores on the same streets in New York and Boston. And upon injunction proceedings it was held that where a corporation, with the consent of its principal stockholders, has embodied their name in the corporation name, the right to use the name so adopted will continue during the existence of the corporation and a rival company subsequently formed and embracing such stockholders will have no right to use the name of such shareholders so as to mislead those dealing with them into the belief that the two companies are the same.

The judge said: "If these parties allowed the use of their names thereby receiving, as they might have done, and probably did, a consideration on the enhanced value of their stock, why does not the law imply an agreement that the name shall continue so long as the corporation shall exist? Or, if they, in connection with others, held out to the world, by the use of their names, that the corporation was entitled to the benefit of their skill and experience, what moral, equitable or legal right have they now to withdraw, or otherwise impair the right to the use of their names?"

I think that even these cursory remarks respecting these cases show that they differed materially from the present.

I may say here that I do not find that respondents had any fraudulent intention in getting incorporated or in assuming the name they took. We must always keep before us in this case the fact that Johnson had a right to start a rival business to plaintiffs here under his own name and that he

did so at No. 31 Mill street. He thereupon sent out a circular stating that The William Johnson Company had sold its business to the plaintiffs and that he had severed all connection with them, and that he had started a new business at Mill street. He did not originate the idea of a joint stock company, but, no doubt, after considering it, acquiesced and aided in its formation by paying expenses of Albatt's trip here and of organizing, etc. He certainly had a right to allow his name to be used and the company, I think, was entitled to the full benefit of the name William Johnson, and all that it might suggest to the trade owing to Mr. Johnson's long experience in the paint business.

The name William Johnson (limited) appears to have been objected to by the authorities at Somerset house, and the name of William Johnson & Sons (limited) suggested and accepted. The prospectus points out distinctly that they have bought Johnson's business as carried on at Mill street, Montreal and the good will of it. Perhaps some exception may be taken to the words: "And the company will secure from the outset all the advantages of the valuable and extensive connections established by Mr. Johnson as the result of his twenty years' experience in all branches of his trade." as being open to the interpretation that they intended to appropriate connections made by the old firms whose good will passed to plaintiff; but, on the other hand, Mr Allbatt is not proved to have known Mr. Johnson's previous contracts in favor of the Johnson Magnetic Iron Paint Co. or the William Johnson Company, and in any case plaintiffs could not expect that when they allowed Johnson to become their rival in business, that he was to hide his identity and renounce to the high position he had gained in the trade. His name was well known, and he would, or any one having the right to use his name would, naturally and legitimately reap the benefit of his long experience, and plaintiffs must have expected that many who had previously dealt with him and knew him to be the brains of the old business would voluntarily prefer to trade with a business conducted by him. Neither this prospectus nor the circular (B 3) contains anything to mislead the public in the belief that the defendants were going to carry on the identical business which had been sold, but they both assert that defendants have acquired the business theretofore carried on by William Johnson at Mill street, Montreal, and are going to carry it on under his management. It is true, the circular says: "No one but us has the right to use Mr Johnson's name." This may or may not be an erroneous statement from a legal standpoint, but I do not find from this or any of these statements or circumstances surrounding the incorporation of this company that it was a fraudulent attempt to pass themselves off for the W. J. & Co., or The William Johnson Co. I really cannot see that it would be much advantage for them to do so. They have William Johnson, and his name and management are of much more importance than the old names.

Now, in considering the similarity of the names, I should, perhaps, remark that in their original petition the William Johnson Company added to its name the word "(limited)." This was an error. The company is not entitled to that word—and it is important that this should be pointed out, as of course its use increases the similarity between the names. The error has been corrected in the amended petition.

The defendants never did business as William Johnson Ld.; they did it under the name of The William Johnson Company, but soon abandoned that name. Of course they are entitled to the benefit of being the successors of these businesses. It does not strike me, however, that the evidence affords much proof that they attached much importance to calling themselves "late William Johnson & Co." or "late William Johnson Company," or successors to these firms. Of course I am not now speaking of the word "Johnson's" as applied to describe paints. It is true that some letters have been sent to the liquidator of The William Johnson Co., which were intended for William Johnson, or defendants, but there is no evidence that plaintiffs have suffered by defendant's name being mistaken for plaintiffs'. And I don't think that the sending of a few letters to the old company is of sufficient importance to justify the court in restraining the defendants from using their corporate name. The evidence of plaintiff's witnesses appears to me to go to show that the name William Johnson would be quite as much calculated to cause confusion as the defendant's name. The defendants could not take the names of the William Johnson & Co. or William Johnson company, and it seems to me, having regard to their right to use the name William Johnson, that the name they have taken was fairly taken, and is not so similar to William Johnson & Co. or William Johnson Company as to justify restraining its use. (Turton v. Turton, 42 Ch., Div. 128). This is not the case of a man selling his good will without reservation and starting again next door, or in the immediate vicinity under the old name with the intention of passing his business off as the old one as in the two first cases I have referred to, or of a company appropriating the name under which a previous company was known and moving into the same street and pretending to be the old company, as in the third case cited. Or of men after giving their names to a corporation under an implied contract that the name should continue, giving their name to another company in violation of such contract, as in the Holmes & Booth case.

Taking all things into consideration I am of opinion that this part of plaintiffs', demand should be rejected. I will now take up that portion of plaintiffs' demand which asks that defendants be enjoined "from prefixing the word 'Johnson's' to the terms and designations employed by defendants, as descriptive of the paints and colors manufactured and sold by them, and from using the words 'Johnson's or Johnson' to describe, distinguish or designate goods manufactured or sold by them, or otherwise in the transaction of their (defendant's) business."

To this defendants plead (1), acquiescence; (2) their right to use William Johnson's name and the name Johnson, as an incident to that right; (3), that plaintiffs have no right to use William Johnson's name.

Johnson, while he did business as William Johnson & Co., manufactured and sold a great number of paints and colors, the designation of which upon the labels, catalogues, price lists, etc., used by him began with the word "Johnson's." These paints, at the time he sold out his business in 1889, had, under the name of "Johnson's" paints, become well known and in considerable demand.

The manufacture and sale of these paints, so called "Johnson's," were continued by the Johnson Magnetic Iron Paint Company and William Johnson Company. And when defendants

acquired their rights, paints known by this name has established a great reputation. They were asked for by that name, and when it appeared it was all purchasers wanted. Defendants themselves say on the back of one of their price lists (B. 23), as follows:—"The term 'Johnson's' has become a household word throughout Canada, and 'Johnson's colors' are everywhere recognized as standard for excellence and purity."

And defendants in the cross-examination of the plaintiffs' witnesses have brought out in a striking manner the value of the name as applied to paints; the object, I suppose, being to show that the similarity in the names of the firms was nothing, but that the name "Johnson's" was everything. Take, for instance, Mr. Cottingham's evidence (p. 10 and seq.):

"Q. Now. Mr. Cottingham, these paints have their value, if at all, as far as the market is concerned, in the fact that the word 'Johnson's' is on them?

"A. Yes; I believe so.

"Q. And the word 'Johnson' is of more importance in effect than the fact that they are made by the Canada Paint Company or by the William Johnson Company?

"A. Yes; certainly,

"Q. And the public generally know these goods as 'Johnson' goods?

"A. Yes; they do.

"Q. And they know 'Johnson's' goods not so much because they have been manufactured by William Johnson & Co., but beacause they were put on the market as 'Johnson's' paints?

"A. That is it.

"Q. And if these paints had been manufactured by your firm, for instance, twenty years, and been put on the market as 'Johnson's' paints they would have got their reputation as 'Johnson's' paints although they were manufactured by your firm?

"A. Yes.

"Q. So that the question of the firm name and manufacture is of small importance as regards the sale of the goods?

"A. I think so."

Now I can entertain no doubt upon the evidence that the word "Johnson's" as applied to these paints and colors manufactured by William Johnson and William Johnson & Co., who, as was well known to the trade, alone used this name, had acquired a secondary signification or meaning; that it had become what is called in the cases the trade denomination of the paints made by William Johnson & Co., and became the property of that firm; that its use was one of the advantages appertaining to that business which passed at the time of the sale of the good will of it to plaintiffs, who, as the proprietors thereof, can protect their right to its use by injunction.

The cases on the subject are too numerous and the reports too lengthy to attempt to review them. The Glenfield Starch case is one in point.

His Honor quoted from this and some other cases, concluding with McKinnon vs. Thompson.

These authorities, I think, dispose of defendant's contention, which was so much that the word "Johnson's" did not become a trade denomination of great value, as it was that Johnson could not be enjoined from using his surname as it was an incident to his right to use his name. I think the reasoning is fallacious. Johnson has the right to do business in his own name as a rival of plaintiffs, but he does not stand in any better position than any other man named William Johnson would stand. By acquiring

the right to return to business, he did not take back the good will and advantages of the old business which he had disposed of for a valuable consideration. It can't surely be pretended in face of the facts proved and authorities cited that any other William Johnson could have used the name "Johnson's" as applied to paints while the William Johnson in this case, the originator and proprietor of it, was using it—and how could the latter, having disposed of it, give defendants such a right as against plaintiffs, who bought and paid for it. I think it is clear that they cannot use it, as they are doing, in the same way as it was used by William Johnson & Co., and their successors, and that the plaintiffs must succeed on this point.

Plaintiffs further ask that defendants be restrained from using any of the floor paint cards of which plaintiff's exibit 3 is a copy. It is proved defendants issued cards similar to exibit 4, which are headed "Johnson's Floor Paints," and in all material respects precisely similar to exibit No. 3. I don't see any room for argument upon that point, and as cards like No. 3 have been in use for years in the business of which plaintiffs are the successors and proprietors of the good will, I have no hesitation in saying that defendants should be enjoined as demanded.

It is also asked that the use of the cards of which plaintiffs' exibit 5 is a copy, be enjoined. Apart from the words "Johnson's" preceding the words "liquid colors" the only ground for this demand appears to be that the cards contain a lithographic copy of the signature of William Johnson and that plaintiffs made use of the same signature with the addition of the words "& Co." In other words defendants use a *fac simile* of William Johnson's signature, while plaintiffs use on certain labels, of which plaintiffs exhibits 6 and 7 are copies, the *fac simile* of the firm signature of William Johnson & Co.

This is going too far in my opinion, Johnson has, I think, as an incident of doing business in his own name, a right to use a *fac-simile* of his own signature in connection with the advertisements and sale of his own goods. And such a right, I think, must have been contemplated by the parties, and defendants standing in his rights can, in my opinion, use it as they have done. I am not disposed to decide in this case precisely how far plaintiffs can use the name William Johnson, which their auteur gave him the right to use in conducting a rival business, but I am not prepared to say that he has not the right of certifying to the public by his own signature that the goods he sells are of his own manufacture. I think, therefore, that I should refuse to enjoin the use of these cards, except as to the words "Johnson's" prefixed to words liquid colors.

The next demand of plaintiffs is that defendants be restrained from using or circulating any of the travellers' cards, of which plaintiff's exhibit No. 8 is a copy or any other travellers' cards, which may state that plaintiffs are not, or that defendants are entitled to use the name William Johnson. The words used on this card are: "No one else has a right to use William Johnson's name." Now in the deed of 10th March, 1892. Johnson "sold the good will of the business theretofore carried on in his own name or otherwise." This certainly gave the purchasers the right to use his name and it seems to me there are ways in which they may still use it, although the condition happened under which he became entitled to resume business, as for instance, plain-

tiffs are entitled to inform the public that they are the successors of the old business carried on by William Johnson. I think this is a different question from that of certifying to their goods by the *fac-simile* of his signature or of preventing him or defendants using such signature. I am disposed to think the language is too broad and denies a right to plaintiffs which they appear to have. I think the order should go restraining defendants from circulating travellers' cards using these words.

As to that portion of plaintiffs' conclusions respecting the advertisement in the newspaper called *The commercial*, I understand from plaintiffs' counsel that they were satisfied that the advertisement had been inserted by error, and that they would ask no order regarding it.

The plaintiffs further claim that they have acquired the right to use the letters "O. J." in connection with the sale of the color known as "vermillion and vermillionette." It is proved, I think, that William Johnson & Co. and the William Johnson Company manufactured and sold, and that plaintiff's continued the manufacture and sale of a brand of vermillionette of which the letters O. J. have been the distinctive description and the letters X. and XX. being sometimes added to express different grades of the same brand, the paint being the described as O. J. X., or O. J. X. X. Also the O. J. vermillionette became well known under that name, and that plaintiffs and their auteurs are the only ones who have used this designation as applied to vermillionette.

It is perhaps not important to decide whether it was by mistake, oversight or otherwise that the defendants have advertised for sale O. J. vermillion and vermillionette as shown in plaintiffs' exhibit (B. 23, p. 6). If this has been done unintentionally then no harm can be done by enjoining them from using this trade mark in future; but defendants have put forth other reasons justifying their use of it, one being that Goodall and McGinnis used it. But if, as is proved, Johnson used it first and then its use was continued in the business while Goodall and McGinnis were connected with it, and then passed back to Johnson again when he bought from McGinnis, and from him to the "Johnson Magnetic Iron Paint Co." and so to plaintiffs, what right have defendants to call plaintiffs' title in question. As against Johnson, who sold all the advantages of the business, and this mark as one of them, their title is good.

As to the other reason that the letters O. J. is a chemical symbol for vermillionette, I think it is not made out, but, on the contrary, disproved by defendants' own chemist. The authorities cited applied to the proof make it my duty to grant the restraining order asked for in respect to the use of these letters.

With regard to "Johnson's Magnetic Iron Paint," the use of the words "Johnson's" will be restrained, and that is all that can be granted under this head.

The next point is as to the sale of paint by defendants under the name of the "Johnson's Decorators' Pure Lead." The prayer of petition is that defendants' be enjoined "from using in their business any of the labels whereof plaintiffs' exhibit No. 16 is a specimen or from in any way infringing on plaintiffs' trade mark referred to in plaintiffs' exhibit No. 15." This trade mark, which consists of this label, etc., was registered by plaintiffs in March, 1892. Lead paint under the title of "Johnson's Decorators' Pure Lead" was sold by "William Johnson

& Co." and by The William Johnson Co. and became well known.

As already decided, the defendants must abandon the word "Johnson's" prefixed to these words. And as to the labels used by defendants (plaintiffs' exhibit No. 16), I think but one conclusion can be reached and that is the one Mr. Cottingham arrived at when he first saw them, (Entries like exhibits x4 and x5.) He says: "I was in Hill and Forbes' the first time that I saw Johnson's goods and I thought that one was the same as the other until Mr. Hill pointed out the difference and showed me the similarity between the two." He adds that he mistook the one for the other when they were piled on the floor. If an experienced man in that business, living in the city, was mistaken when seeing the goods, how would the ordinary customer escape being deceived. The labels are of the same size. They both have an outside bordor of gold of about the same thickness, with thin inside borders of black and white. The letters are white, mostly on a black ground. Both, and that is of great importance, contain the word "Johnson's," as descriptive of the paint. The whole title of the paint is practically the same; the differences would not be noticed by ordinary purchasers. The title on plaintiffs' label consists of the four words "Johnson's Decorators' Pure Lead," the first two on a curved, the last two on a straight line. On defendants' is consists of the six words "Johnson's Pure Lead for Decorators' Use," written in three paralled straight lines. But the words "for" and "use" on defendants' label are so small and inconspicuous as to be readily passed over, so that the title as it would strike the eye reads "Johnson's Pure Lead Decorators," a mere transposition of the words on plaintiffs' label. The differences are the two different trade marks; the gold oval with white letters on plaintiffs' and not on defendants'; the lithographed signature "William Johnson," and the words "manufactured by" and "beware of imitations. None genuine without above trade mark in red and my signature," which are on defendant's and not on plaintiffs'. These differences are of still less importance from the use of the word "Johnson's" on both paints. This is the most striking feature of each label, and, as proved, is the one to which consumers would pay attention. What the consumer wants, as already shown, is "Johnson's Decorators' Pure Lead," and when he sees the name "Johnson's" on a label in connection with such paint, he would very often be satisfied and would scrutinize the label no further. Taking this view, I must restrain the defendants in this particular as praved for.

Damages in this case are laid at $5,000, but no specific damage is proved. In cases of this kind such proof no doubt is very difficult. It is claimed that plaintiff's business has fallen off. Mr. Munro testifies that the turnover of the William Johnson Company, Fergusson, Alexander & Company, and the Peuchen Company, which amalgamated into the Canada Paint Company, was $850,000 a year, and that notwithstanding the greater efficiency and economy of having the three concerns under one management, and other advantages, plaintiffs' turnover from July 1st, 1892, to June 30th, 1893, amounted only to $668,000 (pp. 44 and 45). It is said that as the Peuchen business has increased, and the Fergusson-Alexander business held its own (pp. 59, 60-68), the falling off must of necessity have been in the

William Johnson Company's business. Of course it is not pretended that the whole of this falling off is attributable to unlawful competition, but that such competition must have greatly diminished plaintiffs' business. But this evidence is entirely speculative, and cannot justify a judgment for damages such as demanded. Does it follow, however, that because specific damages cannot be proved that plaintiffs are not entitled to anything at all ? Here the plaintiffs' rights have been invaded in the manner already pointed out, and they have no doubt suffered from such invasion, and from the trouble and expense occasioned thereby. Proof of specific items of loss is from the nature of the case difficult, but it seems that even where that cannot be done the court may give something for the violating of the right.

Mayne on damages (3rd Edn.) p. 6 :—

" Setting aside this exceptional class of cases, it may, however, be broadly stated that every infringement of a right involves a claim to nominal damages, although all actual damage is disproved." * * * See also p. 488.

Sebastian on Trade Marks, p. 143 :—"For damages to be recovered it is not necessary that special damage should be proved ; it is sufficient to show that the plaintiff's right has been invaded, in which case some damages, even if only nominal, will be given." See also p. 99, and the case Blofeld vs Payne B. & Ad. 410.

I will therefore allow damages to the extent of $200.

My judgment, therefore,. is that defendants are enjoined :

(1). From prefixing the word "Johnson's" to the names of paints and colors manufactured or sold by them, or otherwise using it to describe such goods.

(2). From circulating any floor paint cards like petitioners' exhibit No. 4, or colorable imitations of the cards used by petitioners, of which their exhibit No. 3 is a copy.

(3.) From circulating travellers' cards containing the words following, to-wit : " No one else has a right to use William Johnson's name. "

4. From using the letters " O J " whether alone or in combination with other letters in connection with the sale of the color known as " Vermillionette ;" or from otherwise infringing petitioners' trade mark, registered 5th April. 1892, copy of which is filed as Petitioners Exhibit Number Ten.

5. From using any of the labels whereof Petitioner's exhibit number 16 is a specimen or from otherwise infringing petitioners' trade mark registered 5th April, 1892, copy of which is filed as Petitioners' Exhibit Number Fifteen.

The whole under pain of all legal penalties : and we do dissolve said injunction and relieve defendants from obedience thereto, as respects all such matters and things as are not by the present judgment enjoined upon them, and I adjudge and comdemn defendants to pay plaintiffs the sum of $200-00 and costs as of an action over two hundred dollars.

Canada Paint Co. v. *Johnson & Son*, Montreal. Superior Court, November 11th, 1893. Tait, J.

Province of Quebec, District of Iberville. } COURT OF QUEEN'S BENCH.

(CROWN SIDE.)

CORAM :—HON. MR. JUSTICE CHARLAND.

St. John, October 26th, 1893.

CHARLES CURLESS,

APPELLANT ;

&

ALPHONSE F. GERVAIS,

RESPONDENT.

Held : 1. That the Crown, at common law, cannot be a party to a suit entered in the name of another, except when represented by the Attorney-General or Solicitor-General, or acting through an officer duly empowered by statute to sue for it, as for example, in Canada, the Minister of Justice ;

2. That such prerogatives of the Crown as the exemption from payment of costs, the giving of security, are of a restrictive character, and can only be exercised by the Crown or its duly appointed law officers at common law, or by statute ;

3. That the power granted to an Inland Revenue officer to act and sue for the Crown cannot be extended to an informer under the Petroleum Inspection Act, Chapter 102, Revised Statutes of Canada ;

4. That the Crown cannot exempt itself from obedience to the laws ;

5. That, under the Petroleum Inspection Act, the recovery of fines having been abandoned to private subjects, the informer is subjected to the usual rules of procedure, directing him to pay costs, give security, etc. ;

6. That any appellant, under section 879 of the Criminal Code 1892, enacting 51 Vic., cap. 45 and 52 Vic., cap. 45, which were in force at the time of the present appeal, whether he be the accused or the complainant, whose information has been dismissed with costs, must give security for costs, before taking his appeal, this giving of security being a *sine qua non* condition thereof ;

7. That, *semble*, as a rule, security being given for payment of the fine and costs of both the Courts, any appellant should give security, even when his complaint has been dismissed without costs in the Court below ;

8. That, in the present case, the District Magistrate Loupret having dismissed the information with costs, which means a condemnation to pay a sum of money default in the payment of which entails imprisonment of the appellant, the latter was bound to give security for costs, and as he did not, his appeal should be dismissed with costs ;

9. That a fee of twenty dollars, under the circumstances, the trial lasting a day, is reasonable ;

10. That default to give security, can be objected to at any time before trial.

Remarks.—This was an appeal taken from a judgment of the District Magistrate of Iberville, Charles Loupret, dismissing on June 1892, an information against respondent, for having in his possession empty coal oil barrels with brands, etc., not obliterated, there being no proof that the brands had ever existed, the informant not knowing the letters and figures composing the brands, or whether the defendant had himself emptied the barrels. The accused is an empty petroleum barrel dealer on a large scale, and having emptied none of the barrels complained of, and a six months limitation extinguishing the fines, he could not be condemned to fines which were probably extinguished by limitation and which at any rate he did not incur.

The information was laid down, in the following terms :

" By Charles Curless, of the city of Ottawa, in the Province of Ontario, preventive officer of and employed in Her Majesty's Department of Inland Revenue, in and for the Dominion of Canada, that at the town of St. Johns, in the district of Iberville, on or about the ninth day of April, one thousand eight hundred and ninety-two, he, the said Alphonse Gervais, doing business, under the name of Charles O. Gervais & Frère, did then and there unlawfully have in his possession about sixty-six packages commonly called barrels, which had previously contained petroleum, and all of which said packages commonly called barrels, had been emptied, and upon all of which said packages commonly called barrels, marks and brands had been placed pursuant to the requirements of the Petroleum Inspection Act ; which said marks and brands had not been obliterated as required by the provisions of the said Petroleum Inspection Act."

At the hearing, in October, 1893, the respondent raised several objections to the appeal, as taken, and the same was dismissed on the grounds above stated.

Prescott W. Sharpe, for the Appellant.

Honoré Gervais, for the Respondent.