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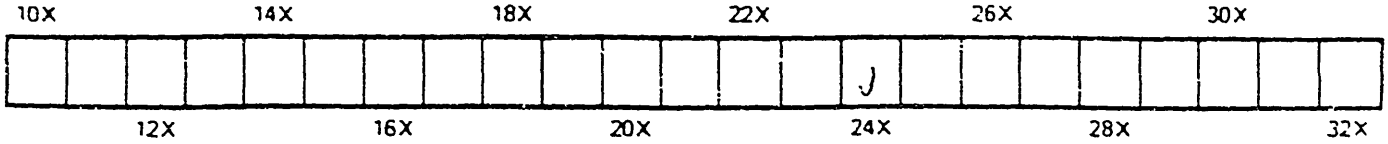

MONTHLY LAW DIGEST

AND REPORTER.

VOL. I. DECEMBER, 1893. No. 12.

ACCIDENT INSURANCE — See Insur. Accident.

AGENCY—See Principal and Agent —Election Expenses.

AGREEMENT — See Commercial Traveller.

APPEAL.

TO PRIVY COUNCIL.

1. FROM COURT OF REVIEW—RIGHT OF.

Johnson, C.J.: In this case, in which we last week confirmed the judgment of the Superior Court at St. Johns condemning the defendant to pay $500 damages and costs, a motion was made by the defendant for leave to appeal to Her Majesty in Her Privy Council under the amendment by the 37th V., c. 5 to art. 494, C. P. By those provisions an appeal was given to Her Majesty in Her Privy Council direct from this court, in cases where the appeal to the Queen's Bench from this court was taken away, and where it would lie from the Queen's Bench if the judgment had been given by that court. The defendant seemed to rely upon the amendment of 1891 to the Supreme Court Act which has nothing to do with the present case. The Privy Council in the case of Allan v. Pratt (Beauchamp's Jur. P. C., p. 76) laid down the rule clearly that the proper measure of value for determining the right of appeal is the amount received by the plaintiff in the action, and against which the appeal could be brought; and that case adopted the rule in McFarlane v. Leclaire that had been laid down still more clearly by Lord Chelmsford, that the judgment is to be looked at as it affects the interests of the party prejudiced by it and who seeks to relieve himself of it by appeal. Such cases are limited to the minimum amount of £500 sterling by art. 1178 C. P.

The defendant's motion is therefore rejected. *Marchand* v. *Molleur*, Court of Review, Montreal, Nov. 11, 1893.

TO SUPREME COURT

2. JURISDICTION.

Held, that a judgment in an action to vacate the sheriff's sale of an immoveable is appealable to the Supreme Court under Sec. 29 (b). Dufresne v. Dixon, (16 Can. S. C. R. 591) followed *Lefeuntun* v. *Veronneau*, Supreme Ct. of Canada, 24 June 1893.

3. JURISDICTION—AMOUNT IN CONTROVERSY—R. S. C. c. 135—54 & 55 V., c. 25—COSTS—QUEBEC.

C. brought an action against E. claiming that a certain building contract should be rescinded; $1,000 damages; and $515 for the value of bricks in the possession of E., but belonging to C. The case was *en delibére* before the Superior Court when 54 & 55 V. c 25, amending c. 135, R. S. C., was sanctioned, and the judgment of the Superior Court dismissed C.'s claim for $1,000 but granted the other conclusions. On appeal to the Court of Queen's Bench by E., the action was dismissed in 1893.

C. then appealed to the Supreme Court of Canada.

Held, that the building for which a contract had been entered into, having been completed over five years ago, there remained but the question of costs and the $545 claim for bricks in dispute between the parties, in the judgment appealed from, and that amount was not sufficient to give jurisdiction to the Supreme Court of Canada under R. S. C. c. 135, s. 29. The appeal was quashed with costs. *Cowen* v. *Evans*, Supreme Ct. of Canada, 24 June 1893.

4. JURISDICTION—AMOUNT IN CONTROVERSY—54-55 VICT. CAP. 25, SEC. 4—QUEBEC.

On the 30th September, 1891, when the Statute 54-55 Vict., c. 25, s. 4, was passed, enacting that the amount demanded and not that recovered should determine the right to appeal when the right to appeal is dependent upon the amount in dispute, the Superior Court had *en délibéré* an action of damages brought by the respondent against the appellant for $3,050 of damages. The Superior Court on the 5th December, 1891, dismissed the respondent's action. On appeal to the Court of Queen's Bench for Lower Canada (appeal side) the Court on the 23rd February, 1893, reversing the jugment of the Superior Court, granted $880 damages to respondent with interest from the 16th June, 1887. On appeal to the Supreme Ct. of Canada.

Held, that the Statute 54-55 Vic., c. 25, did not apply to cases pending, and as the amount of the judgment appealed from was under $2,000 the case was not appealable, following on the question of the non-retroactivity of the Statute, Williams v. Irvine, (22 Can. S. C. R. 108) and as to the amount in dispute, Monette v. Lefebvre, (16 Can. S. C. R. 357). Gwynne, J., dissenting. Appeal quashed with costs. *Cowan* v. *Evans*, Supreme Ct. of Canada, 24 June, 1893.

NOTE.—The appeal of the Montreal Street Railway Co. v. Carrière, argued at the October session 1893 was quashed on the same grounds.

5. JURISDICTION—AMOUNT IN CONTROVERSY—54-55 V., c. 25, s. 4—NON-RETROACTIVITY.

In an action brought by the respondents on the 25th July, 1889, claiming $5,000 damages alleged to have been sustained by them by the production of a plea and incidental demand by the appellants in a case before the Superior Court for the district of Montreal, under number 528, the Superior Court on the 27th day of September, 1890, granted $300 damages to the respondents.

The appellants, defendants, then appealed to the Court of Queen's Bench, and that Court on the 28th February, 1893, confirmed the judgment of the Superior Court.

On appeal to the Supreme Court of Canada:

Held, following Williams v. Irvine, 22 Sc. R. 108, that 54-55 V., c. 25, did not apply to cases pending before the Court on the 30th Sept. 1891, and the appeal should be quashed for want of jurisdiction.—Gwynne, J., dissenting

The appeal was quashed with costs. *Mitchell* v. *Trenholme*, Supreme Court of Canada, 24 June 1893.

6. RIGHT OF—54-55 V., c. 25, s. 4—AMOUNT IN DISPUTE—JURISDICTION—QUEBEC.

In an action of damages for $5,000 brought for the death of a person by a consort, the Superior Court in April 1891, granted $1,000 damages and the judgment was acquiesced in by the plaintiff, but defendant appealed to the Court of Queen's Bench and that Court affirmed the judgment of the Superior Court in December, 1892. 54-55 V., c. 25, s. 4, declaring that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different," was sanctioned 30th September, 1891. On appeal to the Supreme Court of Canada.

Held, that 54-55 Vict. did not apply to such a case, and that the case was not appealable. Monette v. Lefebvre. (16 Can. S. C. R. 357); Williams v. Irvine, (22 Can. S. C. R. 108). Appeal quashed with costs. *Mills* v. *Limoges*. Supreme Court of Canada, 24 June, 1893.

7. RIGHT OF—NEW TRIAL.

The judgment of the Court of Appeal ordering a new trial was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final. *Cobban Manuf'g Co.* v. *Can. Pac. Ry. Co.*, Supreme Ct. of Canada, May 1, 1893.

ASSESSMENTS AND TAXES—See Taxation — Mun. Corp. 1.

ASSOCIATION, UNINCORPORATED — See Club.

BED BUGS—See Landlord and Tenant 2.

BILL OF LADING—See Ships, etc., 2.

BILLS AND NOTES — SEE ALSO INSOLVENCY.

AMERICAN CASES

1. PROMISSORY NOTE — PAYABLE WITH EXCHANGE.

Held, that the fact that an instrument for the payment of a specific sum of money is made payable with current exchange at a place other than the place of payment does not prevent its being a promissory note. *Hastings* v. *Thompson*, Supreme Ct. of Minnesota, 55 N. W. Rep. 968.

Mitchell, J., says: The only point raised on this appeal is whether the instruments sued on are promissory notes, for, if they are, they are unquestionably negotiable under the law merchant. They are promises to pay specified sums of money in St. Paul, "with current exchange on New York city;" and the only question is whether this provision as to exchange renders the sums required to discharge them uncertain, within the meaning of the familiar rule that one of the essential qualities of a promissory note is that the amount to be paid must be fixed and certain, and not contingent. In the definitions of a promissory note or bill of exchange it is generally, if not always, stated that the amount necessary to discharge it must be ascertainable from the face of the paper itself, without having to refer to any extrinsic evidence. Construing this definition literally, it must be admitted that the instruments in question do not strictly fall within it, for, of course, extrinsic evidence must be resorted to in order to ascertain the rate of exchange at a given time between two places. Upon examination of the reports and textbooks it is surprising how little direct authority of any value is to be found as to the effect of the addition of such a provision to an instrument for the payment of money. Daniel, Randolph and Tiedeman state in general that such a provision does not affect the commercial or negotiable character of the paper, but none of them discuss it at any length, and all of them treat of the question as if it only went to the negotiability of the instruments, whereas the real question lies back of that, and is whether they are promissory notes or bills of exchange at all. Tied. Com. Paper, § 28*a*; Rand. Com. Paper, § 200; Daniel, Neg. Inst. § 51. We have found no English case directly in point, and none bearing on the question, except Pollard v. Harries, 2 Bos. & P. 335, where such an instrument was declared on as a promissory note. If the question was authoritatively settled in the leading commercial States of the Union or in the federal courts, we would be inclined, for the sake of uniformity, to follow their decisions; but we have been unable to find that the Supreme Court of the United States or of either Massachusetts, New York, or Pennsylvania, has ever passed upon the question. The only cases, State, federal or colonial, which we have found which may be considered as having passed on the question, are the following, which may be classified thus: That such instruments are not promissory notes: Lowe v. Bliss, 24 Ill. 168; Read v. McNulty, 12 Rich. Law, 445; Bank v. Strother 28 S. C. 504, 6 S. E. Rep., 313; Palmer v. Fahnestock, 9 U. C. C. P. 172; Saxton v. Stevenson, 23 U. C. C. P. 503; Bank v. Newkirk, 2 Miles, 442; Bank v. Bynum, 84 N. C. 24; Russell v. Russell, 1 MacArthur, 263; Fitzharris v. Leggatt, 10 Mo. App. 529; Hughitt v. Johnson, 28 Fed. Rep. 865; Bank v. McMahon, 38 Fed. Rep. 283. That such instruments are promissory notes: Smith v. Kendall, 9 Mich. 242; Johnson v. Frisbie, 15 Mich. 286; Leggett v. Jones, 10 Wis. 35; Morgan v. Edwards, 53 Wis. 599, 11 N. W. Rep. 21; Bradley v. Lill, 4 Biss. 473. In very few of these cases is the question discussed at any length, or considered on principle. Some of them were decided by courts of inferior jurisdiction, and in others the remarks of the court were obiter. Many of those which hold that such instruments are not promissory notes rest, without discussion upon a strict literal construction of the rule that the sum to be paid must appear from the face of the paper without resort to extrinsic evidence. About the only cases where the question is discussed at any length upon principle or authority are Smith v. Kendall, Bradley v. Lill, Morgan v. Edwards, and Bank v. McMahon.

In view of this state of the decisions, while in mere numbers the decided weight of authority may be in favor of the contention of the defendant, we feel at liberty to decide the question in the way we deem most in accordance with principle and business usages, and in accordance with the rule which, in view of such usages, the leading courts of the country are most likely to finally settle down upon. The following are, in brief, the considerations which have led us to the conclusion that such instruments ought to be held to be promissory notes under the law merchant.

1. The reason and purpose of the rule that the sum to be paid must be certain is that

the parties to the instrument may know the amount necessary to discharge it, without investigating facts not within the general knowledge of every one, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument. The provision for the payment of the current rate of exchange between the place of payment and some other place is not within the reason of this rule, or subject to the evils or inconveniences which it was designed to prevent. While the rate of exchange is not always the same, and while it is technically true that resort must be had to extrinsic evidence to ascertain what it is, yet the current rate of exchange between two places at a particular date is a matter of common commercial knowledge, or at least easily ascertainable by any one, so that the parties can always, without difficulty, ascertain the exact amount necessary to discharge the paper. It seems to us that within the spirit of the rule requiring precision in the amount to be paid a provision for the payment of the current rate of exchange in addition to the principal amount named does not introduce such an element of uncertainty as deprives the instrument of the essential qualities of a promissory note. A provision for the payment of exchange is very different from one for the payment of reasonable attorneys' fees in case of suit, as in Jones v. Radatz, 27 Minn. 240, 6 N. W. Rep. 800. The latter introduces an element of uncertainty very different both in kind and degree from that introduced by the former. Not only is the amount of the attorneys' fees incapable of either easy or definite ascertainment, but the amount of it is more or less under the control of the holder of the instrument. Moreover, such a provision has never been considered in business circles as properly ancillary or incidental to commercial paper, or any part of its legitimate "luggage."

2. The law merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the law, and courts, in their decisions, merely declare it. The law of negotiable paper is not only founded on commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with general business usages, and as far as possible, with the common understanding in commercial circles, This was the very purpose of the statute of Anne placing promissory notes on the same footing as bills of exchange, and thus setting at rest a question upon which there had been some difference of opinion in the courts. Now, we think we are safe in saying, and justified in taking notice of the fact, that if bankers or other business men accustomed to dealing in commercial paper were asked whether such an instrument is a promissory note, and whether they would deal with it as negotiable paper, the answers would, in almost every instance, be unhesitatingly in the affirmative. We have no doubt but that this is the way in which such paper is generally looked upon and treated in commercial and other business circles; and, if so, the court should, as far as possible, make their decisions to conform to this general custom and understanding. We recognize the importance of simplicity and certainty in the terms and conditions of commercial paper; and appreciate the objections to permitting it to be loaded down with unnecessary "luggage" but we cannot see, under all the circumstances, and especially in view of what we believe to be the commercial usage, that any practical evil will result from permitting the addition of such a provision for the payment of current exchange on the principal amount. Nor are we disposed, as a rule, to extend the quality of negotiable paper to contracts for the payment of money beyond the strict limits of the already established rules of law: but to exclude from that category paper like that under consideration would be to exclude the very class of paper which ought to be held negotiable, if any promissory notes ought to be so held—paper given and taken in commercial transactions, properly so called; for rarely, if ever, would a provision for exchange be incorporated in any other.

NOTE.—This point is settled by the Canadian Bills of Exchange Act., 1890 Sec. 9 (d) in the same sense as the foregoing case.

2. NOTICE OF PROTEST.

In Jensen v. McCorkell, decided by the Supreme Court of Pennsylvania, April, 1893, it was *held* that the fact of depositing in the post-office a properly-addressed prepaid letter is *prima facie* evidence that it was received by the person to whom it was addressed.

CANADIAN CASES.

3. PLEADING — BILL OF EXCHANGE — ACCEPTANCE AS EXECUTOR — EVIDENCE.

The defendant accepted a draft, "A. M., executor of J. P.", and to an action pleaded a denial of the acceptance and an agreement that he was to be liable only as executor. The plaintiff was a holder for value without notice.

Held, on appeal from a County Court, that these defences should have been struck out.

After the decision below the defendant sought to introduce fresh evidence of a letter written by the drawer after the draft had been transferred as above stated.

Held, that this was not receivable. *Campbell* v. *McKay*, Supreme Ct. Nova Scotia, (Can. L. T.), 1893.

4. PROMISSORY NOTE — MARRIED WOMAN — ART. 1301 C. C. - - NULLITY — THIRD PARTIES HOLDERS IN GOOD FAITH.

LACOSTE, C. J., giving the judgment of the Court, said the appeal was from a judgment which condemned the appellant to pay the amount of a note made by her in June 1890. The defence relied upon article 1301 of the Civil Code, which says that a wife cannot bind herself either with or for her husband otherwise than as being common as to property. The Court below maintained the action, holding that the fact that the wife bound herself with her husband's authorization did not create a presumption that she bound herself for him; that consideration for the note was presumed, and that it was for her to rebut this presumption. The Court below further laid down the principle that a wife cannot invoke article 1301 against a third party, holder of a note for consideration, unless she proves that the holder was aware of the nullity of the obligation at the time he took the note. The evidence established that the endorsers endorsed the note at the husband's request, for his accommodation, without consideration received by the wife. The cashier of the bank did not recollect who presented the note for discount. It resulted from the proof that the note was signed by the wife for her husband, who received the proceeds of the discount and used the money for his business. The discount was obtained by the husband in the name of the endorsers. The nullity under article 1301, is a matter of public order and may be invoked against third parties in good faith. Third parties should be on their guard. If a wife could not invoke nullity as to third parties, it would be too easy to evade the provisions of article 1301, and the nullity would be only relative.

Judgment reversed. *Ricard* v. *Banque Nationale*, Queen's Bench in appeal, Montreal Novb., 29 1893.

CARRIERS.

1. HORSE—"INHERENT VICE."

A tired, excited colt being carried by rail became restive, fell down in its horse-box, and injured itself. It was removed from the box, and the owner was asked to take charge of it but refused. The railway company thereafter having incurred expense in keeping and doctoring it.

Held, that they were entitled to repayment. *North British Railway Co.* v. *Todd*, 9 Scot Law Rev. 326.

. OWNER'S RISK NOTE.

Opinion that an owner's risk note which did not refer to conditions in the time-table did not incorporate them; and that where conditions of carriage alternatively at owner's or carrier's risk excluded alike the carrier's liability, they were not "just and reasonable" in the sense of 17 & 18 V., c. 31 *North British Railway Co.* v. *Todd*, 9 Scot Law Rev. 326.

3. RAILWAYS — ACCIDENT TO PASSENGER — DAMAGES — NEGLIGENCE — ART. 1675, C. C.—CONTRIBUTORY NEGLIGENCE.

L. was the holder of a ticket and a passenger on the company's train from Levis to Ste. Marie Beauce. When the train stopped at Ste. Marie station the passengers alighted, but the car upon which L. had been travelling, being some distance from the station platform, and the time for stopping having nearly elapsed, L. got out at the end of the car, and, the distance to the ground from the steps being about two feet and a half, in so doing he fell and broke his leg, which had to be amputated.

The action was for $5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, gave judgment in favour of L. for the whole amount.

On appeal to the Supreme Court of Canada:—

Held, reversing the judgments of the Courts below, that, in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident being wholly attributable to L.'s own default in alighting as he did, he could not recover; Fournier, J., dissenting. Lavery, for the respondent. *Lortie* v. *Quebec Central Railway Co.*, Supreme Court of Canada, 24 June, 1893.

CHARTER-PARTY — See ships, etc., 1, 3.

CLUB.

CONTRACT—BREACH OF — DAMAGES —UNINCORPORATED ASSOCIATION.

It appeared that the company plaintiff was incorporated by letters patent on the 3rd June, 1887. In March, 1887,

a contract was made between the Fish and Game club and a syndicate represented by Nelson, by which the syndicate undertook to establish and carry on a restaurant in the rooms of the club. An action of damages was brought, founded on alleged breach of contract, and the action was maintained by the court below. The Court of Review reversed this judgment and dismissed the action, holding that the contract was made by an unincorporated association, and even supposing that it was within the powers of the club to enter into such a contract, in the present case the contract was not accepted by the club. The only persons who were entitled to complain of the defendant were the individuals composing the voluntary association. The club had no claim to damages resulting from the temporary closing of the restaurant by the defendant. If the difficulties connected with the restaurant had the effect of deterring some persons from joining the club, such damages would be too remote to be recovered. Upon the whole the court found that the plaintiff had no right of action against the defendant. The judgment was, therefore, reversed and the action dismissed *Montreal Fish and Game Club* v. *Huot*, Court of Review, Montreal, Nov. 11, 1893.

COMMERCIAL TRAVELLER.

TRAVELLING EXPENSES — FRENCH CURRENCY—FOREIGN CURRENCY.

Where a merchant has agreed to pay his traveller's travelling expenses, these are to include charges for carriage of baggage to and from hotels and stations.

Also the extras incidental to a long sea voyage, such as " tips " etc.

Where a traveller was allowed 25 francs per day for travelling expenses on a trip to the United States, this daily allowance while he is in the States must not be reckoned at the usual equivalent of $5.00, but on the basis of 25 francs per day at the then rate of exchange, which was in excess of $5.00, unless there is a contrary intention expressed in the agreement. *Brocheton* v. *Elissalt*, Court of Appeals, Paris, 12 July 1893. (Journal des Tribunaux), 8 Nov. 1893.

COMPANIES—SEE ALSO ESTOPPEL.

1. WINDING-UP — VOLUNTARY ASSIGNMENT FOR BENEFIT OF CREDITORS —APPROVAL OF MAJORITY OF CREDITORS—DISCRETION—R. S. C. c. 129, s. 9.

The 9th section of the Winding up Act, R. S. C. c. 129, gives a wide discretionary power to the Court. Upon an application for a winding-up order, in a case where a company had previously made a voluntary assignment for the benefit of creditors, and it was shown that it was the desire of the great majority in number and value of the creditors that the company should be wound up under the assignment.

Held, that this discretionary power should be exercised ; and the winding-up order was refused, but leave was given to renew the application if any exigency should arise to justify the intervention of the Court. *In re Hamilton Whip Co.*, Ontario, High Court of Justice, In Chambers, Sept. 1893, (Can. L. T.)

2. WINDING-UP—POWER TO CARRY ON BUSINESS—R S. O. c. 183, s. 6 s-s. 1.

The power to carry on the business of a company after winding-up proceedings have been commenced under the Ontario Act, and thus to postpone the final winding-up, is one which is not to be exercised unless a strong case of necessity for doing so exists, and it is only for the purpose of administration and realization that such a course should be taken.

That the mortgagees of the company's works, who have foreclosed their mortgage, will be enabled to dispose of the works to greater advantage, and that by affording facilities for procuring repairs to purchasers of machinery manufactured by the company the chances of obtaining payment of outstanding purchase notes will be improved, are not sufficient grounds to justify the carrying on of the business. Judgment of the Court below reversed. *In re Haggart Bros Manuf'g Co.*, Ontario, Ct. of Appeal, July 1893, (Can. L. T.)

COMPENSATION — See Water Company.

CONTRACTS — See also CLUB—ELECTION EXPENSES—SALE OF DEALS — SHIPS, ETC. 2 — SHIPS (BILL OF LADING) 2.

1. FOR PERSONAL SERVICES.

Where a person agrees with a certain firm to exert himself to sell all the lumber cut at their mill during a certain year, the fact that he, during such time, becomes the managing partner in a firm which operates a competing mill, does not of itself constitute a breach of his contract with the former firm, in the absence of an agreement to give his entire services to either firm. *Bender* v. *Peyton* (Tex.), 23 S.W. Rep. 222.

2. FOR PERSONAL SERVICES — INJUNCTION.

Unless personal services are individual and peculiar because of their special merit or unique character, a negative covenant (even when express) not to render them to others than the plaintiff will not be enforced by injunction in order that the plaintiff may have the incidental benefit of an affirmative covenant to serve him exclusively for a specified time. Hence, where one assigned to a firm his interest in a certain contract of agency for an insurance company, and in the assignment covenanted to remain with the firm as special agent in a named State for one year, and to give his entire time and attention to the business of that company by procuring for it applications for insurance, an injunction will not be granted at the instance of the firm to restrain the assignor from soliciting insurance or transacting business for a rival company, the assignment containing no express covenant that he would not do so, and it not appearing that he was a specially skillful, successful, or expert insurance agent whose place could not be readily supplied by another equally competent to attend to the business for which his services had been engaged. *Burney* v. *Ryle*, Supreme Ct. of Georgia, May 22, 1893. (*Note*).

See in this connection the case of Star Newspaper Co. v. O'Connor [1893] W. N. 114 compromised on appeal [1893] W. N. 122, 1 M. L. D. & R. 571, also next case.

3. INJUNCTION—SPECIFIC PERFORMANCE—CONTRACT FOR PERSONAL SERVICE.

This was a motion by the plaintiff, whose professional name is Miss Gertrude Kingston, for an injunction to restrain the defendants, Messrs. Agostino and Stefano Gatti, until the trial of the action or until further order, from dismissing the plaintiff from her engagement at the Adelphi Theatre in breach of an engagement dated the 5th June, 1893, made between the defendants of the one part and the plaintiff of the other part, and that the defendants might be restrained by the like order and injunction from employing any person other than the plaintiff during the run of the play "A Woman's Revenge" to act the part of Mabel Wentworth in such play, or that such other order might be made in the premises as to the court should seem meet.

Marten, Q.C., and *Martelli*, for the plaintiff, said that an actress was in a peculiar position, and that in a special case like this the bargain should be reciprocal. We wish to prevent the defendant from depriving the public of her services.

Kennedy, J.—Have you ever known of a case where an injunction has been granted to restrain an employer from discharging an actor or person employed by him?

Marten.—Fisher v. Jackson (64 L. T. Rep. N. S. 782; (1891) 2 Ch. 84) was such a case.

A. à B. Terrell for the defendants.

The following cases were referred to: Fisher v. Jackson (sup.); Whitwood Chemical Company v. Hardman (64 L. T. Rep. N. S. 716; (1891) 2 Ch. 416); National Provincial Bank of England v. Marshall (60 L. T. Rep N. S. 341; 40 Ch. Div. 112); Wolverhampton and Walsall Railway Company v. London and Northwestern Railway Company (L. Rep. 16 Eq. 433).

Kennedy, J., refused to grant the injunction, and said, in giving judgment: The second part of this applica-

tion—*i.e.*, that part of it which asks for an injunction to restrain the defendants "from employing any person other than the plaintiff during the run of the play 'A Woman's Revenge' to act the part of Mabel Wentworth in such play"—is wider than the claim indorsed on the writ, which merely asks for an injunction to restrain the defendants from dismissing the plaintiff. The agreement in respect of which this action is brought was an agreement made in June of this year. It appears to me that the application which is made on behalf of the plaintiff is in substance an application for specific performance of that agreement. No doubt in form it is an application for an injunction. I heard fully the arguments which were adressed to me by counsel for the applicant. No authority has been cited which gives any real ground for such an order, which is in fact an order that the employer continue the employment of the artist. The cases most relied on were those of National Bank of England v. Marshall, Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company, Fisher v. Jackson, and Whitwood Chemical Company v. Hardman. There is no authority which, so far as I can see, justifies me in acceding to this application. Lumley v. Wagner (1 De G. M. & G. 604) is the nearest case; but after the case of Whitwood Chemical Company v. Hardman it must be looked upon as rather an anomaly to be followed in similar cases, and not to be extended. Assuming for the moment that there has been a breach of contract on the part of the defendants, the Court of Chancery will not grant a remedy of this kind. It seems to me to fall within that class of agreements to which this remedy is not applicable. It is a contract for personal service, skilled, no doubt, but still personal service, and unless it comes within the form of Lumley v. Wagner, the remedy by injunction is not applicable. There are no express negative words, as in Lumley v. Wagner. Mr. Marten contended that, as on the part of the plaintiff there were negative words, the remedy ought to be reciprocal. There are no negative words; but even if there were, I do not think the application to enjoin the defendant could be granted. Fisher v. Jackson is a totally different kind of case. It was a case of trustees of an endowed school, and the only method of dismissing the school-master had not been fulfilled. I must dismiss the application, leaving the plaintiff to her remedy in damages if there has been a breach of contract. I think this is an application which could not succeed. I think the costs of this application ought to be the defendants' costs in any event. *Silver* v. *Gatti*, Sept. 21 1893, Law Times, (England), 27 Ir Law Times, 545.

4. CONTRACT BY CORRESPONDENCE—NEGOTIATION BY TELEGRAM—INCOMPLETENESS — ACCEPTANCE OF OFFER NOT PROVED.

Where the appellants telegraphed "will you sell us B. H. P. ? Telegraph lowest cash price" and the respondent telegraphed in reply. "Lowest price for B. H. P. £900" and then the appellants telegraphed, "we agree to buy B. H. P. for £900 asked by you. Please send us your title deed that we may get early possession" but received no reply.

Held, that there was no contract. The final telegram was not the acceptance of an offer to sell, for none had been made. It was itself an offer to buy, the acceptance to which must be expressed and could not be implied. *Harvey* v. *Facey*, [1893] App Cas. 552.

CONTEMPT OF COURT.

1. DISOBEYING INJUNCTION—MOTION TO QUASH APPEAL.

The fact that a party to an action is in contempt is no bar to his proceeding with the action in the ordinary way, but only to his asking the Court for an indulgence.

And where the defendants received certain moneys 'in disobedience to an interim injunction, which was made perpetual by the judgment at the trial, a motion by the plaintiff to quash the defendants' appeal from the judgment was refused. *Ferguson* v *County of Elgin*, Ontario Supreme Ct. of Judicature. In chambers Sept. 1893.

2. COSTS — SENTENCE — STAY OF EXECUTION AFTER SENTENCE—APPEAL.

Proceedings were taken against the defendant for contempt of Court, by reason of his having published articles in his newspaper reflecting upon the conduct of a Judge of this Court, and the defendant found guilty of contempt. Previous to sentence, the counsel for the prosecution asked to have costs allowed to the prosecutor.

On behalf of the defendant it was urged that the granting of costs in criminal and quasi-criminal matters was wholly whithout precedent.

The defendant was ordered to be imprisoned in the York county gaol for thirty days and to pay a fine of $200, and also to pay the prosecutor his costs, to be taxed by the clerk and to be paid in ten days after taxation ; and the defendant to be detained in prison until the fine and costs were paid.

After the sentence had been pronounced, counsel for the defendant moved to have the sentence suspended to give the defendant an opportunity to apoeal to the Judical Committee of Her Majesty's Privy Council.

Held, that this application was too late. If the defendant had wished to appeal, his application should have been made before sentence was passed, but the Court, having pronounced sentence, had no power, under the authorities, to suspend the execution of the sentence. *Regina* v. *Ellis*, Supreme Court New Brunswick, 14th October, 1893, (Can. L. T).

CONTRIBUTORY NEGLIGENCE — See Carriers 3.—Negligence.

COSTS—See Contempt of Court.

CRIMINAL CODE 1892 ss. 845 (3) 847, 857.

DAMAGES — See Club — Estoppel—Landlord and Tenant — Mercantile Agencies—Negligence 3—Sale.

DEMURRAGE—See Ships etc., 3.

ELECTION EXPENSES.

DOMINION ELECTION ACT R. S. C., c. 8 — CONFLICTING, SECTIONS 119 & 131—AGENCY.

This was an action against appellant for the value of printing done in connection with his candidacy for election to the Dominion Parliament.

Two questions presented themselves for consideration :

(1) Has the Election Act taken away the right of action for claims of this kind ?

(2) Is a candidate responsible for work ordered by a committee appointed to secure his election, but without special authorization to incur liabilities ?

Upon the first point it was *held* : That in regard to the apparent conflict between the two sections of the Dominion Election Act 119 and 131, chapter 8 of the Rev. Stat. of Canada, their proper interpretation results in this : that no agreement in regard to election matters can be enforced under any circumstances as a contract, the parties being left only to their ordinary recourse for the real value of the commodity or service furnished ; secondly, that the recourse even upon the *quantum meruit* is taken away, except for bills reported to the electoral agent for public inspection, if required.

In the present case, the evidence, showing that the bill was reported to the appellant's election agent and within the delay stipulated by statute, there is no statutory disability against enforcing the account upon which the present action is based.

Upon the second point it was *held* : (Lacoste, C. J. and Blanchet, J., dissenting). That the theoretical assumption being, that the candidate is,—*quoad* his civil rights and responsibilities only in the position of an ordinary elector, working legitimately for the success of the principles advocated by the party to which he belongs, he cannot be held personally responsible for ordinary civil obligations incurred by a committee of his fellow electors, presumably acting with him for the furtherance of his candidature, not for advantages personal to himself, but only for the assertion of the principles advocated by their party. As there is no evidence in this case to show that the appellant assumed any different position from that, in so far as his candidacy was concerned, he cannot be held responsible for the action of this

committee in incurring civil liabilities, and the appeal therefore should be maintained and the action dismissed. *Guerin* (appellant) & *Taylor et al.* (respondents), Queen's Bench in Appeal. Present, Chief Justice Sir A. Lacoste, and Justice Baby, Bossé, Blanchet and Hall. Montreal, Nov. 27, 1893.

HALL, J.—At the general elections in 1891 for the Dominion House of Commons the appellant was the candidate of one of the political parties for the constituency of Montreal Centre. A central committee from among his supporters was appointed, the most prominent and active members of which were Mr. Greenshields, Q.C., the candidate's brother, Dr. Guerin, and Mr. Keys. The official agent of the candidate was a Mr. Euard, although he does not appear to have attended the meetings of the committee or frequented their room. His appointment was made public by notice in the newspapers in conformity with the Election act. A certain amount of money—part of it contributed by the candidate himself—was deposited in the hands of the committee to meet their necessary expenditure for rent, printing, advertisements, etc. At the termination of the contest it was found that this amount was entirely expended, leaving still unpaid a bill of $277.25 for printing done for the committee by the respondents. An action to recover the amount was taken against Mr. Guerin, the candidate, based upon the usual assumpsit, counts for goods, wares and merchandise sold, and work and labor done, and performed by plaintiffs to and for defendant, at his request and for his benefit. The defendant pleaded beside the general issue, that the claim, if any there were, was for expenses connected with a Dominion election contest, for which no right of action existed, particularly as plaintiff had not fyled the account with the election agent, as required by law, and that under any circumstances the work had not been at defendant's personal instance or request, nor that of any one authorized by him to contract such a liability. The plaintiffs replied specially that the work had been done at the request of defendant's authorized agents and for his benefit, and that the claim had been filed with his election agent within the delay stipulated by law. The evidence and admission show that the printing in question was done by the plaintiffs for the committee appointed and acting to secure defendant's election; that the defendant knew of the exertions of this committee in connection with the election, although he had given no special instruction or authorization to incur liabilities, and had not supposed that any would be incurred in excess of the fund provided in advance by himself and others for necessary expenses. The proof, too, was fairly satisfactory that the claims had been regularly filed with the election agent. Judgment went against the defendant in the Superior court for the amount of the account. Two questions present themselves for consideration. First, has the Election Act taken away the right of action for claims of this kind? And, second, is a candidate responsible for work ordered by a committee appointed to secure his election, but without special authorization to incur liabilities?

Upon the first point there has been some difference of opinion among the judges, both of this and the Superior court, but a uniformity in the decisions. The difference of opinion arises from what is considered to be a contradiction between sections 119 and 131 of the Election Act (R.S.C., cap. 8), and it has been considered necessary in order to overcome the alleged inconsistency of the two sections to interpret section 131 as referring to "a contract, promise or undertaking" for a corrupt purpose under the terms of the Election Act.

The two clauses are in these words: "119. "All persons who have bills, charges or claims upon any candidate for or in respect of any election shall send in such bills, charges or claims within one month after the day of the declaration of the election, to such agent as aforesaid; otherwise such persons shall be barred of their right to recover such claims." (131) "Every executory contract or promise or undertaking in any way referring to, or arising out of or depending upon any election under this act, even for the payment of lawful expenses, or the doing of some lawful act, shall be void at law." The alleged inconsistency is that section 119 recognizes a class of claims as valid, if sent in within a stipulated delay to the agent, while section 131 asserts that such claims are absolutely void at law.

We all agree with Mr. Justice Taschereau who rendered the judgment in this case in the Superior Court, in accepting the jurisprudence established by this court in 1877 in Workman vs. The *Herald* Publishing Company, 21 L. C. J. 268, and Q. R. L. 3[illegible] which was followed by the Court of Review in Jalbert vs. De Lery in 1879, 5 Q.L.R. 2[illegible] although it seems possible to place the reasons for those decisions upon a more harmonious and satisfactory basis. It is to be borne in mind that our statutory provisions in regard to election expenses represent attempts to prevent different forms of bribery, although consolidated in one statute. Contracts in connection with elections, whose sole consideration was bribe or corruption, have always been void, but this result was often evaded by a partial consideration to which no legal exception could be taken. A frequent kind of corruption at elections was the undertaking by the person soliciting votes to pay to the elector an exaggerated price for some service or commodity as a disguised method of bribery. To render this less effective clause 131 above cited was enacted, making every such contract or promise or undertaking absolutely without legal effect—unenforceable—as a contract, but still leaving to the elector, as I interpret the statute, his recourse for the provable value of the effects sold or the services rendered by him, in an action upon the *quantum meruit*. For instance, a candidate or his agents had contract-

with an elector to pay him $20 per day for the use of a horse, the hire of which was only worth $2, per day, the $20, rate could not be enforced under the contract, but the real value could still be recovered upon the *quantum meruit*. Payments for real purchases and services at exaggerated prices were sometimes the only evidence of compensation for bribery and as a check upon this method of evasion, section 119 of the Election Act was passed making it obligatory that all bills or claims against any candidate for or in respect of any election, even for necessary expenses, should be sent in within a limited delay to the election agent for public inspection, and failing compliance with this condition the creditor should be barred of his right to recover upon such claim. The result of the two enactments is, therefore, this: That no agreement in regard to election matters can be enforced under any circumstances as a contract, the parties being left only to their ordinary recourse for the real value of the commodity or service furnished; secondly, that the recourse even upon the *quantum meruit* is taken away except for bills reported to the electoral agent for public inspection, if required. This interpretation leaves no conflict between the two clauses of the statute and harmonizes with every reported decision. The claims sued upon in the *Herald* Publishing Company vs. Workman, and Jalbert vs. DeLery were maintained by the courts to the extent of their proved value, and not upon contract, while the action was dismissed in Dansereau vs. St. Louis (M.L.R., 5 Q.B., 332), because it was based solely upon a contract "referring to or arising out of or depending upon" an election contest. It goes without saying that quite independently of these two sections an account for commodities actually contributed to secure votes will be disallowed, as in the case of Brunelle vs. Begin, Rap. Jud., 1 Q.B., 570, recently decided by this Court, without reference to the observance or non-observance of formalities stipulated by the electoral act. We are all agreed, therefore, that there is no statutory disability against enforcing the account upon which the present action was based, although the writing in question was done in connection with an election contest, provided only, the bill was reported, to the appellant's election agent within the delay stipulated by the statute, and this formality appears to have been complied with, as Mr. Boudreau, one of the plaintiffs, swears positively to that fact, while the election agent can only say that he does not remember the circumstance. There remains the second ground of defence to the action—lack of authorization on the part of those who ordered the work—there is more difficulty, and a division of opinion among the members of the Court.

It is admitted that the work was not ordered by the appellant himself, but by a committee appointed to secure his election. There is no evidence that this committee was appointed by the appellant. Probably the large meeting of electors which selected him as their candidate named the central committee which should have the management of the campaign. The candidate recognized this committee by contributing to the necessary expenses which would have to be incurred—rent of rooms, stationery, printing, advertising, etc.—but there is no evidence that he deputed to them any authority to incur liabilities for which he was to be, or to be considered, personally responsible. The burden of proof is in the opposite direction: his contribution in advance of a certain sum toward expenses; the understanding testified to both by him and Mr. Greenshields that expenses were to be paid as fast as incurred, and that none should be incurred unless there was cash in hand with which to meet them, and the infrequency of appellant's visits to the committee room and his consequent ignorance of the details of what occured there, all go to confirm an assumption that the committee was one acting in the interest of a party, of which the appellant was accidentally and temporarily the candidate, and that they were not in any sense his personal agents. Mr. Greenshields, whom the plaintiffs examined as their witness and whose testimony they specially invoke, when questioned upon this point of authorization answers as follows:

"Were you authorized by Mr. Edmund Guerin (appellant) to order what you considered necessary?" Answer—"I never had any special instructions or authorization to order. Question—"He knew of the printing and did not repudiate it?" Ans. "I suppose he knew as any other citizen knew." "Were you not in that committee room as one of a number of friends giving their services gratis for the advancement of the party?" Ans.—"Yes."

The evidence clearly shows, in my opinion, that the defendant only acted, in so far as establishing responsibility for any civil obligation, as one member of his party, "as any other citizen," as Mr. Greenshields puts it; and that he performed no act and made no representation which placed him in any other position—in so far as civil responsibility was concerned—either toward the plaintiff or any one else, and therefore that he is free from any such liability or responsibility, unless his position as the candidate of his party for the time being, implies that degree of personal interest in the result as to make him civilly responsible for the acts and promises of his supporters upon the ground that such acts and promises procured results which were for his direct and personal advantage. That candidates often do place themselves in such a position by their acts and representations, is undoubtedly true; but under the theory of our system of representative government that assumption cannot, in my opinon, be invoked without proof. The electoral law holds the candidate to a strict degree of moral responsibility both for his own acts and promises and those of his agents, and annuls his election when those acts or promises are proved to have violated those provisions of the law enacted in the general interest of the State to secure purity in elections, but it has not modified, and never was intended to interfere with the ordinary rules of interpretation of civil liability of electors among themselves. The theoretical assumption being, as I have said,

that the candidate is,—*quoad* his civil rights and responsibilities only in the position of an ordinary elector, working legitimately for the success of the principles advocated by the party to which he belongs, he cannot be held personally responsible for ordinary civil obligations incurred by a committee of his fellow electors, presumably acting with him for the furtherance of his candidature, not for advantages personal to himself, but only for the assertion of the principles advocated by their party. As I find nothing in the evidence in this cause to show that the appellant assumed any different position from that, in so far as his candidacy was concerned, I think he cannot be held responsible for the action of this committee in incurring civil liabilities, and that the appeal therefore should be maintained, and the action dismissed.

It is a significant confirmation of this view that the original invoices are proved to have been made out not in the name of the appellant, but of Mr. Greenshields, who was either considered by the respondents as the most prominent member of the committee, or was the one who personally gave the particular order upon which the work was done.

LACOSTE, C.J., and BLANCHET, J., differed from the majority on the question of agency. Lacoste, C.J., on this question, observed that there was no special authorization to the respondents for the printing in question. Was there a general agency? There is a difference between agency in election matters and ordinary civil agency. Agency is presumed more easily in election matters. The responsibi ity of the candidate for the acts of his agent, is that of the master for the acts of his servant rather than that of the principal for the acts of his agent. The rules of the civil law have to be applied, but in the application of these rules the candidate must be given the position which the constitution gives him in the election. The constitution makes the election the undertaking of the candidate. The jurisprudence is unanimous on this point. If, then, the candidate gives the direction of the election to any one, if he entrusts him with a sum of money for legitimate and necessary expenses, he makes him a general agent, and he is responsible to third parties for his acts and expenses. In this case, the appellant confided the direction of the election to Mr. Greenshields, and to his brother, Dr. Guerin. Mr. Greenshields admits it, but he says that he designedly kept the candidate out of the business affairs. He admits, however, having received funds from him. The candidate admits that he, his family and his friends formed an election fund which he entrusted to Dr. Guerin and to Mr. Greenshields for expenses. This constitutes a general authorization. The appellant adds that he did not authorize them to incur debts, and that it was understand that everything should be paid for in cash. This is a question to be settled between them. If they have not followed his intructions he can exercise his recourse against them. To pay cash does not mean to pay before the work is done. A candidate is not presumed to have intended to violate the law which requires that payments be made by his election agent. The authorization extended t the giving of orders for expenses which M Greenshields and Dr. Guerin might consid useful or necessary, and Mr. Greenshield tells us that the expenses which they order he believed to be useful and even necessar

I would confirm the judgment.

Judgment reversed, Lacoste, C. J., a Blanchet, J., dissenting.

ESTOPPEL.

COMPANY — SHARE CERTIFICATE CERTIFICATE UNDER COMPANY'S SE —COMPANIES ACT 1862 (25 & 26 V., 89) S. 31—DAMAGES.

P., the owner of numbered shares a joint stock company, transferr them to persons who were register in the company's books as proprieto of the shares. P. afterwards fra ulently executed a transfer of t shares for value to T., who sent t transfer to the company, and receiv from them a certificate under th common seal stating that he was t proprietor of the shares. T., acti bonâ fide on the faith of the certifica sold the shares; but the company fused to register the purchaser as t proprietor, on the ground that af granting the certificate to T. they h discovered that he was not the r owner of the shares. T. then, to fu his contract with the purchaser, bou other shares in the market and s the company for the price.

Held, affirming the decision of Court of Appeal [1891] 2 Q. B. 6 that the company were estop by their certificate from denying t T. was the proprietor of the sha and that he was entitled to reco from the company the damages wh he had in fact sustained owing to t refusal to register the purchaser. *Bo Consolidated Company* v. *Tomkinson*, L. (E.) [1893] App. Cas., 396.

EVIDENCE—See Bills and Notes

EVIDENCE—See Partnership.

FINAL JUDGMENT—See Jury Tri

FIRE INSURANCE—See Insur. Fi

FORGED DEED—See Prin. and Ag

HOTELKEEPER—See Innkeeper.

INJUNCTION—See Contracts, for sonal Services 2 — 3 — Contemp Court 1.

INNKEEPERS.

LIABILITY FOR GOODS DESTROYED BY FIRE—GUESTS AND BOARDERS.

Held, that the fact that an hotel has a rule to charge a guest a less rate *per diem* by the week than by the day, and that, if a guest had been there longer than a week, he got the benefit of the rule, does not show that one who had been at the hotel more than a week was a "boarder," rather than a "guest" it not being shown that he had any notice of the rule, or any knowledge of the charges, or that any arrangement for a permanent stay had been made, and the fact that one has made a special arrangement at an hotel for boarding and lodging by the week is not determinative of the question whether he is a guest or a boarder, but merely evidence on the issue. *Magee v. Pacific Improvement Co.*, Supreme Court of California, 1893.

INSOLVENCY.

INSOLVENCY — OF PARTNER — PROMISSORY NOTE SIGNED BY BOTH PARNERS — HOLDER OF NOTE CAN RANK ON THE PRIVATE ESTATE OF THE INSOLVENT PARTNER—ART. 1899 C. C., BILLS OF EXCHANGE ACT 1890, S. 84.

Andrews, J.—Alfred Blouin made an abandonment of his property. George Demers claims to rank on his estate for the amount of a promissory note made in the following terms.

Quebec, April 14, 1893.

One month after date I promise to pay to the order of George Demers at his office here, seven hundred dollars for value received.

ALFRED BLOUIN,
ANTOINE GAGNÉ.

The curator refused to collocate him for this amount on the ground that he was charged with the liquidation of Blouin's personal estate, and Demers was a creditor of the partnership formed between Blouin and Gagné for the performance of a certain undertaking.

The curator maintains that by the terms of Art. 1899 Civil Code, the property of the partner should be applied to the payment of his personal creditors and that the creditors of the partnership could only rank thereon in event of the partnership property being insufficient, and after Blouin's personal creditors had been satisfied.

Art. 1899 of the Civil Code says: The property of the partnership is to be applied to the payment of the creditors of the firm, in preference to the separate creditors of any partner; and in case such property be found insufficient for the purpose, the private property of the partners or of any one of them is also to be applied to the payment of the debts of the partnership; but only after the payment out of it of the separate creditors of such partners or partner respectively.

The creditor Demers pleads (1) that Art. 1899 is not applicable to this case, which relates to the liquidation of Blouin's personal estate and not of a partnership (2) that Blouin is personally indebted to him.

It is true that article 1899 C. C. relates to the liquidation of partnership property, but an examination of chap. 65, sec. 6, Rev. Stats. Lower Canada will render much clearer the intention of the legislator than the above article.

This statute lays down the law as follows:—The net products of the partnership property shall first go to the payment of the partnership creditors and the net products of the private property of each partner shall go to the payment of their personal creditors and any surplus left from this private property shall be added, if necessary, to the products of the partnership property in payment of the partnership creditors.

Thus according to the terms of the Rev. Stat. of Lower Canada, the curator is right in maintaining that the property to be liquidated by him, being Blouin's personal property, should go to the satisfaction of his personal debts.

(2) Is the claim of Demers against Blouin a personal one, or is it a debt against the partnership which existed between Blouin and Gagné?

Art. 84 of the Bills of Exchange Act, 1890, says:

"A promissory note may be made

by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor."

"(2) Where a note runs "I promise to pay" and is signed by two or more persons, it is deemed to be their joint and several note."

The note in this case is exactly in those terms, and therefore the holder is the creditor of each of the signers individually, and as such must be collocated on the dividend sheet of the Estate Blouin. *Demers* v. *Blouin*, Superior Court, Quebec, Nov. 15, 1893,

INSURANCE.

ACCIDENT.

1. CONDITIONS.

Where an accident insurance policy is, by its terms, made payable in case of death "received through external, violent, and accidental means," the intent is that the means, or that which caused the injury must be external. *American Acc. Co. of Louisville* v. *Reigart*, Ky., 23 S. W. Rep. 191.

2. DISABILITY.

Under an accident policy insuring one against loss of time resulting from bodily injuries effected through external violent and accidental means, which shall, independently of all other causes, immediately, wholly, and continuously disable" the insured "from transacting any and every kind of business pertaining to his occupation," the insurance company is not liable to the policy holder for loss of time resulting from a physical injury, when it affirmatively appears that 30 days elapsed from the time the injury was received before the insured was disabled so he could not attend to his business; that he, being a merchant, was probably in his store every day during this period, giving more or less attention to his business, and did not till the end of that period abandon all attention to the same. *Williams* v. *Preferred Mut. Acc. Ass'n.*, Ga., 17 S. E. Rep. 982.

3. NOTICE OF DELAY, CAUSE OF—FORFEITURE OF POLICY—INSURANCE AGAINST ACCIDENTS TO THIRD PARTIES—FOR WHICH INSURED LIABLE.

Where a policy required that the insured (against accidents happening to third parties for which he would be held liable) should give notice to the company of such accidents within a certain date from the moment the accident came to his notice, under pain of forfeiture of the policy.

Held, that the trial judge could find that there was no forfeiture, although the information had been given to the company after the delay had expired, where the injury arising from the accident had only then become serious enough to give rise to a cause of action against the insured. *Compagnie d'assur. La Prévoyance* v. *Hubert*, Court of Cassation, 21 Dec. 1891, Dalloz, 1892—1—460.

FIRE.

4. MUTUAL — WAIVER OF FORFEITURE.

The levy and collection of an assessment by a mutual fire insurance company on the premium note of a member after the forfeiture of his policy and knowledge of such forfeiture by the company, does not constitute a waiver thereof, where such assessment is made to pay losses occurring prior thereto. *Farmer's Mut. Fire Ins. Co. of Dug Hill* v. *Hull*, Md., 27 Atl. Rep. 169.

5. BREACH OF CONDITIONS.

Where a fire insurance policy provides that it shall be void if the interest of the insured in the property "be other than unconditional and sole ownership," the fact that one of the insured articles is held merely under a contract of sale, with the title outstanding in the seller, invalidates the whole policy. *McWilliams* v. *Cascade Fire and Marine Ins. Co.*, Wash., 3[illegible] Pac. Rep. 140.

6. CONTRACT FOR SALE—CHANGE OF TITLE — CHANGE MATERIAL TO THE RISK—R. S. O. c. 167, s. 114—DAMAGES.

That the owners of an insured building have entered into an executory contract for the pulling down of the building in question and for the sale of the materials to the contractors at a sum very much less than the amount

of the insurance is no bar to their right to recover the full amount of the insurance when the building is burnt down before the time fixed by the contract for the transfer of possession. Judgment of McMahon, J., 22 O. R. 529, affirmed. *Ardill* v. *Citizen Ins. Co. Ardill* v. *Ætna Insurance Co.* Ontario Ct. of Appeal, Oct. 1893 (Can. L. T.)

7. PREMIUMS PAYABLE AT OFFICE OR AT DOMICILE — CONDITIONS OF POLICY — PAYMENT OF PREMIUM AFTER LOSS.

Where the policy states that the premium is to be paid at the company's office. such a stipulation can be derogated from by a tacit agreement between the parties thereto, to the effect that it shall be paid at the domicile of the insured.

Such a tacit agreement can arise where, previous to the forfeiture claimed in this case, it was customary for the company to collect the premiums at the domiciles of their insured.

But where the insured has, in the policy, expressly renounced his right to this usage, the clause stipulating for the premium to be paid at the company's office must have full force, and no subsequent conduct of the company toward the insured can be implied as derogating therefrom.

The company can vadidly stipulate that the policy shall be absolutely forfeited in the event of the premiums being not paid.

Payment to and reception by the agent of the overdue premium, after the fire, would not avoid forfeiture in this case, even where it was proved that the insured never refused to pay the premium to the agent in his district, and it was customary for the insured of the district to pay their premiums to the agent at their convenience, or wait for him to call upon them, even when overdue, without their policies being in anyway rendered invalid thereby.

And the fact that it was known in the district that the company allowed their local agent to act beyond the scope of his power of attorney, and that their inspector, after payment of the overdue premium, agreed to an appraisement of the damages under certain reservations, would not avoid forfeiture in this case. *Compagnie d'Assurance l'Union* v. *Martin*, Court of Cassation, 4th Nov., 1891, Dallog. 1892-1-313.

GENERAL.

8. INSURANCE—HORSE—SUCCESSIVE ACCIDENTS — RATE OF INDEMNITY.

When a succession of accidents befall to the object insured, the insured cannot receive indemnities amounting to a sum greater than that insured for.

And where the owner of a horse who insured it for 2,000 francs received 500 francs indemnity for injuries happening thereto, he cannot, upon the death of the horse, a year afterwards, claim an indemnity which, added to the 500 francs, would exceed the sum of 2,000 francs. *Compagnie d'Assur. l'Urbaine et la Seine* v. *Leroux.* Ct. of Appeal, Paris 1892, Dalloz 92—2—271.

Note.

The editors of Dalloz in a note to this case find fault with this holding. They say (translation) "in effect, what elements in the case should serve as a basis for fixing the indemnity? Both the extent of the actual loss to which the insured is subjected and the amount stated in the policy.

If the value of the object insured be reduced by an accident by one quarter its total value, and if this depreciation in value remains, undoubtedly this must be taken into account, the insured upon the happening of a second accident resulting in a total loss, could only receive the full amount less the one-quarter, It would be otherwise when the depreciation had ceased. If a house were burnt in part, and reconstructed into its former condition. or if a horse, being wounded, received such care as to restore it to its former value, that is the value which should enter into consideration in fixing the indemnity. This is what occurred in the present case; it appears that the insurer did not plead depreciation.

Now, as to the second element in the case; the amount insured for. At the time of the accident which gave rise to this action, the parties thereto were under the force of the original contract of insurance, and the insured had paid the premium stated therein; the judgment specially admits these two points. Under these conditions the rights of both parties must be determined by the policy, that is to say the indemnity, in case of accident, continues to be the measure of the sum fixed by the policy. Now, the premium for each year is the guarantee for that year, just as the rents for each term are the price of the enjoyment of the term: therefore during the year covered by the premium the indemnity cannot exceed the amount insured for. If several accidents happen in the one year, the sum insured for will be the maximum that can be received

for the successive indemnities; if these accidents occur in different years (which was the case in the present action), this sum will be the maximum of each indemnity.

INTEREST.

MONEY PAYABLE AT TIME DEPENDING ON A FUTURE CONTINGENT EVENT —TIME DEPENDING ON A VERIFICATION OF ACCOUNTS — DAMAGES FOR DETENTION OF DEBT — 3 & 4 WM. 4, C. 42, S. 28.

An award made upon a joint traffic agreement between two railway companies determined that accounts should be rendered by each company to the other in May; that a payment of not less than 75 per cent. should be made on account of the balance appearing to be due on the face of the accounts so exchanged, and that this payment should be made as soon after the 1st of June as possible and not later than the 15th of June. A large balance became due from one of the companies to the other, to recover which an action was brought and interest claimed:

Held, affirming the decision of the Court of Appeal ([1892] 1 Ch. 120), that no interest could be recovered under 3 & 4 Wm. 4, c. 42, s. 28; since there was no "debt or sum certain payable by virtue of a written instrument at a certain time," within the meaning of that statute: nor had any demand of payment claiming interest been made in writing: and that interest could not be given by way of damages for detention of the debt, the law upon that subject, unsatisfactory as it is, having been too long settled to be now departed from. *London, Chatham and Dover Railway Company* v. *South Eastern Railway Company*, H. L. (E.) [1893], App. Cas. 429.

INTOXICATING LIQUORS.

CANADA TEMPERANCE ACT—APPLICATION OF FINES — MUNICIPAL CORPORATION — DISCRETION — MANDAMUS.

This was an application for a *mandamus* to compel the municipal council of the city of Fredericton to pay to the applicant certain expenses incurred in prosecutions for violation of the Canada Temperance Act in the city. The applicant had laid some eighteen informations before the police magistrate, and had employed counsel to conduct the prosecutions thereon. Out of the eighteen informations, sixteen convictions were made, and the fines from these collected and paid into the city treasury, and it was not disputed that the city had a fund in hand from the fines collected under the Act.

Held, that the order-in-council of the Dominion Government authorized the fines collected for violations of the Canada Temperance Act to be handed over to the city for the purposes of the Act; but that the manner of applying these funds was in the discretion of the city authorities; and therefore a *mandamus* would not lie to compel the city to make a particular expenditure. *Ex-parte Hooper*, Supreme Court of New-Brunswick, October 1893 (Can. L. T).

JUDICIAL SALE.

VENDITIONI EXPONAS — ORDER OF COURT OR JUDGE—VACATING OF SHERIFF'S SALE—ARTS. 553, 662, 663 714 C. P. C.—JURISDICTION—QUEBEC.

A petition *en nullité de décrêt* has the same effect as an opposition to a seizure, and under arts. 662 and 662 C. C. P. the sheriff cannot proceed to the sale of property under a writ of *venditioni exponas* unless said writ is issued by an order of the Court or a judge. Bissonnette v. Laurent (15 Rev. Leg. 44) approved.

Per Fournier, J.: Where the text of the law is clear and positive, a practice even long established should not be followed.

Taschereau and Gwynne, dissented.

On the question of want of jurisdiction raised by respondent it was *held* that a judgment in an action to vacate the sheriff's sale of an immovable is appealable to the Supreme Court under section 29 (*b*). Dufresne v. Dixon (16 Can. S.C.R., 596) followed. Appeal allowed with costs. *Lefeuntun* v. *Veronneau*, Supreme Ct. of Canada. 24 June 1893.

JURISDICTION—See Appeal.

JURY TRIAL.

1. VERDICT—RIDER BY THE JURY—REPARATION.

In an action by a widow for damages for the death of her husband caused by the alleged fault of the defenders in not firmly securing a disused gate, the jury returned a unanimous verdict for the defenders, but added this rider, "While accepting unanimously the law as laid down by your Lordship, we do not think that a due measure of supervision and care over the gate in question had been exercised by the defenders." The verdict was entered for the defenders. The pursuer moved for a rule to show cause why a new trial should not be granted.

Held, that the verdict of the jury negatived fault on the part of the defenders, and that the rider was not inconsistent with the verdict, and the rule refused. *Burns* v. *The Steel Co. of Scotland, Lt.*, 31 Scot. Law Rep. 41.

2. DISAGREEMENT OF JURY—QUESTIONS RESERVED BY JUDGE—MOTION FOR JUDGMENT — AMENDMENT OF PLEADINGS—NEW TRIAL—RULE 799—APPEAL — JURISDICTION — FINAL JUDGMENT—ONTARIO.

In an action brought to recover damages for the loss of certain glass delivered to the defendants for carriage, the Judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. The defendants then moved in a Divisional Court for judgment, but, pending such motion, the plaintiffs applied for and obtained an order of the Court amending the statement of claim by charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial, but had not been tried when the Divisional Court pronounced judgment on the motion, dismissing the plaintiffs' action. On appeal to the Court of Appeal from this judgment of the Divisional Court it was reversed.

On appeal to the Supreme Court of Canada:—

Held, affirming the judgment of the Court of Appeal, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial Judge or the jury, a new trial should be ordered, and that this was not a case for invoking the power of the Court, under Rule 799, to finally put an end to the action.

Held, also, that the judgment of the Court of Appeal ordering a new trial was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final. *Cobban Manufacturing Co.* v. *Canadian Pacific Railway Co.*, Supreme Court of Canada, May 1, 1893.

JUSTICE OF THE PEACE.

SUMMARY CONVICTION — INFORMATION—TWO OFFENCES—"DEFECT IN SUBSTANCE OR IN FORM"—ADJOURNMENT—CRIMINAL CODE, 1892, ss. 845 (3), 847, 857.

An information stating that the defendant "within the space of thirty days last past, to wit on the 30th and 31st days of July, 1892,.....did unlawfully sell intoxicating liquor without the license therefor by law required" does not charge two offences, but only the single offence of selling unlawfully within the thirty days; but, even if an information so worded can be said to contravene the provisions of s. 845 (3) of the Criminal Code, 1892, the defect is one "in substance or in form" within the meaning of the curative section, 847, and does not invalidate an otherwise valid conviction for the single offence.

The provision of s. 857 that no adjournment shall be for more than eight days is matter of procedure, and may be waived; and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect. Judgment of the Court below 23 O. R. Reversed. *Regina* v. *Hazen*, Ontario, Court of Appeal, Oct. 1893, (Can. L. T.)

LANDLORD AND TENANT.

1. STOPPAGE OF ELEVATOR — DAMAGES.

The plaintiffs, a firm of advocates, claimed $150 damages on account of the stopping of the elevator in defendant's building, where they have their offices. The defence was to the effect that the lease alleged did not exist at the time of the stoppage complained of. Further that the plaintiffs made no objection to the work, and moreover they had an easy and convenient access to their office by the staircase. The defendants further alleged that the elevator was in a bad condition and improvements were absolutely necessary, and defendants wished to substitute electric power. They employed skillful workmen, and the work was done with all possible diligence. The court maintained defendant's pretensions, and the action was dismissed. *Cooke* v. *Royal Insur. Co.* Montreal, Nov. 22. Superior Court, Caron, J.

2. LIABILITY FOR INTRODUCING BED BUGS INTO THE HOUSE.

This was an action by a landlord against his tenant. The landlord noticed some time after his tenant had left that his house was full of bugs.

Defendant pleaded that the insects had long been in the premises.

Plaintiff denied this.

The justice of the peace decided in favor of the landlord and condemned the defendant to pay him 600 francs to defray the expenses indicated by the architect as necessary for the occasion and 237 francs for loss of rent since the tenant left the premises. *Département du Nord, Valencienne.* 3 Aug. 1893. *Gazette des Tribunaux,* 5 Aug. 1893.

LIBEL AND SLANDER.

1. WORDS ACTIONABLE PER SE.

In Continental National Bank of Memphis v. Bowdre, decided in the Supreme Court of Tennessee, in August, 1893 (22 S. W. Rep. 131), it appeared that a postal card was sent by a bank to a correspondent, from whom it had received a draft on B. Bros. & Co., a mercantile firm, for collection, which read, "B. in hands of notary." As matter of fact, the draft had been paid to said bank. It was held that such words were libellous *per se.*

2. STATEMENT THAT DIRECTORS OF A COMPANY WERE SELF APPOINTED — LIBEL ON THE COMPANY.

The defendant published an article in which he stated that the directors of the plaintiffs' company were self-appointed men. Upon this the company brought an action of libel, charging that the innuendo was that by such unlawful, illegal, and irregular appointing, the directors were unable to transact the business of the company.

Held, affirming the decision of Rose, J., that this was a libel on the company. *Owen Sound Building and Savings Society* v. *Meir,* Ontario, Chy. Div. 1893.

"MANAGER IN TRUST"—See Shares.

MANDAMUS.—See Intox. Liq.—Mun. Corp. 4.

MARRIED WOMAN.—See Bills and Notes 4.

MASTER AND SERVANT.

1. COMPENSATION FOR INJURY—CONTRACT BY WORKMAN NOT TO RECOVER COMPENSATION AT COMMON LAW OR UNDER EMPLOYERS LIABILITY ACT 1880 (43 AND 44 VICT. C. 42).

A company of contractors effected an insurance against accidents for their workmen, the premium being paid partly by sums deducted weekly or fortnightly from the workmen's wages, and partly by a contribution from the contractors themselves. On the pay-box and in other places about the works printed posters, headed in large type, "Notice to Workmen—Accident Insurance," were posted up. These posters set forth—(1) that the contractors had effected an accident insurance for the benefit of their workmen; (2) that contributions on a certain scale would be deducted from their wages; (3) that certain benefits would be derived from the insurance, one of which was, that if injury should be sustained from an accident to the workman during the course of his employment, and should not prove

fatal, compensation would be paid to him weekly at a certain rate, and for a certain period; and (4) that the workman's acceptance of the benefits thereby provided for should be equivalent to a discharge of all claims against the employer at common law or under the Employers Liability Act 1880.

A workman who had been nine or ten months in the employment of the contractors, and from whose wages a deduction had been made as a contribution to the Accident Insurance Fund, was injured by an accident while in the employment of the contractors, and thereafter accepted a weekly allowance in terms of the insurance scheme.

Held, that he had thereby discharged all claims against his employers at common law and under the Employers Liability Act 1880. *Wright* v. *Howard Baker & Co.*, 31 Scot. Law Rep. 27.

2. DISOBEDIENCE—DISMISSAL.

Circumstances in which *held* that a farmer was within his legal rights in ordering his servants to work during the night on the ground of emergency, but was equitably barred from founding on the servants' refusal to obey the order as an act of disobedience justifying their dismissal. *Greig, &c.*, v. *Moir*, 9 Scottish Law Review, Sheriff Court Reports, 341.

MERCANTILE AGENCIES.

LIABILITY TO SUBSCRIBERS FOR FALSE REPRESENTATIONS.

By the contract between the defendants who conducted the business of a mercantile agency, and the plaintiff, it was agreed that the defendants, at the request of the plaintiff, as an aid to it in determining the propriety of giving credit, should communicate to the plaintiff such information as they might possess concerning the mercantile credit of merchants, etc.; that such information should be obtained and communicated by sub-agents appointed in behalf of the plaintiff by the defendants; that the defendants should not be responsible for any loss caused by the neglect of any sub-agent, and that the defendants in no manner guaranteed the actual verity or correctness of any such information.

In consequence of a request for such information concerning Kitts of Oswego, a report concerning him was made up by Burchard, the defendants' agent at that place, and was by him sent to the defendants, and by them to the plaintiff. Burchard and Kitts were connected in business, and for the purpose of promoting his own interests, Burchard made false statements in that report. The plaintiff, relying on the report, discounted the acceptances of Kitts, which were valueless.

Held, that the defendants were not liable for the loss; that in transmitting the information which they had obtained they completely fulfilled the terms of their contract with the plaintiff; that the accuracy of the information so obtained was at the risk of the plaintiff; that in making the report, Burchard was not acting within the scope of his authority as agent of the defendants; that he was not employed as the agent of either party in reference to the discounts which he caused to be effected; that he was merely an agent under the agreement of subscription to furnish information; that the defendants were agents of the plaintiff, and as it appeared from the agreement that the service required could not be rendered by the agent, but must mainly be rendered by sub-agents, the defendants were not liable for the errors or misconduct of the sub-agent, if they had used due care in his selection. *City National Bank of Birmingham, Alabama* v. *Dun*, United States Circuit Court of Appeals, Second Circuit, October, 1893, 48 Alb. L. J. 371.

MUNICIPAL CORPORATIONS

—SEE ALSO INTOX. LIQ.—TAXATION 1.

1. IMPROVEMENTS—ASSESSMENT.

Special assessment for a local improvement is void where a portion of the property benefited is arbitrarily and intentionally omitted from the assessment, and that, too, though the property assessed is benefited the amount it is assessed. *Masters* v. *City of Portland*, Supreme Ct. of Oregon, 33 Pac. Rep. 540.

2. TOWNSITES — PUBLIC SQUARES — DEDICATION.

A county owning land platted it as a town site, located a town thereon, and recorded the plat, which in the center showed a tract marked "Public Square." This was surrounded by streets. Outside of it were blocks subdivided into lots. When the lots were sold, the county reserved two, facing the public square, on which it built its Court House. For fifty years the county has asserted no right to the use or occupancy of the square, but it has been used as public grounds in a city ordinarily are used.

Held, that it was the intention to dedicate the square to the town for park purposes, and that it was so accepted by the town, and that, whether or not the legal title was in the county, assessments against the square for paving the street around it were payable by the city, and not the county. *Young* v. *City of Oscaloosa*, Iowa, 56 N.W. Rep. 177.

3. FIREWORKS DISPLAY—NUISANCE.

A large display of fireworks, including heavily-charged explosives, held at the junction of two narrow and completely built streets of a large city, and managed by private persons under no official responsibility, is an unreasonable and dangerous use of the streets, and a public nuisance. 19 N Y. Supp. 665, affirmed.

While a display of fireworks in a city street may be in fact a nuisance, the city cannot relieve itself of liability for damages caused by such a display, licensed by the mayor or under the authority of an ordinance, on the ground that the ordinance is *ultra vires*, since the council, admittedly, has regulating powers in the premises. *Speir* v. *City of Brooklyn*, New York, Court of Appeals, October 3, 1893.

4. ONTARIO MUNICIPAL ACT OF 1887 (R. S. O. c. 184) — CONSTRUCTION — DAMAGES FOR NON-FEASANCE—MANDAMUS—NOTICE IN WRITING—REMEDY BY ARBITRATION.

Under the Ontario Municipal Act of 1887 (R. S. O. c. 184) an action for damages lies against a municipality at the suit of any person who can shew that he has sustained injury from the non-performance of the statutory duty of maintaining and repairing its drainage works.

Held, that sect. 583, sub-sect. 2, applies to a case which falls within sect. 586, and, while prescribing a notice in writing as a condition precedent to a mandamus, does not on its true construction preclude an action for damages without such notice.

In an action brought without notice in writing against a municipality for damages for injury caused to the plaintiffs' lands and for a mandamus to prevent a recurrence of the injury.

Held, that so far as such injury was occasioned by the municipal drain and embankment being out of repair, or from their not being kept in such a state as to carry off in relief of plaintiffs' land all the water which the drain was capable of carrying off as originally constructed, the action was maintainable.

Held, further, that so far as the injury was occasioned by the negligent construction by the municipality under its statutory powers of another drain the action must be dismissed. The remedy in such case (see sect. 591) was by arbitration as directed by the statute. *Corporation of Raleigh* v. *Williams*, [1893] App. Cas. 540.

5. NEGLIGENCE — ACCIDENT — OBSTRUCTION ON STREET—ACTION CLAIMING DAMAGES — CONTRIBUTORY NEGLIGENCE.

The defendant corporation was engaged in laying water pipes on one of the streets of the town, and caused excavations to be made for that purpose. The plaintiff, while on her way home on a dark and stormy night, fell into one of these excavations, which the defendants were charged with having negligently left open and unguarded, and was severely injured.

In an action claiming damages for the injuries sustained, the jury found all questions submitted in favour of the plaintiff except the question whether on the night in question the plaintiff, by taking reasonable precautions could have avoided the mischief, whicl was found in favour of the defendants

There was no evidence that the plaintiff knew of the particular excavation into which she fell, but she had general knowledge that men were engaged in digging trenches in the street. Her evidence on this point was: "They were excavating so often in putting down water pipes that I did not remember."

On a motion on behalf of the plaintiff to set aside the finding in question and the judgment for the defendants entered thereon the Court was equally divided in opinion. *Fraser* v. *The Town of New Glasgow.* Supreme Court, Nova Scotia, 1893.

6. ONTARIO MUNICIPAL ACT — CONSTRUCTION OF BRIDGES — LIABILITY FOR CONSTRUCTION AND MAINTENANCE —WIDTH OF STREAM—R. S. O. (1887) CH. 184, S. 532, 534—ONTARIO.

By the Ontario Municipal Act, R. S. O. (1887) p. 184, sec. 532, the council of any county has "exclusive jurisdiction over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county and connecting any main highway leading through the county," and by sec. 534 the county council is obliged to erect and maintain bridges on rivers and streams of said width. On rivers or streams of one hundred feet or less in width bridges must be constructed and maintained by the respective villages through which they flow.

The river Nith flows through the village of New-Hamburg and in dry seasons when the water is low the width of the river is less than one hundred feet, but after heavy rains and freshets, it exceeds that width.

Held, reversing the decision of the Court of Appeal (20 Ont. App. R. 1) and of the Divisional Court (22 O. R. 193) that the width at the level attained after heavy rains and freshets in each year should be considered in determining the liability under the act to construct and maintain a bridge over the river; the width at ordinary high water mark is not the test of such liability. Appeal allowed with costs. *Village of New Hamburg* v. *County of Waterloo.* Supreme Court of Canada. 24 June 1893.

NEGLIGENCE—SEE ALSO MUN. CORP. 5. — 3. — CARRIERS 3.—JURY TRIAL 1.

1. PROXIMATE CAUSE — DANGER VOLUNTARILY INCURRED — ONTARIO.

C. having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on, left them in charge of the owner of another team, while he interviewed the proprietor of the yard. Shortly after a blast went off, and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses, which began to run. C. at once ran out in front of them and endeavoured to stop them, but could not, and in trying to get away he was injured. He brought an action against the municipality conducting the blasting operations to recover damages for such injury.

Held, affirming the decision of the Court of Appeal (20 Ont. App. R. 49), Gwynne, J. dissenting, that the negligent manner in which the blast was set off was the proximate and direct cause of the injury to C.; that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses; and that he did no more than any reasonable man would have done under the circumstances. Appeal dismissed with costs. *Town of Prescott* v. *Connell*, Supreme Court of Canada, 24 June 1893.

2. HIGHWAY—HORSE.

It is not negligence *per se* for the driver of a horse of a quiet disposition standing in the street to let the reins go while he alights from the vehicle to fasten a head weight, there being at the time little traffic and no noise or disturbance to frighten the animal; and the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver has alighted.

Judgment of the Court below reversed. *Sullivan* v. *McWilliam*, Ont. Court of Appeal, October 1893 (Can. L. T).

3. PASSENGER VESSEL — USE OF WHARF — INVITATION TO PUBLIC— ACCIDENT IN USING WHARF—PROXIMATE CAUSE—EXCESSIVE DAMAGES— NOVA SCOTIA.

A company owning a steamboat making weekly trips between Boston and Halifax occupied a wharf in the latter city leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side part way down the wharf and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk and instead of turning off at the end, there being no lights and the night being dark, they continued straight down the wharf, which narrowed after some distance and formed a jog, on reaching which Y's wife tripped and as her husband tried to catch her they both fell into the water. Forty-four days afterwards, Mrs. Y. died.

In an action by Y. against the company to recover damages occasioned by the death of his wife, it appeared that the deceased had not had regular and continual medical treatment after the accident, and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury when asked:—Would the deceased have recovered, notwithstanding the accident, if she had had regular attendance? replied, "very doubtful." A verdict was found for the plaintiff with $1,500 damages, which the Supreme Court of Nova Scotia set aside and ordered a new trial. On appeal from that decision:

Held, that Y. and his wife were lawfully upon the wharf at the time of the accident; that in view of the established practice they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company was under an obligation to see that they were safe.

Held, further, that it having been proved that the wharf was only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company whose officers had sole control of it, the company was in possession of it at the time of the accident.

Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y's death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed. Appeal dismissed with cost. *York* v. *Canada Atlantic Steamship Co.*, Supreme Ct. of Canada, June 24, 1893.

NEW TRIAL.—See Jury Trial.

NUISANCE—See Mun. Corp. (Fireworks) 3.

ONTARIO MUN. ACT—See Mun. Corp. 4 — 6.

PARTNERSHIP — SEE ALSO INSOLVENCY — RAILWAY COMP. SETTLEMENTS — IMPEACHMENT.

A partner who has knowledge of entries in the partnership books by his copartner, charging him with items for which he is not liable, is guilty of lâches in settling up the partnership business on the showing made by the books, without examining them to see they have been corrected to conform to his contention, and he cannot thereafter impeach the settlement on the ground that the books were not correct. *Kneeland* v. *McLachlen*, Tex., 23 S.W. Rep. 309.

PIPES OF WATER COMPANY — See Taxation 3.

PLEADING—See Bills and Notes 3.

PRINCIPAL AND AGENT.

EXCESS OF AUTHORITY—LIABILITY OF PRINCIPAL—MORTGAGE—AUTHORITY TO PLEDGE TITLE-DEEDS FOR A

PARTICULAR SUM—FORGED DEEDS—REDEMPTION.

The owner of land deposited the title-deeds with the U. Bank to secure an advance of £750. Being desirous of obtaining a further advance of £1500, he authorized his son to borrow £2200 from another bank and gave him a written authority to receive the deeds from the U. Bank on payment of the sum due to them. The son fraudulently pledged the deeds to a different bank from that which had been proposed for a much larger advance than he was authorized to borrow, forging his father's name to a promissory note and deposit note. Out of this advance he paid £750 to the U. Bank, and £1500 to his father, and kept the rest for his own use. The son afterwards induced the defendants to advance him a still larger sum, out of which the advance by the bank was paid off, and the land was conveyed to the defendants by forged deeds by way of mortgage for securing the advances. The defendants had no notice of the fraud, and the dealings with the property were kept secret from the father. Subsequently the son absconded, and the facts then became known to the father. He brought an action against the defendants claiming to redeem the property on payment of the sum of £2200 which he had authorized his son to borrow.

Held, (affirming the decision of Wright, J.), that the plaintiff, having placed the deeds in the control of his son, could not redeem the property without paying the whole amount which his son had raised upon them; although the son had exceeded his authority in raising more than he was instructed to raise, and had effected his purpose by forgery. *Brocklesby* v. *Temperanee Permanent Building Society*, C. A. [1893] 3 Ch. 130.

PRIVY COUNCIL—See Appeals.

PROMISSORY NOTE—See Bills and Notes 1—2—4.

RAILWAY COMPANIES—SEE ALSO CARRIERS 1—2—3—TAXATION 2.

LEASE OR PARTNERSHIP.

A contract by which a number of railroad companies "lease" their roads and other property to one company for 99 years, the latter company agreeing to operate and maintain the lines and pay to each of the other companies a certain proportion of 93 per cent. of the net profits from such operation, is a contract of partnership and not a lease. *Galveston, H. & A. S. Ry. Co.* v. *Davis*, Tex., 23 S. W. Rep. 301.

SALE.

OF DEALS—CONTRACT—BREACH OF—DELIVERY—ACCEPTANCE—QUALITY—WARRANTY AS TO—DAMAGES—ARTS. 1073, 1473, 1507 C. C.—QUEBEC.

In a contract for the purchase of deals from A. by S. *et al*, merchants in London, it was stipulated *inter alia*, as follows:—"Quality—Sellers guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand," and the mode of delivery was f.o.b. vessels at Quebec, and payment by drafts payable in London 120 days sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros. at the request of P. & P. intending purchasers of the deals. When the deals arrived in London they were inspected by S. *et al*, and found to be of inferior quality, and S. *et al*, after protesting A. sold them at reduced rates. In an action of damages for breach of contract.

Held, reversing the judgment of the Court below, that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality. Arts. 1507, 1473, 1073 C. C. The Chief Justice and Sedgewick, J., dissenting. Appeal allowed with costs. *Stewart* v. *Atkinson*, Supreme Ct. of Canada, 24 June, 1893.

SHARES—(SEE ALSO ESTOPPEL.

TRANSFER OF SHARES SUBJECT TO A TRUST—CONSTRUCTIVE NOTICE—SIGNATURE OF BANK MANAGER AS "MANAGER IN TRUST."

Where the respondent had tran-

sferred shares as security for a loan, *held*, that the appellants, as derivative transferees from the lender, were not affected by a trust in favour of the respondent, unless such trust was clearly disclosed on the face of their author's title, or was otherwise notified to them.

The words "manager in trust," appended to the signature of a bank manager, import that he held and tranferred the shares in trust for his employers, the bank, and are not calculated to suggest that he stood in a fiduciary relation to some third person, so as to affect a transferee for value with constructive notice of such relationship. *London and Canadian Loan and Agency Company* v. *Duggan*, [1893]. App. Cas. 506.

SHIPS AND SHIPPING.

1. CHARTERPARTY—TIME FOR DISCHARGE OF CARGO—DESPATCH MONEY—SUNDAYS AND FÊTE DAYS EXCEPTED.

The plaintiffs' steamer was chartered by the defendants to carry a cargo of coals, "to be discharged at the rate of 200 tons per day weather permitting (Sundays and fête days excepted) according to the custom of the port of discharge and if sooner discharged to pay at the rate of 8s. 4d. per hour for every hour saved."

Held, that Sundays and fête days were excluded both in the computation of the time allowed for discharging, and in that of the time saved, so that despatch money, by way of set-off to a claim for freight, was only payable, by the plaintiffs to the defendants, on the difference between the number of hours actually occupied by the defendants in the discharge, and the total number of hours which the charterparty allowed them. The Glendevon, [1893], P. 269.

2. BILL OF LADING, CONSTRUCTION OF — DEVIATION CLAUSE — PRINTED WORDS—LIBERTY TO DEVIATE FROM SPECIFIED VOYAGE—EXTENT OF DEVIATION AUTHORISED.

Oranges were shipped on board a steamship under a bill of lading which stated that the ship was then "lying in the port of Malaga, and bound for Liverpool, with liberty to proceed to and stay at any port or ports in any station in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." The bill of lading contained a clause whereby the shipper expressly agreed to all its stipulations whether written or printed. The deviation clause was printed with the name of the port of shipment left blank and filled up in writing.

The ship left Malaga for a port on the east coast of Spain and out of her course for Liverpool, then returned and made for Liverpool, where the oranges were delivered in a damaged condition owing to the delay. In an action by the shipper against the shipowner for damages for breach of contract:—

Held, affirming the decision of the Court of Appeal ([1892] 1 Q. B. 337), that the printed clause must not be construed so as to defeat the main object and intent of the contract, which was to carry the oranges from Malaga to Liverpool; that the liberty must be restricted to ports which were in the course of the voyage; that the deviation in question was therefore not justified, and that the shipowner was liable. *Glynn* v. *Margetson & Co.* H. L. (E.) [1893] App. Cas., 351.

3. CHARTERPARTY—RESTRAINTS OF PRINCES AND RULERS—DEMURRAGE—CUSTOMARY MODE OF LOADING.

The defendants chartered the plaintiffs' vessel to load a cargo of 3090 tons of nitrate at Iquique in Chili at the rate of 200 tons per working lay day, to be reckoned from the day the vessel was ready to receive cargo to the day of her dispatch, "restrainis of princes and rulers, political disturbances or impediments.....during the said voyage always mutually excepted." There was at Iquique only storage room for a small quantity of nitrate, and the customary mode of loading there was to send the nitrate by rail from the mines direct to the ship's side as required for loading.—The vessel arrived at Iquique on January 29; but at that

time a civil war had broken out in Chili, and by reason of the existence of a state of war in the town itself it was impossible up to March 5 to load any nitrate from the port. After that date it was possible to load from the port; but in consequence of the railway from the mines to Iquique being in the hands of the troops, no nitrate from the mines could reach Iquique until March 23, on which day the loading commenced, and finished on April 4. The vessel sailed on April 8. She was then short of coal, and it being very dear at Iquique she put in to another Chilian port for it. She was there detained for ten days in consequence of her refusal to pay over again to the Chilian government in power at that port the export duties which she had already paid to the government in power at Iquique. An action having been brought by the plaintiffs for demurrage.

Held, that the delay in both cases fell within the exception in the charter-party. *Smith & Service* v. *Rosario Nitrate Company*, [1893] 2 Q. B. 323.

STREET RAILWAY.

STREET RAILWAY — CANADIAN ACT 24 V., c. 83—ONTARIO ACT 53 V., c. 105 —CONSTRUCTION.

Where by Act of the legislature the appellant company was authorized to construct a railway upon and for that purpose to use the streets of a city and its adjoining municipalities, which by the same Act were authorized to grant an exclusive privilege for that purpose upon such conditions and for such period as might be agreed upon; and thereafter, by certain resolutions, agreement, and by law such privilege was limited to thirty years, at the expiration of which the corporation of the city might assume the ownership.

Held, that the Act could not be construed as granting a perpetual privilege to use the streets for the purpose of the railway, but that the privilege thereby granted was limited to thirty years by the agreement and by-law. That limit of time applied, not merely to the original railway, but to the various extensions thereof authorized in pursuance of the same privilege. *Toronto Street Ry. Co.* v. *Corporation of the City of Toronto*, [1893] App. Cas. 511.

SUMMARY CONVICTION—See Justice of the Peace.

SUNDAYS—See Ships, etc. 1

TAXATION.

1. ONTARIO ASSESSMENT ACT, R. S. O., c. 193, SECTIONS 15, 65 — ILLEGAL ASSESSMENT — COURT OF REVISION — BAR — BUSINESS CARRIED ON IN TWO MUNICIPALITIES — PLACE OF BUSINESS — BRANCH — ONTARIO.

Section 65 of the Ontario Assessment Act, R. S. O., c. 193, does not enable the Court of Revision to make valid an assessment which the statute does not authorize.

Section 15 of the Act provides that "where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such persons shall be assessed in the municipality in which such personal property is situated."

W., residing and doing business in Brantford, has certain merchandize in London stored in a public warehouse used by other persons as well as W. He kept no clerk or agent in charge of such merchandise, but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for W., residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at London.

Held, affirming the decision of the Court of Appeal, 19 A. R. 675, that W. did not carry on business in London within the meaning of the section, and his merchandize in the warehouse was not liable to be assessed at London. *Watt* v. *City of London*, Supreme Ct. of Canada, 24 June, 1893.

2. TAX ON RAILWAY — NOVA SCOTIA RAILWAY ACT—EXEMPTION — MINING COMPANY—CONSTRUCTION OF RAILWAY BY — R. S. N. S., 5TH SER., c. 53.

By R. S. N. S., 5th ser., c. 53, s. 9,

ss. 30, the road bed, etc., of all railway companies in the Province is exempt from local taxation. By s. 1, the first part of the Act, from ss. 5 to 33, inclusive, applies to every railway constructed and in operation or thereafter to be constructed under the authority of any Act of the legislature; and by s. 4, the second applies to all railways constructed or to be constructed under authority of any special Act, and to all companies incorporated for their construction and working. By s. 5, ss. 15, the expression "the company" in the Act means the company or party authorized by the special Act to construct the railway.

The International Coal and Railway company was incorporated by 27 V. c. 42 (N. S.), for the purpose of working coal mines in Cape Breton, and for the further purpose "of constructing and making such railroads and branch tracks as might be necessary for the transportation of coals from the mines to the place of shipment, and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation on railways." Under these powers a railway twelve miles in length was built and used to carry coal from Bridgeport to Sydney Harbour, and the company having become involved, its property, including the railway, was sold at a sheriff's sale, and the purchasers conveyed the same to the International Coal Company.

By 48 & 49 V. c. 29 (D.) it was enacted that the International Coal Company might hold and work their railway for the purposes of their own mines and operations, and might hold and exercise such powers of working the railway for the transport of passengers and freight generally for others for hire as might be conferred on the company by the legislature of Nova Scotia, and by 49 V. c. 145, s. 1 (N.S), the company were authorized to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines," in accordance with and subject to the provisions of the second part of R. S. N. S., 5th ser., c. 53, entitled "of railways."

The municipality of Cape Breton having assessed the company for local taxes in respect of the railway:—

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the company were exempt from such taxation; that the railway was one constructed under authority of an Act of the legislature of Nova Scotia, 27 V. c. 42, and in operation under the authority of an other Act, 49 V. c. 145; that the company was a "railway company" within the meaning of s. 9, ss. 30 of c. 53; that the first part of that chapter applies to railways constructed under any Act of the legislature and not only under Acts exclusive of those to which the second part applies; and that the reference in 49 V. c. 145, s. 1, to the second part does not prevent said railway from coming under the operation of the first part of the Act. *International Coal Co.* v. *County of Cape Breton*. Supreme Court of Canada, 24 June 1893.

3. TAXATION — REALTY — PIPES OF WATER COMPANY.

The water pipes, hydrants, and conduits of a water company, laid to the streets of a city or town, are taxable as real estate to the company in possession of them, under our statute, in the city or town where they are laid. *Inhabitants of Paris* v. *Norway Water Co.* Supreme Judicial Court of Maine, February 25, 1893. 37 Cent. L. J., 309.

HASKELL, J.: Debt for a tax laid upon defendant's aqueducts, conduits, pipes, and hydrants, as real estate, within the town of Paris. These appliances are used to distribute water among the citizens of Paris, supplied by a pumping station and reservoir in Norway, where the defendant corporation has its place of business. By charter (Acts 1885, ch. 369; Acts 1887, ch. 46,) the defendant is authorized to supply the inhabitants of Paris and Norway with water, and to lay pipes necessary for the purpose through the streets of both towns. The charter does not locate the corporation in either town.

Taxes on real estate are to be assessed "in the town where the estate lies, to the owner or person in possession thereof" (Rev. St. ch. 6, § 9); and real estate, for the purposes of taxation, includes "all lands * * * and all buildings erected on or affixed to the same," (*Id.* § 3); and the words "lands" includes "all tenements and hereditaments

connected therewith and all rights thereto and interests therein" (*Id.* ch. 1, § 6, rule 10.)

Under these provisions, a boom across the Kennebec river, fastened to permanent piers in the river and to the shores by chains, was held to be real estate, for the purposes of taxation. Hall v. Benton, 69, Me. 346. So was that part within the State of a toll bridge across a river that marks the boundary line. Kittery v. Portsmouth Bridge, 78 Me. 93, 2 Atl. Rep. 847. Water pipes were assessed *in solido* with personal property in Rockland v. Water Co., 82 Me. 188, 19 Atl. Rep. 163, and in a suit for the tax it was contended that they were real estate, and improperly included in an assessment with chattels; but the court, without deciding the question, held it immaterial, as the controversy was one of overvaluation, merely.

It will be seen from these authorities that the court gives very wide scope to the definition of "real estate," for the purposes of taxation, and it is best that it should be so. Subjects of public revenue should contribute to the public burdens so that they may lie as equally as possible among all the people; and, in these days, when capital accumulates in commercial centers, many times representing contrivances, local and permanent in character, that contribute an income, it is just that such source of profit pay its tax where its location may be.

Aqueducs above or under ground are but conditions suited for carrying water, undefiled, through or over the soil. They are fixtures, permanent in character, and part of the land that sustains them. Size, capacity, and the material used in their construction, do not change their nature. They are a constituent part of the freehold, and, so long as they remain the property of the owner of the fee, their character as real estate will not be questioned. It is only when they are constructed and occupied by persons or companies having no title in the soil that their classification as property becomes doubtful; that is, the interest of such persons or companies in them becomes of doubtful classification, rather than their generic character, regardless of ownership. The owner of a fee may, by sale of some structure upon it, and by granting license for it to remain, as between himself and the vendee, make it a chattel, while as a whole, in a generic sense, it would be classified as real estate.

The proper classification, under the rules of the common law, of this species of property, is not a new question. It has been many times considered in England during the last century; and water mains and underground conduits have there been considered as fixed to, included in, and a part of the soil. They have been considered real estate, and have uniformly been held locally taxable as such to the "occupiers of lands," under the statute of 43 Eliz., or, as our statute puts it, "to the person in possession thereof." King v. Mayor, etc., of Bath, 14 East, 610; King v. Waterworks, 1 Maule & S. 634; King v. Gaslight & Coke Co., 5 Barn. & C. 466.

Under the statute of 28 Geo. III., laying taxes upon the owners of "lands and hereditaments," the pipes of a water company in a street were held to be not taxable as land to the owners of them. Lord Campbell says: "The right in question, where exercised, appears to us to be in the nature of an easement, and neither land nor hereditament. The right is to convey water through the land of another, and whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us, for this purpose, to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditaments; nor do we think that the pipes, when laid, can be so considered, within the meaning of the land-tax acts ..... The company are not the owners of the land where the pipes lie, nor are they the tenants of the land..... The moment the company take up their pipes which had been laid under the streets of any particular parish, all pretense for saying that they have or held land in the parish would be gone; but, after the pipes are removed, all the land in the parish would remain, and it would be had and be held as before..... But 'land,' like the word 'inhabitant,' which likewise occurs in 43 Eliz. ch. 2, has various meanings; and it may, in that statute, passed to throw a charge upon the occupier, mean the ground on which a chattel is deposited in the exercise of an easement, although, in other acts of parliament, it means a legal interest in the soil. This is the meaning which we think it bears in the land tax acts." Waterworks v. Bowley, 17 Q. B. 358.

The city of Providence laid a tax on the pipes of the gas company in the streets, as real estate, under a statute authorizing such a tax against those, "who hold or occupy the same," and it was held a valid tax, like those laid under the statute of Elizabeth. Gas Co. v. Thurber, 2 R. I. 15.

So a pipe line laid through the soil of New Jersey, under grants from the owners of the fee, is not only real estate, when considered as a part of the fee, but is held, for the purposes of taxation, to be real estate of the company owning it, under a statute defining "real estate" as including all lands, and all buildings or erections thereon or affixed thereto. Pipe Line Co. v. Berry, 52 N. J. Law, 308, 10 Atl. Rep. 665.

Gas mains and pipes are sometimes distinguished from the class of property now under consideration, as apparatus for the delivery of the manufactured article, and are considered machines or chattels. Com. v. Gaslight Co., 12 Allen, 75; Memphis Gaslight Co. v. State, 6 Cold. 310. Water pipes, etc., are not machinery. Dudley v. Aqueduct Corp., 100 Mass. 183.

The public has an easement in land, over which streets and roads are laid, coextensive with the necessities of public use. No title in the soil is acquired thereby, and when the ways are discontinued the easement is extinguished. Private corporations, like gas companies, water companies, and street railway companies, by legislative authority, are sometimes allowed the use of the public easement to serve the necessary demand of society, and without any additional compensation to the owner of the soil. Such companies therefore, by the public license accorded them, take no title

in the land. They are simply allowed to use it for the public convenience as a counterbalancing consideration for their expenditure, giving opportunities to gather tolls from its use. In using the street or road, they place their pipes or rails in or upon the ground, there permanently to remain. They occupy land with appliances that become valuable for what they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of the irrespective companies, they are not land, within the common law rule. But, when considered as if owned by the same person who has title to the soil they may properly enough be so considered. Suppose the street, with these appliances in it, be discontinued, and they be abandoned, without removal, and pass to the owner of the soil, who should then lease them, in gross or singly, to tenants or persons desiring to operate them. Would they not be real estate, when considered with the property as a whole? Would they not pass by a deed of the land? Why, then, may they not properly enough be assessed as real estate, and to the person in possession of them? Their value as chattels would be nominal. Water pipes buried in the ground as chattels would be of little or no value. It is the use that gives them value, and that use is strictly of a fixture,—a permanent appliance. As bearing upon this view, see Water Co. v. Lynn, 147 Mass. 31, 16 N. E. Rep. 742; City of Fall River v. Bristol, 125 Mass. 567; People v. Cassity, 46 N. Y. 46.

In the last case cited, in considering the validity of a tax upon a street railway as land, under a statute very similar to ours, Folger, J., says: "The statute means, for its purpose, to make two general divisions of property,—one, all lands; another, all personal estates,—and then, to be more definite, it declares that by 'land' is meant the earth itself, and also all buildings and all other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not, in the view of the statute, land, unless held and owned in connection with the ownership of a fee in the soil. We are of the opinion that the statute means such an interest in real estate as will protect the erection or affixing thereon, and the possession, of buildings and fixtures, which will bring those buildings and fixtures within the term 'land,' and hold them to assessment as the lands of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures. The defendants are right, then, in considering the track of the relators as land, and liable to assessment as such."

In our opinion, water mains, pipes, etc., may be considered real estate, and taxable, where they are located, to the person or company owning them. The idea that they may be considered appurtenances to the place of supply and taxable there is untenable. There is no principle upon which it can rest. King v. Bath, *supra*, and King v. Gaslight & Coke Co., 5 Barn. & C. 466. See Manufacturing Co. v. Newton, 22 Pick. 22. The Iowa doctrine, that waterworks are real estate, and taxable as an entirety at the place of supply, is not supported by authority. Oskaloosa Water Co. v. Board of Equalization (Iowa), 51 N. W. Rep. 18. Defendant defaulted.

(NOTE BY CENTRAL LAW JOURNAL).—Not long ago (35 Cent. L. J. 261), this Journal, called attention to the case of The Badger Lumber Co. v. The Marion Water Supply Electric Light and Power Co., decided by the Supreme Court of Kansas, which among other things, decided that the poles, wires and lamps of an electric light plant, beginning at the power house and extending throughout the city are appurtenances to to the power house within the mechanic's lien law of Kansas. The court below had awarded the plaintiff a personal judgment against the defendant for the amount claimed, but refused to enforce a lien upon the real estate and appurtenances of the defendant for the reason "that no part of the material for which plaintiff claims a lien was on the real estate of the defendant or attached thereto in any manner except by the wires stretched from the poles of the defendant's electric light machinery situated on the said estate. The Supreme Court reversed that ruling upon the ground that the poles and wires may be regarded as an appurtenant to the power house. Viewed in the light of the principal case, which seems to be supported by ample authority, the Kansas court in the above case though practically reaching a correct conclusion placed it upon the wrong ground, for a mechanic's lien upon the poles and wires would have been proper, not because they were appurtenant to, but because they were real estate. This view is suggested by a recent editorial on the subject in the *New York Law Journal* wherein after calling attention to the fact that at the time of the Kansas decision it expressed doubts as to the soundness of the principle laid down, says: "None of the materials furnished by the plaintiff was actually placed upon the defendant's real estate, but the poles in question were all used in the streets of the city. While recognizing the equitable purpose of the Supreme Court, it seemed to us that the theory of appurtenance had been strained beyond warrantable limits. Many of the cases in the books relate to such appurtenance as drain pipes. No matter how far from a building its drain pipe extends, such pipe is, nevertheless, originally a part of the building, and necessary for its use and enjoyment as a building; and the courts have very properly ruled liberally in enforcing mechanics' liens in cases of that class. See, for instance, Beatty v. Barker (141 Mass. 523). But the poles and wires of electric light companies and the pipes of water companies, and the tracks of cable road companies while their physical connection with the power house or pumping house is necessary for the operation of the entire plant, are still not parts or adjuncts of the building itself, but independent real estate interests, and independent portions of such plant. "The recent case of Inhabitants of Paris v. Norway Water Co., in the Supreme Judicial Court of Maine. 27 Atl. Rep. 143, substantially sup-

ports this view." The Texas courts seem to have fallen into the same error, holding poles and wires in the street real estate because appurtenant thereto. See Hutchins v. Masterson, 46 Tex. 531, and Keating Implement & Machine Co. v. Marshall Electric Light & Power Co., 74 Tex. 605.

TELEGRAM—See Contracts 4.

TOWNSITE—See Mun. Corp. 2.

TRADE MARKS.

INFRINGEMENT — DECEPTION BY OWNER.

A trade-mark will not be protected if the owner has knowingly misrepresented the article to the public, and it is immaterial that the adverse party fails to allege such misrepresentations. The fact that in one year, eight years years before bringing suit, and forty years after the business was established, complainant issued a circular misrepresenting the character of the article sold by him, will not prevent his obtaining relief against infringement of the trade-mark or trade-name borne by such article. The fact that complainant falsely stated on his packages that the trade-mark was registered November 11, 1843, will not deprive him of his right to protect from infringement, when he in fact on that date filed the name of the article as a book title under the copyright law, and since the public could not have been deceived by such statement, there being no provision for registering trade-marks at that early date. Innocent misrepresentations are not ground for refusing complainant relief. The words "Liver Medicine" being purely descriptive, cannot be appropriated as a trade-mark. The name "Simmons" cannot be appropriated as a trade-mark, when it has become merely descriptive of medicine prepared under the formula of a Dr. Simmons, and is used by many people in in connection with such medicines. Where it appears that defendant put on the market packages of medicine labeled "Dr. M. A. Simmons' Liver Medicine," in packages so substantially similar to those in which complainant's "Simmons' Liver Medicine," had been previously sold as to deceive the public, and that this was done with the purpose of selling it in place of complainant's medicine, the latter is entitled to an injunction to restrain the use of such labels and packages by defendant. The fact that defendant put his packages on the market a year before complainant filed his bill to restrain such competition does not deprive complainant of his right to an accounting. *C. F. Simmons Medicine Co.* v. *Mansfield Drug Co.*, Supreme Ct. of Tennessee, 23 S. W. Rep. 165.

TRUSTS—See Shares, Transfer of.

VENDITIONI EXPONAS — See Judicial Sale.

VERDICT—See Jury Trial, 1.

WARRANTY—See Sale of Deals.

WATER COMPANY.

WATER SUPPLY ACT, 1886, ss. 11, 23 — COMPENSATION — PAST AND FUTURE PROFITS — BARBADOES.

Where certain streams of water had been abstracted from the appellant's property by a water company acting under the Water Supply Act, 1886:—

Held, that the compensation due to the appellant included the value of his proprietary interest therein, and was not limited to the amount of pecuniary benefits obtained by past user thereof in disregard of possible benefits in the future. *Trent-Stoughton* v. *Barbados Water Supply Company, Limited.* [1893] App. Cas., 502.

SUPREME COURT OF JUDICATURE, (IRELAND)

COURT OF APPEAL.—27 *Ir. Law Times Rep.* 125.

MALLON *v.* G. S. & W. RY. CO.

July 19, 1893. — DOG BITE—CONTRIBUTORY NEGLIGENCE — REMOTENESS OF DAMAGE — EVIDENCE OF ACTIONABLE NEGLIGENCE — SCIENTER.

The plaintiff passing along the platform of the defendants' railway station came into contact with a chain that he had not observed, and was immediately bitten by a dog. The dog was attached by the chain to a luggage barrow, which was being drawn by a porter in the employment of the defendants. The plaintiff brought an action against the defendants for negligence. The jury awarded £100 damages to the plaintiff. The Queen's Bench Division (GIBSON J., *diss.*), *having set aside the verdict on the ground of there being no evidence of actionable negligence fit to be submitted to a jury.* Held (*reversing the Divisional Court*) *that there was evidence of actionable negligence fit to be submitted to a jury, and that the verdict for the plaintiff should stand:*

Held, *also that no question of scienter arose; and that the damage was not remote. The court considering the damages excessive intimated that unless the plaintiff assented to the reduction of the damages from £100 to £50, there should be a new trial.*

The plaintiff arrived at Portarlington station on 1st July, 1892, in the evening, while there was full light. A dog was delivered at the station while the plaintiff was there. The dog was booked from Athlone to Kilkenny, and therefore it became necessary to put it in a train proceeding to Kildare, so as to be there transferred to a train for Kilkenny. Cochrane, a porter in the employment of the defendant company, who had a number of duties to discharge, according to his own evidence, was on this day engaged conducting a barrow loaded with parcels, and at the same time he had charge of the dog, a terrier, on which there was a muzzle, a chain being attached to the muzzle; the porter fastened the chain between the leg of the barrow and the iron support going from the shaft to the leg, the dog having thereby a range from the barrow of about two feet. With the barrow thus laden and the dog thus attached the porter proceeded along the platform, which platform was about 16 feet in width, the porter drawing the barrow. The platform was crowded with passengers. The plaintiff was going along the platform to buy a ticket; he was moving quickly, being in a hurry; he did not perceive the dog or the chain because of the crowd obscuring the view, and he tripped on the chain but did not fall. There was no evidence to show whether the plaintiff trod on the dog, but as soon as the plaintiff tripped he was bitten by the dog. It was not shown that the dog was vicious. At the trial

the counsel for the defendant company asked for a direction, stating that there was no evidence of negligence to go to the jury; also that the dog's biting was not a reasonable and natural consequence of the negligence, if there was any.

R. Meredith, Q.C. (*Phil. White* with him), for the plaintiff.

Atkinson, Q.C. (*Mathew Bourke*, Q.C., with him), for the defendants.

WALKER, C. — On the argument before us it was first contended that there was no evidence of negligence on the part of the defendant company. The duty of the defendants towards the plaintiff, a lawful passenger, was to keep the platform reasonably safe for him, and not to expose him to risks that he naturally could not anticipate. I cannot but think that the conveying of a dog along a platform, with a chain which became an obstacle, two feet in length, and in a manner that persons approaching could see neither the chain nor the dog, was some evidence of negligence. The defendants cannot find refuge in their having imposed on the porter so many duties. No doubt, if the plaintiff's conduct amounted to contributory negligence, directly causing the accident, the case should have been withdrawn from the jury. The use of the word "contributory" often causes difficulty. I cannot think that the plaintiff caused the injury by not seeing or expecting a dog on his path abnormally chained to a barrow. It has been said here that the damages were too remote. It was stated that there was no proof of knowledge that the dog was likely to bite—that is so; but I think the doctrine of *scienter* has no application to this case. Once it is shown that the defendant company by their negligence caused the plaintiff to trip over a chained dog, whether the animal be a dog, or a horse, or a cow, if the animal be put into a position in which it may be made aggressive, the defendant, whose conduct so affects the disposition of the animal, is liable for the natural consequences of such change of disposition. This is illustrated in reference to one of these animals, a horse, in Lee v. Riley (18 C. B., N. S. 722). In this case I think the bite was not unreasonably the consequence of the act of negligence of the defendant company. The question of the damages has already been dealt with. It is only because we differ from the majority of the Judges in the court below that we have thought it necessary to state the reasons that have led us to a different conclusion; and that is, that there shall be a new trial if the plaintiff does not consent to take the verdict with the damages reduced to £50.

FITZGIBBON, L.J.—The first question is whether there is evidence to support the finding of the jury that the defendants are guilty of negligence, and the second, and only other question, is, whether the fact of the biting is too remote a consequence of the way in which the dog was being led to involve the defendants in any liability. These questions must be kept quite distinct. I can see no necessary evidence of negligence in the hurry of the plaintiff going for his ticket, nor any demonstrable negligence on his part because he fell over the chain. The negligence point being out of it, there is remaining the question of remoteness. There is no distinction between tripping over a chain with which the dog was being towed and tripping over the animal itself. It is conceivable that the dog could, in a canine sort of way, plead *son assault demesne*. The *scienter* does not apply to a case such as this, where a quiet dog, being irritated, snaps at and bites

the person taken to be the instrument of the irritation; no foresight on the part of the plaintiff would have prevented the biting. The verdict cannot be entered for the defendants, but we will give them a new trial, for which also they ask in the alternative, on the ground of excessive damages, unless the plaintiff consents to our reducing the amount from the £100 to £50.

BARRY, L.J.—This case has been tried and argued largely upon one question, and one only: whether there was evidence of negligence in the manner in which this interesting dog was towed, as FitzGibbon, L.J., has felicitously described it. I cannot agree with O'Brien, J., that it was quite as safe to carry the dog in that way as holding him directly by the chain. In the latter method obviously the porter would have more control over the acts of the animal, whereas he had no control over the dog by the mode of conducting him resorted to in the present instance. The porter had not the dog in view, nor could the dog see the porter. It has been contended for here that the plaintiff ought to have produced evidence of the unsafety of such a mode of leading a dog across a crowded station. When the case was at trial the absence of expert evidence on that subject was not pointed out. But it is most unreasonable to raise any such objection, as if the men on the jury could not be as good judges of that as anybody else. Another objection taken by O'Brien, J., was that this was not directly owing to the negligence of the defendants, but to a combination of circumstances. That, however, is all subject to the question, was there negligence on the part of the company? O'Brien, J., asks is the company bound to have a special staff of porters for the purpose of taking dogs across the station? No such proposition has been put forward here. The only allusion to the insufficiency of the staff has been on the part of the defendant's own witnesses—this poor man, the porter, in order to exonerate himself, has enumerated his various functions. If a company maintain a staff that happens on some occasions to be insufficient, they must do so at their own risk. The judgment delivered by Andrews, J., shows that he hesitated greatly. I think it is sufficiently proved that in this case there was a question to go to the jury, for while Holmes, J., and O'Brien, J., thought that it was a good way to carry a dog across the station, Gibson, J., was of opinion, as we three here are, that it was a bad method. There is no question of *scienter* here, for that only arises where the biting is of a voluntary character, and unprovoked. A clearer case for asking a jury their opinion rarely has come into a Court. There is no principle involved in the case. We say to the defendants take a verdict against you for £50, or a new trial.

Solicitor for the plaintiff: *J. J. O'Hara.*

Solicitor for the company: *C. Barrington.*

CONTRACTS IN RESTRAINT OF TRADE.

MELVIN L. GREENFIELD, Respondent, *v.* GEORGE W. GILMAN *et al.*, as Executors, etc., Appellants.

New York Court of Appeal, Nov. 28, 1893, 140 N. Y. 168.

While contracts between vendor and vendee in restraint of trade will be upheld, they are not to be treated with special indulgence. They are intended to secure to the purchaser of the good will of a trade or business a guaranty against competition by the vendor. When this object is accomplished, in the absence of any further precise and clear stipulation, it will not be presumed that more was intended.

G., defendant's testator, and plaintiff, who were practicing physicians and surgeons, in 1884 *entered into a copartnership agreement for the practice of their profession for one year, at the expiration of which G. agreed to execute to plaintiff an agreement and guarantee that he would not thereafter practice medicine or surgery in the village of D., their place of business, or within five miles thereof. At the expiration of the year G. executed the agreement called for, by which he covenanted not to practice said professions within either of two towns in which said village is situated. The contract provided that "to practice medicine and surgery, as above mentioned shall be construed to mean to prescribe for, to compound medicine for, advise or visit any person sick or disabled." G. thereafter became a member of a firm which engaged in the business of selling drugs, books, etc., in another village in one of said towns, two miles distant from D., and he continued in that business until* 1889. *In an action to recover a sum fixed in said contract as liquidated damages for its violation, it appeared that defendant purchased drugs at the store of the firm, and made no objection to the conducting of the business by G. The only acts proved claimed to be violative of the agreement were that G. on one occasion attended as counsel with other physicians upon a person* in extremis, *for which he made no charge, but received and accepted a small fee. In eight other cases he furnished persons calling at his store medicines kept in stock suitable for their respective ailments. No charge was made for medical advice, only the medicines being paid for. Held, that a violation of the contract was not established; that it prohibited the practice of the profession by G., not the doing of isolated acts such as were proven; that the definition of what should constitute such practice did not enlarge the meaning of that term, but was designed simply as a a specification of the acts which, if systematically, habitually or frequently done, would be a breach of the agreement.*

MAYNARD, J.—The plaintiff has recovered in this action for an alleged breach of a covenant with defendants' testator not to practice medicine or surgery within a prescribed territory for a period of five years. For convenient description the defendants' testator will be referred to as the defendant. The contracting parties were physicians and surgeons at Durhamville, Oneida county. The defendant had been practicing medicine at that place for ten or twelve years, and the plaintiff had but recently moved there, when, on April 11th, 1884, they entered into an agreement by the terms of

which they were to practice medicine and surgery as co-partners for the term of one year, at the expiration of which the contract provided that the defendant would execute to the plaintiff a valid written agreement and guarantee that thereafter he would not practice medicine or surgery in Durhamville, or within a radius of five miles thereof, or if he did he would forfeit and pay to the plaintiff a sum double the consideration named in the agreement with an amount double the fees usually charged in such cases. The special consideration of the agreement so to be executed was the sum of $500 then paid by the plaintiff; and it was stipulated that in case of failure to execute such agreement the defendant should forfeit and pay to the plaintiff the sum of $1,500 as liquidated damages agreed on by the parties. At the expiration of the year the further agreement was made by the defendant in which he covenanted that he would not practice medicine and surgery for five years either in the town of Verona, Oneida county, or the town of Lenox, Madison county, in which towns the village of Durhamville is situated. The agreement then contained the following provision: "*Second.* It is mutually agreed by and between the parties hereto that to practice medicine and surgery as above mentioned shall be construed to mean to prescribe for, to compound medicine for, advise or visit any person sick or disabled, or to perform any act or service which the laws of the state of New York at present require to be done by a person legally qualified to practice medicine and surgery."

The agreement further provided that owing to the impossibility of obtaining sufficient evidence on which to base the measure of damages for a violation of it, the defendant should forfeit and pay to the plaintiff the sum of $1,005, which was not to be regarded as a penalty for such violation, but as a measure of liquidated damages agreed on by the parties.

After the execution of this agreement the defendant remained at Durhamville for nearly a year, but did not practice his profession, and no claim is made for any breach of the agreement during that time. He then removed to the village of Oneida in the town of Lenox and two miles distant from Durhamville, and entered into a partnership there with another in the business of selling drugs, books, stationery, law blanks, wall paper, pictures and picture frames and artists' materials, in which he was engaged until 1899, when he retired from the business, and died in July of that year. The plaintiff purchased drugs at this store, and it is not shown that he made any objection to the conduct of the business by the defendant. After the latter's death the plaintiff presented a claim against his estate to the executors of his will for the sum of $1,500 damages for the breach of the defendant's covenant not to practice medicine and surgery, and upon its rejection brought this action. During the four years and over which intervened between the execution of the agreement and the death of the defendant only nine different acts were proven which it is insisted constituted the breach complained of and made his estate a debtor to the plaintiff in the sum of $1,500. The first of these occurred in April, 1898, when he attended as counsel with two other physicians upon a person for *extremis* for which he made no charge but was paid and accepted a small fee. This was the only professional visit proven. In all the other cases the persons prescribed for came to the

drug store and were furnished with medicines suitable for their respective ailments. Some of these medicines were what are known as patented remedies and such as are kept in stock and for sale at all drug stores. No charge was made for medical advice; only the medicines were paid for; and the aggregate of all was less than $10. It is not contended by the plaintiff that this proof is sufficient to establish the fact that the defendant was engaged in the practice of medicine and surgery within the prohibited period or radius according to either the popular or legal signification of these terms, but it is insisted that the parties have by their agreement, defined what shall constitute such practice, and that the performance by the defendant of a single act, such as is described in the second paragraph of the article above quoted, rendered him liable for the full amount of damages recoverable for a breach of its conditions. Undoubtedly the parties might so stipulate and they would be bound by their contract and the courts could not refuse to enforce it; but before such a meaning should be given to an agreement of this kind it should appear, upon a fair and reasonable interpretation of its provisions, in the light of the circumstances under which it was made and of the evident intent and object of its execution, that no other inference is justly permissible. While the law, to a certain extent, tolerates contracts in restraint of trade or business when made between vendor and purchaser and will uphold them, they are not treated with special indulgence. They are intended to secure to the purchaser of the good will of a trade or business a guaranty against the competition of the former proprietor. When this object is accomplished it will not be presumed that more was intended. Construing this agreement in accordance with its obvious purpose, we think the definition in paragraph two of the acts, which shall be construed to constitute the practice of medicine and surgery did not enlarge or restrict the meaning of that term, but was regarded by the parties as a specification of the things which, if systematically, or habitually, or frequently done, would be a breach of the agreement. If the plaintiff's contention prevails it would follow that the visitation of a single patient and as an act of charity would render the defendant liable for the full penalty of the contract. Even the filling of a physician's prescription would be a breach, if this literal and technical construction is to be adopted, for it would be a compounding of medicine for a sick perons and thus within the description of the prohibited acts. It was evidently the purpose of the second paragraph of the agreement to explain and illustrate the meaning of the generic terms employed in the first paragragh and not to subvert or destroy their ordinary signification. Effect should be given to both paragraphs, otherwise the first was superfluous. A covenant not to do any act described in the second would have been sufficient.

The agreement should also be read in the light of the previous one by which the defendant had bound himself to execute it, and which specifically described the terms of the obligation he was to assume and which supplied the consideration for it. That required a guaranty not to practice medicine and surgery and nothing more. There was no hint or suggestion of a convenant which would render the defendant liable for an isolated act which would not in law be deemed to constitute the practice of medicine. Unless

the language employed in the later agreement imports an irreconcilable variance it will be presumed that the executed covenant was not intended to have a different meaning or a wider scope from that required by the terms of the agreement which compelled its execution.

It was not necessary to wait until the expiration of the five years named in the contract before asserting a claim to the liquidated damages. If the respondent's position is tenable the making of a single professional visit, or the giving of medical advice in a single case constituted a breach of the entire covenant, and rendered the defendant liable for the full sum stipulated. No more could be recovered if the defendant made daily calls upon the sick, and administered professional treatment to all who applied for relief. Neither reason nor justice favors such a view of the rights of the parties under this contract.

The defendant was not restrained by his covenant from engaging in the business of a druggist. At the present day the occupation of a pharmacist and that of a physician are essentially distinct. An agreement not to engage in the one does not preclude the party from engaging in the other, so long as the one is not used as a cover for the operations of the other. There is no sufficient evidence in the record to support the conclusion that the defendant made use of his business as a druggist for the fraudulent purpose of escaping liability for a violation of his covenant. The business was conducted in the usual manner, and the plaintiff suffered no damage on that account.

The judgment must be reversed and a new trial granted, with costs to abide the event. All concur. Judgment reversed.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

SMITH *v.* HANCOCK — *November* 22, 23.

RESTRAINT OF TRADE—AGREEMENT NOT TO "CARRY ON OR BE IN ANYWISE INTERESTED IN" BUSINESS—BREACH OF AGREEMENT — BUSINESS CARRIED ON BY WIFE OF DEFENDANT TRADING SEPARATELY.

In 1886 the defendant, who had been carrying on the business of a grocer at K. under his name of T. P. H., sold the business to the plaintiff, and entered into an agreement not to "carry on or be in anywise interested in" any similar business. In 1893 the wife of the defendant, desiring (against his wishes) to start a nephew of hers in business, opened a grocer's shop at K., in which business was carried on under the style of "Mrs. T. P. H." The business was managed by the nephew, and the wife took some small part in carrying it on; but the defendant took no part. The money necessary for carrying on the business was found by the wife out of her

separate estate, and no money whatever was contributed by the defendant, nor did he share in the profits. He however assisted his wife in obtaining the lease in her name, and, as she was disabled by rheumatism from writing, he wrote for her a circular inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own; introduced the nephew to some provision merchants, and attended at the bank when his wife opened the business banking account in her own name. The plaintiff brought this action for an injunction and damages for breach of the agreement.

Warmington Q. C., and *Tyssen*, for the plaintiff.

Renshaw Q. C., and *Brinton*, for the defendant.

KEKEWICH, J., held that there had been no breach of the agreement, and that the action must therefore fail. His Lordship said that an agreement by the vendor of a business not to "carry on or be in anywise interested in" a business of a similar character was not broken if the vendor had an interest of a merely domestic or sentimental character in such a business, as, for example, where it was carried on by his wife with her separate estate trading separately from him. To constitute a breach of such an agreement the vendor must have an interest, not necessarily in the profits of the business, but such as touched him directly, and gave him some right to interfere therein, or some means of gaining an advantage therefrom. 1893, Weekly Notes 182.

SUPERIOR COURT.

CORAM:—HON. MR. JUSTICE GILL.

Montreal, November 29th, 1893.

MADAME CORINNE LABBÉ & VIR.,

PETITIONER FOR CERTIORARI;

v.

FERDINAND FICHAUD,

RESPONDENT.

&

LA VILLE DE ST-HENRI,

MISE EN CAUSE.

This is a *certiorari* issued against a judgment rendered against the present petitioner in favor of defendant by the Commissioners' Court for small cases of St. Henri, condemning petitioner to pay $25 imposed by a local by-law on any person carrying on the trade of a peddler in St. Henri. The petitioner contends that theCommissioners' Court had no jurisdiction, because by the

Code of Procedure it is limited to personal action of $25 or less based on a contract or a quasi contract, and that Art. 951 of the Municipal Code extending that jurisdiction to actions for municipal taxes and fines does not apply in this case as the said Municipal Code is not in force in St. Henri, a town having a private charter, and governed when its charter is silent by the Towns and Villages General Clauses' act and not by the Municipal Code. Neither the General Clauses' act nor the charter having an enactment similar to the Municipal Code's amendment relating to the jurisdiction of the Commissioners' court, it follows that in St. Henri the only jurisdiction that court has is the one determined by the Code of Procedure and limited to obligations created by a contract or a quasi-contract and not to those arising from the law as in the present case. The court adopting the views of the petitioner on the above grounds maintained the writ of *certiorari*. A precedent in the same sense by the late Mr. Justice Rainville in Meunier and Hardy v. Burel (September, 1893) was cited.

RAINVILLE, ARCHAMBAULT & GERVAIS, for Petitioners.
MADORE & LAROCHELLE, for the Defendant & mise-en-cause.

ACCIDENT INSURANCE—NOTICE OF DEATH.

MARY L. TRIPPE AS ADMINISTRATRIX, ETC., RESPONDENT, v. THE PROVIDENT FUND SOCIETY, APPELLANT.—140 N. L. 23.

An accident insurance certificate issued by defendant to T., plaintiff's intestate, contained a condition to the effect that notice of an accident for which a claim is to be made must be given in writing within ten days from its occurrance "with full particulars of the accident and injury," and that failure to give such notice would invalidate all claims under the certificate. In an action upon the certificate it appeared T. was killed by the fall of a building in which was his place of business; his body was not found until three days after the accident, and up to that time it was not known that he was dead. The required notice was served more than ten days after the accident, but within ten days after discovery of the body.

Held, *that there was a sufficient compliance with the condition; that the intent of the contract was that notice should be given when and after the manner of death became known to the party required to act, and so that the time began to run from the date of the discovery of the body.*

The notice served was retained by defendant without objection; forty days thereafter, upon written application, defendant furnished the necessary blanks for proofs of loss, which proofs were made and forwarded to defendant and were retained by it without objection: more than five months thereafter defendant called for forther information.

Held, *that conceding the notice was not served in time, the condition was waived.*

O'BRIEN, J. The defendant is an accident insurance company, upon the co-operative or assessment plan, and on the 13th day of March, 1891, issued its policy or certificate to Frederick W. Trippe, the plaintiff's intestate, where-

by it agreed upon the considerations referred to in the instrument to pay to him certain sums specified as a weekly indemnity on account of disability from accidents within the terms of the contract, and also the sum of $5,000 in case of death "through external, violent and accidental means." The place of business of the insured was in a building near Park place, in the city of New York, which, on the 22nd of August, 1891, fell, crushing to death in the ruins several of the occupants, and among them the insured. The destruction of this building, and the consequent loss of life, is known in the events of that year as the "Park place disaster." The claim is resisted by the defendant upon the ground that certain conditions expressed in the certificate, which were warranties or conditions precedent to liability, have not been complied with. The most important question and that most strenuously insisted upon by the defendant arises upon the following condition:

"Notice of any accidental injury for which claim is to be made under this certificate, shall be given in writing, addressed to the president of the society at New York, stating the full name, occupation and address of the injured member, with full particulars of the accident and injury, and failure to give such written notice within ten days from the date of either injury or death, shall invalidate any and all claims under this certificate."

There is nothing in the case to create any doubt as to the fact that the insured was killed on the day of the accident, but the fact was not known until the 25th, when the body was found among the ruins and identified. Notice of the death was given to the defendant on the 2nd day of September, which was within the ten days from the discovery of the body, but not within ten days from the day of the accident, when, as the defendant insists, the death must have occurred. The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must, therefore, receive a liberal and reasonable construction in favor of the beneficiaries under the contract. (McNally v. Phœnix Ins. Co., 137 N. Y. 389.) The provision requires not only notice of the death, but "full particulars of the accident and injury." It is quite conceivable that in many cases of death by accident the fact cannot be and is not known until days and even weeks after it has occurred. Such conditions in a policy of insurance must be considered as inserted for some reasonable and practical purpose, and not with a view of defeating a recovery in case of loss by requiring the parties interested to do something manifestly impossible. The object of the notice was to enable the defendant, within a reasonable time after the death or injury, to inquire into all the facts and circumstances while they were fresh in the memory of witnesses, in order to determine whether it was liable or not upon its contract. The full particulars of the death which the condition requires cannot ordinarily be furnished until the fact of death and the manner in which it occurred are ascertained. In this case all that was known prior to the 25th of August, when the body was found, was the fact that the deceased had his place of business in the building and that it had been destroyed. But it did not follow from these facts that the insured was dead, as he might have been absent from the building at the time or in some way escaped from the result of the accident, and a notice served upon the defend-

ant prior to the time when the body was found and the fact of death ascertained, would not be within the object or terms of the condition. The parties having contracted that the notice of death should be accompanied by full particulars of the manner in which it occurred and the attendant circumstances, they evidently intended that it should be given only when the fact and manner of death became known to the parties who were required to act. The fair and reasonable construction of this condition, therefore, is that the ten days within which the notice is to be given did not begin to run from the date of the accident or the disappearance of the insured, but from the time when the body was found, and the important fact of death, with the circumstances and particulars under which it occurred, ascertained. This construction secures to the defendant every benefit and advantage that was intended by this provision of the policy, and it cannot, therefore, complain if the very harsh and technical meaning which it now seeks to put upon a condition subsequent is rejected. The plaintiff was the widow of the deceased and the beneficiary named in the certificate. She was the only party interested in the enforcement of the contract, and who could give the notice, and she could not give it, within the meaning of the condition, until she had knowledge of the facts which she was bound to communicate. To hold that the plaintiff was bound to give notice of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made. (Insurance Companies v. Boykin, 12 Wall. 433.)

But even if the defendant's construction of this condition was correct, we think by its acts the objection has been waived and cannot now be urged as a defense. The notice served on the 2d of September was retained without objection, and another served on the 15th of October, after the plaintiff had been appointed administratrix. On the 12th day of October upon written application to the defendant it furnished the necessary blanks for proofs of loss. These proofs were made and forwarded to the defendant in compliance with the terms of the contract, and were retained without objection. On the 19th of March following, the defendant called for further information, which was given. It is well settled that such defenses are waived when the company, with knowledge of all the facts, requires the assured by virtue of the contract to do some act, or incur some expense or trouble inconsistent with the claim, that the contract had become inoperative in consequence of a breach of some of the conditions. (McNally v. Phœnix Ins. Co., *supra*; Roby v. Am. Cent. Ins. Co., 120 N. Y. 510; Titus v. Glens Falls Ins. Co., 81 id. 410, 419; Benninghoff v. Ag. Ins. Co., 93 id. 495; Goodwin v. Mass. Mut. Life Ins. Co., 73 id. 480; Brink v. Hanover Fire Ins. Co., 80 id. 108; Jones v. Howard Ins. Co., 117 id. 103; Armstrong v. Ag. Ins. Co., 130 id. 560; Travelers' Ins. Co. v. Edwards, 122 U. S. 457.)

The acts of the defendant in receiving and retaining these papers without objection, and calling for others, are consistent only with the theory that the contract was still considered in force, and as the plaintiff acted accordingly in performance of its conditions subsequent to the loss, the defendant ought not to be permitted now to change its position and assert that

after ten days from the accident the obligations of the policy virtually ceased by reason of failure within that time to serve notice of death.

The deceased stated in his application, which is part of the policy, and a warranty that his business was that of a "wholesale drug merchant." It is now urged that the contract is avoided for the reason that this statement or representation was untrue. This point is based upon evidence tending to show that some of the articles that the deceased kept in his store and dealt in were of such a character as to deprive him of the right to be classified for accidental insurance as a wholesale druggist. Without further reference to the merits of this objection it is sufficient to say that it is not available to the defendant in this court for the reason that the testimony introduced did not conclusively establish any breach of warranty in this respect. At best the question was one of fact and the disposition made of it by the learned trial judge was sufficiently favorable to the defendant when he submitted it to the jury. No exception was taken by the defendant to this course or to the instructions given by the court to the jury upon the submission of the question, and obviously none could have been. In fact the only question submitted to the jury was whether this statement was true. The only objection that the defendant made to this disposition of the case was to request a submission also of the question as to the date of the death of the insured, which request was properly refused as the sufficiency of the notice of death served presented a question of law.

The other exceptions in the record have been examined, and as they disclose no error prejudicial to the defendant the judgment should be affirmed. All concur. Judgment affirmed.

SUPREME COURT OF NEW YORK.

(72 HUN 477).

OCTOBER TERM 1893.

MARY MENNEILEY, PLAINTIFF, *v.* THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION (LIMITED), DEFENDANT.

ACCIDENT INSURANCE.

EXCEPTION FROM THE POLICY OF DEATH OR DISABLEMENT "ARISING FROM ANYTHING ACCIDENTALLY INHALED" — ILLUMINATING GAS.

*A policy of insurance "against personal injuries caused by accident within the meaning of this policy," contained the following, among other "agreements and conditions" upon which it was issued: "This policy does not insure * * against death or disablement arising from anything accidentally taken, administered or inhaled, contact of poisonous substances, inhaling gas or any surgical operation," etc. The insured died from accidentally inhaling illuminating gas which accidentally escaped into the room where he was sleeping in a hotel.*

Held, *that the cause of death came within the exception of "anything accidentally inhaled," and consequently was taken out of the provision of the policy so*

that no recovery could be had therefor under the policy.

DWIGHT, P. J. :—The action was on a policy or contract of insurance payable to the plaintiff, which insured her husband, Samuel D. W. Menneiley, "against personal injuries caused by accident within the meaning of this policy." The insured died from accidentally inhaling illuminating gas which accidentally escaped into the room where he was sleeping in a hotel. The only question in the case is whether that accident was "within the meaning of this policy."

The policy contained the following, among other "agreements and conditions" upon which it was issued: "This policy does not insure * * * against death or disablement arising from anything accidentally taken, administered or inhaled, contact of poisonous substances, inhaling gas or any surgical operation," etc.

It has been held by the court of last resort in this State that, by the words "inhaling gas" in a similiar exception contained in the contract of another insurer against accidents, "the company can only be understood to mean a voluntary or intelligent act by the insured and not an involuntary and unconscious act." (Paul v. The Travelers' Ins. Co., 112 N. Y, 472). So that if the exception of death or disablement by "inhaling gas" was the one relied upon by the defendant here, the authority cited would be conclusive against its contention. But such is not the case. The exception here relied upon, which was not in the policy in the case of Paul, expressly describes an act not voluntary and intelligent, but, on the contrary, accidental. The death or disablement excepted is one "arising from anything accidentally inhaled." And here was the death of the insured arising from illuminating gas accidentally inhaled.

It seems difficult to elaborate or prolong an argument upon this statement. Here is no room for interpretation; the words employed interpret themselves, and unquestionably apply to the facts presented by the stipulation of the parties. The exception here relied upon, if expressly framed to avoid the construction put upon that in the case of Paul (*supra*), could not more successfully have accomplished the purpose. It would be a contradiction in terms to apply the words "accidentally inhaled" to the voluntary and intelligent act of inhaling an anæsthetic in aid of a surgical operation, which the court say was apparently the reference in that case.

The facts in this case bring it, unavoidably, within the exception, and, consequently, take it out of the provision of the policy in suit.

The motion for judgment upon the verdict must be denied, with costs, and, upon the facts agreed upon judgment ordered for the defendant dismissing the complaint. All concurred. So ordered.

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