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The question of judicial pensions is now settled by an act just passed at Ottawa. As to judges of the Supreme Court and of any Superior Court, they are entitled upon resignation—if seventy-five years of age and have continued as judges for twenty years, or, have attained the age of seventy years and continued as judges for twenty-five years, or, have continued in office as judges of one or more of the said courts for thirty years, to a life annuity equal to the salary they had received. By another section it is provided that "Every County Court Judge who has attained the age of eighty years shall be compulsorily retired; and to any Judge who is so retired, or who, having attained the age of seventy-five years, resigns his office, and in the latter case has continued in office for a period of twenty-five years or upwards, His Majesty may grant an annuity equal to the salary of the office held by him at the time of his retirement, or resignation; or, if he had continued in office as such Judge for a less period than twenty-five years and become afflicted with some permanent infirmity, disabling him from the due execution of his office, an annuity equal to two-thirds of such salary; the annuity in either of the above cases to commence immediately after his retirement or resignation, and to continue thenceforth during his natural life."

The Principal of the Ontario Law School having been successful in his request to that effect, a very interesting lecture was delivered there by that eminent English jurist, Sir Frederick Pollock, on the subject of "The Common Law and the Foundations of Justice" That the subject was treated in a masterly and interesting manner goes without saying. We only regret that want of space prevents our giving Sir Frederick's scholarly words in full. He spoke of modern law as having been derived partly from the Roman law and partly from German law, the common law of England being the historical outcome and the principal exponent of the latter, the former, of course, being the more ancient, but the common law being the more continuous, and in force in a crude form from a very early period, probably as far

back as the 13th century or before, when there were no permanent judges and no recognized system of juries. Sir Frederick then traced the history and development of the common law, dealing especially with four features by which it has been continuously characterized: publicity of procedure; the neutrality of the trial court; the interpretative and legislative functions of the Court, and the absence of privilege on the part of the officials of the Court. He did not regard these features of the common law as by any means obsolete or likely to become so, the art of jurisprudence being like the art of war—the nature of the contest remaining the same, though methods and devices might change from age to age. He concluded by saying that the common law was bound up with the destinies of the English speaking nations.

As the profession of the law is somewhat prosaic in its character, it is refreshing occasionally to refer to the comical side of things. Statutes frequently afford some recreation in this respect and we are indebted to the last volume issued by the Ontario Legislature for some items of that nature. Sec. 2 of the Statute Law Amendment Act provides that "whenever a holiday falls on a Sunday, then the day next following shall be in lieu thereof a legal holiday throughout Ontario, and shall be kept as such under the same name". By the Interpretation Act, s. 8 (16), which applies to all acts passed by the Legislative Assembly, the word "holiday" includes Sundays. Ergo, whenever a Sunday falls upon a Sunday, which it is pretty sure to do every week, the next day to it, Monday, must be kept and observed as Sunday. Whether there is any judge on the bench with a mind sufficiently cribbed, cabined and confined by strict rules of logic to so interpret this section, we do not undertake to say, but, would commend this interpretation to the consideration of the officials of the Sunday Observance Association. Again; sec. 17 makes "all rights under letters patent or any equitable or other right property interest or equity of redemption therein saleable under execution." As we have no impecunious peers, &c., in this country, that class of patent can be eliminated from the discussion. Possibly, however, it might be well to warn His Majesty's Counsel to pay their debts for fear of having their silk gowns, and all other their rights and interests under their patents, sold to satisfy rapacious creditors.

PROVINCIAL LEGISLATION OF 1903.

The result of the labours of the Ontario Legislature at its recent session is embodied in a bulky volume of 1200 pages, the greater part of which is made up of the Consolidated Municipal Act, and Acts of a private nature. The volume has been issued with commendable promptitude, and though not altogether free from defects, nevertheless reflects credit on the Provincial officials charged with its production. It would be a waste of time to refer here to all the statutes comprised in this volume but a glance at some of its contents will probably be useful.

Chap. 7. The Statute Law Amendment Act is one of the usual omnibus Acts which we have learned of late years to look for every session as a matter of course.

Sec. 16 effects a needed amendment in the Arbitration Act (R.S.O.c. 62 s. 8) by extending its provisions as to the supplying vacancies in the office of arbitrator to cases not hitherto within its scope, which only applied to the case of references to two arbitrators, one to be appointed by each party. The section as amended now includes not only that case, but also the case of a reference to three arbitrators, one to be appointed by each party and the third by such two arbitrators, or by any other person, or in any other manner, or where a third arbitrator has been appointed under the Act. Where the arbitrator appointed by either party dies or becomes incapable, or where the opposite party refuses to appoint an arbitrator the court or judge is empowered to make the appointment. The section seems however still defective in not providing for the case of a default in appointing a third arbitrator. The section as amended might be held to cover the case of an arbitrator appointed by one of the parties refusing to appoint a third, but it certainly does not cover the case where the third arbitrator is to be nominated otherwise than by the parties to the arbitration, or by the arbitrators appointed by them. If a third arbitrator refuses to act or is incapable or dies, the court or judge may appoint, but this obviously does not cover the case of neglect to appoint a third arbitrator.

Sec. 17 amends the Execution Act by making "all rights under Letters Patent, or any equitable or other right property interest or equity of redemption therein" personal property and liable to be seized and sold under execution. What is meant by

"all rights under Letters Patent" seems to require some judicial explanation. Taken in its literal sense it might produce some unexpected results. Probably the section is intended to apply to patents for inventions only; if so, it is a pity it was not more explicitly worded.

Sec. 18 also referring to the Execution Act provides that a purchaser under execution of equitable rights in personal property is not to be personally liable to satisfy any mortgage or other incumbrance effecting the same. Why this provision should have been inserted is not apparent. In the case of the sale of the equity of redemption in lands in execution there is an express provision (R.S.O. c. 77, s. 32) in effect obliging the purchaser to indemnify the mortgagor against the payment of the mortgage debt, but no such statutory liability was imposed by s. 17 on the purchaser of an equity of redemption in chattels. Why, however, a different rule should prevail as chattels in this respect, is one of those things "that no fellow can find out."

Sec. 26 extends the provisions of section 28 (a) of the Trustee Act (see 63 Vict. c.17, s.18) to the case of trustees appointed by the court, who are thus enabled to pass their accounts in a summary manner in the Surrogate Court. And section 27 further amends the Act by enabling the court where the trustee is a barrister or solicitor to make him an allowance for services rendered of a professional character, thus giving a legislative reversal to the rule of equity established by a long chain of decisions: see Holmested & Langton, p. 848.

Sec. 29 amends s. 11 of the Assignment and Preferences Act (R.S.O. c. 147) by giving the assignment priority over attachments and garnishee orders, and orders appointing receivers. Here again the amendment appears to be loosely worded, and it is not clear whether a garnishee order to pay over which has been actually acted on, is within the section.

Sec. 30 makes an amendment in the Chattel Mortgage Act as to the form of the affidavit of bona fides and the affidavit required on the renewal of a chattel mortgage, which practitioners will do well to note; possibly some of them have already made a slip in this matter. The section provides that "any such affidavit made by an officer or agent shall state that the deponent is aware of the circumstance connected with the sale or mortgage as the case may be, *and has personal knowledge of the facts deposed to.*"

Sec. 31 makes some trifling amendments to the Infants Act (R.S.O. c. 168) by making it clear that the jurisdiction of the Surrogate Court to appoint guardians of infants is not dependent on their having property.

Sec. 32 amends the same Act by providing that "The fees to be charged to applicants for all proceedings and services where the whole estate and effects do not exceed in value the sum of $400 shall not in any one case exceed the sum of $2." It will probably take a judicial decision to settle whether "the fees" referred to are the fees of court or "the fees of solicitors and counsel," or all of them combined, and also how, if at all, the apportionment is to be made. These attempts of a benevolent legislature to compel people to do work for nothing are sometimes found expensive, and fail of their object.

Sec. 33 provides that where persons other than barristers or solicitors are appointed notaries, the territory within which they may act may be limited by the commission appointing them. We doubt very much the desirability of the Government acting on the section, as it will necessitate inquiry as to whether a notary is acting or has acted within the prescribed limits. This section had better become a dead letter.

Sec. 35 empowers shareholders of Ontario companies to authorize their directors to delegate any of their powers to a committee of not less than three to be elected by the directors "from their number," i.e., we presume from members of the directorate.

By sec. 46 the liability of employers for breach of the provisions of the Factory Act are made subject to the limitations of s. 7 of the Workmen's Compensation Act as to the amount of damages which may be recovered.

Sec. 50 enables a Surrogate judge on the passing of the accounts of executors or administrators to order money or securities appearing to be in their hands, belonging to infants or lunatics, to be paid into or deposited in the High Court under the Trustee Relief Act (R.S.O. c. 336, s. 4.)

Sec. 60 makes a further amendment of the Chattel Mortgage Act (R.S.O. c. 148) by providing that mortgages of the rolling stock of incorporated companies to secure bonds together with the affidavits required by the Act, and renewals thereof, are to be filed in the office of the Provincial Secretary.

The Judicature Act (R.S.O. c. 51) as usual comes in for a certain amount of amendment; but chap. 8, by which the amendments are effected, is by chap. 9 declared not to come into operation until 1st December next unless an earlier day is fixed by proclamation of His Honour the Lieutenant Governor.

The principal amendments made by chap. 8 are first the establishment of a new Division of the High Court, to be called the Exchequer Division, to be presided over by a chief justice or two puisne judges.

Sec. 4 empowers the Court of Appeal when composed of less than five judges to direct an appeal to be argued or, if necessary, re-argued before the full court.

Sec. 5 enables the Court of Appeal to sit in two divisions.

Sec. 7, we observe, makes provision for the sitting of a Divisional Court while the assizes are going on.

Sec. 8, we are glad to notice, in effect provides that all Divisional Courts shall be composed of three judges.

Sec. 10 restores appeals from the Master in Ordinary to a Judge in Court. Why the anomaly was created of transferring such appeals to the Divisional Court no one knows.

Sec. 11 provides that where an action is brought on a judgment recovered in Quebec the costs of "obtaining the judgment" are not to be recoverable without a judge's order, which is not to be granted unless the judge is satisfied that the costs were properly incurred, nor if it would have been a saving of expense to have sued in Ontario on the original claim.

By sec. 13 the word "writ" in Rule 162, which relates to service out of the jurisdiction, is made to include "any document by which a matter or proceeding is commenced."

Chap. 11 enables mortgagors of real estate in default, notwithstanding any agreement to the contrary, to pay the principal in arrear on giving three months' notice or paying three months' interest. If he fails to pay according to notice he is thereafter only entitled to make such payment on paying three months' interest in advance. This provision appears to apply only where the mortgagor is in default, and only as to the amount in default. It does not authorize him to accelerate payment of principal as to which he is not in default, and the Act would probably not apply

to principal money, the payment of which the mortgagee is entitled to accelerate by reason of the mortgagor's default in payment of an instalment.

Sec. 17 of R.S.O. c. 121, is further amended by adding thereto a sub-section enabling a mortgagor to redeem at any time after the lapse of five years from the date of the mortgage, notwithstanding the mortgage may not be due, on payment of three months' interest or giving three months' notice.

Chap. 12 makes some important changes in the Land Titles Act (R.S.O. c. 138). Sec. 1 deprives a claimant of right to compensation out of the assurance fund whenever the person registered as owner could by a duly registered deed have conferred as against the claimant a valid title to a bona fide purchaser for value, without notice of any defect in the title, provided no sufficient caution was registered by the claimant, and not then if he had notice of the application for registration and failed to appear, nor where the claimant's own negligence has contributed to the loss.

Sec. 5 reduces the payment to be made to the assurance fund from one-fourth of one per cent. of the value of the land to one-fourth of one per cent. of the value of land apart from improvements, and one-tenth of one per cent. of the improvements; and in the case of registration with a possessory title only the charge is to be reduced from one-eighth of one per cent. of the value of the land to one-eighth of one per cent. of the land apart from improvements, and one-twentieth of one per cent. of the value of the improvements. By sec. 6 the applicant for first registration may on certain terms defer paying the charge, and make it a lien on the land on any transmission thereof. How the Master of Titles is to enforce the lien does not appear.

Chap. 13, s. 1, makes a change in regard to the provisions in lien notes on conditional sales of chattels as to revenue, and prescribes a notice to be printed in red ink across the face of such notes. By sec. 2 railway contracts for the conditional sale or bailment by incorporated companies of rolling stock are to be filed in the office of the Provincial Secretary.

The Insurance Act seems to be somewhat like the Municipal Act in regard to its constant need of amendment. Chap. 15 effects several amendments in regard to matters of detail in the Insurance Act. Inter alia, sec. 3 authorizes beneficiaries or

assignees of insurance policies having the right either at law or in equity to receive and to give an effectual discharge to the insurer, to sue for money payable thereunder in their own names.

Chap. 18, which extends over 38 pages makes divers' amendments to the Municipal Act, all of which amendments are, however, embodied in the following chap. 19, being the Consolidated Municipal Act, which comprises 394 pages of the volume and upon which it is needless to dwell.

We believe we have now touched upon most of the provisions of general interest to the profession. We are glad to observe that in the arrangement of the Statute Law Amendment Act care has been taken to arrange the various sections according to the chronological order of the chapters and sections of the various statutes amended. This arrangment is departed from in one particular in the amendment of the Judicature Act where we find the amendment to s. 183 is followed by an amendment to three prior sections.

G. S. HOLMESTED.

SUNDAY OBSERVANCE.

The Lord's Day Alliance have, to judge from the utterances of their moving spirits, formed the conclusion that no serious handicapping of the Society's endeavours to enforce Sunday legislation will result from the Privy Council's judgment in *Attorney-General of Ontario* vs. *Hamilton Street Railway Company*, delivered last July.

The writer ventures the belief that the ground of their confidence will be found illusory. They lean for support upon two things, (1) a declaration by Chief Justice Armour, contained in his reply to the several questions referred by the Lieutenant-Governor-in-Council to the Court of Appeal for determination, and (2) a sentence occurring in the judgment of the Lord Chancellor, sustaining the Chief Justice's dissenting opinion, through which agreement with that declaration is by upholders of the legislation deduced.

Chief Justice Armour's expression, however, being wholly unnecessary to the decision—(the point he assumes to determine was not even argued before the court) was the purest obiter dictum,

His answer to the question is, "The profanation of the Lord's Day is an offence against religion, and offences against religion

are properly classed under the limitation 'crimes,' and, consequently, the enacting of laws to prevent the profanation of the Lord's Day, and imposing punishment therefor by fine, penalty or imprisonment, properly belongs to the Parliament of Canada, under sub-s. 27 of s. 91 of the British North America Act, and, to this extent, c. 246 is beyond the powers of the Legislature of Ontario. The consequence of this opinion is that, to this extent, C.S.U.C. c. 104 is still in force, never having been repealed by competent authority."

The second and closing paragraph of this pronouncement is that which it is now desired to emphasize, The Lord Chancellor's observation from which a sanction for Chief Justice Armour's reasoning is argued comes to us in the report (Times Law Reports, vol. 19, p. 612) as follows: "It was impossible to doubt that an infraction of the act which was in operation at the time of Confederation was an offence against the criminal law."

Readers of this language will notice that it falls very far short of placing the seal of approval upon the Chief Justice's thorough-going statement. All that the Lord Chancellor intimated is that C.S.U.C., c. 104 was in operation at the time of Confederation—a view not likely to be disputed by anybody—and that disregard thereof would contravene the criminal law. Is it, in fact, only another way of saying that the subject about which the controversy existed would, under the division of powers ordained by the B.N.A. Act, pertain thenceforth to the Federal authority.

The first point to be considered is the meaning of that section of the British North American Act on the strength of which the late Chief Justice's assertion must have been made. Sec. 129 reads, "except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the union . . . . shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made." Now, what signification do the words "in force in Canada" have? The title-page of the volume which comprises the Consolidated Statutes of Upper Canada declares its contents to be Consolidated Statutes which apply to Upper Canada only. How can it possibly be maintained that laws expressly limited to a segment of territory could operate in such territory as a whole?

It will of course be remembered that different legislation on a given subject for each of the Provinces was almost as freely intro-

duced as a uniform law for both. Reference indeed to the statutes discloses the fact that conflicting measures in respect of this very matter had been enacted. Why not affirm that a Bill announced by the Imperial House to affect Ireland alone embraced Great Britain?

Reg. v. *Hart*, 20 O.R., 611—a decision of the Common Pleas Division en banc—may throw light on the situation. There, the question before the Court was whether a defendant prosecuted for infringement of a municipal by-law, was under the law as then existing a competent witness for himself. The Court, holding that he could not be such a witness, points out that the words, "imposed by or under the authority of this Act," (Municipal Act) and "exhibited or made under this Act" did not include the case of a fine inflicted or a complaint laid under a by-law. The circumstance that a statute has force within the undivided Province, whereas, a by-law extends no further than the municipality must have supplied in part the ratio decidendi of the judgment. Would there be any difference in principle in the case of laws of a country acquired by purchase or cession by another Power? It could hardly be doubted that unless explicity preserved by legislation emanating from the new sovereignty, such laws would become obsolete.

If laws confined to one or other Province had been intended to be characterized, how easy it would have been to place the matter beyond peradventure. The use of the phrase "laws of Canada," instead of laws in force in Canada, would exactly have met the difficulty.

Then, what sense ought to be attached to the opening words of section 129, "except as otherwise provided by this act?" They cannot be devoid of meaning altogether. The British North America Act does not expressly repeal any legislation. So that, even if statutes governing a single component of the Union answered the description, many will be disposed to think that all measures of a representative body, having to do with matters in respect of which it had lost the right or been deprived of the capacity to legislate, would from the time of the alienation cease to be in force. Surely the enactment could not have been meant to bring about the survival of legislation other than such as might relate to subjects, authority over which remained with the individual Provinces.

Is it quite clear, besides, that nothing less than a positive affirmation by Parliament that prior legislation upon the subject dealt with, derogating from the scheme and tenor of the later, was annulled, would occasion its repeal? There can be no doubt, at any rate, that the Dominion has by enacting sections 170 to 173, inclusive, of the Code, as well as by provisions of the Railways and Canals Act, inaugurated laws bearing upon the sanctity of the Lord's Day.

The suggestion is broached that the Legislature might be able to surmount this adverse judgment of the Privy Council by exacting from every shop-keeper, under the provision of s. 92, sub-s. 9 of B. N. A. Act, a license to prosecute his calling, and then restrict the time of its exercise to week-days. If the regulations on the statute book of the Province against Sunday liquor-selling can outlive the decision, not a little could be argued in favor of the proposition.

Granting that Chief Justice Armour's theory is correct would it be possible to secure a conviction under C.S.U.C. c. 104? It must be remembered that prosecutions of this nature are usually instituted as the result of evidence by decoys. Under the above statute the informant is incompetent as a witness. The Evidence Act of the Dominion as well as of the Province, declares that interest shall no longer be a bar to the admission of a complainant's testimony, but the Upper Canada statute cannot of course receive any bolstering from such acts. It has to stand on its own legs. The laying in every case of an information on oath is obligatory, and the wording of the section which prescribes this would seemingly debar statements on mere information and belief. Enforcement is in addition much hampered by the limitation of one month for the bringing of charges. But the most serious difficulty, perhaps, is the absolute contradiction of the penalty clauses by the form inserted in the act which the justice is directed to follow. Fines are by the section recoverable by imprisonment only after a previous distress—which, by the way, the justice may order, "if he deems it expedient to do so," whereas the form authorizes its direct infliction. Since a justice will be compelled to go to the section to ascertain the term, it is hard to see how the dilemma is to be met. A prime curiosity about the act is that, although it confers an appeal, a defendant really cannot resort

to this beneficial provision by reason of the Courts—the Quarter Sessions and the Recorders Court—having been superseded, to say nothing of the point that the machinery that would govern the appeal has also been consigned to limbo.

J. B. MACKENZIE.

ACCORD AND SATISFACTION.

We copy for the benefit of our readers an article published in the *Central Law Journal* which deals with the above subject in relation to the rule of the common law that payment of a lesser sum than the whole of a liquidated demand will not discharge the debt though accepted in full payment. There is a full reference by the writer to a large number of authorities, American and English, which, however, we do not reproduce. The article is to be found in full at p. 244 of the current volume of the above journal :—

"The common-law rule may be stated as follows: The payment of a less sum at the time and place where a greater liquidated and undisputed demand is due is not a satisfaction of the debt, though paid and accepted as such, and after receipt in full given, action for the balance may be maintained by the creditor. The origin of the rule is charged to Lord Coke as having been established by his opinion in *Pinnel's Case*, 5 Coke 117, and, although in that case the rule was but a dictum of the court of common pleas, it has since been almost universally recognized by courts in England and America and by law writers as well.

The reason of such a holding, if it may be said to be supported by reason at all, or at any rate, the consideration which appears to have been the foundation of Coke's conclusion, is that where part payment of a liquidated and undisputed debt is accepted in full, no consideration exists for this promise of the creditor to release the remainder of his debt. The Supreme Court of Vermont, following the principle, in the case of *Hard* v. *Burton*, 62 Vt. 314, says : 'A man is not injured by paying his own debt, nor by paying a part of it on promise of his creditor to release the remainder, etc.' especially where it does not appear that by payment of the part on such agreement of his creditor he is placed in no worse plight than before.

The exact point being considered does not appear to have been involved in the *Pinnel Case*, supra, Coke's opinion indicating that

his determination of the case was upon a question of insufficient pleading. Some eminent lawyers, in fact, take issue with the great weight of authority, and deny that it was ever the intention of Lord Coke to establish such law. Among these is Chief Justice Woods, of the Supreme Court of Mississippi, who, in *Clayton* v. *Clark*, 74 Miss. 499, declares: 'That the question was not only not decided, but it was impossible that it should have been.' And Lord Blackburn in his most entertaining discussion of the origin of this rule, in the case of *Foakes* v. *Beer*, appears to believe that Coke was mistaken as to fact as well as law. He says: 'What principally weighs with me in thinking that Lord Cole made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do, every day, recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enfore payment of the whole. Even where the debtor is perfectly solvent and sure to pay at last, this is often so. Where the credit of the debtor is doubtful, it must be more so.'

But however this may be, it must be admitted that whether as mere dictum or not, the rule is laid down in the *Pinnel Case*, as a reading of it will shew, and while exceptions have been announced and adverse criticism from bench and bar passed, it has for these three hundred years or more, obtained as the rule of the common law, and been recognized as such by courts of highest dignity. And *Cumber* v. *Wane*, a later case, which shares with Pinnel's the distinction of having originated this rule, again announces the doctrine clearly, citing the Coke opinion. In this latter case the defendant pleads that he had given a note for five pounds in satisfaction of a note for fifteen pounds, and Lord Chief Justice Pratt in his opinion says: 'Even the actual payment of five pounds would not do because it is a less sum." In *Fitch* v. *Sutton*, Lord Ellenborough again sustains the doctrine, for he says: 'There must be some consideration for the relinquishment of the residue, something collateral to shew the possibility of benefit to the party relinquishing his further claim otherwise the agreement is nudum pactum. . . . The authority of *Cumber* v. *Wane*, is directly supported by Pinnel's case, which never appears to have been questioned.' And in the United States as well the doctrine has to this day obtained, being upheld by the Supreme Court in the cases of *Fire Association* v. *Wickham* and *United States* v. *Bostwick*, as

well as by practically all of the state courts, as the liberal citation of authorities above will demonstrate. In the case of *Fire Association* v. *Wickham* the Supreme Court of the United States cites with approval the Pinnel Case, and among other things says, Justice Brown rendering the opinion : 'The rule is well established that where the facts shew clearly a certain sum to be due from one person to another a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue.' Again in *United States* v. *Bostwick*, cited above, the same court says : 'Payment by a debtor of a part of his debt, is not a satisfaction of the whole, except it be made and accepted upon some new consideration.' These holdings, however, have been with great reluctance and much adverse criticism on the part of the courts, expressed in almost every case in which the question has been presented.

The rule is an anachronism brought down by adherence to ancient customs and theories, the open extermination of which has been already too long delayed. In the present age of commercial affairs and financial activity, it is out of all harmony with reason, and its enforcement detrimental to all the best principles of the modern law merchant. It is in recognition of just this fact that the courts have grown more and more loath to enforce the rule, and in some instances at least, have openly declined to observe it; and those who have not yet had the boldness to overrule the doctrine, have nevertheless admitted its pernicious effect and in consequence, hedged it about with so many technical exceptions as to render its practical enforcement next to impossible.

Foremost of the former, is the Supreme Court of Mississippi, who in *Clayton* v. *Clark*, openly declares the rule to be absurd and unreasonable, and with severe denunciation and caustic criticism, expressly sets it aside. Chief Justice Woods in his vigorous yet most logical opinion in that case says : 'However it may have seemed three hundred years ago in England when trade and commerce had not yet burst their swaddling bands, at this day and in this country where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt cash in hand, without vexation, cost and delay, or the hazards of litigation in an effort to collect all, is not often—nay generally—greatly to the benefit of the creditor. . . . And a rule of law

which declares that under no circumstances however favourable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to a satisfaction of the original debt, is absurd, irrational, unsupported by reason and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it. We decline to adopt or follow it." And they overrule in express terms anything to the contrary in the cases of *Jones* v. *Perkins*, *Pullman* v. *Taylor* and *Burrus* v. *Gordon*, theretofore decided by the Mississippi court.

At great majority of the courts however, have not so far taken this decisive step, but have rather, as this learned judge observes, while admitting the absurdity of the rule, reluctantly sustained it, except where the case under consideration could be brought within one of the many technical exceptions which their very desire to escape from it has created. These exceptions are very numerous, and coeval with the rule itself, for even Lord Coke himself agrees, as do all the English and American authorities, that if any consideration exists, however slight, for the promise to release the residue of the debt upon the payment of a part, then the agreement is binding and the whole is discharged. And as increasing commerce has rendered what may be called this rule in Pinnel's case harsher and more obnoxious to mercantile affairs, the courts, in their endeavour to render the doctrine ineffectual, have gradually enlarged the scope of these exceptions. In fact the courts will take advantage of the slightest and most trivial excuse to vitiate the rule, their distinctions in some instances being so close and so technical as to become, to the mind of the layman at least, absolutely absurd. The whole history of judicial decisions upon the subject has shewn a constant effort to escape from its absurdity.

In speaking of this in *Harper* v. *Graham*, 20 Ohio 105, a case in which a most trivial technicality was indulged to relieve a debtor from further payment after receipt in full by the creditor, the court says: 'We see then that the payment of a less sum than is due the day before the debt falls due will discharge it; payment at another place than is stipulated will do so; the delivery of a collateral article of any value will do so; the acceptance of the

debtor's note with security, the note of a third person, or even the negotiable note of the debtor himself will do so; and yet the payment of as much money in hand as is called for by the note will have no such effect although it is demonstrable that the utmost a creditor can get from such note cannot exceed in amount that which he gets in hand in the other case without trouble, delay or expense. It may seem to some persons not having a great veneration for these institutions of antiquity for which no reason can be given that a rule so effectually undermined and having neither rhyme nor reason to support it, ought to be at once overruled and the whole matter placed upon the footing of reason and common sense, especially as the exigencies of modern commerce frequently compel the most deserving men with the aid of friends to compromise their debts for less than the amount due—an operation mutually beneficial to both debtor and creditor, as the creditor gets a part where otherwise he would lose the whole, and the debtor, is left free to commence again with the hope of better success. These considerations will necessarily arise whenever it becomes necessary to decide the general question. In this case we aspire to nothing higher than to follow in the foot-steps of the sages of the law, and hold this one of the cases 'taken out' of the rule, because the money, by the original obligation was payable in Ohio, whereas the lesser sum of money was paid at another place, to wit, in Arkansas.'

This opinion expresses the general position of the courts in reference to the rule; their antipathy to it is marked and expressed, yet they have ordinarily, with Ohio's court, 'followed in the footsteps of the sages of the law' and reluctantly declared it to be the law.

The case last referred to also points out many of the exceptions. Generally stated it may be said that any consideration whatever, however slight, beyond the mere payment of a part will be sufficient to support the promise to release the residue.

Some of the exceptions to which the courts have given validity may be considered as follows:

If the demand be uuliquidated or disputed, a release of the whole on partial payment will be sustained.

If partial payment be made before maturity of demand, promise to release the whole will be sustained.

This was held at the very inception of the rule, in Pinnel's case, for, says Lord Coke: 'Peradventure parcel of it before the day (of maturity) would be more beneficial to him (the creditor) than the whole at the day.'

Payment of a part at a different place from that stipulated in the original obligation is sufficient to support the promise.

Payment in anything of value, other than money, is sufficient, and this is true however slight the value of the thing given provided the thing itself and not its value, be accepted in satisfaction, for it will be presumed that the thing given was of greater benefit to the creditor than the obligation held.

In this same Pinnel's Case it is quaintly observed that the gift of a horse, hawk or robe in satisfaction is good. For it shall be intended that a horse, hawk or robe might be more beneficial to the plaintiff than the money in respect to some peculiar circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. And in the report of commissioners of Civil Code of New York (1865), 219, it is said: 'This rule of the common law is not founded on natural justice nor can it be supported on any other than technical grounds.

An agreement to accept a barrel of flour in satisfaction of a debt of one thousand dollars is valid, and if the flour be delivered the debt is satisfied. But an agreement to accept nine hundred and ninety-nine dollars in satisfaction of the debt is unavailing and the obligation to pay the remaining dollar is unimpaired.'

Payment by the negotiable note of the debtor, although, for a less amount than the whole has been held valid.

Payment by note of a third person for less than the whole is good accord and satisfaction if given and received as such.

Part payment by check if negotiable, is sufficient.

Payment by a stranger of a less amount than the whole if accepted as such is a good accord and satisfaction.

However where the debtor furnishes money to a third party to obtain the judgment and afterwards release the defendant therefrom it is insufficient, and the original holder may recover the residue.

Payment of a less amount than the whole, under a composition agreement with creditors and where release of residue is granted is

sufficient, for here it is held that the mutual promises of creditors among themselves (a necessary element in a composition) is a sufficient consideration to support the release.

An agreement by a debtor not to go into bankruptcy and thereby be discharged from his debts, furnishes a sufficient consideration to support a contract by the creditor to accept less for his debt than the full amount thereof.

Nor are these all of the exceptions which have at one time or another been sustained. In fact, the courts will take hold on any possible consideration to support and give validity to the contract to release the residue on payment of part.

It is easily apparent that the rule is rapidly obsolescent, and the express reluctance of the courts to uphold it, and their eagerness upon the most trivial excuse to escape its effect, indicate that the doctrine will very shortly, either by judicial decision or statutory enactment, be avoided in all of the states"

IT is a common remark among intelligent observers that the sweeping together of a vast number of cases on the same points in the Encyclopædias, thus shewing at a glance the great preponderance of authority, has contributed much to uniformity of decision in the multitude of courts in the United States. This is unquestionably true to a great extent. An overworked judge naturally feels justified in accepting without independent investigation a conclusion to which the decided majority of other judges have arrived. It does sometimes happen, however, that a doctrine established in many jurisdictions has been departed from in a single court for reasons very cogently stated in its opinion, and not previously considered elsewhere. Now, it is seldom or never that a text-book undertakes to cite all the authorities, especially on minor points, and this last single case may be found only in the Encyclopædias, just in time to control the decision in a case which would have followed the strong current of opinion if the dissenting authority had been neglected by the law writer as unimportant. A judge who would have felt too timid to break away from the generally accepted rule is thus encouraged to contribute a precedent which may result in a stampede of courts in the same direction.—*Law Notes.*

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

LEASE—LESSEE, DEATH OF—RENEWAL LEASE TO ONE OF NEXT OF KIN—FIDUCIARY RELATION—ACCRETION TO INTESTATE'S ESTATE.

In re Biss, Biss v. *Biss* (1903) 2 Ch. 40, a lessee from year to year of premises on which a profitable business was carried on died intestate leaving a widow and three children. The widow obtained administration of his estate. She and one of her sons respectively applied to the lessor for a renewal of the lease. The lessor refused to renew the lease in favour of the administratrix, but, having put an end to the tenancy from year to year, granted a new lease to the son for three years at an increased rent. The present action having been instituted for the administration of the deceased lessee's estate, the administratrix claimed that the estate was entitled to the benefit of the lease for three years obtained by the son. Buckley, J., who tried the case, held that the son was trustee of the lease for the estate and directed an account by him as trustee, but the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.,) unanimously reversed his decision, holding that the evidence established that the right or hope of renewal had been determined by the lessor himself, and that the son had in no way abused his position, nor stood in a fiduciary position towards, nor owed any duty to the other persons interested in his father's estate, and therefore the lease could not be treated as an accretion thereto. Romer, L.J., took the trouble to examine the original records in the case of *Palmer* v. *Young*, 1 Vern. 276, and discovered that the report is incorrect, which shews the value of preserving the records of legal proceedings.

MARRIAGE SETTLEMENT — CONSTRUCTION—ULTIMATE TRUST OF WIFE'S PROPERTY—DIE "WITHOUT HAVING BEEN MARRIED."

In re Brydone, Cobb v. *Blackburne* (1903), 2 Ch. 84, Kekewich, J., construed of a clause in a marriage settlement dealing with the wife's property. The settlement vested the property in trustees upon trust to pay the income to the wife for her life, and

after her death to her husband if he survived her for his life, and after the death of the survivor to hold the trust fund for the child or children of the marriage as the husband and wife, or the survivor should by deed or will appoint, and in default of appointment, for the children equally who should attain 21 or marry; and if there should be no child or children who should attain 21 or marry, the trustees were to hold the fund upon such trusts as the wife should appoint, and in default of appointment for her statutory next of kin who would be entitled at her death "if she had died intestate possessed thereof without having been married." The wife made no appointment and died intestate, leaving three children who died in infancy, and no other children. In construing the last clause creating the ultimate trust the question was whether the deceased twins were excluded. Kekewich, J., thought they were not, and conceived that *Wilson* v. *Atkinson* (1864) 4 D. J. & S. 455, had laid down the rule that in construing such clauses the issue of the marriage were never to be excluded as next of kin; but the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.,) considered that that case laid down no such general rule and held that the words in question ought primâ facie to be construed according to the natural meaning, which would exclude the issue of the wife, unless there be something in the contract, or the circumstances of the case, which shews that the words were not intended to bear that meaning. In arriving at this conclusion the Court of Appeal adopt the view expressed by Jessel, M.R., in *Emmin* v. *Bradford* (1880), 13 Ch. D. 493, and by Eady, J., *In re Smith* (1903), 1 Ch. 373 (see ante, p. 356) and reject the contrary view expressed by Fry, J., in *Upton* v. *Brown* (1879), 12 Ch. D. 872, and by Kekewich, J., *In re Mare* (1902), 2 Ch. 112.

HUSBAND AND WIFE—PURCHASE OF LAND WITH WIFE'S MONEY—CONVEYANCE TO HUSBAND—RESULTING TRUST FOR WIFE IN LAND PURCHASED BY HUSBAND WITH WIFE'S FUND PRESUMPTION.

In Mercier v. *Mercier* (1903) 2 Ch. 98, the facts were as follows: In 1883 the defendant married Colonel Mercier. They kept a joint bank account composed chiefly of the wife's money, on which both were accustomed to draw. In 1891 they bought some land which was paid for out of the joint account and was conveyed to the husband. He died intestate in 1901 leaving his wife surviving. His heir-at-law claimed the land; the wife on

the other hand claimed that as it had been purchased with her money there was a resulting trust in her favour. Buckley, J., held that there was no evidence of any gift of the purchase money by the wife to her husband, and consequently that the land belonged to her, and this decision was affirmed by the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) Romer, and Cozens-Hardy, L.JJ., held that it was immaterial as regards the question of resulting trust in such a case, whether the purchase money is paid out of the wife's capital or income.

WILL—CONSTRUCTION—GIFT TO "WIFE" OF A PERSON FOR LIFE—SECOND WIFE WHETHER INCLUDED.

In re Coley, Hollinshead v. *Coley* (1903) 2 Ch. 102, a testatrix gave her residuary estates to trustees on trust to pay the income to her son for life and after his decease to "his wife" for life. The son at the date of the will had a wife living well known to the testatrix. After the testatrix's death the son's wife died and he married again, and died leaving the second wife surviving. Kekewich, J., held that the word "wife" must be confined to the wife living at the date of the will, and the second wife was not entitled to the benefit of the gift, and the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.,) affirmed his decision, overruling *In re Lyne* (1869), L.R. 8, Eq. 65.

LESSOR AND LESSEE—COVENANT NOT TO ASSIGN WITHOUT LEAVE—LEAVE NOT TO BE UNREASONABLY WITHHELD—LESSOR IMPOSING UNREASONABLE CONDITION—DECLARATORY JUDGMENT—(ONT. JUD. ACT, S. 57 (5)).

In *Young* v. *Ashley Gardens* (1903) 2 Ch. 112, the jurisdiction of the court to grant a declaratory judgment was successfully invoked. The plaintiffs were lessees of certain property which they had covenanted not to assign without the leave of the lessors, "such license not to be unreasonably withheld." They complained that the lessors refused to grant leave to assign except upon a condition which was unreasonable, and they asked a declaration that the license was unreasonably withheld, and that they were entitled to assign without any further consent of the lessor. Joyce, J., who tried the action, being of the opinion that the condition sought to be imposed by the lessor was unreasonable, granted, the plaintiffs the relief claimed, and his decision was affirmed by the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.)

EASEMENT—WAY—GENERAL WORDS IN CONVEYANCE—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., C. 41) S. 6, SUB-S. 2—(R.S.O. C. 119, S. 12).

International Tea Co. v. *Hobbs* (1903) 2 Ch. 165, was an action brought to restrain the obstruction of a right of way claimed by the plaintiffs to the back of their premises over the yard of an adjoining house owned and occupied by the defendant. The defendant had been originally the owner of both houses, and he leased the plaintiffs' premises to one Kearly for 21 years from March, 1891. This was assigned to the plaintiffs who subsequently purchased the freehold thereof from the defendant. The conveyance described the premises as those mentioned in the lease and contained no general words. The way in question had been used for some years before the date of the conveyance with the permission of the defendant by the tenants and occupiers of the premises, but not for such a length of time as to give any right. Under these circumstances Farwell, J., held that at the time of the conveyance the way in question was used and enjoyed with the property conveyed, and therefore under the Conveyancing and Property Act (44 & 45 Vict., c. 41) s. 6, sub-s. 2, (R.S.O. c. 119, s. 12) the way passed to the grantee without any express or general words, as part of the property conveyed.

WILL—CONSTRUCTION—GIFT TO CHILDREN OF TENANT FOR LIFE "OR LEGAL REPRESENTATIVES."

In re Roberts, Percival v. *Roberts* (1903) 2 Ch. 200, Joyce, J., was called on to construe a will whereby the testator gave a share of his residuary estate to each of his two daughters for their respective lives and after their respective deaths directed their shares to be divided between their respective "children or legal representatives." Some of the children predeceased their mothers. The learned judge held that the "representatives" referred to in the will were the representatives of the deceased daughters and not the representatives of their deceased children, and that the addition of the words "or legal representatives" did not operate as a divesting clause, but constituted an alternative gift to arise only in the event of there being no child who took a vested interest; and consequently all the children of the daughters who survived the testator or were born after his death took vested interests notwithstanding that they might not have survived their respective mothers.

WILL—CONSTRUCTION—GIFT AFTER LIFE ESTATE TO CHILDREN, TO GRANDCHILDREN "OR THE ISSUE OF SUCH AS MAY HAVE DIED"—JOINT TENANCY OR TENANCY IN COMMON.

In re Woolley, Wormald v. *Woolley* (1903) 2 Ch. 206, another will was up for construction. In this case the testator gave his property to trustees upon trust after the death of the survivor of his children to divide the same between his grandchildren then living per stirpes and not per capita or the issue of such as shall have died (such issue taking a parent's share only) so that my grandchildren (or their issue) may take their shares equally in loco parentis. The problem to be solved by Joyce, J., was whether the gift to the great grandchildren was original or substitutional, and whether the great grandchildren took vested interests, and whether in common or as joint tenants; and he came to the conclusion that the gifts to the great grandchildren were original, and that they took vested interests in their respective shares as tenants in common.

BUILDING SCHEME—RESTRICTIVE STIPULATIONS—RIGHT TO ENFORCE RESTRICTIVE STIPULATIONS—NOTICE.

In *Rowell* v. *Satchell* (1903) 2 Ch. 212, the plaintiff was purchaser of some lots of an estate laid out and offered for sale under a building scheme, whereby certain portions were reserved for shops and others for private residences. Sales took place at different times, and lots were purchased by the plaintiffs at different times. Some of their conveyances intentionally or through inadvertence omitted restrictive stipulations. The defendants purchased other lots set apart for private residences and erected shops thereon, the use of which as shops the plaintiffs sought to restrain. Eady, J., held that notwithstanding the omissions in some of the deeds under which the plaintiffs claimed they were nevertheless entitled to enforce the stipulations as notwithstanding the form of the conveyance the grantee would not be entitled to the benefit of such departure from the building scheme as against the purchasers of other lots, but as to one of the defendants who had acquired his title as a sub-purchaser without notice of the restrictive stipulations the action was dismissed. As to him the learned judge held that the fact that his grantor proposed to insert certain restrictive stipulations in his deed, some of which he waived and some of which were insisted on, did not constitute notice that the land was already

subject to such stipulations, but only that his grantors were seeking to impose them for the first time, the deed from the original owner of the estate to his grantor containing no restrictive stipulation.

PRACTICE — AGREEMENT TO REFER TO ARBITRATION — STAYING PROCEEDINGS — STEP IN PROCEEDINGS — ARBITRATION ACT, 1889 (52 & 53 VICT., c. 49) s. 4—(R.S.O. c. 62, s. 7).

In *Richardson* v. *Le Maitre* (1903), 2 Ch. 222, the defendant applied to stay proceedings in the action on the ground that the parties had agreed to refer the matters in dispute to arbitration. It appeared that the defendant had attended before the master on a summons for directions taken out by the plaintiff, and had acquiesced, without protest, in a common form order for delivery of pleadings, and Eady, J., held that this was taking a step in the proceedings, which precluded the defendant from applying thereafter to stay proceedings in the action under the Arbitration Act, (52 & 53 Vict., c. 49) s. 4, (R.S.O. c. 62, s. 6.)

SOLICITOR—ALLEGATION OF PROFESSIONAL MISCONDUCT—REPORT OF COMMITTEE OF LAW SOCIETY ACQUITTING ACCUSED—RIGHT OF COMPLAINANT TO BE HEARD IN PERSON.

In re a Solicitor (1903) 2 K.B. 205, the Court of Appeal (Collins, M.R., and Matthew, and Cozens-Hardy, L.JJ.,) affirmed the decision of the Divisional Court (1903) reported in 1 K.B. 857 to the effect that where a complaint of professional misconduct against a solicitor has been investigated by a committee of the Law Society and a report made acquitting him, although the complainant has still the right to move the court to call on the solicitor to answer allegations contained in an affidavit, yet the court may properly refuse to entertain such an application by the complainant in person.

ASSIGNMENT OF DEBT—EQUITABLE ASSIGNMENT OF CHOSE IN ACTION—ASSIGNMENT BY LETTERS TO DEBTOR AND ASSIGNEE—BANKRUPTCY OF ASSIGNOR BEFORE RECEIPT OF LETTER.

In *Alexander* v. *Steinhardt* (1903) 2 K.B. 208, a firm residing in South America being indebted to the plaintiffs, consigned a quantity of ores to the defendants, their agents in England, and directed them by letter to sell the ores and pay the

plaintiffs the balance of the proceeds remaining after payment of a specified sum to another creditor. They also wrote to the plaintiffs advising them of what had been done. Before the receipt of the letters the firm in South America became bankrupt and the syndic in the bankruptcy telegraphed instructions which amounted to a revocation of directions given in the letter of the consignors to the defendants. The action was brought claiming to recover the balance of the proceeds of the sale of the ores pursuant to the consignors' original letter of instructions to the defendants, and Bigham, J., who tried the case, held that the plaintiffs were entitled to recover because as soon as the letters of the consignors were posted there was a good equitable assignment of the balance of the proceeds to the plaintiffs, which the subsequent bankruptcy of the consignors could not effect.

PARTNERSHIP—DEATH OF PARTNER—GOODS ORDERED BEFORE BUT NOT DELIVERED TILL AFTER DEATH OF PARTNER — DECEASED PARTNER'S ESTATE—PARTNERSHIP ACT, 1890 (53 & 54 VICT., 3. 39) S. 9.

Bagel v. *Miller* (1903) 2 K.B. 212, was an action brought against the personal representative of a deceased member of a firm to recover the price of goods ordered by the firm in the lifetime of the deceased, but not delivered until after his death. The County Court judge dismissed the action, and the Divisional Court (Lord Alverstone, C.J., and Wills, and Channell, JJ.,) held that he was right in so doing, as until delivery there was no debt.

NEGLIGENCE—INVITATION BY SERVANT TO TRAVEL ON MASTER'S ENGINE—LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANTS.

Harris v. *Perry* (1903) 2 K.B. 219, is one of those cases which illustrate the way in which employers are involved in actions for damages notwithstanding that the servant has acted contrary to the express instructions of his employer. In this case the defendant was a contractor for the construction of a tunnel, and for the purpose of carrying out the work had constructed a temporary line on which an electric engine ran. This engine was used to draw trucks and was not intended nor adapted for carrying passengers, and the defendant had directed that no one should be permitted to ride on it but the driver and a guard. Notwithstanding these instructions, however, it had been used for carrying officials in the employment of the defendant and of the

railway company, for whom the tunnel was being constructed, with the knowledge and concurrence of the defendant's representative. The defendant's timekeeper, who was riding on the engine, invited the plaintiff, who was an engineer of the railway company, to ride on the engine to his destination in the works, which invitation he accepted. Through the negligence of the defendant's servants, an accident happened owing to the engine running into a truck, and the plaintiff was injured. The action was tried by Wills, J., and on answers of the jury to questions submitted to them judgment was entered for the plaintiff. The Court of Appeal (Collins, M.R., and Stirling, and Mathew, L.JJ.,) affirmed the judgment, holding that the defendant was bound by the invitation of his timekeeper and having invited the plaintiff to ride was bound to take such reasonable care, as a person is bound to take of another whom he offers to carry gratuitously, and was consequently responsible for the injuries caused through the negligence of his servants.

LANDLORD AND TENANT—LEASE—PROVISO FOR RE-ENTRY—AFFIRMATIVE AND NEGATIVE COVENANTS.

Harman v. *Ainslie* (1903) 2 K.B. 241, was an action by a landlord to recover possession of the demised premises for breach of a covenant not to use the premises for certain specified purposes. The lease contained a covenant to pay rent and taxes besides the covenant above referred to, and contained the proviso that "if the lessee shall commit any breach of the covenants hereinbefore contained on his part to be performed" the lessor might re-enter. Wright, J., held that as the lease contained both affirmative and negative covenants the proviso in the above form only applied to a breach of the affirmative covenants and therefore gave judgment for the defendant. The conclusion may be technically right, but we doubt very much whether it effectuates the real intention of the parties.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Falconbridge, C.K.B.] [June 29.

GRIFFITHS *v.* HAMILTON ELECTRIC LIGHT CO.

Evidence—Workman's death without witnesses—Withdrawal from jury—New trial.

Plaintiff's son and another labourer were directed to clear up and remove the rubbish caused by their cutting a trench in the concrete floor of an alleyway in the defendant's power house. The alleyway was crossed at right angles with others on each side of which were electric machines and live wires within arm's length of any one working in the trench, one of the latter of which was ruptured perhaps by bending in constant use. The other labourer went into a cross alleyway where the live wires were, although there had been a slat nailed across it when the two were put to work; and was sweeping towards the trench the litter that had been scattered about when he suddenly became unconscious from an electric shock. The bodies of both men were found near a switch-board, plaintiff's son being dead. It was shewn there was a rupture in the insulation of a loose loop or cable hanging from the switch-board directly over where the survivor was lying and that the insulation of the wires was with respect to the voltage passing, insufficient for the safety of anyone working among them, and that the hanging loop might easily have been better guarded than it was.

Held, that there was evidence which could not be properly withdrawn from the jury and a new trial was ordered.

Judgment of FALCONBRIDGE, C.J.K B., reversed.

Lynch Staunton, K.C., for the appeal. *Brennan*, contra.

From Lount, J.] SKILLINGS *v.* ROYAL INSURANCE CO. [Sept. 14.

Insurance—Fire insurance—Cancellation—Notice of cancellation received after loss.

Per MACLENNAN, J.A., an actual delivery of notice was what was intended by statutory condition 19 (a) R.S.O. 1897, c. 203, s. 168, and s. 43 of the Postal Act R.S.C. 1886, c. 35, was not intended to alter the actual rights of the sender and the person addressed, as between themselves.

Per GARROW, J.A., the notice may be recalled at any time before it reaches its statutory home by direct or indirect interference on the part of

the insured even by the erroneous address upon the letter retarding its delivery; and a notice sent before and not received until after the fire was wholly ineffectual. *Crown Point Iron Co.* v. *Ætna Insurance Co.* (1891) 127 N.Y. (Hun.) 603 cited with approval.

The judgment of LOUNT, J., reported 4 O.L.R. 123 affirmed.

C. Robinson, K.C., and *MacInnes*, for the appeal. *Riddell*, K.C., and *A. Fasken*, contra.

From Meredith, C.J.C.P.] EARLE *v.* BURLAND [Sept. 14.

Interest—Moneys of company improperly withdrawn—President and manager—Trustee—Statute of limitations—Reference—Powers of master.

The appellant, who was for many years the president and general manager as well as the principal shareholder of an incorporated company, withdrew from the funds of the company, between Aug. 1, 1889, and Dec. 1900, at the rate of $5,025 per annum, as salary, in addition to his regular salary. He assumed to do this under a resolution authorizing the payment of extra remuneration to the "staff," but it was held by the Court of Appeal (27 A.R. 540) and by the Judicial Committee (1902, A.C. 83) that the resolution did not apply to him, and he was ordered to account for the moneys received during the whole period, notwithstanding a plea of the Statute of limitations.

Held, that his position was that of a trustee for the company, and that he was chargeable with interest on the moneys received.

In re Exchange Banking Co., Flitcroft's case, 21 Ch. D. 519, followed.

Held, also, that the Master upon a reference had power under Con. Rules 666 and 667 to charge the appellant with interest, although the judgment directing the reference was silent on the subject.

Judgment of Meredith C. J., affirmed.

Hogg, K.C., and *Shepley*, K.C., for appellant. *Marsh*, K.C., and *Bethune* for plaintiffs.

From Street, J.] CITY OF TORONTO *v.* BELL TELEPHONE CO. [Sept. 14.

Constitutional law—Telephone company—Work or undertaking—Connecting provinces—Jurisdiction of Dominion Parliament—Right to construct lines in streets—Effect of Provincial Act.

The work or undertaking for the prosecution of which the defendants were incorporated by 43 Vict. c. 67 (D.) is one falling within the description of a work or undertaking connecting the Province with any other of the Provinces, or extending beyond the limits of the Province, within the meaning of the exception a. in clause 10 of s. 92 of the B. N. A. Act, and therefore falls within the exclusive legislative authority of the Parliament of Canada, under clause 29 of s. 91.

The powers conferred by the defendants' Act of incorporation, as amended by 45 Vict. c., 95 (D.), are not curtailed by the provisions of 45 Vict. c. 71 (O.), as regards the right to construct, erect and maintain their line or lines of telephone along the sides and across any highway or street of the city of Toronto, subject, however, to the provisions set forth and contained in s. 3 of the Act of incorporation as amended. Maclennan, J. A., dissenting.

Judgment of Street, J., 3 O.L.R. 465, reversed.

W. Cassels, K.C., *Lynch-Staunton*, K.C., and *S. G. Wood*, for appellants. *C. Robinson*, K.C., and *Fullerton*, K.C., for respondents.

C.C.R.] REX *v.* NOEL. [Sept. 19.

Criminal procedure—Trial—Right to re-examine

The right to re-examine follows upon the exercise of the right to cross-examine, and even if inadmissable matter be introduced in cross-examination, the right to re-examine remains, and the rule holds good where the witness volunteers the statement. If it be desired to avoid re-examination upon such matters, it must be expunged at the instance of the party cross-examining. While it remains as part of the testimony, the right to re-examine upon it also remains.

Du Vernet for the prisoner. *Cartwright*, K.C., for the Crown.

HIGH COURT OF JUSTICE.

Falconbridge, C. J. K. B., Street, J.] [July 16.

RUSHTON *v.* GRAND TRUNK R.W.

Practice—Motion for new trial—Examination on pending motion—Admissibility of evidence—Witness at trial—Con. Rule 491.

The plaintiff herein having given notice of motion for a new trial on ground of surprise, in that certain witnesses called for the plaintiff, had withheld evidence which they could have given in his support at the trial, and were willing to give such evidence if a new trial were granted, subpœnaed three of these witnesses under Rule 491, for examination before the local registrar upon the motion for a new trial. The defendant moved before the Master in Chambers to set aside the subpoena and appointment and he referred the matter to the Divisional Court.

Held, that Rule 491 applies to motions for a new trial before a Divisional Court.

Held, however, that evidence of persons who had been witnesses at the trial, that the evidence they then gave was not in fact true, and that certain statements made by them before the trial to the plaintiff's solicitor

(which was avowedly the evidence sought to be obtained here by the examination in question) would not be receivable, and therefore the subpœna and appointment should be set aside .

The Master in Chambers has no power to refer a matter before him to the Divisional Court.

Riddell. K.C., for defendants. *Shirley Denison*, for plaintiff.

Osler, J.A.] GARDNER *v.* PERRY. [July 22.

Executor—Life tenant—Misappropriation by co-executor—Negligence—Delay in compelling accounting—Leases for years by life tenant—Covenant as to straw and manure—Property in—Emblements.

R. G. died in 1870, having by his will given the income of his estate to his widow for life and subject to certain bequests—the residue to the children of his brothers and sisters, and appointed T. H., J. G. and the widow executors and executrix of his will with power "to dispose of the property if they see fit." J. G. managed the estate until the time of his death in 1885 by which date some of the real property had been disposed of and invested, and his management was duly accounted for. T. H. then took the management of the estate until 1895 when the widow after much pressure by her friends took proceedings against him for an account, the result of which was he was found largely indebted and a large sum was lost to the estate. The widow died in 1902. Probate of her will was then granted to the defendants and T. H. was removed as trustee and the plaintiffs appointed in his place. In an action by plaintiffs against defendants in 1903 to compel them to make good the losses to the estate of R. G. occasioned by the negligence of the widow in permitting her co-executor to misappropriate the funds of the estate.

Held, that, as all the alleged acts of negligence or breaches to trust charged against the widow occurred more than six years before action, s. 32 (1) (b) of the Trustee Act R.S.C. 1897, was a good defence. *In re Bowden, Andrew* v. *Cooper* (1890) 45 Ch. D. 447 commented on and followed.

During the widow's lifetime two of the farms belonging to the estate were leased for five years dependent on her living so long and the lessees covenanted to cultivate, till, manure, . . . and will spend, use and employ in a proper husbandlike manner all the straw and manure . . . and will not remove or permit to be removed from the premises any straw of any kind, manure, wood or stone, and will carefully stack the straw . . . and turn all the manure thereon into a pile (so it may heat and rot so as to kill and destroy foul seeds) and will thereafter and not before spread the same on the land.

Held, 1. The defendants were not entitled to the straw and manure as emblements as the widow was not in actual occupation or cultivation of the lands on which it was produced.

2. The lessees would have been entitled to the straw and the manure which had been piled into heaps, but for their covenants which preclude them from making any claim; and that the covenants may be construed or held to operate as a reservation of the straw and manure to the lessor to be dealt with in the stipulated manner, and as the lessees' right or power and obligation so to deal with it came to an end with the death of the lessor it passed to her representatives unrestricted thereby.

Snetzinger v. *Leitch* (1900) 32 O.R. 440 referred to.

Du Vernet and *Heggie*, for plaintiffs. *Shepley*, K.C., and *E. G. Graham*, for defendants.

Meredith, C.J.C.P.] RE MACKEY. [July 24.

Will—Devise—Of bonds—Specific legacy—Succession duty.

A testator possessed of a considerable number (more than 5) of $1,000 debentures, bearing interest at four per cent., of a certain city both at the time of making a codicil to his will and at the time of his death by the codicil devised to each of the two devisees "one debenture of (the city) for the sum of $1,000, bearing interest at four per cent. per annum" and directed "that if I should deliver over any of the said debentures in my lifetime to any of the above legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." He had in previous clauses bequeathed to each of five named persons one debenture of (the city) for the sum of $1,000, bearing interest at four per cent.

Held, that the legacies to the two legatees were not specific legacies: and that even if they had been the legatees were not entitled to receive them free of succession duty and the executors should either deduct or collect the duty before paying them over legacies.

Gorman, K.C., for executors. *Hogg*, K.C., for residuary legatees. *D'Arcy Scott* and *R. G. Code*, for other legatees. *Gideon Grant*, for H. Mackey.

Meredith, C.J.C.P.] McINTYRE *v.* MUNN. [July 24.

Judgment—Leave to sign—"Debt or liquidated demand."

The defendant having entered into an agreement to manufacture for and deliver timber to the plaintiff received from him certain advances in money exceeding the value of the timber actually delivered and failed to complete his contract. No adjustment of accounts took place nor was the amount to be paid for the delivered timber ascertained. In an action to recover the balance of the advances overpaid,

Held, that the claim was not a debt or liquidated demand within the meaning of Con. Rule 138 and an order of a local judge giving leave to sign judgment under Con. Rule 603 was set aside.

Kilmer, for appeal. *Ludwig*, contra.

Meredith, J.] REX *v.* GILMORE. [July 31.

Criminal procedure—Private prosecutor—Right to conduct proceedings.

Held, on motion for certiorari that though it is the right of every one to make a complaint with a view to the institution of criminal proceedings, and also, under certain circumstances, to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, and cannot insist that he, or counsel retained by him, shall aid in the conduct of the prosecution.

Bartram, for the private prosecutor, ex parte.

Meredith, J.] RE BRADLEY ESTATE. [July 31.

Devolution of Estates Act—Sale by administrator—Non-concurring adult heirs—Approval of official guardian.

Application for a direction to the official guardian to approve of a sale of certain lands, made by the applicant as administrator of his deceased brother's estate, there being heirs who were sui juris, but had not concurred in the sale. The application was made under R.S.O. 1897, c. 127, sec. 16, the devolution of Estates Act, which gives the official guardian power to approve the sale in such a case, as in the case of infants. There appeared to be no expressed objection to the sale by any of the heirs, but their concurrence had not been sought, because of the delay and expense which that would involve.

Held, that, under the facts of this case, the proper course was for the official guardian to make the usual inquiries, and if no good reasons were advanced or discovered for witholding his approval, it should be given.

T. G. Meredith, K.C., for applicant. *Harcourt*, Official Guardian.

GENERAL SESSIONS OF THE PEACE, COUNTY OF YORK.

Morgan, Co. J.] REX *v.* MEZER, [Sept. 22.

Lord's Day Act, R.S.O. C. 246 Keeper of eating-house—Supplying candies on Sunday—Removal from premises.

The respondent, Pauline Mezer, who held a license as a keeper of an eating house had been convicted by the Police Magistrate for exercising her worldly business or calling on the Lord's Day, by a sale to a customer of candies, which were taken from the premises.

Held, sanctioning the principal of the decision MCDOUGALL Co., J., in *Reg.* v. *Alberti*, in 1900, that candies were a food, and could therefore be legitimately furnished under the respondent's license on a Sunday, as the performance of a work of necessity.

Held, also, that removal of the goods from the premises would not constitute her an offender.

Haverson, K.C., and *A[illegible]sten* for respondent, *Lobb*, for appellant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] MARKS *v.* DARTMOUTH FERRY COMMISSION. [April 11.

Master and servant—Contract of hiring—Termination and variation of—Assent—Burden of proof—Permanent and temporary illness—Effect of—Continuing contract—Obligation to pay.

M. was employed by the defendant Commission to act in the capacity of captain of ferry steamer, under a contract in writing, the employment to commence March 1, 1899. On Jan. 8, 1900, defendants passed a resolution that after that date no employee would be paid for any time he or she might be absent from duty. This resolution was never formally communicated to M. but there was evidence that he was aware of its terms and that on two occasions a portion of his wages was deducted for absence from duty. On Dec. 15, M. was taken ill, and was thereafter continuously absent from duty until the time of his death, which occurred on July 16. In an action by the executrix of M. claiming payment of wages for the time during which he was so absent from duty,

Held, per WEATHERBE, J., and GRAHAM, E. J., affirming the judgment appealed from, that plaintiff was entitled to recover.

Per TOWNSHEND and MEAGHER, J. J., that deceased having been aware of the passage of the resolution, and of the change which it purported to make in the terms of his contract, and having assented to the resolution by accepting his wages less the deductions made therefrom, the action could not be maintained.

Per WEATHERBE, J., that the contract was a continuing one, and if not put an end to the obligation to pay continued.

Also, that if the illness of deceased was so treated as temporary the like obligation existed.

Also, that if defendants relied upon permanent illness as a defence they were bound to prove it.

Per GRAHAM, E. J., that the resolution was not effective in the absence of evidence that it was submitted to and approved of by the Governor in Council. That in the face of the contract the resolution, so far as absence from duty was concerned, was ultra vires. That the burden was on defendants to show acquiescence, and that this was not to be inferred from the deductions made on two occasions from deceased's wages. That to establish acquiescence it must be shewn that deceased was aware of his legal rights. That permanent illness is not of itself sufficient to terminate a contract of hiring; that defendants were bound to make an election, and that by retaining deceased in their employ and not requiring him to work

they treated his illness as one of a temporary character. That the mere non-payment of wages did not indicate that defendants were treating the contract as terminated, but that they were relying upon the effectiveness of the resolution with respect to the stoppage of pay during absence from duty.

Drysdale, K.C., for appellant. *Ritchie*, K.C., and *Finn*, contra.

Province of Manitoba.

KING'S BENCH.

Killam, C.J.] GIBBONS *v.* METCALFE. [July 29.

Conspiracy—Combination in restraint of trade—Agreement to boycot plaintiff in his business.

Plaintiff and defendants were members of a corporation known as "The Winnipeg Grain and Produce Exchange," and dealt in grain both on their own account and for others on commission. The Exchange had certain rules which prevented members from doing a commission business at less than certain rates and from operating on a joint account basis with persons not members of the Exchange without charging the full minimum commissions on the interest of any such outsider in any transaction entered into by a member. During the autumn of 1902 the defendants and other members of the Exchange came to the conclusion on reasonable evidence and bona fide belief, that certain persons and firms not members of the exchange were carrying on business with members in violation of the commission rules and that the plaintiff was the medium through whom the purchases and sales were made on account of such outsiders and the defendants then agreed amongst themselves that they would neither sell nor buy grain from the plaintiff and afterwards carried out this agreement, thereby causing loss and damage to the plaintiff in his business of grain dealer. Plaintiff then brought this action for damages and for an injunction to prevent the defendants from continuing the boycot and from continuing to conspire together to injure his trade and business. Some of the other findings of fact were as follows:

1. The main object and purpose of the defendants in so combining and acting were to prevent the outside parties referred to from selling grain to or buying it from them or other members of the Exchange having offices in the Grain Exchange Building and doing a business similar to theirs, unless and until those outside dealers would agree to be bound by the rules of the Exchange.

2. Such combination and action were not intended to be continued in case the plaintiff would agree not to deal with such outsiders.

3. The defendants so combining were not actuated by any malicious feeling towards the plaintiff or said outsiders or by any wish to injure him

or them or by any improper motive; but solely by the desire to serve the business interests of themselves and of the members of the Exchange generally and in protection of the market created under the rules of the Exchange.

4. It was not proved that the plaintiff had committed any breach of the rules or by-laws of the Exchange or that he knowingly assisted any of the said outsiders or other members of the Exchange to do so.

5. The defendants contemplated that the result of their action would be to cause some loss of business to the plaintiff and they desired that he should thereby find that it would be more to his interests to abandon any dealings with the outsiders referred to. Probably, too, they expected or hoped that the latter would find it less profitable to deal independently elsewhere than with them under their rules. But the infliction of business injury was not an object in itself desired. At most it was to be a means of bringing those other parties to adopt the business methods of the Exchange.

6. There was no evidence that the combining defendants sought to compel or induce either the plaintiff or any of the outsiders to break any contract by which any of them was bound, or that there was any design on the part of the defendants to obtain for themselves a monopoly of the grain trade or of any branch of it or to drive either the plaintiff or the other parties out of business.

7. The combining defendants had become bound by certain business rules which placed them at a disadvantage if those not bound by them could resort to the market which the defendants and other members of the Exchange had among themselves and what they did was done because they thought it to be to their interest to keep the outsiders out of that market and for that purpose to avoid dealing with the plaintiff who could sell to them the grain of those parties or buy from them for those parties without their knowledge.

Held, that such action was but a lawful exercise of their own rights, of the reasonableness or propriety of which the court could not judge, and that there was no conspiracy to do any act or for any object or to use any means illegal if done or pursued or used by an individual, and that there being no evidence of malicious or improper motive, this combination and the pursuit of its objects did not affect any legal right of the plaintiff or operate to do him any legal injury, and the action must be dismissed with costs.

The Mogul Steamship Co. v. *McGregor*, 21 Q.B.D. 544, 23 Q.B.D. 598 and (1892) A.C. 25, followed.

Andrews and *Ferguson*, for plaintiff. *Howell*, K.C., *Perdue*, *Wilson*, *Phippen*, *Phillipps*, *Metcalfe*, *Mathers*, *Dawson* and *J. T. Fisher*, for the several defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] HOSKING *v.* LE ROI NO. 2. [Jan. 28.

Master and servant—Common employment—Former servant's negligence—Employers' Liability Act—Trial—Party bound by course of.

Appeal from judgment of MARTIN, J., dismissing plaintiff's action for damages for personal injuries. Where a party frames an action for negligence at common law and also under the Employers' Liability Act, but at the trial attempts to develop a case at common law and fails, he will not be granted a new trial in order to try to establish a case under the Employers' Liability Act. The jury found that the defendants were negligent in not providing proper and accurate working plans of a mine, and that such neglect was the cause of the accident, but they did not specify what person or official was guilty of the negligent act. The plans were prepared by the defendants' engineers who were competent, and who had left the defendants' employment before the injured person entered their employment.

Held, that the defendants were not liable either under the Act or at common law.

Per IRVING, J.: The doctrine of common employment is applicable where the servant because of whose fault the accident happened had left the employer's service before the injured servant entered his service.

Appeal dismissed.

Taylor, K.C., for appellant. *Davis*, K.C., for respondent.

Full Court.] RE IBEX MINING CO. [April 9.

Winding-up—Mechanic's lien—Priority—Jurisdiction of Court to order—Notice to party affected—Order made without jurisdiction.

The holders of mechanics' lien filed against mineral claims owned by a company which was subsequently ordered to be wound up, recovered judgment thereon in the County Court the same day the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditor, but as judgment creditors. The winding-up order was made on the petition of Holmes, a surveyor, who held the field notes of the survey made by him, and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims and retain a lien on them until he was paid; the liquidator applied to the Court for leave to accept the proposal and an order was made, without notice to the lien holders, giving Holmes a first charge on

the claims for his debt and the amount advanced by him; afterwards, on Holmes' application, an order was made, on notice to the liquidator but without notice to the lien holders, that the claims be sold to pay his charge. The lien holders did not appeal from either of the last orders, but applied for leave to enforce their security and that they be declared to have priority over Holmes:

Held, by the Full Court (reversing DRAKE, J., who dismissed the application), that the order giving Holmes priority over the lien holders was made without jurisdiction and the lien holders were not bound by it.

Peters, K.C., for appellants. *Duff*, K.C., for Holmes. *Barnard*, for liquidator.

Full Court.] YORKSHIRE GUARANTEE CORPORATION *v.* COOPER. [April 28.

Execution—Exemption under Homestead Act—Thing seized of a value over $500.

Appeal from judgment of Henderson Co., J., in an interpleader issue.

Held, affirming the judgment appealed from that the execution debtor was entitled, as an exemption under the Homestead Act, to $500 out of $1000 realized by the sheriff on the sale of a steamship, the only exigible personalty of the debtor. *Vye* v. *McNeill* (1893), 3 B.C. 24, approved.

Semble, notice of claim of exemption is necessary.

McPhillips, K.C., for appellant. *Martin*, K.C., for respondent.

Full Court.] JACKSON *v.* CANNON. [Aug 7.

Company—Security taken bona fide—Holder of—Necessity to inquire as to regularity of proceedings—Liquidator suing in his own name—Liability for costs.

Appeal from judgment of MARTIN, J. A person who bona fide takes a security in the ordinary course of business from an incorporated company is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything had been done regularly. In this respect a shareholder stands on the same footing as a stranger. Where an action is brought by the liquidator of a company in liquidation in his own name he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect.

Sir C. H. Tupper, K.C., and *Peters*, K.C., for appellant. *Martin*, K.C., for respondent.

Book Reviews.

Fish and Game Laws of Ontario, by A. H. O'Brien, M.A., Barrister-at-law, author of O'Brien's Conveyancer; Chattel Mortgages and Bills of Sale, etc., etc. Fifth edition. Authorized by the Department of Marine and Fisheries (Canada). Canada Law Book Co., Toronto. Price, 25 cts., paper; 50 cts., cloth.

The above is a digest of the whole law, Dominion and Provincial, affecting the animals, birds and fish of Ontario, alphabetically arranged, with references to the various statutes and Orders in Council in force on September 28th, 1903. This Manual is a marvel of skilful and comprehensive arrangement, coupled with compactness, and it shews the whole law at a glance; and, although the size of the publication is small, for manifest reasons of convenience to the sportsman and to game officers, it deals exhaustively, and with the author's well-known accuracy, with a subject of a complex character and in many respects a difficult one to handle. This edition contains a number of illustrations of game, now appearing for the first time. A couple of pages are devoted to some excellent practical hints on camping. Its authorization by the Department of Marine and Fisheries of Canada gives it an official status.

County Law Associations—Ontario.

On the 3rd inst. representatives from the various County Law Associations of the Province of Ontario met at Osgoode Hall to give their annual consideration to matters of interest to the legal profession. D. W. Dumble, K.C., Peterboro, was chosen Chairman, and W. C. Mikel, Belleville, Secretary.

A number of important topics were discussed and resolutions favoring the following reforms were passed:—The extension of the powers of Local Judges of the High Court; Increase of Judges' salaries; Bankruptcy Legislation; The establishment of a Divorce Court; Improvement of Municipal Legislation; Aid to County Libraries from the Dominion Government; The simplification of Surrogate forms; The revision of the Surrogate tariff, and a resolution opposing the proposed Bill to create a special class of Conveyancers.

A Legislation Committee was appointed consisting of Mathew Wilson, K.C., Chatham, Wm. Proudfoot, K.C., Goderich, A. H. Clarke, K.C., Windsor, W. A. McLean, Guelph, and W. C. Mikel, Belleville. Also a deputation to wait upon the Attorney-General in reference to Surrogate Forms. September was chosen as the time for next year's Meeting.

UNITED STATES DECISIONS.

CRIMINAL LAW.—Mere preparatory acts for the commission of a crime, and not proximately leading to its consummation, are held, in *Groves* v. *State* (Ga.) 59 L.R.A. 598, not to constitute an attempt to commit the crime.

NEGLIGENCE—EXPLOSIVES.—One who uses high explosives excavating so near the property of another that the natural and probable result of an explosion will be injury to such property, is held, in *Fitzsimmons & C. Co.* v. *Braun* (Ill.) 59 L.R.A. 421, to be liable for injuries caused even by the vibration of earth and air, however high a degree of care he may have exercised in their use.

DAMAGES—MENTAL SUFFERING.—A railroad company is held, in *Mabry* v. *City Electric R. Co.* (Ga.) 59 L.R.A. 590, to be liable in damages for injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury thereby.

DAMAGES—RIGHT OF PRIVACY.—The unauthorised publication of one's likeness by another person for advertising purposes is held, in *Robertson* v. *Rochester Folding Box Co.* (N.Y.) 59 L.R.A. 478, not to give a right to an injunction or damages on the theory that it is an invasion of a "right of privacy."

SURVIVORSHIP.—In case of the death, in the same disaster, of a member of a mutual benefit society and the beneficiary named in the certificate, which provides that, in the event of the death of the beneficiary before the decease of the member, the benefit shall be paid to his heirs, it is held, in *Middeke* v. *Balder* (Ill.) 59 L.R.A. 653, that the representatives of the beneficiary must show her survivorship or the fund will go to the heirs.

NEGLIGENCE.—FELLOW SERVANT.—The negligence of a fellow servant is held, in *Loveless* v. *Standard Gold Mining Co.* (Ga.) 59 L.R.A. 596, not to relieve the master from liability to a coservant for an injury which would not have happened had the master not been negligent himself.

NEGLIGENCE—INVITATION.—No invitation to cross the yard of a railroad company to reach show grounds is held, in *Clark* v. *Northern P. R. Co.* (Wash.) 59 L.R.A. 508, to be given by the railroad company by permitting a circus to exhibit on its vacant land adjoining its switch yard, so as to charge it with the duty of exercising care to protect people from danger, and render it liable to one injured by the operation of trains while attempting to cross the yard after having been expressly told to keep out, where the show grounds can be reached without danger by the highway.

A railroad company is held, in *Ashworth* v. *Southern R. Co.* (Ga.) 59 L.R.A. 592, liable for injury to a child of immature years who gets upon the running board of an engine as it enters a playground, according to a general custom of children playing there, well known to the railroad employees and who is injured while attempting to alight therefrom at a point where

children have been, for a long time previous, in the habit of alighting, even though the employees in charge of the train had no actual knowlege of the child's presence upon the engine.

JUSTIFIABLE HOMICIDE.—One who is assaulted in a public street is held, in *State* v. *Bartlett* (Mo.) 59 L.R.A. 756, to be justified in using a deadly weapon to defend himself from a public whipping by one greatly his superior physically.

BILLS & NOTES.—The maker of a negotiable instrument who delivers it to the payee complete in all its parts is held, in *Bank of Herington* v. *Wangerin* (Kan.) 59 L.R.A. 717, not to be liable thereon even to an innocent holder, after the same has been fraudulently altered so as to express a larger amount than was written therein at the time of its execution.

RAILWAY LAW.—One purchasing a round-trip railroad ticket good only on the day of purchase is held, in *Illinois Cent. R. Co.* v. *Harris* (Miss.) 59 L.R.A. 742, to be entitled to recover damages in case he is ejected from the only train passing his station on the return trip on that day, for the reason that the ticket is not good on that train because the train is not scheduled to stop at that station.

To hold the carrier responsible for an injury received by a passenger while using an excursion ticket, one of the conditions on which is that the passenger assumes all risk of accident, it is held, in *Crary* v. *Lehigh Valley R. Co.* (Pa.) 59 L.R.A. 815, that he must show affirmatively that the carrier was guilty of negligence which caused the injury.

Although a railroad company enters into a joint contract with another company for the transportation of goods to a point beyond the end of its own line, it is held, in *Union State Bank* v. *Fermont, E. & M.V.R. Co.* (Neb.) 59 L.R.A. 939, to be competent for it to enter into an express contract with the shipper limiting its liability to the transportation of the property over its own line.

CRIMINAL LAW.—A peace officer acting without a warrant is held, in *Petrie* v. *Cartwright* (Ky.) 59 L.R.A. 720, to have no right to kill a fleeing person who refuses to stop when commanded to do so, on suspicion that he has been guilty of a felony, where the offence is in fact only a misdemeanor.

LITTELL'S LIVING AGE: That delightful writer, R. Bosworth Smith, whose recent articles on "Owls" and "Ravens" attracted so much interest as they appeared in *The Nineteenth Century and After*, now contributes a charming sketch entitled "The Old Thatched Rectory and Its Birds," which *The Living Age* for September 26 reprints. Few writers on bird-lore add to their knowledge of out-door life so wide an acquaintance with literature, modern and classic, and so mellow a sympathy with human nature. Mr. Arnold White's "Kisheneff and After" is a broad treatment of the whole Jewish question, of which the Kisheneff massacre is only a tragic episode.