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MONTHLY LAW DIGEST

AND REPORTER.

Vol. I. JULY, 1892. No. 7.

Acceptance of Contract by Correspondence—See Contracts 4.

Accident Insurance — See Insurance, Accident.

Accommodation Endorser — See Bills and Notes 1.

Acquiescence in Judgment — See Appeals 1. 2.

ACTION FOR GOODS SOLD AND DELIVERED.

Evidence.

To an action for goods sold and delivered the defendant pleaded that the goods were sold, if at all, to the defendant by the Minudie Mining and Transportation Company; that the plaintiff received from the company drafts accepted by them in payment for the goods; that he subsequently recovered judgment against the company for the price of the goods; and that the defendant, believing the goods to have been sold by the plaintiff to the company and by the company to him, paid the company for them.

The evidence showed that the goods were ordered by the defendant, through his agent C., and were charged, sent to, received by, and used by him. There was a written order for the goods in the defendant's own writing, which was filled by plaintiff in the ordinary course of business. The defendant's agent C. was also agent of the company, and as such ordered goods on their account from the plaintiff and others. He informed the plaintiff that the company would pay the defendant's bill, and, acting on the information, the plaintiff included the amount of the bill in a draft on the company. The draft having been refused by the company, the plaintiff wrote a letter claiming that his account was against the company only, and that the goods were purchased by the company's agent for the company.

On the issues raised on these facts, judgment was given in the County Court in favour of the defendant.

On appeal the judgment was reversed with costs. *Peters* v. *Seaman*, Supreme Ct. Nova Scotia, May 1892.

Action to Account—See Substitution.

ADJOINING LAND-OWNERS.

Excavations — Relation of Master and Servant — Independent Contractors.

(1) A person who is told by an adjoining land-owner that a proposed excavation for a building would be made in the usual way by removing the dirt "in sections," and walling up one section before another was opened, is entitled to rely upon such representations, at least until a reasonable opportunity has been given him to take measures for the protection of his building; and where, after one section has been built substantially as promised, the removal in sections is abandoned, and the dirt is all taken out at once, thereby occasioning the fall of the said building only a few hours afterwards, it cannot be said as a matter of law that such opportunity was given.

(2) The fact that the removal of earth in sections for the foundation of a building involves some additional expense, and lessens in some slight degree the strength of the foundation wall, but not to such an extent as to impair its utility, does not excuse the failure to remove the earth in this manner, where it is necessary for the safety of an adjoining building.

(3) A company which contracts for an excavation for the foundation of a building, to be made as the company's

engineer should direct, any one refusing to obey his orders to be discharged by the contractor, is liable for damages to adjoining property, resulting from the negligent manner in which the excavation is made.

Sherwood, C.J., and Gantt, J., dissenting. *Larson* v. *Metropolitan St. Ry. Co.*, Supreme Court of Missouri, May, 1892.

ADMISSION TO PROBATE—See Wills.

ADMISSIONS OF AGENT — See Insurance 4.

ADMISSIONS—See Insurance 13.

AGREEMENTS — See Appeals 1. 2 — Bills and Notes 3.

APPEAL.

1. ACQUIESCENCE IN JUDGMENT — JURISDICTION — 36 V., C. 81 P. Q.— CHARGES FOR BOOMAGE — AGREEMENTS — RENUNCIATION TO RIGHTS— ESTOPPEL BY CONDUCT — RENONCIATION TACITE.

In an action in which the constitutionality of 36 V., c. 81 (P. Q.), was raised by the defendant, the attorney general for the province intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the attorney general's intervention, the defendant appealed to the Court of Queen's Bench (appeal side), but pending the appeal, acquiesced in the judgment of the Superior Court on the intervention and discontinued his appeal from that judgment. On a further appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench on the principal action, the defendant claimed he had the right to have the judgment of the Superior Court on the intervention renewed.

Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned, the judgment on the intervention of the Attorney General could not be the subject of an appeal to this Court.

F. Mc. C. brought an action against G. B. for $4,464 as due to him for charges which he was authorized to collect under 36 V., c. 81, P. Q., for the use by G. B. of certain booms in the Nicolet river during the years 1887 and 1888. G. B. pleaded that under certain contracts entered into between F. Mc. C. and G. B. and his *auteurs*, and the interpretation put upon them by F. Mc. C., the repairs to the booms were to be and were in fact made by him and that in consideration thereof he was to be allowed to pass his logs free; and also pleaded compensation of a sum of $9,620 for use by F. Mc. C. of other booms and repairs made by G. B. on F. Mc. C's booms and which by law he was bound to make.

Held, reversing the judgment of the Court below, that as there was evidence that F. Mc. C. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration for the repairs made by him to the piers, &c., F. Mc. C. was estopped by conduct from claiming the dues he might otherwise have been authorised to collect.

Held, further that even if F. Mc. C.'s right of action was authorised by the Statute the amount claimed was fully compensated by the amount expended in repairs for him by G. B.

Appeal allowed with costs. *Ball* v. *McCaffrey*, Supreme Court of Canada, April 1892.

2. ACQUIESCENCE IN JUDGMENT — ATTORNEY AT LITEM — AGREEMENT NOT TO APPEAL—BUILDING SOCIETY—C. S. L. C. c. 69—BY-LAWS—TRANSFER OF SHARES—PLEDGE—ART. 1970, C.C. — INSOLVENT CREDITOR'S RIGHT OF ACTION—ART. 1981, C. C.

By a judgment of the Court of Queen's Bench the defendant society were ordered to deliver up a certain number of their shares upon payment of a certain sum. Before the time for appealing expired the attorney *ad litem* for defendants delivered the shares to the plaintiffs' attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken, before the plaintiff's attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment:—

Held, that the appeal would lie.

Per Taschereau, J., that an attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken.

A by-law of a building society (the appellants) required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P., a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Banque Ville Marie as collateral security for an amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted to the appellant society in a sum of $3,744, for which amount under the by-law his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares held by the bank. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the bank. The society claimed that the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side) and restoring the judgment of the Superior Court, that the payment by the society of the bank's claim annulled and cancelled the transfer made by P. in fraud of the company's rights, and that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society; Fournier and Taschereau, JJ., dissenting.

Appeal allowed with costs. *La Société Canadienne-Française* v. *Daveluy*, Supreme Ct. of Canada, April 1892.

APPLICATION FOR INSURANCE, BINDING FORCE OF APPLICANT'S ANSWERS—See Insurance 12.

APPURTENANCES, WHAT ARE — See Lien.

ARBITRATION—See Insurance 6.

ASSAULT WITH DEADLY WEAPON—See Criminal Law 2.

ASSESSMENT—See Good-will.

ASSESSMENT, NON PAYMENT OF — See Insurance 18.

ASSESSMENT, NOTICE OF—See Insurance 19.

ASSIGNMENT.

INSURANCE POLICY—DEPOSIT — FOREIGN LAW.

A domiciled Irishman insured his life with a Scottish Life Insurance Company. He then deposited the policy with a creditor also a domiciled Irishman, in security of debt. Subsequently he executed in Ireland an assignment of the policy in favour of another creditor, also a domiciled Irishman, and the assignation was intimated to the Company who had at that time no knowledge of the deposit of the policy. The assignee at the time he took the assignment knew that the policy had been deposited with the first creditor.

The insured died and a competition took place for the contents of the policy in the Courts of Scotland, between the depositary and the assignee.

Held, that the validity of the transference must be determined by the law of that contract, *i. e.*, by the law of Ireland, and after admission as to that law, that the depositary must be preferred. *Scottish Provident Institution* v. *Robinson & Newett et al.*, 29 Scot. Law Rep. 733.

ASSIGNMENT FOR BENEFIT OF CREDITORS—See Insolvency 1.

ATTORNEY AD LITEM—See Appeals 2.

BANKS AND BANKING.

1. PAYMENT OF FORGED ORDER — RECOVERY OF AMOUNT PAID.

A forged order for the payment of money drawn on plaintiff bank, was indorsed in blank by the forger, and was discounted by the defendant company, and by it indorsed to its correspondent "for collection." Defendant's correspondent presented the order to plaintiff, by whom it was paid, and the money was remitted to defendant. It was held that defendant, by indorsing the forged instrument, gave to it the appearance of a genuine transaction, and plaintiff was entitled to recover the amount so paid. *First National Bank* v. *Indiana National Bank*, Appellate Court of Indiana.

2. NEGOTIABLE SECURITIES — DEPOSIT OF SECURITIES BY BROKER — AUTHORITY OF BROKER TO PLEDGE — PLEDGE OF SECURITIES WITHOUT AUTHORITY — HOLDER FOR VALUE AND IN GOOD FAITH.

A person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who had none.

A broker in fraud of the owner pledged negotiable instruments together with other instruments belonging to other persons with a bank as a security en bloc for an advance. The bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had any authority to deal with them, and made no inquiries. The broker having absconded the bank realized the securities:

Held, reversing the decision of the Court of Appeal (1891, 1 Ch. 270), that there being as a matter of fact no circumstances to create suspicion the bank was entitled to retain and realize the securities, having taken negotiable instruments for value and in good faith.

The decision of this House in Earl of Sheffield v. London and Joint Stock Bank (13 App. Cas. 333) turned entirely upon the special facts of that case. *London Joint Stock Bank* v. *Simmons* [1892], A. C. 201.

3. FRAUDULENT DETENTION OF MONEY BY CUSTOMER'S CASHIER — UNAUTHORIZED OVERDRAFT — LIABILITY OF BANK.

Where in pursuance of an arrangement between the appellant bank and the local government, the registrar-general opened an account which, to the knowledge of the appellant, was simply for the purpose of the daily lodgment of the collections of his department and the weekly transferring by his cheque of such lodgments to the to the treasury; and the cashier sent to lodge such moneys continuously kept back a part thereof, concealing his fraud by means of forged receipts by a fictitious clerk of the bank, whereby the weekly cheques of the registrar-general in favour of the treasury resulted in overdrafts to the extent of £6127, of which he was ignorant, and which the bank omitted to bring to his notice.

Held, in an action by the bank against the Government to recover the same, that the latter was not liable. The Government had only received the amount which had been actually collected and which the bank by honouring the weekly cheques represented that it had received in lodgment. The overdrafts by the Registrar-General were not merely without authority, but were outside the scope and object of the lodgments and of the drawing therefrom. *London Chartered Bank of Australia* v. *McMillan*, [1892] A. C. 292.

BENEFICIARIES—See Insur. 21. 22.

BILLS OF EXCHANGE ACT (ENG.) 1882—See Bills and Notes 3.

BILLS AND NOTES.

1. PROMISSORY NOTE—ACCOMMODATION ENDORSER—JOINT SURETIES.

Under the circumstances of this case, the plaintiff, though last endorser could not recover from defendant, a prior endorser, more than one half the amount of the promissory note sued upon, inasmuch as they were both accommodation endorsers, and so joint sureties, for the maker of the note. *Vallée* v. *Talbot*, (Court of Review), 1 Q. R. (S. & C. C.), 223.

2. NOTE—INDORSER—INTEREST.

Suit cannot be maintained against the indorser of a note, before its maturity, for overdue interest, unless proper demand therefor has first been made upon the maker. *Mt. Mansfield Hotel Co.* v. *Bailey*, Vermont Supreme Court, March 5, 1892.

Notes.

1. The courts of England have never recognized the American doctrine that interest is a mere incident, an outgrowth of the principal, and in many cases follows and is recoverable as such without an express contract. Until 37 Henry, chapter 9, it was unlawful to demand interest even upon a contract to pay it. Since the case of De Havilland v. Bowerbank, 1 Campb. 50, interest has been allowed in England upon express contracts therefor and not otherwise. Where there is such a contract interest stands like the principal in respect to the rights and liabilities of an indorser. Sedgw. Dam. 383; Selleck v. French, 1 Conn. 32; 6 Am. Dec. 185.

2. In Jennings v. Brush Co., reported in 20 Can. L. J. 361, in a learned opinion by McDougall, J., it was held that, where there was an express contract to pay interest annually or semi-annually, it was not different from a contract to pay an instalment of the principal itself, and that notice to the indorser of the maker's default was necessary to charge the indorser with it. In that case the indorser was released from payment of the first two half-yearly instalments of interest for want of demand and notice.

3. PROMISSSORY NOTE — CLAUSE GIVING TIME TO MAKERS—PRINCIPAL AND SURETY — AGREEMENT — STAMP DUTY—BILLS OF EXCHANGE ACT, 1882 (45 & 46 V., C. 61, S. 3, SUB-SS. 1 AND 3, S. 9, SUB-S. 1, SS. 16 AND 19, SUB-SS. 1 AND 2, S. 83, SUB-S. 1, S. 89, SUB-SS. 1 AND 2—STAMP ACT, 1870 (33 & 34 V., C. 97), S. 49.

A document, in the form of a joint and several promissory note by a principal debtor and a surety for 5*l.* payable by instalments, with the proviso that, in case of default in payment of any one of the instalments, the whole amount remaining unpaid should become due, concluded with the following clause — namely, "Time may be given to either without the consent of the other and without prejudice to the rights of the holders to proceed against either party, notwithstanding time may be given to another":

Held, that the clause was a mere consent or license that time may be given to the principal debtor, and that if time be so given the surety will not avail himself of that as a defence.

Held also, that the document was not by reason of such a clause an agreement requiring to be stamped as an agreement, but a good promissory note.

Per Hawkins, J.—Even if the clause in question amounts to an agreement, it is by the Stamp Act of 1870 exempted from stamp duty, the subject-matter not exceeding 5*l.* *Yates* v. *Evans*, 61 L. J. Rep. Q. B., 446.

WILLS, J.—I am of the same opinion. The question is a difficult one, and I should have liked to hear the other side. But they did not appear, and there is no machinery to compel them to appear against their will. In my opinion it is not possible to construe the words of the memorandum as an agreement. The words of the memorandum do not qualify the obligation affected by the promissory note, by which both the makers are liable for all time, until the claim is barred by the Statute of Limitations. The obligation on the part of one of them not to avail himself of the defence resulting from time being given to the other maker, should time be so given, is quite a collateral matter, and does not affect the note at all, and would be wholly inoperative as against an indorsee for value. I should like to have heard it argued whether the words of the memorandum constitute an independent agreement. I rather read the words, not as an agreement, but as a consent at the outset that the holder may, after the note becomes due, give time to the principal debtor without discharging the surety. No agreement in writing is necessary for that; for the law is that if a surety consents to time being given to the principal debtor, he cannot avail himself of that as a defence. No consideration is necessary for such a consent nor need it be in writing, nor, if in writing, does the document require a stamp. It is simply an irrevocable consent on the part of one of the makers not to avail himself of a defence which might be open to him. Such a document does not require to be stamped as an agreement. With regard to the point made by my learned brother, there is, I think, a possible case here: that if the memorandum does amount to an agreement, the subject-matter of it exceeds the sum of 5*l.* But it is not necessary to decide that point. I, however, agree that the document sued on is not an agreement, and does not require to be stamped as an agreement.

BOOMS—See Appeals 1.

BROKER, AUTHORITY OF TO PLEDGE SECURITIES—See Banks 2.

BUILDING SOCIETY—See Appeals 2.

BURDEN OF PROOF—See Insur. 18.

BY-LAWS—See Appeals 2—Insur. 21.

CABLE RAILWAY — See Street Railway Company.

CARRIERS.

SPECIAL CONDITIONS LIMITING LIABILITY—FRAGILE GOODS—ART. 1676 C. C. —SPECIAL RATES FOR PERISHABLE GOODS.

Held: Where by a condition of the bill of lading, it is stipulated that the carrier will not be responsible for loss or breakage of fragile goods, unless a higher rate of freight be paid therefor, and the shipper has not paid such additional rate, the carrier is not bound to use greater care, in respect to such goods than is usual in the case of goods for which ordinary rates are charged. *Mongenais* v. *Allan*, 1 Q. R. (Q. B.) 181.

CHALLENGE—See Crim. Law 1.

CIVIL CODE, ART. 1484 — See Substitution.

CIVIL CODE, ART. 1970—See Appeal 2.

CIVIL CODE, ART. 1981—See Appeal 2.

CIVIL CODE, ART. 1676—See Carriers.

CIVIL CODE, ART. 806 1592 — See Donation inter vivos.

CIVIL CODE, ART. 992—See Petition of Right.

CIVIL PROCEDURE, 920—See Substitution.

COMPANIES ACT 1862, SS. 8, 12, 25 & 38 (Eng.)—See Company.

COMPANIES ACT 1867, S. 25 (Eng)—See Company.

COMPANY.

ISSUE OF SHARES AT A DISCOUNT—REGISTERED CONTRACT — COMPANIES ACT, 1862, SS. 8, 12, 25, AND 38—COMPANIES ACT, 1867, S. 25.

A company limited by shares under the Companies Acts has no power to issue shares at a discount; nor does a registered agreement, filed under section 25 of the Companies Act, 1867, make such an issue good.

In re Almada and Tirito Company (57 Law J. Rep. Chanc. 706; Law Rep. 38 Ch. D. 415) approved.

Per Lord Watson and Lord Herschell. —Shareholders of a limited company have power to resolve that no call shall be made upon new shares except in liquidation, and then only for the purpose of paying debts and expenses of liquidation. *Ooregum Gold Mining Co. of India (Lim.)* (appellants), *Roper and Wallroth* (respondent); *and Wallroth* (appellant), *Roper and Ooregum Gold Mining Co. of India (Lim.)* (respondents), 61 L. J. Rep. H. L. 337.

COMPENSATION PERSONAL INJURIES —See Neg. 4.

CONCEALED DANGER—See Neg. 4.

CONDITION PRECEDENT—See Insur. 17.

CONDITIONS OF POLICY—See Insur. 7 and others.

CONDUCTOR AND BRAKEMAN — See Master and Servt. 3.

CONFLICT OF LAWS.

INSURANCE CONTRACT—ACTION ON POLICY—LIMITATION.

The fact that an application for life insurance is made in Michigan does not render the contract a Michigan contract, where it appears in the by-laws indorsed upon the policy, that the application was to be of no force until approved at the principal office, situated in another state, and in the application furnished the assured, that the contract should be considered as entered into in such other state, and governed by the laws of said state.

Children, who, under the by-laws of an insurance company, are entitled to be named as beneficiaries in a policy on the lives of their parents, are entitled to recover on such a policy without otherwise showing insurable interests.

The time limited for the commencement of an action for a loss under an insurance policy does not begin to run so long as negociations looking to a settlement are in progress. *Voorheis* v. *People's Mut. Ben. Society of Elkhart*, Sup. Ct. of Michigan, May 1892.

CONNECTING LINES—See Telegraph Comp. 3.

CONSTITUTIONAL LAW—See Lotteries.

CONTRACT OF INSURANCE—See Conflict of Laws—Insur. 4.

CONTRACT BY CORRESPONDENCE—See Contracts 4.

CONTRACT WITH CITY, CONSTRUCTION OF—See Water Company.

CONTRACTS.

1. ILLEGAL—SALE OF INTOXICATING LIQUORS TO BE ILLEGALLY SOLD IN ANOTHER STATE.

A contract of sale of intoxicating liquors in Massachusetts, with a view to their being resold in another State contrary to the laws of that State, is void, and the price cannot be recovered. Webster v. Munger, 8 Gray, 584, followed. *Graves* v. *Johnson*, Massachusetts Supreme Judicial Court, May 6, 1892.

2. GAMBLING—OPTION DEALINGS—RECOVERY OF AMOUNT LOST.

A contract whereby one of the parties is to have the option to buy or sell at a future time a certain commodity, on the understanding of both that there is to be no delivery of the commodity, the party losing to pay to the other the difference in the market price simply, is by common law, as well as by statute, in this State (§ 6934*a*, Rev. Stat., as adopted April 15, 1882), a "gambling contract" or wager upon the future price of the commodity, and therefore void.

Where the purchase or sale of a commodity is adopted as a mode of disguising a wager upon the market price of the commodity at a future time, the fact that one of the parties assumes to make the purchase or sale as a commission merchant only will not alter the relation in which they stand as parties to the wager. Each is in law *particeps criminis* to the wager, and either may, as loser, recover from the other as "winner," under the provisions of section 4270, Revised Statutes. *Lester* v. *Buel*, Ohio Supreme Court, March 22, 1892.

3. RESTRAINT OF TRADE.

Plaintiffs, representing four cotton seed mills, and defendants, representing a large number of like mills, all independent dealers in cotton seed and manufacturers of products therefrom, entered into a contract which provided that plaintiffs, in consideration of "covenants" therein, should deliver to defendants the entire yield of their mills, and defendants guaranteed plaintiffs a certain profit per ton. The prices to be paid for seed cotton were established and were to be changed only by "mutual agreement of the parties." Defendants were authorized to establish from time to time "the minimum prices at which all meal cake and lint produced at plaintiffs' mills shall be sold," and that plaintiffs "shall not purchase any seed or ship any from" a certain place, and a specified proportion of seed shipped from certain other places to be "subject to be bought by" defendants.

Held, in an action to recover the net profits under the guaranty, that the contract was void as being in restraint of trade, and plaintiffs could not recover. *Texas Standard Cotton Oil Co.* v. *Adoue*, Texas Supreme Court, March 8, 1892.

4. OFFER AND ACCEPTANCE—POST OFFICE, EFFECT OF USING—WITHDRAWAL RECEIVED AFTER POSTING, BUT BEFORE RECEIPT OF ACCEPTANCE.

Where an offer is made under such circumstances that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance, the acceptance is complete as soon as it is posted; but this doctrine does not apply to the revocation or modification of an offer.

The defendants handed to the plaintiff, at their office in Liverpool, an offer in writing to sell him certain real property in Birkenhead, where he resided. On the following day the plaintiff's solicitor wrote by his direction accepting the offer. After the letter was posted, but before it reached its destination, the plaintiff received

through the post a withdrawal of the offer:

Held (reversing the decision of Bristowe, V.C.), that the acceptance was complete before the offer was withdrawn. *Henthorn* v. *Fraser*, (App.) 61 L. J. Rep. Chanc. 373.

Lord Herschell, after stating the facts as above set out, continued: If the acceptance by the plaintiff of the defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of Adams v. Lindsell, 1 Barn. & Ald. 681, which was approved by the Lord Chancellor in Dunlop v. Higgins, 1 H. L. Cas. 381, and also with the opinion of Lord Justice Mellish in Harris's Case, L. R. 7 Ch. 587. The very point was decided in the case of Byrne v. Van Tienhoven, L. R. 5 C. P. D. 344, by Lord Justice Lindley, and his decision was subsequently followed by Mr. Justice Lush. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. This can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them, and not on the letter being posted. It cannot of course, be denied, after the decision in Dunlop v. Higgins 1 H. L. Cas. 381 in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted; but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendants' office at Liverpool. The question, therefore, arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of The Household Fire Insurance Company v. Grant L. R. 4 Ex. D. 216, Lord Justice Baggallay, referring to Dunlop v. Higgins, said: "I think the principle established by that case is limited in the application to cases in which, by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such an offer by a letter through the post is expressly or impliedly authorized." And in the same case Lord Justice Thesiger based his judgment on the defendant having made an application for shares under circumstances from which it must be implied that he authorized the company, in the event of their allotting the shares applied for, to send the notice of allotment by post. The facts of that case were that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the Lords Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post.

I am not sure that I should myself have regarded the doctrine, that an acceptance is complete as soon as the letter containing it is posted, as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of Dickinson v. Doods, L. R. 2 Ch. D. 463, was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given, I think the judgment must be reversed and the usual decree for specific performance made. The respondents must pay the costs of the appeal and of the action.

Lindley, L. J.—I entirely concur. I am not prepared to accede to the argument that because the offer was not made by post, therefore there was no authority to accept by post. That is the root of the mistake which has been made.

Kay, L. J.—On the 7th of July, 1891, the

defendants gave to the plaintiff, who was then in their office in Liverpool, an offer in writing to sell him certain real property in Birkenhead, where the plaintiff resided. The plaintiff had been on several previous occasions at their office on this or like business. He was not able to write beyond signing his name. On the 8th of July his solicitor wrote by his direction accepting the offer. This letter was posted at 3.50 p.m., and arrived at 8.30 the same evening. This was after office hours, and it was not opened till 10 o'clock next morning. In the meantime the defendants wrote withdrawing their offer on the same 8th of July, and posted their letter between 12 and 1 p.m. This was received, and opened at 5.30 the same evening. On the same 8th of July the defendants entered into a contract to sell the same property to another person, upon the express condition that they were able to withdraw their offer to the plaintiff. The question is, was the withdrawal in time or too late?

Dunlop v. Higgins, 1 H. L. Cas. 381, has decided that when a letter sent by post was a proper mode of acceptance, the contract was complete from the time that the letter was posted. In that case the letter was actually received, though by fault of the post-office there was some delay in its transmission. Upon receipt of it the offer was withdrawn. The question was the same as in the present case, except that the withdrawal was after the actual receipt of the acceptance, which was treated as being too late. It was held that by posting the letter in due time the party, by the usage of trade, had done all that he was bound to do. He could not be responsible for the delay of the post-office in delivering the letter, and, therefore, there was from the time of the posting a valid acceptance. It might have still been doubtful whether posting a letter of acceptance in time would amount to an acceptance if the letter was never received. The ordinary rule is that to constitute a contract there must be an offer, an acceptance, and a communication of that acceptance to the person making the offer—*per* Lord Blackburn in Brogden v. Metropolitan Railway Company, L. R. 2 App. Cas. 666, 692. It may be that where the communication is in fact received, the contract may date back to the time of posting the acceptance; but there is considerable reason for holding that, if never received, the posting might be treated as a nullity. The point was so decided in The British and American Telegraph Company v. Colson, L. R. 6 Ex. 108; and see the judgment of Lord Bramwell in The Household Fire Insurance Company v. Grant, L. R. 4 Ex. D. 216. However, in the last mentioned case, which is a decision binding upon this Court, the Court of Appeal (Lord Justice Bramwell dissenting) held that the posting of a letter of allotment in answer to an application for shares constituted a binding contract to take the shares, though the letter of allotment was not received. In his judgment in that case Lord Justice Thesiger refers to the cases in which the decision in Dunlop v. Higgins, *supra*, has been explained by saying that the post-office was treated as the common agent of both contracting parties. That reason is not satisfactory. The post-office are only carriers between them. They are agents to convey the communication, not to receive it. The communication is not made to the post-office, but by their agency as carriers. The difference is between saying "Tell my agent A. if you accept," and "Send your answer to me by A." In the former case A. is to be the intelligent recipient of the acceptance; in the latter he is only to convey the communication to the person making the offer, which he may do by a letter knowing nothing of its contents. The post-office are only agents in the latter sense. All that Dunlop v. Higgins, *supra*, decided was that the acceptor of the offer, having properly posted his acceptance, was not responsible for the delay of the post-office in delivering it, so that after receipt the other party could not rescind on the ground of that delay. I cannot help thinking that the decision has been treated as going much farther than the House of Lords intended. Lord Justice Baggallay, in his judgment in The Household Fire Insurance Company v. Grant, *supra*, treats it as applicable "to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." If for "authorized" the word "contemplated" is substituted, I should be disposed to agree with this *dictum*. But I would rather express it thus: "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post."

Is that a proper inference in the present case? I think it is. One party resided in Liverpool, the other in Birkenhead. The acceptance would be expected to be in writing, the subject of purchase being real estate. These, and the other circumstances to which I have alluded, in my opinion warrant the inference that both parties contemplated that a letter sent by post was a mode by which the acceptance might be communicated. I think, therefore, that we are bound by authority to hold that the contract was complete at 3.50 p. m. on the 8th of July, when the letter of acceptance was posted, and before the letter of withdrawal was received.

Then, what was the effect of the withdrawal by the letter posted between 12 and 1 the same day, and received in the evening? Did that take effect from the time of posting? It has never been held that the doctrine applies to a letter withdrawing the offer. Take the cases alluded to by Lord Bramwell in The Household Fire Assurance Company v. Grant, *supra*. A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received. No doubt there is the seeming anomaly pointed out by Lord Bramwell that the same letter might contain an acceptance and also such a notice or offer as to other property, and that when posted it would be effectual as to

the acceptance and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor, in Lord Cottenham's language (in Dunlop v. Higgins, *supra*) has done all that he was bound to do by posting the letter; but this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the other party; and as this was not done in this case till after the letter of acceptance was posted, I am of opinion that it was too late.

The point has been so decided in two cases —Byrne v. Van Tienhoven L. R. 5 C. P. D. 344 and Stevenson v. McLean L. R. 5 Q. B. D. 346; and I agree with those decisions.

CONTRIBUTORY NEGLIGENCE — See Telegraph Company 1.

CONVEYANCE OF HOMESTEAD — See Insur. 5.

CORPORATIONS.

1. FRAUDULENT CONVEYANCE.

(1) A transfer by a corporation of all its property to another corporation, pending an action against it, which afterward results in a judgment against it, is void as against such plaintiff. As against the creditor the transfer to the Millerton Company was illegal, and in fraud of his rights. The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against the stockholders and all transferees except those purchasing in good faith and for value. Bartlett v. Drew, 57 N. Y. 587; Brum v. Insurance Co., 16 Fed. Rep. 143; Mor. Corp., § 791. The Millerton Company was not such a purchaser. It parted with nothing. It knew and participated in the illegal purpose to destroy the National Company, to make it utterly insolvent and to deprive its creditors of the trust fund upon which they had a right to rely, and so they were at liberty to set aside the transfer so far as it barred their remedy, and to enforce their equitable lien upon the property in the hands of the transferee.

(2) The facts that both corporations have the same officers and stockholders, and that there is no disproportion between the assets of the two corporations, do not validate the transfer. *Cole v. Mercantile Trust Co.*, New York Ct. of Appeals, April 1892.

2. FRAUDULENT SALES — RIGHTS OF MINORITY STOCKHOLDERS.

The secretary and one of the stockholders of a corporation whose business was unprofitable secretly agreed to purchase all the stock and the property of the corporation. Accordingly they purchased in the names of third parties all the stock, except that of complainant, who held a little more than one-third of the stock. A resolution was passed, against complainant's vote, authorizing the president and secretary to sell all the corporate property which they accordingly sold to a nominal purchaser for the benefit of the secretary and said stockholder.

Held, that said sale might be set aside as in fraud of complainant's rights.

It being shown that the directors were under the control of the said stockholder, complainant had a right to bring suit in his own name to set aside such sale without first demanding that the corporation bring such suit. *Chicago Hansom Cab Co.* v. *Yerkes*, Supreme Court of Illinois, March, 1892.

Extracts from the case.

"The question is therefore presented whether, after it is determined to wind up a corporation and settle its business, it is competent for a holder of a majority of its shares of stock to make or ratify a sale of all its property to himself, against the protest of a holder of a minority of its shares, and in disregard of his rights. That a holder of a majority of the shares of stock in a corporation may, where the law authorizes a vote of stockholders, so vote upon any matter of policy in the conduct of the corporation as to best subserve his own interests, and that this may relate to the ceasing to do corporate business, winding up of its affairs, and the sale of its property, we do not question. But the authorities cited by counsel for appellant, Gamble v. Water Co., 123 N. Y. 91, 25 N. E. Rep. 201, and Transportation Co. v. Beatty, L. R. 12 App. Cas. 589 concede that even in such cases the action resulting from such vote must not be so detrimental to the corporation itself

as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of, and in opposition to, the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority. In the cases cited, and, so far as we are informed, in all other cases where the majority of the stockholders may by their votes lawfully affect the interests of the minority of the stockholders, the interests of the minority are, theoretically at least, protected, either by directors, or trustees of the corporation, who it will not be presumed will betray their trust by acting in the interest of one stockholder to the prejudice of another, or by reason of the transaction being such as is presumed to be alike beneficial to all stockholders, as where the corporate property is in good faith appropriated to the payment of the corporate debts, or is sold at a fair sale; and no case cited or within our knowledge goes to the extent of holding that a majority of the stockholders may take the property of the corporation, and retain it, if the minority shall elect to deny its right to acquire title to it in that way. Undoubtedly, if in such case the minority of the stockholders shall elect to treat the majority as purchasers, they may do so, and require them to account for the value of the property. It is said in Cook, Stocks, s. 656: " It is illegal and fraudulent for the majority of the stockholders to purchase the property of the company at a sale authorized by themselves. Such a purchase by the majority may be set aside in the same way and to the same extent that a purchase of corporate property by a director may be set aside." See also 2 Bigelow, Frauds, p. 645, where it is said: " No act of the majority can purge the fraud " of appropriating the common property to their own benefit by any portion of the corporators. And to like effect is the ruling in Meeker v. Iron Co., 17 Fed. Rep. 49; Ervin v. Navigation Co., 20 Fed. Rep. 577. And see also, Menier v. Telegraph Works, 9 Ch. App. 350; Brewer v. Boston Theatre, 104 Mass. 378; Preston v. Dock Co., 11 Sim. 327; Hodgkinson v. Insurance Co., 26 Beav. 473; Atwool v. Merryweather, L. R. 5 Eq. 464, note. "

COUNTY COUNCIL — See Libel and Slander 2.

CREDITOR AS BENEFICIARY — See Insur. 13.

CREDITORS, RIGHTS OF — See Insolvency 2.

CRIMINAL LAW AND PROCEDURE.

1. CRIMINAL PROCEDURE -- MIXED JURY—CHALLENGE.

Held :—On a trial for misdemeanor, the defendant, who applies for a mixed jury, is not bound to divide his challenges. *The Queen* v. *Brulé*, (Q. B. Crim. Jurisdiction), 1 Q. R. (S. & C.C.) 273.

2. CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON--FAILURE TO PROVE THAT RIFLE WAS LOADED.

On a prosecution for an attempt to commit an assault with a deadly weapon it appeared that defendant met a traveller in a road, and pointing a rifle toward him, commanded him to halt, saying to him, " Turn around quick, or I will blow your head off;" and " If you move another step forward I will blow your head off." It was not shown that the rifle was loaded.

Held, that the fact that the rifle was not loaded was a matter of defence, and the court erred in ruling as a matter of law that it was not a deadly weapon. *State* v. *Herron*, Montana Supreme Ct., May 2, 1892.

3. CRIMINAL LAW--CROWN CASE RESERVED — CRIMINAL PROCEDURE — JUDGE'S ORDER FOR GRAND JURY—ADDITIONAL PETIT JURORS.

This was a Crown case reserved from the Carleton County Court. The prisoner was indicted for assault with intent to kill. When the Court met, it was found that the sheriff had omitted to summon a grand jury, and had only summoned twelve petit jurors. Under the authority of 47 V. c. 14, N. B., the Judge made an order directing the

sheriff to summon a grand jury and nine additional petit jurors for the next day, which he did, and the prisoner was tried and found guilty, subject to the following objections which were reserved for the decision of the Court:

(1) That the order of the judge to the sheriff directing a grand jury and nine additional jurors was void, because (*a*) there should be a separate order in each case; and (*b*) the order should have been for twenty-one petit jurors and not for nine additional ones.

(2) That the foreman of the grand jury did not initial the names of the witnesses on the indictment who had been examined by the grand jury.

(3) That the jurors were entitled to six days' notice, and the judge should have adjourned the Court for that purpose.

(4) That the grand jury were not summoned from the body of the country.

Held, that the order of the judge for a grand and petit jury should have been separate in each case, and the order for the nine additional petit jurors was void, because it should have been for a full panel of twenty-one jurors, and that therefore the trial was a nullity. The conviction was quashed and a *venire de novo* ordered. *Regina* v. *English*, Supreme Ct., New Brunswick (Can. L. T.)

CROSS, SIGNATURE BY—See Receipt.

CROWN CASE RESERVED — See Crim. Law 3.

CURATOR TO SUBSTITUTION — See Substitution.

DAMAGES—See Petition of Right.

DANGEROUS PREMISES—See Neg. 2.

DANGEROUS ROAD—See Neg. 3.

DEATH OCCASIONED BY DISEASE—See Insur. 1.

DEED FRAUDULENT ON ITS FACE—See Insolvency 1.

DEFAMATION—See Libel and Slander.

DEFECTIVE APPLIANCES—See Master and Servant 5.

DELAY IN TRANSMITTING MESSAGE—See Telegraph Company 1.

DELAY IN DELIVERY OF MESSAGE—See Telegraph Company 3.

DELIVERY—See Sale of Goods.

DENIAL UNDER OATH—See Telegraph Company 3.

DEPOSIT—See Assignment.

DONATION INTER VIVOS.

SUBSEQUENT DEED—GIVING IN PAYMENT — REGISTRATION — ARTS. 806, 1592, C. C.

The parties to a gift *inter vivos* of certain real estate with warranty by the donor, did not register it, but by a subsequent deed which was registered changed its nature from an apparently gratuitous donation to a deed of giving in payment.

In an action brought by the testamentary executors of the donor to set aside the donation for want of registration,

Held, affirming the judgment of the Court below, M. L. R., 6 S. C. 316, that the forfeiture under art. 806, C. C. resulting from neglect to register, applies only to gratuitous donations, and as the deed in this case was in effect the giving of a thing in payment (*dation en paiement*) with warranty, which under article 1592, C. C., is equivalent to sale. the testamentary executors of the donor had no right of action against the donee based on the absence of registration of the original deed of gift *inter vivos*. Appeal dismissed with cost. *Lacoste* v. *Wilson*, Supreme Ct. of Canada, April 1892.

DUES, PAYMENT OF—See Insur. 20.

ELECTRIC LIGHT POLES—See Lien.

EMPLOYERS' LIABILITY ACT 1880 (SCOTLAND)—See Master and Servt. 1.

ENDORSER—See Indorser.

ESTOPPEL BY CONDUCT—See Appeal 1.

EVIDENCE — See Action for Goods Sold and Delivered—Insur. 10. 15. 16. 22—Intox. Liquor 2—Mun. Corp. 2—Receipt.

EXCAVATIONS—See Adjoining Land Owners.

False Representations — See Insurance 11.

Failure to Deliver Message — See Tel. Comp. 2.

Fancy Words not in Common Use —See Trade Mark.

Fencing—See Neg. 3.

Fellow Servants—See Master and Servant 3.

Fire Insurance — See Insur. Fire.

FIXTURES.

Portable Saw-Mill.

Plaintiff sold a portable saw-mill, consisting of a boiler, engine, etc., to be paid for by instalments, the title and right of possession to remain in plaintiff until the price was paid in full. The purchaser, being permitted by the contract of sale to run the machinery in several townships of a certain county, set it up on a farm in which he had an undivided interest. The boiler was bricked in, and the engine set up on brick-work, and bolted down to the foundation. Part of the machinery was roofed over. The purchaser afterward conveyed his interest in the farm by quit-claim deed to defendant, who afterward operated the mill as sole-owner.

Held, that the machinery remained personal property. *Lansing Iron & Engine Works* v. *Walker*, Supreme Ct. of Michigan, April 22, 1892.

Foreign Law—See Assignment.

Forged Order — See Banks and Banking 1.

Forfeiture—See Insurance 9.

Fragile Goods—See Carriers.

Franchise—See Mun. Corp. 3.

Fraudulent Conveyance — See Corp. 1.

Fraudulent Detention of Money by Customer's Cashier—See Banks 3.

Fraudulent Sales—See Corp. 2.

Gambling—See Contracts 2.

GOOD-WILL.

Taxation—Hotel.

The proprietor of a hotel who had carried on business there let the hotel to a tenant upon a ten years' lease, the tenant paying a sum down for good-will, fixtures, utensils, etc., and the proprietor undertaking not to begin business in the spirit line in the same town during the currency of the lease. The assessor in valuing the premises took the rent in the lease and added thereto the tenth part of the whole sum paid for good-will (the value of fixtures, etc., being first deducted). The tenant appealed to the valuation committee, and offered to prove that the sum arrived at was greater than the lettable annual value of the subjects. The valuation committee refused to hear evidence, and upheld the valuation.

Held, that it is a question of circumstances in each case how much of a sum paid for good-will is personal and how much effeirs to the premises and that where the rent in a lease is displaced by the existence of such a "consideration other than rent," the whole circumstances must be inquired into to determine the annual value. *Hughes* v. *Assessor of Sterling*, 29 Scot. Law Rep. 625.

Government Indemnity to Victims of an Inundation—See Insolv. 2.

GOVERNMENT LANDS.

Pre-emption — Statutory Right to—Lands Reserved.

By 47 Vic., c. 14 (B. C.), "The Settlement Act," certain lands in the province previously withdrawn from settlement, purchase or pre-emption, were thrown open to settlers, and it was provided that for four years from the date of the Act, "they should be open to actual settlers for agricultural purposes" at the rate of $1 per acre, except coal and timber lands, which were expressly reserved. A part of these lands, which had been reserved for a town site many years previously, had been granted to the defendant company as part consideration for the construction by them of

a railway from Esquimault to Nanaimo. H. & Co. claiming that the statuate entitled them to a conveyance of these lands from the company, applied under the pre-emption Act for registration of lots of 160 acres each, which was refused and the refusal was confirmed by the chief commissioner. No appeal was taken to the Supreme Court as the act allows, but suits were brought against the company by each applicant for a declaration of his right to purchase said lands upon payment of said price of $1 per acre therefor.

Held, affirming the decision of the Supreme Court of British Columbia, that the Settlement Act did not operate to open for settlement lands reserved as these were for a town site; and that the applicants had never entered thereupon as actual settlers for agricultural purposes, but had express notice when they entered that they were not open for settlement as agricultural lands.

Appeal dismissed with costs. *Hoggan* v. *The Esquimault & Nanaimo Ry. Co. Waddington* v. *The Esquimault & Nanaimo Ry. Co.* Supreme Ct. of Canada, April, 1892.

GRADING CONTRACT — See Munic. Corp. 2.

GRAND JURY, JUDGE'S ORDER FOR —See Crim. Law 3.

HOLDER FOR VALUE AND IN GOOD FAITH—See Banks 2.

HOTEL, VALUATION OF FOR TAXES— See Goodwill.

ILLEGAL CONTRACTS—See Contracts 1.

IMPUTATION OF UNFITNESS FOR OFFICE NOT OF PROFIT—See Libel and Slander 3.

INDEMNITY TO VICTIMS OF AN INUNDATION—See Insolv. 2.

INDEPENDENT CONTRACTORS — See Adjoining Land Owners.

INDORSER—See Bills and Notes 1, 2.

INDUSTRIAL SOCIETY.

APPLICATION OF PROFITS — SUBCRIPTION TO STRIKE FUND — "LAWFULL PURPOSE" — CONSTRUCTION OF RULES—INDUSTRIAL AND PROVIDENT SOCIETIES ACT 1876 (39 & 40 V., c. 45), s. 12, SUB-S. 7. (ENG.)

By the rules of an industrial society established to carry on the business of general dealers, farmers, manufacturers, &c., it was provided that the profits of the society's business should be applied "either to increase the capital, reserved fund, or business of the society, or to any lawful purpose, and the remainder, less any grant that may be made for educational purposes," divided among the members:

Held, that a subscription to a strike fund was not a lawful purpose within the rules. Decision of the Divisional Court affirmed. *Warburton* v. *Huddersfield Industrial Soc.* App. 61. L. J. Rep. Q. B. 422.

INSOLVENCY.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—RESULTING TRUST—DEED FRAUDULENT ON ITS FACE.

This was an appeal from a decree of the Judge in Equity setting aside a deed of assignment for the benefit of creditors. The trust deed provided that the property assigned should first be applied to pay certain preferred creditors therein named, and the residue to the other creditors who should sign the deed and release the assignor from their claims. The sole question in the case was whether the assignment set out in the bill was void under the statute of 13 Eliz., because it was made to delay or defeat creditors. The Equity Judge reluctantly followed the case of Whitman v. Union Bank of Canada, 16 S. C. R. 410, and declared the assignment fraudulent and void. On appeal to this Court:

Held, that the appeal should be dismissed, the Court feeling themselves constrained to follow the decision of the Supreme Court of Canada in the case above-named.

This case has been carried to the Judicial Committee of the Privy Council. *Brown* v. *Moss*, Supreme Ct., New Brunswick, May, 1892. (Can. L. T.)

2. INSOLVENCY — GOVERNMENT INDEMNITY TO VICTIMS OF AN INUNDA-

TION—NON-ALIMENTARY CHARACTER —RIGHTS OF CREDITORS.

The sum allowed by the State in aid of victims of an inundation, must be considered, if the amount is large, not as a mere charitable aid, but as a real indemnity proportionate to the value of the property lost; considered thus, it enters into the insolvent's estate for the benefit of his creditors, excepting the insolvent's right to receive therefrom alimentary allowances for himself and family. (Translation) Tribunal Civil de Carcassonne, 31 May, 1892. (Gazette du Palais).

3. INSOLVENCY — RIGHTS OF INSOLVENT.

Held, that the curator of an estate is but the agent of the parties; the abandonment made by the insolvent does not deprive him of interest in his property; he remains liable to his creditors for the whole of his debts, and like them, has an interest that his effect should be realized. Thus, where the curator neglects to recover property belonging to the insolvent, the latter has the right, as he has the interest, to take action for such rights in his own name. *Lemay* v. *Martel*, 1 Q. R. (Q.B.) 160.

Extracts from the judgment:

(1) In Silk v. Osborne (1 Esp. 140), Lord Kenyon, in maintaining an action by an uncertificated bankrupt, for work and labour, and for materials found, said: "However, the question might be between the bankrupt and his assignee, it did not lie in the mouth of third parties to set up such a defence." (The defence was that plaintiff could not maintain the action, as all his effects belonged to his assignees).

(2) Laroche v. Wakeman, Peake's *Nisi Prius* Cases, p. 190: This was an action of trover for a vessel seized under a *fieri facias* against one Smith, who, prior to the seizure had assigned the vessel to plaintiff. At the time of this assignment, Smith was an uncertificated bankrupt, but had the possession of the vessel, and carried on trade on his own account and without any molestation by his assignee. For the defendant, the seizing officer, it was objected that this vessel was the property of the assignee, and therefore that Smith could give the plaintiff no title.

Lord Kenyon: "If the assignees of Smith take any steps to disaffirm his title, they may do so; but if they do not, he being the ostensible owner, may convey a title to the plaintiff, subject to be disaffirmed by them, but it is not competent to third persons to make this objection."

(3) Dunn v. Irwin, 25 C. P. (U.C.), p. 111. It was held by Mr. Justice Wilson: "The plaintiff having rightly sued in his own name, has a right to continue the procedure, as long as the assignee does not intervene and desire his name to be inserted as the plaintiff instead of the debtor's name; and as he has not done this, the plaintiff is entitled to judgment."

(4) Reave v. Waterhouse, 10 P. R. 277, referring to sec. 39 of Insolvent Act: "It would seem that this section does not oblige the assignee to intervene in pending suits. It only becomes a duty for an assignee to prosecute a suit when the interest of the estate demands it, of which the assignee is in the first instance the judge."

(5) The Act of 1875 does not say that the insolvent is *divested* of his rights, (an expression used by the Court of Review), but simply that the curator is *vested* therewith, which is an important distinction. (Hall, J.)

INSOLVENT CREDITOR'S RIGHT OF ACTION—See Appeal 2.

INSURANCE CONTRACT—See Conflict of Laws.

INSURANCE POLICY, ASSIGNMENT OF —See Assignment.

INSURANCE.

ACCIDENT.

1. DEATH OCCASIONED BY DISEASE.

A policy insuring against death, effected through external, violent, or accidental means, but excepting all cases in which there should be no visible sign of bodily injury, or in which death should occur in con-

sequence of disease, or in which the injury was not the proximate cause, does not relieve the insurer from liability, where death results from *peritonitis* occasioned by a fall; and this, even though the assured had previously had *peritonitis*, and had thus been rendered peculiarly liable to a recurrence. *Freeman* v. *Mercantile Mut. Acc. Ass'n*, 30 N. E. Rep. 1013, Mass. Supreme Ct.

2. KNOWLEDGE OF AGENT—APPLICATION.

An accident insurance company cannot escape its liability under a policy on the ground that the insured, who was deaf, signed an application stating that he was not subject to any bodily infirmity, where it appeared that the company's agent who took the application had full knowledge of the insured's physical condition. *Follette* v. *United States Mut. Acc. Ass'n*, 14 S. E. Rep. 923, N. C. Supreme Ct.

3. LIMITATIONS OF TIME TO BRING SUIT.

Where an accident insurance company undertakes to pay the insured certain amounts in case of bodily injury, and in case of death resulting from such an injury to pay to the wife of the insured a certain sum, and the certificate provides that no suit shall be brought to recover any sum unless commenced within one year from the time of the alleged accidental injury, an action may be brought on the policy by the widow of the insured more than one year after the accident, if it is brought within one year after the insured's death, since the widow's right of action does not accrue, and the prescribed period of limitation begin to run against her, until the death of the insured. Steen v. Insurance Co., 89 N. Y. 315; Mayor, etc., of New York v. Hamilton Fire Ins. Co., 39 id. 45; Hay v. Insurance Co., 77 id. 235; King v. Insurance Co., 47 Hun, 1. *Cooper* v. *United States Mut. Ben. Ass'n*. New York Ct. of Appeals, April 1892.

Haight J.—This action was brought upon a certificate of insurance, issued by the defendant to recover $5.000. The defendant, by its certificate, undertook to insure Theodore H. Cooper against personal bodily injury, and in case he should receive such injuries, disabling him from transacting business pertaining to his occupation, to pay him certain amounts, specifically named, dependent upon the nature of his injuries; and in case death should result from such injuries within ninety days the defendant agreed to pay to the plaintiff, as his wife, the sum of $5.000. The certificate contained the following:

No suit or proceed)ng at law or in equity shall be brought * * * to recover any sum under this insurance unless the same is commenced within one year from the time of the alleged accidental injury.

Cooper received an accidental bodily injury on December 10, 1887, which resulted in his death on January 2, 1888. This action was commenced on December 29, 1888, more than one year after the accident, but within one year of this death. It is claimed that the action was not commenced within the time required by the provision of the certificate referred to.

It will be observed that provisions are made in the certificate for two different persons, who, upon the happening of the events specified, may have a right of action against the association. One provision is in favor of Cooper, who may recover during his lifetime the amounts provided for his disability resulting from the accidental injury received. The other is to his wife, which is for the injuries which she suffers by reason of his death, resulting from such accident. The accident received by Cooper did not injure the plaintiff, or give her a right of action, until death ensued. So far as she is concerned, the infliction of the wound is but the beginning, and the death is the completion, of the injury. Her suit must be "commenced within one year from the time of the alleged accidental injury;" in other words, within one year from the time of the injury to her, which was the death of her husband, as the result of the accident. As to Cooper, he suffered from the date of the wound. His right to indemnity dates from that event, and if it is possible that his right to maintain an action would not continue after the expiration of a year from that date. But, as to the plaintiff, it appears to us that the construction already indicated was intended and should be given to the certificate. As thus construed the various clauses of the contract are rendered harmonious, and the different beneficiaries thereunder are given the same period of limitation within which to bring actions to establish their claims; that is, within one year from the time that their right of action accrued. This construction is in a measure sustained by the authorities. In the case of Steen v. Insurance Co., 89 N. Y. 315, the policy of insurance required actions to be brought within twelve months next after the "loss or damage shall accrue." In an action upon the policy, it was held that the period of limitation prescribed did not commence to run until the loss became due and payable, and the right to bring an action had accrued. And to the same effect are the cases of Mayor, etc., of New York v. Hamilton Fire Ins. Co., 39 N. Y. 45; and Hay v. Insurance Co., 77 N. Y. 235. The case of King v. Insur-

ance Co. 47 Hun, 1, appears to us to be clearly distinguishable. In that case the policy provided that no suit or action could be maintained unless commenced "within twelve months next after the fire shall have occurred." In that case it was held that the year within which the action must be brought commenced to run from the date on which the fire occurred; it so having been expressly stipulated in the policy. We consequently are of the opinion that the judgment should be affirmed with costs. All concur, except Vann, J., not sitting.

FIRE.

4. Contract to Insure—Witness—Admission of Agent.

In an action against an insurance company on an alleged contract of insurance, it appeared that, when plaintiff's policy with defendant was about to expire, plaintiff's manager directed its cashier, who, as such, was authorized to pay premiums on insurance, to renew the policy. Plaintiff's cashier was also defendant's agent, with authority to issue policies, and he promised to renew the policy, but neglected to do so; and the property was destroyed after the policy had expired. He testified that he intended to renew the policy, and thought that he had renewed it. *Held*, that there was no contract of insurance.

In such case, plaintiff's manager, after narrating the conversation between himself and the agent, cannot be asked, "How long was the insurance to be?" as such question calls for a conclusion of the witness.

The admissions of the agent subsequent to the conversation, to the effect that the property was insured, are not competent. *Idaho Forwarding Co.* v. *Fireman's Fund Ins. Co.*, Utah Supreme Ct., 29 Pac. Rep. 826.

5. Waiver of Conditions — Conveyance of Homestead—Severable Contract.

Where it was stipulated in a policy of fire insurance "that, if the property insured shall hereafter become mortgaged or incumbered, without the consent of the company indorsed thereon, it shall be null and void," and the insured sold and conveyed the property for the sum of $6,000, $5,000 of which was paid in cash, and the purchaser gave to his grantee a mortgage for $1,000 upon the premises to secure the balance of the purchase price, and the vendor and vendee went to the local agent of the insurance company and notified him of the terms of the same, and filled out an assignment of the policy to the purchaser, which was transmitted to the home office, and consent was given to the sale, but the company had no notice other than the knowledge of the local agent of the giving of the mortgage until after the property was destroyed, *held*, that the assent given by the company to the sale and transfer, and the notice to the local agent of the giving of the mortgage, was an assent to the terms of the sale and the incumbrance of the property for the purchase price, and that the giving of the mortgage did not avoid the policy. *German Ins. Co. of Freeport* v. *York*, Kan. Supreme Court, 29 Pac. Rep. 586.

6. Conditions of Policy—Proofs of Loss — Waiver of Defects — Arbitration as a Condition to Suit.

Under the provision of a fire policy that assured should within 6 days give notice of loss, and within 30 days thereafter render proofs of loss, loss to be payable 60 days after receipt of proofs of loss at the company's office, failure to furnish proofs within 30 days will not, in the absence of a provision to that effect, operate as a forfeiture of the policy, but will merely postpone the maturity of the claim.

Where proofs of loss are retained by the company without objection, defects therein will be regarded as waived.

Under a policy providing that, in case the company and assured fail to agree on the loss, there should be arbitration, and that no action should be maintainable until after an award, where proof of loss has been filed, and the company has neither made objection thereto nor suggested arbitration, an action commenced three months after the filing of proof cannot be defeated by reason of the fact that there has been no arbitration. *Vangindertaelen* v. *Phenix Ins. Co. of Brooklyn*, Supreme Court of Wisconsin, April, 1892.

7. CONDITIONS OF POLICY—VIOLATION.

Plaintiff had five lumber docks, running parallel to each other with spaces between. The lumber piled on Nos. 3, 4 and 5 was more than 150 feet from its mill, but on 1 and 2 lumber was piled within 30 feet of the mill. Its agent, in ordering insurance thereon, told the company's agent that he wanted $5,000 insurance on plaintiff's docks, 150 clear space, for which the rate was much lower than a less clear space. A policy was issued, which described the property insured as lumber on its docks, and contained the clause : " Warranted by the assured that a continuous clear space of 150 feet shall hereafter be maintained between the property hereby insured " and any manufacturing establishment. " Any violation of this warranty shall render this policy null and void."

Held, where plaintiff sought to recover by limiting the insurance to docks 3, 4 and 5, that it could not recover, such attempted limitation being in violation of the contract of insurance. *Michigan Shingle Co.* v. *London & Lancashire Fire Ins. Co.*, Mich. Supreme Court, 51 N. W. Rep. 1111.

8. PAYMENT OF PREMIUM—WAIVER.

A fire insurance policy contained a provision that the company should not be liable for a loss occurring while any note given for premium was overdue and unpaid, and provided that payments should be made at the company's office in Chicago or New York, " or to an authorized person having such note in his possession for collection." The complaint alleged that assured gave a premium note payable in four yearly instalments; that he paid the first two instalments to defendant's agent ; that when the third instalment was due he called on defendant's authorized agent, who had the note in his possession for collection, and offered to pay him the amount due, but that the agent said he did not have the note. The building was subsequently destroyed by fire.

Held, that there was a sufficient allegation of facts to show that defendant was estopped to claim a forfeiture.

Where the tender was made before the loss, the fact that it was not made until after the maturity of the instalment is immaterial, since the policy does not provide for a forfeiture in case of non-payment at maturity. *Continental Ins. Co.* v. *Miller*. Ind. App. Ct. 30 N. E. Rep. 718.

LIFE.

9. FORFEITURE — WAIVER OF CONDITIONS—INSTRUCTIONS—WAIVER OF OBJECTIONS.

In an action on a life insurance policy the plaintiff proved tender of premium 27 days in arrears, the death of the assured occurring three days later, and claimed waiver of the policy condition requiring prompt payments. The court charged that a waiver might be found if the whole conduct of the company in dealing with the assured had been such as to lead a prudent and reasonable man to believe that premiums would be accepted a few days after due, without regard to the health of the assured ; but, if the conduct of the company was such that the assured could believe that he might pay delinquent premiums only when in good health, then there was no waiver. *Held* a proper charge, as the company may, by its conduct, waive the condition requiring payments at a specified date.

Payment or tender of the premium in arrears being a prerequisite to the policy, plaintiff's letter inclosing the amount to the company is competent evidence to show such tender. *Hartford Life & Annuity Ins. Co.* v. *Unsell*, 12 Sup. Ct. Rep. 671. U. S. Supreme Ct.

10. EVIDENCE OF SUICIDE — RES GESTÆ—OPINIONS.

In an action for life insurance on a policy to be void in case of suicide within two years from date, the evidence showed tha, assured's death resulted from morphine or opium self-administered; that, though only a manager in a store and insolvent, he carried $23,000 life insurance ; that he was greatly troubled over the matter of his homestead, which had been conveyed in payment of a debt, with

right to repurchase; that on a hot Sunday afternoon, complaining of a headache and the noise, he went out, saying that he would take a street car; that later in the evening he was found by his brother in the store, with the door locked, lying on a table; that, when asked what was the matter, he said he had a headache, and falsely said that he had taken Hoffman's Anodyne, and might have taken it too strong; that he never used narcotics, and was opposed to taking any medicine, except on the prescription of a regular physician; that when asked by the doctor, whom his brother immediately got, how much morphine he had taken, he said that it was none of his business, but that he had taken so much that he could not get it out of him; that at the time a note in the handwriting of assured, and evidently written after he went to the store, was found conspicuously stuck in the railing about his office, and had on it the word "sick"; that though this was traced to the possession of assured's brother, and plaintiff was notified to produce it, he failed to do so or to account for it.

Held, that a verdict finding that assured did not come to his death by suicide would be set aside, as manifestly against the weight of evidence. *Mutual Life Ins. Co. of New York* v. *Tillman*, 19 S. W. Rep. 294. Tex. Supreme Ct.

11. False Representations.

In an action on a policy of life insurance, the defence was a breach of warranty by the insured in falsely answering in his application that he had never had consumption. The policy was issued on March 20, and insured died of acute tuberculosis October 7, next following. A physician testified for defendant that in February he treated insured for consumption, and at that time discovered what are known as "Koch bacilli." The presence of bacilli was confirmed by another physician. A sister of insured testified that in February insured suffered from a cold, but after treatment his cough disappeared and he was apparently healthy, continuing his usual employment as a laborer until within a few weeks of his death. Defendant's examining physician testified that on March 19, he made a thorough examination of insured by the usual tests, and found his lungs in a perfectly healthy condition; that he talked with insured several weeks later and saw nothing to indicate any lung trouble or disease of any kind.

Held, that it was for the jury to determine whether insured was afflicted with consumption when the insurance issued. *Tucker* v. *United Life & Acc. Ins. Ass'n.* New York Ct. of Appeals, April 1892.

12. Application for Insurance—Binding Force of Applicant's Answers.

Where a policy of insurance declares that no agent is empowered by the company issuing the policy to modify it, or "to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy," and an agent of the company in receiving an application for insurance, writes the applicant's answers to certain questions, and the applicant signs his name thereto, the binding force of such answers cannot, in an action on the policy, in which defendant alleges that a certain answer was false, be avoided by evidence that the applicant did not know the contents of the application, or that they were known to be false by the agent. *Fitzmaurice* v. *Mutual Life Ins. Co. of New York*, 19 S. W. Rep. 301. Tex. Supreme Court.

13. Creditor as Beneficiary—Admissions—Proofs of Death.

A clause in an insurance policy upon a debtor's life, reciting that it is payable upon his death to his creditor if living, if an admission at all by the company of the relation of debtor and creditor, is an admission only at the date on which the policy was issued; and, in an action to recover on such a policy, the creditor must furnish positive proof of the fact that he is a creditor, and of the amount of his debt, and for this purpose the recital in the policy and the creditor's statements in the proofs of death are not sufficient.

A creditor named as beneficiary in,

or made the assignee of, a policy on his debtor's life, has no further interest after the payment of his debt, and the policy becomes one for the benefit of the insured, and can be collected by his personal representatives.

The fact that an insurance company receives the proofs of the death of the insured without question is an admission only that they are sufficient in form, and not that all the statements contained in them are true, although such statements are in answer to questions on the printed form sent out by by the company. Insurance Co. v. Francisco, 17 Wall, 672, distinguished. *Crotty* v. *Union Mutual Life Ins. Co. of Maine.* United States Supreme Court, February, 1892.

14. Conditions—Non-Payment of Premiums—Waiver.

(1) Where an insurance policy, conditioned to be void on non-payment of dues, provides that the assured may be reinstated on payement of delinquent dues and "satisfactory evidence of good health," the taking of delinquent dues by the insurer from an agent of the assured, on the day before the assured's death of fatty degeneration of the heart, and the giving of a receipt, providing that the payment and receipt shall be void unless the assured is in as good health as when originally received as a member, do not constitute a waiver of the breach of the policy, since no "satisfactory evidence of good health" could under the circumstances be furnished.

(2) Where the assured's agent, on paying the delinquent dues, stated that the assured had a swollen foot, and had been on his annual spree, the fact that the representative of the insurer required proofs of death, and the certificate of the clergyman who officiated at the burial, and furnished blanks in each case, and gave instructions as to the filling thereof, and promised to pay the policy on approval of the board of directors, did not constitute a waiver. *Ronald* v. *Mutual Reserve Fund Life Ass'n.*, N. Y. Court of App., April 1892.

15. Action on Policy—Evidence.

Where in an action on an insurance policy, which requires the beneficiary simply to furnish proof of the death of the insured, the beneficiary introduces in evidence, without qualification, the sworn certificate of. the physician who attended the insured in his last illness, the statements in such certificate are evidence to show that the answers made by the insured to defendant's medical examiner on his application, and warranted by him to be true, were false, and that there was, in consequence, a breach of warranty, the application being part of the contract. *Helwig* v. *Mutual Life Ins. Co.*, New York Ct. of Appeal, April 1892.

MARINE.

16. Action on Policy—Evidence.

Where, in an action on a marine insurance policy to recover for the loss of a vessel by fire occasioned by the slacking of a cargo of lime, the captain of the boat and his son, who placed the cargo on board, testifies that the lime was not wet when it was put on board: that the hatches were carefully closed, and the barrels on deck well protected by canvass; and the defendant introduces no evidence in contradiction of such testimony—it is error to nonsuit the plaintiffs on the ground that the boat was improperly laden. *Singleton* v. *Phenix Ins. Co.*, 30 N. E., Rep. 839. N. Y. Ct. of App.

17. Re-Insurance — "To Pay as May be Paid" on Original Policy—Indemnity—Condition Precedent.

The W. Company, having insured a ship, re-insured part of their risk with the E. Company, and duly paid the premiums. The re-insurance policy was not an exact copy of the original policy, but contained the following clause: "Being a re-insurance applying to the lines of the Western Insurance Company, Limited, policy No , subject to the same terms and conditions as the original policy or policies, and to pay as may be paid thereon." The ship insured had suffered damage from the perils insured against, but the W. Company had not as yet paid any part of it. Both companies were in liquidation, and the liquidator of the W.

Company made a claim in the winding-up of the E. Company for the amount secured by the policy of re-insurance:

Held, that payment by the W. Company on the original policy was not a condition precedent to their recovering against the E. Company. *In re Eddystone Marine Insurance Co. (Lim.); ex parte Western Insurance Co. (Lim.)* 61 L. J. Rep. Chanc. 362.

MUTUAL BENEFIT.

18. Non-Payment of Assessments—Burden of Proof.

The burden rests on a mutual aid association sued on a certificate of membership to show a default in not paying assessments accruing after the issuance of the certificate, and that the class to which the member belonged—which is shown to have been full when the certificate was issued — did not continue full until his death. *Hall* v. *Scottish Rite, K. T. & M. M. Aid Asso.*, 6 Ohio C. C. 137. Ohio Circ. Ct.

19. Mutual Insurance — Conditions of Policy—Notice of Assessments.

Where an insurance company's articles of association provide that members shall pay their assessments "within thirty days after receiving notice thereof," before a policy can be declared forfeited for non-payment the company must show that actual notice was had by the member, though a by-law provided that notice of assesments "shall be given by publication in one or more newspapers." *Schmidt* v. *German Mut. Ins. Co. of Indiana*, 33 N. E. Rep. 939. Ind. App. Ct.

20. Payment of Dues.

In an action on a certificate of life insurance, it appeared that deceased died on January 5, 1880. The certificate contained an agreement that deceased would pay all dues and monthly payments agreeable to the by-laws. By a rule of defendant, the monthly payment was due on the first day of each month, with the balance of the month allowed as grace; and, if any such payment was not made at the expiration of such days of grace, the certificate would become void. Deceased's payment for September 1879, was made October 4th; his payment for October was made November 1st; his payment for November was made December 2nd; but his payment for December was not made when he died. Defendant's by-laws (section 39) provided that lapsed members might be reinstated within thirty days after lapse on payment of back dues, and giving a certificate of good health. Plaintiff contended that such payments were accepted with a waiver of a certificate as to good health, under such section.

Held, that the jury were warranted in finding that the certificate was continued in force and the dues accepted after the days of grace had elapsed. *Painter* v. *Industrial Life Ass'n*, 30 N. E. Rep. 876. Ind. Supreme Ct.

21. Beneficiaries — By-Laws — Amendment — Retroactive Effect.

An application for admission to membership in a mutual benefit association provided that compliance by the applicant with all existing regulations of the order, and such as it should thereafter adopt, should be the condition upon which he should be entitled to benefits of the order.

Held, that a subsequent amendment of the laws of the society, to the effect that each member "shall designate" the person to whom the beneficiary fund due at his death "shall be paid," who "shall in every instance" be a member of his family, a blood relation, or a person dependent upon him, was not retroactive in its effect, and did not require the substitution of such relation or dependent person for one who had been previously designated as beneficiary. *West* v. *Grand Lodge A. O. U. W.*, 29 Pac. Rep, 610. Oreg. Supreme Court.

22. Change of Beneficiary — Vested Interest—Evidence.

A person designated as beneficiary of a policy issued by a benefit society, who voluntarily and gratuitously pays the assessments thereon, and not under any contract with the insured, acquires no vested interest therein as against a person afterwards named beneficiary by the insured.

The evidence of a son of the insured that she had told him that she wanted plaintiff, her daughter, to have the insurance money, was properly received as tending to show that defendant, named as beneficiary, had no vested interest in the certificate. *Nix* v. *Donovan*, 18 N. Y. Supp. 435. City Ct. of N. Y.

INTEREST—See Bills and Notes 2.

INTOXICATING LIQUORS — See also Contracts 1.

1. LIQUOR LICENSE ACT, 1883, S. 6—SALARIES OF LICENSE INSPECTORS — APPROVAL BY GOVERNOR-GENERAL IN COUNCIL.

On a claim brought by a board of license commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors, with the approval of the Department of Inland Revenue, but which were found to be in excess of the salaries which two years later were fixed by Order in Council under s. 6 of the Act,

Held, affirming the judgment of the Exchequer Court, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor-General in Council. Appeal dismissed with cost. *Burroughs* v. *Reginam*, Supreme Ct. of Canada, April 1892.

2. LIQUOR LICENSE ACT—SUMMARY CONVICTION FOR SELLING DURING PROHIBITED HOURS — NO EVIDENCE THAT DEFENDANT HELD LICENSES — POWER TO AMEND DEFECTS.

Application to quash a summary conviction. The defendant was convicted for unlawfully selling liquor during prohibited hours. In the evidence returned by the justices there was nothing whatever to show that the defendant, or any one else, held a license for the premises where this liquor was sold.

Held, that the offence of selling liquor during prohibited hours was one that could be committed only in a place where intoxicating liquors were licensed to be sold, and it was incumbent on the prosecution to prove that the defendant held a license for the premises in question.

It was contended that, as the evidence for the prosecution showed that the defendant sold liquor without a license, and as he did not prove that he had a license, the prosecution should be treated as one for selling without a license, and the Court should make such amendments in the conviction as were necessary under s. 118 of the Liquor License Act, 1889, to make it one for selling without a license.

Held, that, although the section cured many defects of substance and of form, it did not go the length of enabling the Court arbitrarily to convict the defendant of an offence for which he had never been tried or called upon to answer.

The conviction must be quashed without costs, with the usual order for the protection of the justices. *Regina* v. *Williams*, Manitoba Q. B., May 1892. (Can. L. T.)

"JOHN BULL" BRAND—See Trade Mark.

JOINDER OF ACTIONS — See Telegraph Company 2.

JOINT SURETIES — See Bills and Notes 1.

JURISDICTION—See Appeal 1.

KNOWLEDGE OF AGENT—See Insur. 2.

LANDS RESERVED – See Government Land.

LATENT DEFECT IN MACHINE — See Neg. 6.

LESSOR, NEGLIGENCE OF—See Neg. 2.

LIBEL AND SLANDER,

1. LIBEL—PREMATURE PROTEST OF NOTE.

The holder of a note protested it before maturity, and mailed a formal notice thereof to the maker and indorser. On maturity the maker paid the note and protest fees without objection and subsequently sued the holder for extortion for collecting the protest fees and for damages for injury to his re-

putation and credit as a business man, and exemplary damages. There was no allegation of special damages.

Held, the action being in the nature of an action for libel, that the language of a notice of protest is not actionable *per se* and plaintiff cannot recover. *Hirshfield* v. *Fort Worth Nat. Bank.* Tex. Sup. Ct., Feb. 1892 (Alb. L. J.)

Extract from the case.

The language contained in the writing or official extension of the act of protesting the note which is set out in the petition and made the basis of the suit does not impute, directly or indirectly, insolvency or dishonesty to the plaintiff, or a want of ability or disposition to pay any past debt. It is this writing that the plaintiff alleges the defendant made, uttered and published concerning himself, and which caused damage to his credit. The writing does not by any means, necessarily or naturally, have that effect, so that the law would presume damages from its publication. The legal effect and the purpose of the protest, as well as the formal notarial attestation thereof, are simply to fix the liability of the drawer or indorser on the bill or note to which he is a party, and to prevent a loss to the owner by reason of the non-acceptance or non-payment, as the case may be, by the maker or drawer. The notary is called upon to witness and attest the essential facts which establish the liability, viz., due presentment and the refusal of payment, etc. 1 Danl. Neg. Inst., § 929. We very much doubt that the writing in question is actionable at all. All of its statements are true, and it does not appear to be defamatory. A copy of the note is annexed to and made a part of it, as set forth in the petition. There is no innuendo, if admissible here, that the intent and purport was to charge the defendant with refusing to pay a just debt which had then matured. This conclusion would not naturally be drawn by any one who might read the instrument in connection wlth the note, and it certainly contains no words to that effect. The reader, presumed to know the law, would see that the protest had been made before the note was due, and hence that the plaintiff had a most excellent reason for not paying it at that time. Let us illustrate. Suppose the defendants had published in a newspaper the statement that the plaintiff had, after demand duly made upon him, refused to pay, on the first day of June a note upon which he was duly bound, but which by its terms did not become due or payable until 20th day of July. That would not be libellous, although the defendants may have been actuated by malice. "Acts which neither the moral code nor the law of the land requires, it cannot be libellous to charge him with not performing." Cooley, Torts, 207; Odger Sland. & L. 308. The damages are not the natural or legal consequences of the language. But we will concede that the ordinary effect or import of such language, in connection with the fact of protest, would be to impute to the plaintiff a failure and refusal to pay his note of hand after it had fully matured. This is certainly as far as the concession can be extended, for the language used by the defendants, and by which alone they must be judged, does not affirm the justness or validity of the obligation. The accusation must also be confined to a single note, because they have not said that he refused to meet any other obligation, or was in the habit of refusing to pay his notes. Under such circumstances we think that it is obvious that the writing is not actionable *per se.* The refusal to pay this particular note may have been justified by sufficient reasons. It may have been an illegal or unjust allegation or may have already been paid by the plaintiff, hence was allowed to go to protest without any fault upon the part of the plaintiff. We mean by this that the act imputed to the plaintiff was susceptible of the above explanations, and therefore neither the acts nor the language of the defendants necessarily, or in their ordinary tendency or meaning, charged the plaintiff with insolvency, loss of credit or with dishonest conduct in business. In such case the law does not presume an injury to the plaintiff, and allow the recovery of general damages, as when the words are actionable in themselves,

for the plaintiff's credit or reputation as a tradesman may or may not have suffered any injury, according to the circumstances, by the publication of such alleged defamatory matter as would not necessarily or ordinarily injure, or tend to injure, him in these particulars. If it did so injure him in this instance, then the fact should have been alleged showing the special injury. We are clear therefore in the conviction that the writing declared on as a libel is not actionable *per se*, and consequently that the allegations of the petition do not show any rights to recover damages for its publication. Zier v. Hofflin, 33 Minn. 66: Pratt v. Press Co., 30 id. 41; Newbold v. Bradstreet, 57 Md. 38; Cooley Torts, 203-205.

Note.

See also May v. Jones 1 M. L. D. & R. 293.

2. Slander—Defamation — Absolute Immunity—Privileged Occasion — Judicial Duties — County Council—Words Spoken by Member—Meeting for Granting Music and Dancing Licenses — Notice of Action—Local Government Act, 1888 (51 & 52 V., c. 41), s. 3—11 & 12 V., c. 44, ss. 8 & 9.

At a meeting of the London County Council held for the purpose of hearing applications for music and dancing licenses, upon the plaintiffs applying for a renewal of such a license for a place of entertainment belonging to them, the defendant, a member of the council, stated that he had been to the place in question, and had witnessed a most indecent performance there, and gave that as his reason for voting against the renewal. In an action of slander brought by the plaintiffs in respect of such statement, the jury found a verdict for the plaintiffs.

Held, that the defendant was not entitled to absolute immunity from liability for the words spoken, the duties of the county council in dealing with music and dancing licenses being administrative and not judicial.

Held also, that the defendant was not entitled to notice of action under 11 & 12 V., c. 44, ss. 8 & 9, words spoken not being "anything done" within the meaning of those sections. *Royal Aquarium & Summer & Winter Garden Society (Limited)* v. *Parkinson*. (App.), 61 L. J. Rep. Q. B. 409.

3. Slander — Imputation of Unfitness for Office not of Profit—Absence of Special Damage.

Where a slanderous imputation is made concerning a person holding office, if the office is one not of profit, but of credit or honor, and the imputation is not one of misconduct in that office, but merely of unfitness for it, no action of slander will in the absence of proof of special damage lie against the defendant, unless the misconduct imputed, if true, is such as would render the plaintiff liable to be removed from or deprived of that office. *Alexander* v. *Jenkins*, English Court of Appeal, May 28, 1892, 66 L. T. Rep. (N. S.) 391.

On the 18th of October, 1890, the plaintiff, Edward Alexander, was duly elected a member of the town council of the city of Salisbury.

The plaintiff alleged that afterward, and while he was such a member of the said council the defendants, Frank Jenkins and John Bryant Young, falsely and maliciously spoke and published of the plaintiff the following words: "Alexander is never sober, and is not a fit man for the council. On the night of the election he was so drunk that he had to be carried home." The plaintiff also alleged, that upon his charging the defendant Jenkins with having spread a report that he (the plaintiff) was never sober, and that he was drunk on the night of the election, and that by the reason of his drunken habits he was unfit to be a member of the said council, the defendant Jenkins falsely and maliciously spoke and published the following words: "I saw you go by here with a crowd after you, and one of the crowd said, 'There goes Alexander, drunk again, never sober—a pretty man for the Council.'"

The plaintiff further alleged that by reason of the premises he was injured in his business of a boot and shoe dealer, and in his credit and reputation as a tradesman and a town councillor and a teetotaler, and in his prospects of being re-elected to the said office when his term of office should expire, and that he had suffered much pain and annoyance.

The plaintiff accordingly brought this action against the defendants, claiming damages.

The defense was, *inter alia*, that in the absence of special damage the action was not maintainable.

On the 12th of June, 1891, the action was tried before Grantham, J., sitting with a common jury in Middlesex.

It was not proved at the trial that the

plaintiff had suffered any special damage by reason of the imputation contained in words complained of.

Grantham, J., decided that the words, if spoken by the defendants, were actionable even in the absence of proof of special damage.

The jury found that the words were spoken by the defendants, and gave a verdict for the plaintiff with £50 damages. The defendants now appealed.

Lord Herschell. — This action raises a question of some novelty, and not without its importance. The action was brought by the plaintiff, who had been elected town councillor. It is an action of slander in which the defendants are charged with having said that the plaintiff was "never sober, and not a fit man for the council." The verdict was found for the plaintiff, and the jury must be taken to have found that those words were in fact used. But the defendants appealed against the judgment which was entered for the plaintiff, on the ground, that assuming those words to have been used, under the circumstances in which they are alleged to have been used, an action of slander will not lie. Now I think it must be taken that those words are not mere words of abuse, but that they do impute to the plaintiff, who had been elected a town councillor that he was an habitual drunkard, and that as an habitual drunkard he was not a fit man to discharge the duties of a town councillor. The question is whether, in respect of such an imputation, an action will lie. The charge is not one made against the plaintiff of any misconduct in his office, or any acts done by him as an officer which he ought not to do. But it is simply a charge of unfitness to hold the office to which he had been elected on account of moral misconduct. Now, I think that no one can examine the authorities upon the law of slander without seeing that there are a number of distinctions to be found which cannot be supported on any satisfactory principle. Obviously the idea lying at the root of the distinction between slander and libel is this, that it would never do to permit of actions being brought in respect of every word spoken which might reflect on the character or conduct of another. But, on the other hand, it was considered necessary to put some qualification on this by enabling an action to be brought where the charges were of a certain gravity, and likely to be pecuniarily injurious, and in certain cases injurious in another fashion, to which I will allude presently. Of course where special damage can be shown the action will lie. We are now only dealing with a case which assumes that the plaintiff canot show, or has not shown, any special damage. But in all cases in which the action has been held maintainable, the nature of the rules which had been laid down is itself a certain check against an indiscriminate use of the law of slander. Now, I may put aside the actions which are brought in respect of an imputation that a man has been guilty of a crime, and I will deal only with those which impute to him misconduct in relation to some office or employment. It is quite clear that as regards a man's business or profession, or calling, or office, if it be an office or profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. Immoral or disgraceful conduct is unnecessary, because the one may as much lead to his suffering in his calling as the other. Therefore in that class of cases there can be no doubt that an action will lie. In Lumby v. Allday, 1 C. & J. 301, Bayley, B., said: "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade or business." It must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who by reason of his want of ability or honesty is unfit to hold the office. So much with regard to offices of profit, the reason being that in all those cases the court will presume—or the law will presume perhaps I should rather say — such a probability of pecuniary loss from such imputation in that office, or employment, or calling, or profession, the special damage will not be required to be shown. It may be said to be an arbitrary rule. Be it so, but the rule is at all events so laid down, and seems to me to rest on that basis. But when you come to offices that are not offices of profit, the loss of which therefore would not involve necessarily a pecuniary loss, the law has been differently laid down. And it is quite clear that the mere imputation of want of ability or capacity, which would be actionable made in the case of a person holding an office of profit, is not actionable in the case of a person holding an office which has been called an "office of credit" or an "office of honor." Now, in his werk on the law of slander and libel, Mr. Starkie points out that the distinction which has been drawn is not by any means satisfactory. I think nobody can read the cases without feeling that to be so. The ground upon which Holt, C. J., puts it is, that a man cannot make himself wiser or more able than he is; he cannot add to his abi'ity, but he may make himself a better man. That is not a very satisfactory foundation on which to rest a legal distinction. But however it may be, there it is, and I feel very strongly in this case what was said by Pollock, C. B., in delivering the judgment of the court in the case of Gallwey v. Marshall, 9 Ex. 294, that we ought not to extend the limits of actions of this nature beyond those laid down by our predecessors. When you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle. But where you are dealing with such an artificial law as the law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature that must make the extension and not the court. Now it has, as I have already said, been held that in the case of imputa-

tions made on those holding offices of honor or credit as compared with imputations made on those holding offices of profit, there is a distinction between that which is actionable and that which is not so. The ground upon which the action has been said to be maintainable, certainly in some of the authorities, would seem to be this: that the language used has been such as, if true, would show that the man referred to ought to be deprived of his office, and therefore involves a risk of exclusion from that office. No case, I think, has now been cited to the court which cannot be supported on that ground. In the case of an imputation on a justice of the peace (Bill v. Neal, 1 Lev. 52), there was certainly a risk of deprivation. The language used, if true, would have justified deprivation, and shown that it was proper, and perhaps necessary. So in the case of the action by a churchwarden (Jackson v. Adams, 9 Bing. N. C. 402), where there was an imputation on him of misconduct in his office, he too might have been deprived. But, as I have said, it is not necessary to go so far to-day as to deal with the case of an imputation on a man of misconduct in his office. All we have to deal with is merely an imputation of unfitness for the office. And there is no case in which an action of slander has been held to lie for an imputation that a man by reason of his conduct is unfit for an office, except where by reason of that misconduct, if it existed, he could have been deprived of the office. In Mr. Starkie's work this liability—this danger of exclusion from office—is stated to be that which gives rise to the action, and at all events, there is there an intelligible ground upon which these actions may be rested, even if it be not altogether a satisfactory one. But we are asked to-day to make an extension, and to say that an action will lie where a person is charged with being unfit for the office, notwithstanding that he could not—however true the charge—be excluded from that office. That would be a step in advance, and I do not think it is a step in advance which we are justified in taking. It is on that ground that I desire exclusively to rest my judgment. To put it shortly, it is this: Where an imputation made against a person is an imputation not of misconduct in an office, but of unfitness for an office, and the office, for which he is said to be unfit is not an office of profit, but one merely of what has been called honor or credit, an action will not lie unless the misconduct charged be such as would enable him to be removed from or deprived of that office. It follows therefore that in the present case the action is not maintainable. But certainly the whole of these proceedings have been induced by misconduct, or by what has been found to be misconduct, on the part of the defendants. And therefore I think that we should now deal with this action as it should have been dealt with at the trial if that view of the law had been taken, and say that, although there must be judgment for the defendants in the action, it must be judgment without costs. As to the costs of this appeal, I should not be indisposed to deprive the appellants of them. But upon the whole, as they have succeeded, and it was necessary to come here to set the judgment right—they having proved right in point of law—I think the appellants must have the costs of the appeal.

Lindley, L. J. I am of the same opinion. It is not open to us to remodel the law of slander. And I do not think it desirable that we should extend the limits within which, according to law, actions will lie for merely words which are spoken. We are not dealing with libel; we are dealing with slander. Not however mere abuse. The defendants have gone beyond the limits of mere abuse. They have charged the plaintiff with such intemperance, such habits of drunkenness, as unfit him to be a town councillor. That is the slander complained of, and that is the slander proved. Now the cases, when looked at, are not based on very logical principles. But they are based on working rules which are intelligible enough, and are to a certain extent reasonable enough. What the plaintiff complains of here is a slander, which is to the effect that by reason of his drunkenness he is unfit for the office which he aspires to fill, and to which he has been elected. He is not charged with any malversation of office. We have not to consider that. He is charged simply with being so often drunk as not to be fit to be a town councillor. Now, the first thing to my mind which we have to find out is this: Whether he can be removed from the office of town councillor because he is often drunk? I can find nothing in the statute relating to country councils which enables anybody to be removed for that offence. Now, if that be so, we have to face some decisions to which I will refer presently, which appear to me to show that when a person is merely accused of unfitness for an office of honor (not of profit, with which we are not now dealing), that unfitness must be one which would expose him to the risk of removal from the office which he fills or seeks to fill. I think that the law must be treated as having been settled at least as early as Onslow v. Horne, 3 Wils. 188, where De Grey, C. J., reviewed some previous decisions. I can find no doubt thrown on that doctrine in any case which has been decided since. It has been recognized apparently more or less in subsequent cases. But neither in Gallwey v. Marshall, *ubi supra*, nor in Lumby v. Allday, *ubi supra*, do we find that that principle has been doubted. I do not know that it was expressly sanctioned in the case of Lumby v. Allday, but I rather think it was in Gallwey v. Marshall. But that is an intelligible rule, although, as I say, it is open to the objection that it is not very logical. It is a rule which ought not to be extended. But I take it that it is settled, and being settled it disposes of this case. Being settled, the learned judge ought not to have left this case to the jury. He ought to have said that there was no case for the jury, but that the action was not sustainable. If he had done that I do not suppose he would have given the defendants any costs. The defendants did not win on any merits of their own, and would not have got the costs of the action. At all events, I should not have

given the costs to them. The appeal is a different matter. They are driven to the Court of Appeal in order to get free from the judgment which exists. Therefore I think the appeal must be allowed, with costs. There must be judgment for the defendants without costs, but they, as appellants, must have the costs of their appeal.

Kay, L. J.—I concur in this decision, and desire to express my concurrence in a very few words. This is a case of slander. Beyond all question the words used were defamatory words. I have no doubt of their meaning. They imputed to the plaintiff that he was an habitual drunkard, and that by reason of that fatal habit of his he was unfit for the office to which he had just been elected of a town councillor. Now, the reason for my concurrence is this: There is no proof of any special damage, and the question is, whether this is one of those cases in which the court will dispense with proof and will infer or presume that there was damage. The office to which the plaintiff had been elected was not an office of profit. It was an office which has been called in some of the cases an "office of credit"—an office to which it was an honor to be elected, and which it was an honor to hold. But it was not one which brought in any direct pecuniary advantage, if any pecuniary advantage in any sense. The habit which was imputed to him by the slander, even if the slander had been proved, would not have enabled any one to deprive him of that office. There at once arises the difficulty. Will the court in a case of that kind presume, in the absence of proof, that such a slander would occasion damage? I agree that it is not in every case necessary to prove pecuniary damage. One has only to remember that the imputation of a criminal offense to a man is actionable without any proof of damage. And there are other instances where it is quite plain that it is not necessary that pecuniary damage should have been shown. I have no doubt it may be said that in a case of this kind such imputations, if believed, would be likely to render him an object of contempt to his fellow town concillors, and to induce them rather to avoid him. But nevertheless no case yet has been cited to us, and I can find none, which has gone so far as to say that under circumstances such as I have stated the court will assume, or should assume, that damage will be suffered without any proof of it. Now I distinguish—and I desire entirely to reserve my opinion in cases of this kind—if this had been an imputation of an act done in his office, although it would be an act not sufficient to deprive him of that office, it may be possibly that an imputation of that kind would be a sufficient slander to be actionable without proof of damage. Again, on another point, I will not at present express any opinion—I desire to reserve my opinion on this point—namely, if this imputation had been made while he was a candidate for the office, and might possibly have prevented his candidature from succeeding, it seems to me that a very strong argument might have arisen in a case of that kind, although there was no proof of actual damage. I express my opinion only on the facts of this case, and it seems to me that although the words, if untrue, were perfectly unjustifiable, yet seeing that the plaintiff cannot prove that he has suffered any special damage from them, it is not, for the reasons I have given, a case in which the court will assume in his favor that there would be damages. Therefore I think the action is not maintainable.

Appeal allowed.

LICENSEE—See Neg. 2.

LICENSES—See Petition of Right.

LIEN—SEE ALSO SOLICITOR.

APPURTENANCES, WHAT ARE—ELECTRIC LIGHT POLES.

An electric light and power company owned land on which was a building and machinery for generating electricity, and it had a franchise from a city to use its streets for the erection of poles on which to stretch wires and suspend lamps to furnish light for the people of the city. Poles were purchased from plaintiff, planted in the streets of the city, wires and lamps were placed thereon, and all connected by the electric light wires with the machinery and premises of the company.

Held, that the poles and wires were an appurtenance of the premises of the company, and that the plaintiff was entitled to a lien upon the same for the poles furnished. *Badger Lumber Co.* v. *Marion Water Supply, Electric Light & Power Co.*, Supreme Court of Kansas, March 5, 1892.

The court said: "As will be seen, the statute gives a lien for material furnished for a building or its appurtenances, and the same is chargeable upon the land, building and appurtenances. If the poles and wires can be regarded as an appurtenance of the power-house, the plaintiff acquired a lien and is entitled to enforce it against the property of the defendant. What then, is an appurtenance? Bouvier's definition is: 'Things belonging to another thing as principal and which pass as incident to the principal thing. * * * Thus, if a house and lot be conveyed, every thing passes which is necessary to the full enjoyment thereof and which is in use as incident or appurtenant thereto.' 'The grant of a thing wil includel whatever the grantor had power to convey which is reasonably necessary to the enjoyment of the thing granted. Thus, the grant of a house with appurtenances passes a conduit by which water is conducted to it.' 3 Washb. Real Prop. (3d ed.) 419; Farmer v. Water Co., 56 Cal. 11; Meek v. Breckenridge, 29 Ohio St. 642; 1 Am. & Eng. Enc. Law, 641.

Here the principal thing was the power-house and the poles and wires attached thereto were an incident to the power-house and machinery. They were necessary to the enjoyment of the principal thing, and indispensable in the transmission of electricity and the lighting of the city. If a conveyance of the property of the company, with the appurtenances belonging, had been made by the defendant, we do not doubt that the poles and wires would have passed as appurtenant to the premises conveyed. The fact that the poles were planted in the streets of the city, the fee of which is in the public, will not change their character or make them any the less an appurtenance to the premises of the electric light company. The city had granted the company a franchise to plant the poles upon the streets, and hence they were rightfully there; and there can be no question that they were owned by the electric light company. In Redlon v. Barker, 4 Kans. 445, it was held that an hotel sign, attached to a post planted in the street of a city, seven or eight feet from the front of the hotel, and placed there as a permanent sign, was an appurtenance to the hotel; and where the hotel and premises were conveyed with the appurtenances without reservation, such conveyance carried the sign and post. It was there urged that as the owner of the hotel did not have the fee of the street on which the post and sign were standing, they could not be regarded as appurtenances to the premises; but it was said, as the sign and post were rightfully in the street, and necessary for the uses and purposes of the building to which they were incident, they remained the property of the owner of the hotel, and when he conveyed the hotel premises he parted with his title to the sign and post. In Beatty v. Parker, 141 Mass. 523, the plaintiff undertook to enforce a mechanic's lien for a drain-pipe from the cellar of a house through the cellar wall, front yard and out into the street, to a connection with the sewer. The house was built upon a street of the city, and the 'piping inside of the house and outside of it to the sewer was necessary to the use of the house, and was included in the contract for building it. It extended twenty-seven feet beyond the street line, and the fee of the street was not in the owner of the house. The court ruled that the contractor was entitled to a lien for the piping, and stated that it is immaterial whether it was inside or outside the walls of the house, or whether it was above ground or under ground, or whether it extended one foot or thirty feet. It is immaterial also whether the fee of the land in the street was or was not in the owner of the lot. It must be assumed that the pipe was rightfully laid to the sewer, even if the fee of the street was not in the respondent. The pipe did not become the property of the owner of the fee of the street, but belonged to the owner of the house, and he had an interest in the soil of the street to sustain his pipe, which would pass by a deed of the lot.' See also Philbrick v. Ewing, 97 Mass. 124; Factory v. Batchelder, 3 N. H. 190; Carpenter v. Leonard, 5 Minn. 155 (Gil. 119); Milling Co. v. Remick, 1 Ore. 169; Pullis v. Hoffman, 28 Mo. App. 666; McDermott v. Palmer, 8 N. Y. 387; Amis v. Louisa, 9 Mo. 629; Phil. Mech. Liens, § 202; Kneel. Mech. Liens, § 83. The defendant in error principally relies upon Parmelee v. Hambleton, 19 Ill. 615, to defeat the lien and sustain the judgment that was rendered. The court there held that a person who performed labor upon a vault under a sidewalk adjacent to a building was not entitled to a lien. The vault is there held to be an appurtenance to the building, but as the appurtenance was in the street, and not upon the lot on which the building stood, the lien was denied. The case is not an authority here, and is based upon an Illinois statute, which provided that both the building and appurtenance shall be upon the lot sought to be subjected to the lien. Our statute does not require that the appurtenance shall be upon the land, but authorizes a lien where the structure or improvement is appurtenant to the land or building. While the lien rests upon a statute, and the remedy must be confined within the terms of the statute, yet such provisions are to receive a liberal construction in the interest of justice, and we think the term 'appurtenances,' as used in the statute, fairly includes the poles and wire attached to the premises of the defendant, and that the plaintiff is entitled to the lien which he claimed." (Alb. L. J.)

LIFE INSURANCE—See Insur. Life.

LIMITATION—See Conflict of Laws—Insur. 3.

LIMITING LIABILITY—See Carriers.

LIQUOR LICENSE ACT 1883, s. 6.—See Intox. Liquor 1. 2.

LOTTERIES.

CONSTITUTION—POWERS OF FEDERAL PARLIAMENT.

Held :—That chapter 159 of the Revised Statutes of Canada of 1886, 49 Vict., entitled "Act concerning Lotteries, Betting and Pool selling" is *intra vires* the Federal Parliament. *The Queen* v. *Harper etc.*, (Court of Special Sessions), 1 Q. R. (S. & C. C.) 327.

MANDATARY—See Substitution.

MANUFACTURE OF DEFECTIVE ARTICLE—See Neg. 5.

MARINE INSURANCE—See Insurance, Marine.

MASTER AND SERVANT—

SEE ALSO ADJOINING LAND OWNERS.

1. SCAFFOLD — PRECAUTIONS FOR SAFETY OF WORKMEN — EMPLOYERS LIABILITY ACT 1880 (43 & 44 V., c. 42.

A mason along with a foreman

erected a scaffold for a particular purpose such as they and other masons were accustomed to put up. The scaffold proved insufficient, and the mason fell with it and was killed.

In an action by his representatives against his employer, *held*, that the defender was not liable in damages. *Thompson* v. *Dick*, 29 Scot. Law Rep. 729.

2. Responsibility—Accident.

Held, that where there is "common fault" on the part of the master as well as the servant, the master is nevertheless liable to the servant for injuries received by the latter, but the contributory negligence of the latter must be taken into consideration in ascertaining the measure of damages. *Pontus dit Clément* v. *Rousseau*, (in Review), 1 Q. R. (S. & C. C.) 263.

3. Fellow Servants—Conductor and Brakeman—Vice Principal—Rules of company.

Where the determination of the sufficiency of appliances for holding defendant's railroad train in descending a grade was left to its conductor, the decision of the conductor was the decision of the defendant; and defendant was liable for the death of a brakeman on the train, caused by the insufficiency of the appliances used.

A brakeman who has been in the employ of a railroad only three months cannot be held to have had knowledge of a standing order in regard to the management of the train, and therefore to have, by continuing in the employment, assumed the risks attendant thereon; it appearing only that the order, which was not in the book of rules, had been posted some time before, and it not being shown whether it had been torn down or was still up during his employment. 16 N. Y. Supp. 840, affirmed, by divided court. *Wooden* v. *Western New York & P. R. Co.*, Superior Court of Buffalo, N. Y. 1892.

4. Injury to Railroad Fireman—Negligence.

Where a person, who is employed as fireman on an engine, is missed from his post, and upon search being made, his dead body is found between the rails at a place where the train had become uncoupled a short time before, but nothing is known as to how the accident occurred, or whether the lurching of the engine consequent upon the uncoupling of the cars contributed thereto, evidence that the uncoupling was due to a defect in one of the cars is not enough to go to the jury to establish the company's negligence. *Borden* v. *Delaware, L. & W. R. Co.*, New-York Ct. of Appeals, March 1892.

5. Defective Appliances.

In an action for personal injuries sustained by a laborer in defendant's employ by the breaking of an iron hook, to which was attached a heavy iron girder, it appeared that in purchasing the iron from which the hook was made, defendant's superintendent ordered the very best of refined iron, without limitation of price. It was shown that defendant knew it to be a custom of all well-established mills to test such iron in its manufacture. On its arrival the iron was delivered to defendant's blacksmith, against whom there was no charge of unskilfulness, and he made a number of hooks from it, among which was the one that broke. There was noting to manifest any weakness, flaw or imperfection either in the iron or in the hook.

Held, that the complaint was properly dismissed, as defendant was bound to exercise only reasonable and ordinary care, and was not negligent in failing to make additional tests after receiving the iron. Marsh v. Chickering, 101 N. Y. 390; Shear & R. Neg., § 195. *Carlson* v. *Phenix Bridge Co.*, New York Ct. of Appeals, March 1892.

Brown, J. A master who puts a tool or implement into his servant's hand may procure it in several ways—he may buy it ready-made of a dealer, procure it to be manufactured or purchase the materials and manufacture it himself. Liability for an injury resulting from a defect in the materials of a tool will be determined by the same rule in each case. If a hook like the one used in the present case had been procured ready-made in the market, or manufactured at a foundry the defendant would necessarily have been compelled to rely upon the dealer and manufacturer for the quality of materials

used. A completed hook ready for use could neither be cut into with a chisel or beat over an anvil without inpairing its strength, or perhaps destroying it altogether. A test of that character applied to one of a lot would be no guaranty of the quality of the others. To apply such a test therefore to tools procured in that way is impracticable, and such articles are not usually tested before they are put in use. The modern industrial system rests upon confidence in others. A railroad corporation cannot well apply such tests to the materials of which its cars and engines are made, or to the rails which form its tracks. Reasonable inspection is necessary and required. But when articles are manufactured by a process approved by use and experience, and apparently properly finished and stamped, it is not usual for them to be tested again in quality, and such examinations are not generally required by law. If materials of the best quality are purchased, and tools constructed from them by competent and *skilful workmen, and if there is nothing in* the appearance of the material to indicate inefficiency, men in the ordinary affairs of life use them, and place them in the hands of their servants, and there were no circumstances surrounding the manufacture of the hook in question to induce a prudent man to depart from the usual course, or to adopt extraordinary care and precaution. All the best iron and steel is made in a few large establishments. The evidence shows that all practicable tests are used during the process of manufacture, and the completed product represents the best article that can be produced. It passes into the hands of dealers, and so reaches the consumer. If the best refined iron is required, the purchaser may assume that the tests necessary to produce that article have been properly made, and the work properly done. He must see that the work he undertakes to do is properly performed, but if the tool breaks from an internal defect in the material, not apparent from an external examination of the iron, or in the process of making the tool, the master is no more responsible than he would be if he had purchased it ready-made in the market, or if it had broken from an external, apparent defect, produced by use, of which he was not chargeable with knowledge.

MEMORANDUM—See Stat. of Frauds.

MINORITY STOCKHOLDERS, RIGHT OF—See Corporations 2.

MIXED JURY—See Crim. Law 1.

MUNICIPAL CORPORATIONS

1. ROAD — RESPONSIBILITY.

Held, When a municipal corporation upon default of the proprietor, causes work to be done on a front road of his lot, and in the performance of these necessary works, somewhat lowers the level of the road, so as to cause the proprietor some damage, it is not liable to him for damages. *Plante* v. *Corpor. of Parish of St. Jean de Matha*, 1 Q. R. (Q. B.) 189.

2. GRADING CONTRACT — INTERPRETATION — EVIDENCE OF PERFORMANCE —DIRECTING VERDICT.

(1) Where in an action against a city on a contract which required plaintiff to grade a street to the satisfaction of the commissioner of public works, and according to certain plans and specifications, the answer admits that the rock excavation required by the contract has been completed, and the work accepted by the commissioner, evidence that the rock has not been excavated as required is inadmissible, and though received, will not be considered on review, to reverse a verdict for plaintiff by direction.

(2) Conceding that the evidence was admissible under the pleadings, a verdict for plaintiff was properly directed.

(3) The contract empowered the commissioner to designate when the work should commence, suspend work, order it to be begun again, consent to its being sublet or assigned or declare the contract null, and re-award it. Plaintiff covenanted to complete the work to the satisfaction of the commissioner and in substantial accordance with the specification and plan. *Held.* that a literal compliance with the specifications and plan was not required.

(4) Where, in accordance with the contract, the surveyor, inspector and superintendent of street improvement certified that the work was completed, and the commissioner of public works accepted it, the city was bound by their decision in the absence of fraud or mistake. *Brady* v. *Mayor, etc., of the City of New York*, New York Ct. of Appeals, April 1892.

3. WATER - WORKS — EXCLUSIVE FRANCHISE.

Held, that the legislative authority to a municipal corporation to provide a system of water-works, to grant the right to a private corporation to esta-

blish such a system, and to supply the municipality with water, and to contract therefor, does not confer upon the municipality the power to grant an exclusive franchise, so as to disable the municipal corporation, for the period of thirty years, from itself establishing water-works and a system of supply. Such grants or delegation of authority are to be strictly construed. *Long* v. *City of Duluth*, Supreme Court of Minnesota.

4. ORDINANCES—STALLIONS — NUISANCE.

A city ordinance declaring it a misdemeanor punishable by fine to keep stallions, etc., within the city limits for service, is invalid, such keeping not being a nuisance *per se*. *Ex-parte Robinson*, Tex. Ct. App., Nov. 1891. (Alb. L. J.)

Extracts from the case.

The keeping of a stallion for breeding purposes is not only not in contravention of the laws and purposes of this State, but is a right which every citizen of the State possesses under our laws, and while such occupation is not licensed or taxed, yet the right is so far regarded as a valuable one, that by express provision of our statute, a lien is given to the owner or keeper of a stallion, jack or bull, on the progeny thereof, to secure the payment of the service of such animal. Gen. Law, 21st Leg., p. 115. The keeping of a stallion in a town or elsewhere, is not *per se* a nuisance. In Pye v. Peterson, 45 Tex. 312, our Supreme Court held that authority to abate nuisances does not include the power to declare that to be a nuisance which in its nature, situation or use is not such. This doctrine is fully sustained by numerous authorities cited in support of the same doctrine in 15, American and English Encyclopædia of Law, 178-180. Mr. Dillon says: "No ordinance can legally be made which contravenes a common right, unless the power to do so be plainly conferred by legislative grant, and, in cases relating to such right, authority to regulate, conferred upon towns of limited power, has been held not necessary to include the power to prohibit." 1 Dill. Mun. Corp. (3d ed.), § 325; Ex parte Garza, 28 Tex. App. 381. Mr. Wood, in his work on Nuisances, remarks: "It would indeed be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, anything a nuisance which the caprices of those having control of its government might see fit to outlaw, without being responsible for the consequences; and even if such power is expressly given by the Legislature, it is totally inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it. The fact that the particular use of property is declared a nuisance by an ordinance of the city does not make that use of the property a nuisance, unless it is in fact so, and comes within the common-law or statutory idea of a nuisance." Wood, Nuis. (2d ed.), p. 823, § 744. "A nuisance, to be a public nuisance, must be in a public place, or where the public frequently congregate, or where members of the public are likely to come within the range of its influence; for if the act or use of property be in a remote and unfrequented locality, it will not, unless *malum in se*, be a public nuisance. But the mere fact that the act or the use of property is unpleasant to the public, or renders property in the vicinity less valuable, will not alone be a sufficient invasion of a public right to constitute it a public nuisance. Provided the act or use of property be not in itself illegal, the law will not, for slight cause, interfere with the business or actions of any man. To constitute a public nuisance there must be a substantial injury to the public at large." 16, Am. & Eng. Enc. Law, 227-229. It is also a general rule, which needs no citation of authorities, that ordinances which needlessly restrain trade, or operate oppressively upon individuals, will not be sustained unless they are such as are calculated to preserve the public health. It is shown by the evidence in the case that the keeping and breeding of this stallion was done in a manner that prevented it from being seen or heard by the people in the town, in a large, close, brick livery stable, one hundred and fifty yards from the nearest dwelling,

and where people passing and repassing upon the street could not see into said stable, or know what was going on when said horse was being bred to mares. We do not wish to be understood, or mean to say that the corporate authorities of the city of Ennis would not have been fully authorized to have passed an ordinance prohibiting the breeding of the stallion to mares within the limits of the town, within public view of the inhabitants of said town, who were wont to pass and repass, and accustomed to pass and repass, through said street where such thing was carried on. Crane v. State, 3 Ind. 193. Such an act would be a nuisance *per se*, and one which the corporation would have the right both to punish and abate.

MUTUAL BENEFIT INSURANCE—See Insur., Mut. Benefit.

NEGOTIABLE SECURITIES—See Banks 2.

NEGOTIORUM GESTOR — See Substitution.

NEGLIGENCE — SEE ALSO MASTER AND SERVANT.

1. PASSING OBSTRUCTIONS.

Plaintiff, a passenger on defendant's uptown street car, was requested by the conductor to get out and assist in getting the car off the track, so as to enable it to pass an obstruction. While on the street for that purpose, defendant's downtown car, for the purpose of passing the same obstruction, "jumped" the track to the east, instead of the west, thereby catching plaintiff between the two cars.

Held, plaintiff. being lawfully in the street at the time, was not guilty of contributory negligence, and was entitled to recover for the injuries so received. N. Y. Superior Ct., *Stastney* v. *Second Ave. R. Co.*, 18 N. Y. Supp. 800.

2. NEGLIGENCE OF LESSOR — DANGEROUS PREMISES — NUISANCE — LICENSE.

A decayed stairway in the rear of leased premises does not constitute a nuisance as to the occupant of an adjoining house, so as to make the lessor responsible under his covenant to repair, for an injury sustained by such neighbor while walking on the stairway.

While plaintiff was on premises adjoining her own, seeking her children, who were accustomed to play there, she was injured by the breaking of a decayed stairway.

Held, that she could not recover from the owner of such premises on the ground that he negligently permitted the stairs to remain in an unsafe condition, because she being on the premises without invitation, and as a mere licensee, the owner owed her no duty of protection. *Sterger* v. *Vansicklen*, New York Court of Appeals, Second Division, May 3, 1892.

3. DANGEROUS PART OF A ROAD—FENCING.

Held, that part of a road supported upon a retaining-wall, and with drop of eight or nine feet to the seashore, was not necessarily dangerous so as to require fencing, and that the question of whether it was dangerous or not was peculiarly one for a jury to determine upon evidence. *Fraser* v. *Magistrates of Rothesay*, 29 Scot. Law Rep. 740.

4. COMPENSATION FOR PERSONAL INJURY — CONCEALED DANGER — REMOTENESS OF DAMAGE.

The defendant contracted to carry a cargo to a ship for loading, and he sub-contracted with a third person to take his (the defendant's) barge to the ship and return it when unloaded. The plaintiff, a stevedore's man, was engaged after dark in unloading the barge, and, stepping back to get clear, fell through the cabin hatchway, which was left uncovered. The defendant had not provided the barge with a cabin top. In an action for compensation for personal injuries,

Held, by Cave, J., and *semble*, by the Court of Appeal, that the defendant owed no duty to the persons using his barge to provide a cabin-top or to give warning of its absence.

Held, by Cave, J., and the Court of Appeal, that the accident did not

directly result from the absence of the cabin-top, but from the hatchway being left uncovered, and that the action failed. Heaven v. Pender (52 Law J. Rep., Q. B., 702; Law Rep. 11 Q. B. D. 503) and Smith v. The London & St. Katharine Dock Co. (37 Law J. Rep. C. P. 217; Law Rep. 3 C P. 326) distinguished. *O'Neil* v. *Everest*, (App.) 61 L. J. Rep., Q. B. 453.

Lord Herschell, (after stating the facts, continued as follows:)—The plaintiff's case is that the accident was the result of the defendant's negligence. Mr. Bell, in his ingenious argument, insisted that the negligence of the defendant lay in providing a barge in an improper condition, with the knowledge that stevedore's men were likely to be working upon it. The plaintiff in order to succeed must make out: first, that the defendant was guilty of negligence—that is, some breach of duty owing by the defendant to the plaintiff; secondly, that the injury was the direct result of that negligence. The plaintiff relied on Smith v. The London and St. Katharine Dock Company (L. R. 3 C. P. 326) and Heaven v. Pender (L. R. 11 Q. B. D. 503): but those cases are different from the present, because in both those cases there was a concealed danger in the condition of the premises which the defendants owned, and to which they invited people who carried on their business to come. In one case the injury was caused by an insecure plank; in the other case it was a rope which was rotten. In both those cases there was a concealed danger, which could not have been avoided by the persons using the premises. I will assume that if the barge had been in a condition inherently dangerous this case would have come within those authorities, and that an action would lie. But in the present case there is certainly no concealment about the danger which is said to exist. The negligence which is alleged is in not providing the barge with a cover for the hatchway. Well, of course, if the hatchway was open, that was a thing which would be obvious to every one. It was not said that the defendant was under any obligation to see that the hatchway was covered. It is admitted that the hatchway must have been sometimes uncovered. The utmost that the plaintiff alleged, or could allege, was that there was a duty on the defendant to see that there was a cover to the hatchway. I am far from satisfied that that duty has been made out as a duty to the plaintiff existing at the time when the defendant handed over the barge to Taynton, because any risk arising from the absence of such a cover might be obviated in a variety of ways. During the daytime there was no risk at all, and at night the risk could have been obviated by providing sufficient lights. But, assuming the existence of such a duty, in my opinion the plaintiff has not made out his case. He must shew that the accident was the direct result of the defendant's breach of duty. If the cover had been there, and the whole was open, it is admitted that the defendant would not have been liable. But if there was no negligence on the part of the defendant in the hole being left open, supposing the cover to have been provided, it is difficult to see how there was negligence in not providing a cover for the hole. However the case is regarded, it is impossible to say that the injury the plaintiff sustained was the direct result of any negligence which can be brought home to the defendant.

Lindley, L. J., and Kay, L. J., concurred.

5. Manufacture of Defective Article — Liability to Third Person.

If one engaged in the business of manufacturing goods not ordinarily of a dangerous nature, to be put upon the market for sale and use, so negligently constructs an article that it will obviously endanger the life or limb of any one who may use it, and knowing such defects, and that the same are so concealed that they are not likely to be discovered, puts the article in his stock of goods for sale, he is liable for injuries caused by such negligence to one into whose hands the dangerous implement comes for use in the usual course of business, even though there be no contract relation between the latter and the manufacturer. *Schubert* v. *J. R. Clark Co.*, Minnesota Supreme Court, April, 21, 1892.

Extracts from the case.

The following cases may be cited as instances in which, although there were no contract relations between the parties, a legal duty toward the person injured has been recognized: Thomas v. Winchester, 6 N. Y. 397, was an action by a person whose physician had prescribed for her use as a remedy the extract of dandelion, which is a harmless drug. A druggist furnished her what was supposed to be extract of dandelion, taking it from a jar so labelled by the defendant, the manufacturer. With that label on the jar the defendant had sold it to a dealer in drugs, from whom the druggist who dispensed it for the plaintiff's use had purchased it. In fact the jar contained extract of belladonna, a poison. The defendant was held liable for injury suffered by the plaintiff from taking the mislabelled poison. A similar case was that of Norton v. Sewall, 106 Mass. 143, where the defendant, an apothe-

cary, negligently sold a deadly poison —laudanum—in place of a harmless medicine—rhubarb—which had been called for. The purchaser procured it to administer to his servant. The servant having died from the effect of the poison, his administrator was allowed to maintain an action for the negligence. In Elkins v. McKean, 79 Penn. St. 493, 502, it was considered that, if refiners and vendors of petroleum put on the market for sale for illuminating purposes an oil which they knew to be below the legal fire test, they would be liable for a death caused by the explosion of a lamp, even though the oil had been purchased from an intermediate dealer. In Wellington v. Oil Co., 104 Mass. 64, the principle of general duty and liability, independent of contract relations, was carried very far. The defendant, knowing naphtha to be an explosive fluid, dangerous for use for illuminating purposes, sold it to a retail dealer, knowing that the latter intended to sell it for such use. The plaintiff purchased from the retail dealer for that purpose, both he and the seller being ignorant of the dangerous nature of the substance. The plaintiff was held entitled to recover for injuries suffered from its use. The case of Bishop v. Weber, 139 Mass. 411, was this: The plaintiff attended a ball, for which he had purchased a ticket. The defendant, a caterer, had been employed to provide refreshments for those who should attend the ball. The plaintiff partook of the food furnished by the defendant, which was alleged to have been unwholesome and poisonous, The defendant was held liable. In Heaven v. Pender, 11 Q. B. Div. 503, Brett, M. R., laid down in general terms the rule of duty and liability, even in the absence of a contract relation between the parties, sufficiently broadly to cover this case, and to hold the defendant to responsibility if the case were as we are assuming it to have been. While the other justices decline to adopt the general test of liability which was stated by the master of the rolls, they declare that they did not intend to express a doubt as to the principle that any one who leaves a dangerous instrument—as a gun—in such a way as to cause danger, or who, without due warning, supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act. In George v. Skivington, L. R., 5 Exch. Cas. 1, a husband purchased from the defendant a chemical compound as a hair wash for his wife's use. It proved to be of a harmful nature, and the wife's health was injured. She was allowed to maintain an action for the injury. In this connection should also be cited, as recognizing a duty *independent* of contr[illegible] relations, Moon v. Railroad Co. (Minn.), 48 N. W. Rep. 679, 680. See also Cooley, Torts, (2d ed.), 560.

6. Latent Defect in Machine—Duty of Inspector—Onus—Res Ipsa Loquitur.

In an action of damages where an accident had occurred through the lower strap of a crane snapping owing to a latent defect, it was proved that two years before, the upper strap had snapped from a similar defect; that the defender, the owner of the crane, had not then discarded the lower strap, but had sent the crane to be overhauled by a competent engineer, who had examined and retained the lower strap; that since then the defender's foreman had continued to inspect the crane in the ordinary way, and that sufficient time had not elapsed to necessitate such special inspection as could alone have revealed the defect.

Held, that no fault had been established against the defender, who fell to be assoilzied.

Observations upon the *onus* of proof in cases of latent defect, and upon the application of the maxim *res ipsa loquitur* to such cases. *Milne* v. *Townsend*, 29 Scot. Law Rep. 747.

Notes—See Bills and Notes.

Notice of Assessment—See Insurance 19.

NOTICE OF CLAIM — See Telegraph Comp. 2.

NUISANCE—See Mun. Corp. 4—Neg. 2.

OFFER AND ACCEPTANCE — See Contracts 4.

ONUS OF PROOF—See Neg. 6.

OPTION DEALINGS—See Contracts 2.

OVERDRAFT, UNAUTHORIZED — See Banks and Banking 3.

ORDINANCES—See Mun. Corp. 4.

ORIGINAL WILL IN FRENCH — See Will.

PERISHABLE GOODS, SPECIAL RATE FOR—See Carriers.

PETIT JURORS—See Crim. Law 3.

PETITION OF RIGHT.

(P. Q.) — R. S. C. ART. 5976—SALE OF TIMBER LIMITS—LICENSES—PLAN — DESCRIPTION — DAMAGES — ART. 992 C. C.

Where the holder of a timber license does not verify the correctness of the official description of the lands to be covered by the license before the issue of the license, and after its issue works on lands and makes improvements on a branch of a river which he believed formed part of his limits but are subsequently ascertained by survey to form part of adjoining limits, he cannot recover from the Crown for losses sustained by acting on an understanding derived from a plan furnished by the Crown prior to the sale. Fournier, J., dissenting.

Patterson, J., was of opinion that the appellant's remedy should have been by action to cancel license under art. 992 C. C. and with a claim for compensation for moneys expended. Appeal dismissed with costs. *Grant* v. *The Queen*. Supreme Ct. of Canada, April, 1892.

PLEADING, DENIAL — See Telegraph Comp. 3.

PLEDGE—See Appeal 2—Banks and Banking 2.

PORTABLE SAW MILL—See Fixtures.

POST-OFFICE, EFFECT OF USING — See Contract 4.

POWER TO AMEND DEFECTS—Intox. Liquor 2.

PRE-EMPTION — See Government Lands.

PREMATURE PROTEST OF NOTE—See Libel and Slander 1.

PREMIUM, PAYMENT OF—See Insurance 8.

PREMIUM, NON-PAYMENT OF — See Insurance 14.

PRINCIPAL AND SURETY — See Bills and Notes 3.

PRIVILEGED OCCASION — See Libel and Slander 2.

PROBATE OF FRENCH WILL — See Will.

PROMISSORY NOTE — See Bills and Notes 1. 2. 3.

PROOF OF DEATH—See Insur. 13.

PROOF OF LOSS—See Insur. 6.

PROTEST OF NOTE — See Libel and Slander 1.

RAILROAD FIREMAN, INJURY TO — Mast. & Serv. 4.

RECEIPT.

SIGNATURE BY CROSS—EVIDENCE.

Held : That a receipt signed by a cross, in the presence of a single witness, is valid, but is not a private writing which makes proof between the parties without evidence of its execution, and only constitutes a commencement of proof in writing. *Trudeau* v. *Vincent*, 1 Q. R. (S. & C. C.), 231.

REGISTERED CONTRACT — See Companies.

REGISTRATION OF GIFT INTER VIVOS —See Donation Inter Vivos.

RE-INSURANCE—See Insur. 17.

REMOTENEES OF DAMAGE—See Neg. 4.

" RENONCIATION TACITE "—See Appeal 1.

" RES IPSA LOQUITUR "—See Neg. 6.

" RES GESTÆ "—See Insur. 10.

RESPONSIBILITY — See Master and Servant 2—Mun. Corp. 1.

RESTRAINT OF TRADE—See Contracts 3.

RESULTING TRUST—See Insolvency 1.

RETROACTIVE EFFECT—See Insur. 21.

RIFLE, FAILURE TO PROVE IT WAS LOADED—See Crim. Law 2.

RIGHTS OF INSOLVENT—See Insolvency 3.

ROAD—See Mun. Corp. 1—Neg. 3.

SALARIES OF LICENSE INSPECTOR—See Intox. Liquor 1.

SALE OF INTOXICATING LIQUORS TO BE ILLEGALLY SOLD IN ANOTHER STATE—See Contracts 1.

SALE OF TIMBER LIMITS—See Petition of RIGHT.

SALE OF GOODS.

SALE—DELIVERY—WARRANTY.

Held :—That the purchaser of hay for export, should ascertain its quality upon its delivery, *here*, and therefor, has no recourse against the vendor, if upon arrival at its final destination, the hay should be found of inferior quality, (in Review). *Marchand* v. *Gibeau*, 1 Q. R. (S. & C. C.), 266.

SCAFFOLD—See Master and Servt. 1.

SERVITUDE—See Street Ry. Comp.

SEVERABLE CONTRACT—See Insur. 5.

SHARES, ISSUE OF AT A DISCOUNT—See Comp.

SIGNATURE—See Statute of Frauds.

SIGNATURE BY CROSS—See Receipt.

SLANDER—See Libel and Slander 2. 3.

SOLICITOR.

LIEN — SUCCESSIVE SOLICITORS IN ACTION — INSUFFICIENT FUND — PRIORITY.

Where successive solicitors are employed in an action, and the fund in Court is insufficient for payment of all the costs, the solicitor who conducts the cause to its conclusion is entitled to be paid first, and the solicitor who was next previously employed is entitled to be paid next, and so on throughout, the latest in order of employment being entitled to priority; and it is immaterial that the previously employed solicitors may have obtained charging orders for their costs. Cormack v. Biesley (3 De Gex & J. 157, 162 and *In re* Wadsworth ; Rhodes v. Sugden (56 Law J. Rep. Chanc. 127 : Law Rep. 34 Ch. D. 155) followed, and held not to be affected by the decision of the House of Lords in North v. Stewart (Law Rep. 15 App. Cas. 452). *In re Knight; Knight* v. *Gardner*, 61 L. J. Rep. Chanc. 399.

SPECIAL DAMAGES, ABSENCE OF—See Libel and Slander 3.

SPECIAL RATES—See Carriers.

STAMP ACT (ENG.) — See Bills and Notes 3.

STATUTE OF FRAUDS.

MEMORANDUM—SIGNATURE.

A memorandum of an agreement that plaintiff should serve defendants for three years, in the form of a letter from plaintiff, addressed to defendants, whose name appeared at the beginning of the letter, was written by defendants' agent with their authority, and presented to plaintiff for signature, and signed by plaintiff. In an action for wrongful dismissal, *held*, that defendants' name, inserted in the letter by their authorized agent, amounted to a signature binding on defendants, within section 4 of the statute of frauds, and that plaintiff was entitled to recover. *Evans* v. *Hoare*, 1 Q. B. [1892] 593.

Denman, J. This was an action for wrongful dismissal. The plaintiff entered the defendant's service as a ledger clerk at £80 a year. The salary was twice raised £10 a year, until it reached £100. On February 19, 1890, the plaintiff signed an agreement as follows:

"5 Campbell Terrace, Cannhill Road, Leytonstone,

"Feb. 19, 1890.

"Messrs. Hoare, Marr & Co., 26, 29 Budge Row, London, E. C. :

"Gentlemen—In consideration of your advancing my salary to the sum of £130 per annum, I hereby agree to continue my engagement in your office for three years, from and commencing January 1, 1890, at a salary at the rate of £130 per annum aforesaid, payable monthly, as hitherto.

"Yours obediently,

"GEORGE E. EVANS."

If this agreement was within section 4 of the statute of frauds the judgment was justified. The learned judge gave judgment for the defendants on the ground that the document was not signed within that section. This decision would be right unless the words "Messrs. Hoare, Marr & Co.," at the commencement, can, under the circumstances, be held to be "a signature by a person authorized thereunto by the defendants." In fact the document was drawn up by one Harding, who was authorized by the defendants to draw it up and take it, in its present shape in all other respects, for the plaintiff's signature. It appears to me that the case falls within the principle of the decisions cited in favor of the plaintiff, especially Schneider v. Norris, 2 M. & S. 286, and Jones v. Victoria Graving Dock Co., 2 Q. B. Div. 314. See also the case of Bleakley v. Smith, 11 Sim. 150. In the present case it is impossible to doubt that the word "your," twice used in the written document, refers to the defendants, whose name and address is given in full at the head of the document. Nor can I doubt that both Harding and the defendants intended that this document, when signed by Evans, should be the final memorandum of the contract binding upon the defendants as well as the plaintiff. Mr. Witt contended that the cases relied upon were all cases where the document was sent out by the person charged. I do not think that this is necessary, if by the expression "sent out" is meant more than submitted for signature to the other party. If the party sued has authorized an agent to lay before the party suing a document containing his name in full as that of the party with whom the contract is to be made, so as to announce to the other party that they are offering him certain terms if he will agree to them in writing, and he thereupon signs, I think that there is sufficient "agreement or memorandum thereof, signed by a party authorized thereunto" within section 4 of the Statute of Frauds. That appears to me to be the case here. I therefore think that the plaintiff is entitled to judgment for the amount of the verdict.

Cave, J. I am of the same opinion. The case put forward on behalf of the plaintiff was based on the grounds which have been stated by my brother Denman, and it was further contended that the plaintiff had served, and must therefore be entitled to recover something in respect of such service. It is obvious however that this latter contention is not well founded, for the plaintiff had not completed any one month of service under the contract. The real point to be decided is whether the document in question is a memorandum or note in writing of an agreement signed by the party to be charged, or by some other person lawfully authorized, within the meaning of section 4 of the Statute of Frauds. 29 Car. 2, chap. 3. The statute of frauds was passed at a period when the Legislature was somewhat inclined to provide that cases should be decided according to fixed rules, rather than to leave it to the jury to consider the effect of the evidence in each case. This no doubt arose to a certain extent from the fact that in those days the plaintiff and the defendant were not competent witnesses. Several cases were referred to in the course of the argument, which it was contended could not be distinguished from the present case, but it is difficult to ascertain whether the circumstances of the different cases are the same, or rather whether the circumstances in which the different cases are similar or dissimilar are material or immaterial to the point under consideration. No doubt in attempting to frame a principle one is obliged to depart somewhat from the strict lines of the statute. I am of opinion that the principle to be derived from the decision is this. In the first place, there must be a memorandum of a contract, not merely a memorandum of a proposal, and secondly, there must be in the memorandum, somewhere or other, the name of the party to be charged, signed by him or by his authorized agent. Whether the name occurs in the body of the memorandum, or at the beginning or at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute. In the present case it is true that the name of the defendants occurs in the agreement, but it is suggested on behalf of the defendants that it was only put in to show who the persons were to whom the letter was addressed. The answer is that there is the name, and it was inserted by the defendant's agent in a contract which was undoubtedly intended by the defendants to be binding on the plaintiff, and therefore the fact that it is only in the form of an address is immaterial. A case was referred to in the argument (Schneider v. Norris, 2 M. & S. 286), in which a printed bill-head was held to amount to a signature within the meaning of the statute. That is a stonger case than the present. The printed heading there was not put into the document for the purpose of constituting a memorandum of the contract, but it was so used with the assent of the party sought to be charged, and it therefore was held to have the effect of a signature. This shows that it is unimportant how the name came to be inserted in the document. I cannot discover any other principle than that which I have stated, and I am of opinion that the present case comes within that principle, and therefore the plaintiff is entitled to judgment for the amount of damages found by the jury.

Appeal allowed. Leave to appeal refused.

STATUTES, REV. STATS. CAN. C. 159—See Lotteries.

STATUTES, REV. STATS. CAN. ART. 5976—See Petition of Right.

STATUTES 36 VIC. CH. 81 (P. Q.)—See Appeal 1.

STATUTES, CONSOL. STATS. LOWE CAN. C. 69—See Appeal 2.

STREET RAILWAYS — SEE ALSO NEG. 1.

SERVITUDE—CABLE RAILWAY.

Held that the use of a street by a cable railway company is not an additional servitude, entitling abutters to compensation, though vehicles cannot stand between the curbing and the tracks without interfering with the cars, and though the pipes under the surface of the street, by being lowered to make room for the cable conduit, may be slightly more difficult of access. *Rafferty* v. *Central Traction Co.*, Sup. Ct. of Pennsylvania, March 21, 1892.

The court said: "It has been many times held, and by many different courts, that the use of a public street for purposes of street railroads is not the imposition of an additional servitude, and does not entitle the abutting land-owners along the street to compensation for such use. In the case of Lockhart v. Railroad Co., 139 Penn. St. 419, we affirmed the lower court in the following ruling: 'It cannot be doubted at this day that the Legislature of Pennsylvania has the power to authorize the incorporation of companies with power to build and operate railways with horses over the streets of cities, with the authority and consent of the authorities of said cities, as provided by section 9, article 17, of the Constitution; and it is too late to say that such use and occupation of the streets impose such an additional burden or servitude thereon as renders it necessary to provide for compensation *therefor to the owners of abutting property.* * * * So far as the street use proper is concerned, there is no substantial difference between the tracks of such a street railway and one operated by electricity. * * * And it may be now taken as settled that the owner's rights, as to abutting property, are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate uses, such as the public may from time to time require. * * * Recognizing the right of the Legislature and city authorities to authorize the building of railways upon the streets of a city without compensation to property-owners, because it is a means of public transportation and accommodation, the necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in its construction or use.' In Halsey v. Railway Co., 20 Atl. Rep. 859 (Court of Chancery, N. J. 1890), it was held that land taken for a street is taken for all time, and compensation is made once for all, and by taking the public acquire the right to use it for travel, not only by such means as were in use when the land was acquired, but by such other means as new wants and the improvements of the age may render necessary; and that the question whether a new method of using the street for public travel results in the imposition of an additional burden on the land or not must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. It was held that the erection of poles in the center of the street, and on the sidewalk in front of the plaintiff's property, with connecting wires, for the purpose of applying electricity as a motive power to propel street cars, was not imposing an additional servitude upon the street, and that the owner had no cause of action. In Williams v. Railway Co., 41 Fed. Rep. 556, the court said: 'The operation of a street railroad by mechanical power, when authorized by law, on a public street, is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use of the street as a public highway, and affords to the abutting property-holder, though he may own the fee of the street, no legal ground of complaint.' In the case of Briggs v. Railway Co., 79 Me. 363, the court said: "We do not think the construction and operation of a street railroad in a street is a new and different use of the land from its use as a highway. The modes of using a highway, strictly as a highway, are almost innumerable, and they vary and widen with the progress of the community. * * * The laying down of rails in the street, and running street cars over them for the accommodation of persons desiring to travel on the street, is only a later mode of using the land as a way, using it for the very purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. * * * We do not think the motor is the criterion. * * * This defendant company is using the land as a street. Its *railroad is* a street railroad. Its cars are used by those who wish to pass from place to place on the street. A change in the mode is not a change in the use.' All of this is strictly applicable to the facts of the present case. High street was a public street of the city before the defendant's tracks were laid, and it is so still. Whether the motive power of the cars be horses, electricity or a submerged cable makes no difference in the use, and no one of these modes of use confers any right of action upon the abutting owner. In Taggart v. Railway Co. (R. I.), 19 Atl. R. 326, it was held that a street railway operated by electricity imposed no new servitude upon the property-owner, although poles and wires were erected in the street in connection with the railway. Laying a street-car track so close to the sidewalk that vehicles cannot stand gives no ground for action. Kellinger v. Railway Co., 50 N. Y. 206. It is claimed for the plaintiffs that their right of free access to their property along High street is interfered with because vehicles cannot stand between the railway tracks and the curbing without interfering with the cars. *But the right of the property-owner in this* respect is not at all changed. He has the same right after the tracks are laid and the cars running that he had before. It is a right which must be exercised in reason

whether there are car tracks on the street or not. In no circumstances does it confer the privilege of obstruction by unreasonable exercise. But the reasonable exercise of the right gives no right to the street-car companies to arrest it. If at any time the owner has occasion for the presence of vehicles in front of his property on the streets to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purpose, and, if in such exercise of the right the passage of the street cars is impeded, the street cars must wait. Such stoppage of cars is a matter of hourly occurrence in all large towns and cities where street-car tracks are laid upon narrow streets, and it was proved on the hearing before the master that not only in Pittsburg and Allegheny, but in Philadelphia, there are numerous instances of this kind. It was also proved that in actual fact there had been no trouble of this kind on High street since the cars were running. But the important question is as to the existence of the right of the owner, and not as to its abuse by either the street-car company or the owner. For such abuse by the company on the one hand or the owner on the other, each is responsible, and each has adequate remedy. These principles are sustained by adequate authority, and they are the teachings of common sense. The same is true respecting the right of access to the pipes and mains lying under the surface of the street. Some of them were lowered slightly by the defendant company, to make room for the conduit for their cables, and the connections were restored by the company. The right of future access to those pipes and mains by the owner remains precisely the same as it was before. A slight difference in the depth to which the owner must go, upon the very rare occasions when he may desire to make repairs or new connections, is so very trivial that it must be regarded as *damnum absque injuria*. If for any reason, such as change of grade by the municipal authorities, or to get below the frost, the pipes and mains require to be lowered, it certainly has never been supposed that the owner would have a right to recover damages against the municipality or other authority on account of such lowering of the pipes and mains."

STRIKE FUND, SUBSCRIPTION TO — See Indust. Society.

SUBSTITUTION.

CURATOR TO—ACTION TO ACCOUNT – INDIVISIBILITY OF — WILL — CONSTRUCTION—TRANSFER—EFFECT OF—SALE OF RIGHTS—MANDATARY — NEGOTIORUM GESTOR—PARTIES TO SUIT FOR PARTITION—ART. 920, C. C. P.—PURCHASE BY CO-HEIR WHILE CURATOR—ART. 1484, C. C.

P. A. A. D. (respondent) as representing the institutes and subsitutes under the will of the late J. D. brought an action against J. B. T. D. (appellant) who was one of the institutes and had acted as curator and administrator of the estate for a certain time, for reddition of an account of three particular sums, which the plaintiff alleged the defendant had received while he was curator.

Held, reversing the judgment of the Court below, that an action did not lie against the appellant for these particular sums apart from and distinct from an action for an account of his administration of the rest of the estate.

The plaintiff in his action alleged that he represented S. D. one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of the defendant a sum of £437 7s. 6½d., the defendant having in an action of reddition of account settled by a notarial deed of settlement with the said S. D. for the sum of $4,000 which he agreed to pay and for which amount the plaintiff became surety.

Held, that as the notarial deed of settlement gave the defendant a full and complete discharge of all redditions of account as curator or administrator of the estate, the plaintiff could not claim a further reddition of account of these particular sums.

The plaintiff also claimed that he represented F. D. and E. D., two other institutes under the will. in virtue of two assignments made to him by them on 21st January, 1869, and 15th November, 1869, respectively. In 1865, after the defendant had been sued in an action of reddition of account, by a deed of settlement the said F. D. and E. D. agreed to accept as their share in the estate the sum of $4,000 each, and gave the defendant a complete and full discharge of all further redditions of account.

Held, affirming the judgment of the Court of Queen's Bench, that the defendant could not be sued for a new acccount, but could only be sued for the specific performance of the obligations he had contracted under the deed of settlement.

In 1871, C. Z. D., another of the

institutes, died without issue and by his will made the defendant his universal legatee. Plaintiff claimed his share in the estate under a deed of assignment made by defendant to plaintiff in 1862 of all right, title and interest in the estate.

Held, that the plaintiff did not acquire by the deed of 1862, the defendant's title or interest in any portion of C. Z. D.'s share under the will of 1871.

Held, further, that under the will of the late J. D., C. Z. D.'s share reverted to the surviving institutes and substitutes, and that all defendant took under the will of C. Z. D. was the accrued interest on the capital of the share at the time of his death.

By the judgment appealed from the defendant was condemned to render an account of his own share in the estate which he transferred to plaintiff by notarial deed in 1862, and also an account of C. D.'s share, another institute who in 1882 transferred his rights to the plaintiff. The transfer made by defendant was in his capacity of co-legatee of such rights and interests as he had at the time of the transfer, and he had at that time received the sixth of the sums for which he was sued to account.

Held, reversing the judgment of the Court below, that the plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would not be liable in an action to account as the mandatary or *negotiorum gestor* of the plaintiff.

2. That F. D. and E. D. having acquired an interest in C. Z. D.'s share after they had transferred their shares to the plaintiff in 1869, the plaintiff could not maintain his action without making them parties to the suit. Art. 920, C. P. C.

Per Taschereau, J. — Was not the transfer made by the institutes E. D. and F. D. to the plaintiff while he was acting as curator to the substitution null and void under Art. 1484, C. C.? Appeal allowed with costs. *Dorion* v. *Dorion*, Supreme Ct. of Canada, April 1892.

SUICIDE, EVIDENCE OF—See Insur. 10.

SUMMARY CONVICTION—See Intox. Liquor 2.

TELEGRAPH COMPANIES.

1. DELAY IN TRANSMITTING MESSAGE—CONTRIBUTORY NEGLIGENCE.

Where defendant telegraph company accepted a telegram, and undertook to deliver it about nine o'clock at night, it cannot be excused for failure to perform the contract because its office to which the telegram was directed was practically closed against the office from which it was sent, no effort having been made to send the message until next morning, after it was too late for the purpose for which it was intended.

The fact that the sender of the telegram might have filed it earlier in the evening, so that it could have reached plaintiff, to whom it was addressed, in time to prevent the injury complained of, does not make plaintiff guilty of any contributory negligence. *Western Union Tel. Co.* v. *Bruner*, Tex. Supreme Ct., 19 S. W. Rep. 149.

2. FAILURE TO DELIVER MESSAGE—JOINDER OF ACTIONS—USE OF BLANKS—NOTICE OF CLAIM.

In an action by a father and son against a telegraph company for damages for its failure to deliver certain messages, it appeared that the father and his two sons resided at D.; that the father was at work at the county poor farm to satisfy a fine at H.; that his son J. died, and that the other son, S., telegraphed to the manager of the poor farm, informing him of the death; that the constable to whose custody the father had been remanded, sent a message to such manager to release the father on account of the death; that thereafter, on the same day, S. sent another message to such manager. The charges on the three messages were paid, and were received by the company's agent at H., but the messages were not delivered until the following day, when the father was immediately released. By reason of

the delay, he was unable to reach D. before the burial of his son.

Held, that the father's and S.'s causes of action could not be joined.

The company answered that the messages were written on blanks, which had thereon printed stipulations that messages would be delivered free within the established free delivery limits of the terminal office; that for a greater distance a special charge would be made to cover the cost of delivery; that the person to whom the messages were addressed did not reside within the free delivery limits at H., which were one-half mile each way from the company's office; and that no charges were paid or guaranteed for special delivery, *held*, that the answer stated a good defence.

Where it was shown that the constable's telegram was not written on one of the company's blanks, and it did not appear that it was pinned to one of such blanks with his knowledge or the knowledge of the person by whom it was sent to the company's office, it was error to refuse to admit it in evidence, detached from the blank form to which it had been so pinned.

Since the constable's telegram secured the father's release, and the failure to deliver it was the gist of the action, the company having received it without stipulating that notice of a claim for damages should be made within sixty days, the father's claim for such damages was not barred, though no notice of such claim was given within sixty days. *Anderson* v. *Western Union Tel. Co.*, Supreme Court of Texas, March, 1892.

3. Connecting Lines — Delay in Delivery of Message—Pleading—Denial Under Oath.

A telegraph company, upon a receipt of a message for transmission to a point beyond its line, sent it to defendant to be forwarded, and paid the latter one-half of the sum collected from the sender.

Held, that defendant was liable for delay in delivering the message, and the court erred in directing a verdict for defendant, on the ground that it was merely the agent of the other company.

It was not necessary for defendant, under Rev. St. art. 1265, ss. 6, 8, to deny, under oath, the execution of a written contract with it for the transmission of the message, and the existence of a partnership between it and the other company, when the same were not alleged in the petition. *Smith* v. *Western Union Tel. Co.*, Supreme Court of Texas, April 1892.

Extracts from the case.

The analogy of connecting telegraph lines to connecting railways is so great that it is believed that the established rules of law which determine the liability of the latter should be applied to the main question involved in this case, which relates to a connecting telegraph company. Scott & J. Tel. s. 278; Gray, Comm. Tel. s. 58, and note 1. In the case of Railway Co. v. Baird, 75 Tex. 256, 12 S. W. Rep. 530, it is said that, "in the absence of a partnership or authority to make a joint contract binding upon all carriers over whose lines freight is to pass, connecting lines are but the agencies employed by the contracting carrier to perform its own contract." But, according to the great weight of the authorities in the United States, the mere "making or booking" of freight to a point beyond the line of the receiving carrier does not amount to a contract of through transportation upon its part. The same may be said of the effect of a telegram addressed to a point upon the connecting line, although there should be no express limitation as to the liability of the first company. Port. Bills Lad. s. 328; Gray, Comm. Tel. ss. 58, 59; Lawson, Cont. Carr. ss. 238-240; Railroad Co. v. Pratt, 22 Wall, 123. But however this may be as affecting the liability of the initial carrier, it has been held by the courts of nearly every state in this country, including those which followed what is known as the English doctrine as to a through bill of lading, that nevertheless the connecting company will be liable if in fact it is the carrier which inflicted the injury or committed the negligence of which the plaintiff complains. Lawson, Carr. s. 741; Baldwin v. Telegraph Co.,

45 N. Y. 744. This appears to be the later English doctrine, apparently upon the ground of tort. Foulkes v. Railway Co., 5 C. P. Div. 157; Hooper v. Railway Co., 43 Law T. (N. S.) 570. In the case of Railway Co. v. Baird, *supra*, it was also held that the connecting carrier would be "liable for any injury to the property while in its possession," etc., but was not responsible for the negligence of the other carriers. This decision is in perfect accord with the great current of authorities in this country. Port. Bills Lad. s. 343, note 2. Each carrier should be held liable for its own acts of negligence, and even for the acts of the others, if there is a partnership between all, or a joint contract binding upon each of them. Baird's Case, *supra*. It has also been held by good authority that, where several railroads constitute a continuous line, each of them performs a public duty and an independent employment, and, in accepting freight from another carrier for the further transportation over its own line, contracts expressly or by legal implication, not with the other carrier, but with the owner of the goods. Sherman v. Railroad Co., 64 N. Y. 254. In any event we think that the contract in this case which was made by the appellee, even if not made with the plaintiff, was clearly made on his behalf and for his benefit, and therefore he could elect to ratify and enforce it. But again, whether we should regard the first company as the agent of the plaintiff or the agent of the defendant, (the authorities conflicting on this point,) in contracting with the appellee for the transmission of the telegram from Ennis to Dallas, it is evident that such contract is a binding agreement between the plaintiff and the defendant, for the breach of which by the latter the former may maintain his action for damages. The court, therefore, erred in directing the jury to find for the defendant.

TIME, CLAUSE IN NOTE GIVING —See Bills and Notes 3.

THIRD PERSON, LIABILITY OF — See Neg. 5.

TRADE MARK.

FANCY WORDS NOT IN COMMON USE— BRAND — WORDS HAVING NO REFERENCE TO CHARACTER OR QUALITY OF GOODS — PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883 (46 & 47 V., c. 57), S. 64 (1) (c) — PATENTS, DESIGNS AND TRADE MARKS ACT, 1888 (51 & 52 V., c. 50), S. 64 (1), SUB-S. (E.

The words "John Bull Brand" used by a firm of brewers in respect of beer brewed by them were registered by them as a trade mark under the Act of 1883. The evidence was that the mark denoted, in the trade, beer brewed by them and nobody else. On a motion to expunge,—*Held*, first, that the words were not "fancy words not in common use" under the Act of 1883; secondly, that the trade mark could not be supported on the distinct ground of consisting of a "brand"; and thirdly, that the case must be decided under the Act of 1883 alone; but *Semble*, the words were not "words having no reference to the character or quality of the goods" within the amending Act of 1888. *In re Paine & Co.'s Trade Mark*, 61 L. J. Rep. Chanc. 365.

TRANSFER OF SHAPES — See Appeal 2.

VALUATION—See Good-Will.

VESTED INTEREST—See Insur. 22.

VICE-PRINCIPAL — See Master and Servant 3.

WATER COMPANIES — SEE ALSO MUN. CORP. 3.

CONTRACT WITH CITY — CONSTRUCTION.

A stipulation in a contract, whereby a water company undertook to supply a city with water, that it would "at all times furnish, if required," 100 gallons of water per day for each inhabitant, and a sufficient force or pressure to throw from any five hydrants, "at one and the same time......... five streams of water to the height of 75 feet," became operative only upon proper notice expressly requiring such supply; and it was insufficient to merely notify the company "to bring its water up to the requirements of the

contract, so as to throw water on fires," and to comply with the contract by furnishing "a proper supply and service of water in time of fire."

Water Supply after termination — Quantum Meruit.

Where a contract by a water company to furnish water to a city provided that it should "cease and be at an end" upon failure for three months to furnish "an adequate supply of water," the city was liable upon a *quantum meruit* for water supplied after such termination of the contract. *Wilson* v. *City of Charlotte*, N. C. Supreme Ct., 14 S. E. Rep. 961.

WARRANTY—See Sale of Goods.

WAIVER OF CONDITIONS—See Insur. 5. 6. 8. 9. 14.

WATER WORKS—See Mun. Corp. 3.

WILLS.—SEE ALSO SUBSTITUTION.

ADMISSION TO PROBATE—ORIGINAL WILL, IN FRENCH, PROVED IN FRANCE —CERTIFIED COPY—ENGLISH TRANSLATION ADMITTED TO PROBATE — RIGHT OF COURT TO LOOK AT CERTIFIED COPY.

Edwin Cliff died in 1874, in France. His original will, in the French language, was registered in France, and retained there. In 1876 an English translation of a certified French copy of the original will was admitted to probate here. On an allegation that the translation was inaccurate, and none of the parties insisting that an application should first be made to the Probate Division to rectify the English translation,

Held, that the Court might look at the certified French copy as well as at the English translation admitted to probate, to determine the true construction of the will. *In re Cliff's Trusts*, 61 L. J. Rep. Chanc. 397.

North, J.—Having regard to the facts in L'Fit v. L'Batt, 1 P. Wms. 526, now that I have seen the original documents in that case, which have been produced from Somerset House, I think that in this case I am bound to look at the French document (the certified French copy of the original will) as well as the English translation which has been admitted to probate. It may be that if any of the parties had insisted that I ought not to look at the French document until it had been before the Court of Probate on an application to rectify the English translation, I should not have looked at it: but no one does insist on this being done.

I am prepared, therefore, to look at the French document just as if it were part of the probate, as well as the English translation; but, it being a French legal document, I cannot take upon myself to say what it means without the assistance of French lawyers.

I do not at present know what was the testator's domicil at the time of his death; and it may be that the will may have to be considered differently, and the translation may have to be prepared on a different footing, according as his domicil may turn out to have been French or English.

The petition will stand over generally, with liberty to apply to restore it to the paper again.

WITNESS—See Insur. 4.

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