Canada Law Journal.

VOL. XLVII. TORONTO, JULY. Nos. 13 & 14.

THE CORONATION.

It is on occasions such as this that we are reminded of the great traditions of the British race; and the blending, according to the ancient usage, of the rites of religion with the affairs of state, is, at the coronation, a conspicuous, we might say the dominating, feature of the occasion. Though to some the coronation rites and ceremonies may seem to be superfluous and even to savour of superstition, yet to others who are blessed with imagination, they are full of significance. The recognition of His Majesty as lawful King by that great assembly recalls the fact that Royal power and authority has, as its ultimate foundation, the consent of the people. The anointing and the other symbolic ceremonies, as Bishop Stubbs points out, are to be understood as typifying rather than as conveying the spiritual gifts for which prayer is made, and they come down to us hallowed by ancient and immemorial custom, and though to the matter-of-fact man of the present day, they may seem out of place and no longer appropriate, yet to those who have respect to the past and to the fact that the King is set as a beacon to his people, it seems well to surround him on this momentous occasion with a halo of sanctity, not that the "sacring" of the King was ever an affirmance of Divine right. That "the powers that be are ordained of God" was a truth recognized as a motive to obedience, without any suspicion of the doctrine, so falsely imputed to churchmen of all ages, of the indefeasible sanctity of royalty. The same conclusion may be drawn from the compact made by the King with his people and the oaths taken by both. "If coronation and unction had implied an indefeasible right to obedience, the oath of allegiance on the one side, and the promise of good government on the other, would have been superfluous." Stubb's Con. Hist. c. 6, 163.

But though we dismiss as untenable the theory of the Divine right of Kings, we cannot forget that, though the autocratic powers of Kings have in process of time grown less and less, their moral influence for weal or woe was perhaps never greater than at the present time. Kings and Queens nowadays live in the full glare of a publicity unknown to their predecessors and they can no longer, even if they would, live regardless of public opinion, nor can they fail to realize that they possess an opportunity of exercising an ethical force of incalculable value to their people. We have reason to hope and believe that in the present occupants of the throne of England we have a King and Queen whose constant aim will be the moral welfare of their people, and who are permeated with the consciousness that one duty they owe them is to set them an example of virtuous and godly living. Therefore, we say, God save our King and Queen.

The message of the King to his people since the Coronation seems to give assurance that the hopes and expectations above expressed will be realized. We gladly reproduce his appropriate and thoughtful words:—

"To My People:—Now that the Coronation and its attendant ceremonies are over, I desire to assure the people of the British Empire of my grateful sense that their hearts have been with me through it all. I feel this in the beautiful and impressive service in the Abbey, the most solemn experience of my life, and scarcely less in the stirring scenes of the succeeding days, when my people have signified their recognition and their heartfelt welcome of me as their Sovereign, for this has been apparent not only in the loyal enthusiasm shewn in our passage to and from Westminster, and in the progresses which we have made in the different districts of London, but also in the thousands of messages of goodwill which have come to me across the seas from every part of the Empire. Such affectionate demonstrations have profoundly touched me and have filled me afresh with faith and confidence. Believing that this generous, outspoken sympathy with the Queen and myself is, under God, our surest source of strength, I am encouraged to go forward with renewed

hope that whatever perplexities or difficulties may be before me and my people we shall all unite in facing them resolutely and calmly, and with public spirit, confident that under Divine guidance the ultimate outcome will be to the common good."

THE DOCTRINE OF "STARE DECISIS," IN COUNTY COURT AND MECHANIC'S LIEN APPEALS.

The recent decision of the Chancery Division in *Farrell* v. *Gallagher*, 23 O.L.R. 130, indicates a rather surprising extension of a principle which was first emphasized in this province in *Canadian Bank of Commerce* v. *Perram*, 31 O.R. 116, and subsequently followed in *Mercier* v. *Campbell*, 14 O.L.R. 639. As a preliminary to the discussion of these decisions, it is desirable to refer to s. 81 of the Judicature Act, which is as follows:—

"81. (1) The decision of a Divisional Court of the Court of Appeal on a question of law or practice shall, unless overruled or otherwise impugned by a higher court, be binding on the Court of Appeal and all Divisional Courts thereof, as well as on all other courts and judges, and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision, unless and until so overruled or impugned. (2) It shall not be competent for the High Court or any judges thereof in any case arising before such court or judge to disregard or depart from a prior known decision of any court or judge of co-ordinate authority on any question of law or practice without the concurrence of the judges or judge who gave the decision; but if a court or judge deems the decision previously given to be wrong and of sufficient importance to be considered in a higher court, such court or judge may refer the question to such higher court: 58 V. c. 12, s. 79; c. 13, s. 9."

It is stated in Holmested & Langton that the above quoted subs. (2) was intended to prevent such a result as occurred in *Stevens* v. *Grout*, 16 P.R. 210, and *McDermott* v. *Grout*, 16

P.R. 215, where two Divisional Courts decided differently the same point in two actions which had been tried together. A similar difficulty had previously arisen in the cases of *Sears* v. *Meyers* and *Heath* v. *Meyers*, 15 P.R. 381, where it was laid down that a court is not bound by the decision of a court of co-ordinate jurisdiction when the matter is one of jurisdiction and involving the settling of a new practice. It had also been stated by the late Chief Justice Hagarty, in delivering the judgment of the court in *Donnelly* v. *Stewart*, 25 U.C.R. 398, in an appeal from the County Court of Hastings, that as his decision in that appeal was final, the court might not necessarily be bound by a previous decision of the same court in the case of *McPherson* v. *Forester*, 11 U.C.R. 362, though he concluded that he was not prepared to dissent from it after it had remained unquestioned for 13 years.

After the passing of the above Act, the case of *Canadian Bank of Commerce* v. *Perram* came before the King's Bench Division on appeal from the County Court of York. The judgment was delivered by Armour, C.J., and he declined to follow a previous decision of the Court of Appeal on the same point in *Duthie* v. *Essery*, 22 A.R. 191, saying: "As this is the ultimate court of appeal in this County Court case, we are bound to give our independent judgment."

The same point again came before the King's Bench Division in an appeal from the County Court of Prescott and Russell, in the case of *Mercier* v. *Campbell*, above mentioned. Mr. Justice Riddell, in the course of an elaborate judgment, thus deals with this point at pp. 644-5: "As we are the court of last resort in this matter, we, at the hearing, called for argument upon the question as to whether we were bound by the decision of a Divisional Court, it appearing to us that a decision of the Common Pleas Division hereafter to be referred to might govern the case. Mr. Macintosh argued that we were so bound, citing the Ontario Judicature Act, sec. 81 (2), Holmested & Langton, 3rd ed., p. 140, but said he had not found any decision in that sense. We have not found any. Mr. Middleton cited the case

of *Canadian Bank of Commerce* v. *Perram*, 31 O.R. 116, in which a Divisional Court, sitting, as we are, in appeal from a County Court, refused to be governed by previous decisions, and held that the court was bound to exercise an independent judgment. Other cases were cited, decided under the Railway Act, more or less applicable. I think we must give an independent judgment, and adopt the decision in 31 O.R. Any other conclusion would lead to a dilemma similar to that which has amused students for twenty centuries and more. The ancient Cretan who asserted so stoutly that 'Cretans are always liars,' was proved to be lying, whether he told the truth or not. So, on the plaintiff's contention, we are reduced to the paradox that, if we are bound by a Divisional Court judgment, we are bound by that in 31 O.R. to hold that we are not bound. On principle, however, I am of the opinion that the section cited does not refer to a court of final appeal. It is necessary to consider the case without regard to the decision just referred to."

The case of *Farrell* v. *Gallagher*, 23 O.L.R. 130, above referred to, was a mechanic's lien action, brought by the contractor and certain lien holders who had done work and furnished materials. In consequence of the contractor's default, the owner took the work out of his hands before completion. The Referee found the plaintiff entitled to $739.90, and gave judgment for that amount, first to the wage earners in full, and the balance to the material men, following the decision of the King's Bench Division in *Russell* v. *French*, 28 O.R. 215. The judgment of the court was delivered by Mr. Justice Middleton, who reversed the finding as regards the material men, and at pp. 135-6 said as follows: "The case of *Russell* v. *French* (1897), 28 O.R. 215, is precisely in point. It is there held that the 20 per cent. is a fund for the payment of lien-holders, not subject to be affected by the failure of the contractor to perform his contract. This view is in conflict with the reasoning of *Goddard* v. *Coulson* (1884), 10 A.R. 1, and the decision in *In re Sears and Woods* (1893), 23 O.R. 474, which are said to be no longer applicable by reason of changes in the statute. The statute has

since been revised and in some particulars changed, but we cannot find any real grounds upon which the case can be distinguished. The soundness of the decision, however, is challenged, and, according to *Mercier* v. *Campbell* (1907), 14 O.L.R. 639, it is not conclusive authority, and we are bound to make an independent examination of the statute and earlier cases and to act upon our own opinion."

This decision certainly carries the law beyond anything laid down in the previous judgments above referred to. In these cases, the Divisional Court was the final court of appeal, and Mr. Justice Riddell, in *Mercier* v. *Campbell*, says with reference to s. 81 above quoted: "On principle, I am of the opinion that the section cited does not refer to a court of final appeal." However this may be, no such reasoning can be applicable in the *Farrell* case, as under s. 40 of the Mechanics' and Wage Earners' Lien Act, the decision of a Divisional Court is final only where the aggregate amount of the claims of the plaintiff and all other persons claiming liens, is not more than $500. In this case the aggregate amount was considerably over that sum, and as a matter of fact, an application was made by the plaintiff for leave to appeal to the Court of Appeal (see 2 O.W.N. 815). The Chief Justice, in refusing leave, referred to the fact that the lien holders had not sought to appeal from the judgment, and added: "The plaintiffs have no locus standi to assert the rights of the sub-contractors against the defendant Mrs. Gallagher. Rightly or wrongly it has been held that these sub-contractors have no lien against Mrs. Gallagher's land, and consequently she is not liable to pay them." It is a fair inference from this statement, that if the lien holders had applied for leave to appeal, such leave could and might have been granted.

Without at all going into the merits of the decision of the Divisional Court, one cannot view without some concern, the extension of such a principle; and it is apparent that even the exemption from the operation of section 81 of the Judicature Act, claimed by Mr. Justice Riddell, does not represent the views of all the judges. After the enactment of this section, the

case of *Toronto Auer Light Co.* v. *Colling* came before the Chancery Division on appeal from the County Court of York, and the Chancellor in delivering the judgment of the court, 31 O.R. at page 27 said: "Though this is the final court of appeal in this litigation, still I think it is our duty to defer to the various cases which affirm the validity of the patent, and to follow the example of the Court of Appeal in the unreported case of *Welsbach Co.* v. *Stannard*, in which the court refused to disturb the decision in the *O'Brien* case (1897), 5 Ex. C.R. 243."

In *Slater* v. *Laboree*, 10 O.L.R. 648, which was an appeal from the junior judge of Carleton, Meredith, C.J., in delivering the judgment of the court affirming the judgment below, said: "The learned judge of the Division Court held that he was bound to follow the decision of the Supreme Court of Canada in *Robinson* v. *Mann*, 31 S.C.R. 484, and he accordingly gave judgment for the respondents. We are of the opinion that the learned judge was right in following *Robinson* v. *Mann*, which is an express and the latest decision on the very point raised by the appellant. It was not for the learned judge, nor is it for us to question whether a decision of the highest court in Canada is in accordance with the previous cases. It is our duty, as it was his to follow it."

In the case of *Crowe* v. *Graham*, 22 O.L.R. 145, which was heard before a Divisional Court composed of the Chancellor, Riddell, J., and Middleton, J., on appeal from the County Court of Hastings, the Chancellor said, in discussing this point, at p. 147: "The other Canadian case of *Donnelly* v. *Stewart*, 25 U.C.R. 398, does not carry the matter any further; it merely affirms the earlier case, but apparently on the ground that, by reason of its having stood thirteen years unquestioned, the court was not disposed to depart from it except on the strongest grounds. That case indicates, I think, the course that should be taken by us, viz., to follow the earlier cases, which have now for over fifty years been regarded as law. As this case cannot be taken to the Court of Appeal, it must be left for the consideration of the Legislature as to whether any change should be made

on this point of law." Mr. Justice Riddell, at p. 148, dealt with this point as follows: "It has been pointed out, both before and since the Ontario Judicature Act, and before and since 58 Vict. c. 12, s. 79, now s. 81 of the Ontario Judicature Act, that a court sitting in appeal from a County Court decision, being the final court, is not bound by previous decisions; per Hagarty, J., in *Donnelly* v. *Stewart*, 25 U.C.R., at p. 398; per Armour, C.J., in *Canadian Bank of Commerce* v. *Perram* (1899), 31 O.R. 116, at p. 118; *Mercier* v. *Campbell* (1907), 14 O.L.R. 639, at p. 645 (in the first two cases by a judge giving the judgment of the court). If the case stood thus without anything further, we might not follow the cases in 11 and 25 U.C.R. without inquiring into the soundness of the decisions. But there are authorities which we are bound to follow, whether they recommend themselves to our judgment or not."

The authorities referred to, consisting of decisions of the Court of Appeal in England, and which are declared by the Privy Council to be binding on Colonial courts, are then discussed by the learned judge in detail. But one cannot well understand why a decision of the Court of Appeal in England should be of more binding authority upon an Ontario Divisional Court, sitting in appeal from a County Court, than would be a decision of our own Court of Appeal, such as that of *Duthie* v. *Essery*, above referred to; nor why such latter decision should not be as binding upon a Divisional Court as a decision of the Supreme Court like that of *Robinson* v. *Mann*. It may not be out of place to here remark that *Robinson* v. *Mann* affirmed *Duthie* v. *Essery*, and therefore overruled *Canadian Bank of Commerce* v. *Perram*.

The practical result of the cases is to establish a different principle of decision in County Court appeals, from that followed in High Court appeals, notwithstanding the fact that Con. Rule 1217 expressly provides that "motions against judgments and for new trials in actions in the County Court shall be disposed of upon the like grounds and principles as in the High Court." As things are at present, it is impossible for a county judge or

an officer trying a mechanic's lien action, to decide a matter with any certainty that the decision of a Divisional Court or even of a higher court, upon which his judgment is based, will be followed, in case an appeal is taken from him. If it is necessary that there should be further legislation to prevent the continuance of this anomaly, the sooner it is introduced and enacted the better.

For an interesting discussion of the doctrine of stare decisis, see the judgment of Mr. Justice Anglin, in the case of *Stuart* v. *Bank of Montreal*, 41 S.C.R., at p. 536. See also a previous article by the writer in vol. 22 Canada Law Times, p. 419, on the lack of judicial agreement as to the meaning of the words "ascertained by the act of the parties" in the County Courts Act, which words have now been fortunately eliminated from the statute.

M. J. GORMAN.

OTTAWA.

A DISGRACE TO THE BENCH.

It would be difficult to find in judicial annals anything to equal the incident which appears in the public press in reference to a judge of the Northern Judicial Circuit, of the State of Georgia. Two negroes were accused of assaulting a woman. It was necessary to send them to an adjoining county for trial. The authorities told the judge who gave the order for their transmission, that they would be lynched on the way, if they were not guarded by troops; and he was asked to order an escort for them. This he refused to do and the men were lynched accordingly. The reason given by this disgrace to the Bench was thus expressed: "I do not propose to be the engine of sacrificing any white man's life for all the negro rapists in the country. (They were not yet tried and therefore still technically innocent.) I would not imperil the life of one white man to save the life of a hundred negro criminals. If I called out the military, and some young man among them was killed, I would never forgive myself. The clods falling on the grave of such a one would ring

in my ears as long as life lasted." It is unnecessary in a legal journal to enlarge on such an exhibition of judicial imbecility, cowardice, and disregard of duty. For the sake of his country it is to be hoped that there are none others occupying such a position who would act in such a dastardly manner.

The *Law Magazine and Review* for May contains an article on the law relating to commissions and tips. The writer sums up his conclusions as follows:—

(1) Commissions and tips, if open and unconcealed, and given to the agent with the principal's knowledge, are legal.

(2) Commissions and tips, given to the agent without the principal's knowledge and for the purpose of influencing him in relation to his principal's affairs, even if the principal did not suffer any injury, are illegal. The principal has (*a*) a civil remedy, and may recover the amount of the bribe from the agent. He had also (*b*) a criminal remedy both at common law and under the Prevention of Corruption Act, 1906, and may prosecute the agent.

In conclusion, it may be stated that the law relating to tips, came under consideration in 1908 in the case of *Penn* v. *Spiers and Pond*, L.R. [1908] 1 K.B. 766. In that case the question arose as to whether the "tips" given to a waiter on a restaurant car running on the London and South Western Railway were part of his "earnings" under the Workmen's Compensation Act, 1906. The Court of Appeal held that they were. The Master of the Rolls, in giving judgment, said: "We desire to state that nothing in this judgment extends to "tips" or "gratuities" (*a*) which are illicit; (*b*) which involve or encourage a neglect or breach of duty on the part of the recipient to his employer; or (*c*) which are casual and sporadic and trivial in amount. But where the employment is of such nature that the habitual giving and receiving of "tips" is open and notorious, and sanctioned by the employer, so that he could not complain of the retention by the servant of the money thus received, we think the money thus received with his knowledge and approval ought to be brought into account in estimating the average weekly earnings."

REVIEW OF CURRENT ENGLISH CASES.

ADMINISTRATION—LEGATEE DEBTOR—RETAINER OF LEGACY IN SATISFACTION OF DEBT DUE TESTATOR'S ESTATE—SET OFF.

In *Turner* v. *Turner* (1911) 1 Ch. 716 a question arose in the winding-up of a partnership. The firm was indebted to a deceased testatrix who had, by her will, bequeathed legacies to both members of the firm; and the question was whether there was any right of retainer or set-off of the individual legacies against the debt due by the firm. It was contended that *Smith* v. *Smith*, 3 Giff. 263, 270, had decided that the right of set-off claimed did exist, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.) held that that case only decided that the assignees in bankruptcy of a firm indebted to an estate were not entitled to recover a legacy bequeathed to one of the members of the firm, without first paying the firm debt. But the Master of the Rolls points out that the assignees in bankruptcy of a member of a partnership were at the date of that decision assignees both of the joint and separate estates of such partner, but that a partner so long as the firm is in existence, is only jointly liable for partnership debts, although on his death or bankruptcy his estate is severally liable in due course of administration for partnership debts, but subject to the prior payment of his separate debts. In the present case the firm being in esse, the Court of Appeal held that the right of retainer or set-off of the legacies to individual partners against a debt due by the firm of which they were members did not exist.

FIDUCIARY RELATION—GIFT—NATURAL AFFECTION—DUAL RELATION EXISTING BETWEEN DONOR AND DONEE—INDEPENDENT ADVICE—MOTHER AND SON.

In re Coomber, Coomber v. *Coomber* (1911) 1 Ch. 723, the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.) have affirmed the decision of Neville, J. (1911), 1 Ch. 174 (noted ante, p. 222), but on somewhat different grounds. It may be remembered that the action was brought to impeach a gift from mother to son for want of independent advice. Neville, J., upheld the gift as being made in consideration of natural affection, and because the donee thought that

in making it she was carrying out her deceased husband's wishes. The Court of Appeal proceeded on a somewhat broader ground, that it is not every fiduciary relation between a donor and donee which will induce a court of equity to set aside a gift for want of independent advice, but only where the relations between the donor and donee raise a presumption of undue influence, and that it is sufficient if an independent adviser sees that a donor understands what he is doing and intends to do it, and that it is not necessary for him to advise him to do it, or not to do it; as Moulton, L.J., puts it, independent and competent advice, does not mean independent and competent approval.

COMPANY—WINDING-UP—"SURPLUS ASSETS."

In re Ramel Syndicate (1911) 1 Ch. 749. In this case a company was being wound up. By its articles of association there were two classes of shares of £1 and 1s. each. The former was called class A and the other class B and it was provided that in the event of the company being wound up "the surplus assets" were to be equally divided, one half to be distributable among class A and the other among class B. The point Neville, J., was called on to decide was, whether the expression "surplus assets" meant the surplus which remained after payment of all the debts and outside obligations of the company, or whether it meant the surplus left after payment of all debts and the return of all paid up capital to the shareholders; and the learned Judge came to the conclusion that the latter alternative was the proper meaning of the words.

MUNICIPALITY—COUNCILLOR—DISQUALIFICATION — JOINT COMMITTEE FOR TWO DISTRICTS—CLERK OF COMMITTEE—(CON. MUNICIPAL ACT (3 EDW. VII. c. 19) s. 80).

Greville-Smith v. *Tomlin* (1911) 2 K.B. 9. In this case two municipal bodies had formed a joint committee composed of members of each corporation for the purpose of providing hospital accommodation for the use of inhabitants of both municipalities, the defendant, a councillor of one of the municipalities, was appointed secretary of this committee and paid for his services out of a fund contributed to by both municipalities. On a case stated by justices a Divisional Court (Lord Alverstone, C.J., and Ridley, and Channell, JJ.) held, that the defendant was the holder of a paid office under the council of which he was

a member, and as such had become disqualified to act, and had subjected himself to a penalty for acting as a member of the council after he had incurred such disqualification (see Ont. Munl. Act, s. 80).

EXTRADITION—REQUISITION OF FOREIGN GOVERNMENT FOR SURRENDER OF CRIMINAL—CONDITIONS OF TREATY—DEFECT IN PROCEDURE—JURISDICTION.

The King v. *Governor of Brixton Prison* (1911) 2 K.B. 82. This was an application made on the return of a habeas corpus for discharge from custody. The applicant was charged with obtaining money by false pretences. The offence was alleged to have been committed on a railway train, and there was some doubt whether it was committed in France or Belgium. On December 22, 1910, a deposition alleging the facts was sworn before a commissioner of police in Brussels, and on February 6, 1911 a warrant had been issued by a magistrate in France, it did not appear what evidence this magistrate acted on but presumably he had the deposition made in Brussels before him. At the time this warrant issued no depositions relating to the charge had been taken on oath before him. A requisition by the French diplomatic representative having been made to the Home Secretary, he issued an order addressed to the chief magistrate at Bow Street signifying that the requisition had been made, and requiring him to issue a warrant for the defendant's arrest, which having been done, and the defendant having been taken into custody thereunder, he was committed to prison by the magistrate to further answer the charge against him. By the treaty between France and England it was provided that requisition for extradition should be accompanied by the warrant and depositions, and the prisoner contended that the omission to send depositions from France entitled him to be discharged. But the Divisional Court (Ridley, Darling and Channell, JJ.) held that that was a matter merely for the Home Secretary's discretion and that the prisoner could not claim his discharge merely because the Home Secretary had not seen fit to require depositions, and that his order to the magistrate was sufficient to give the latter jurisdiction to issue the warrant and to commit the defendant. The application was therefore refused.

FOREIGN JUDGMENT—CRIMINAL PROSECUTION FOR NEGLIGENCE—CLAIM OF INJURED PERSON FOR DAMAGES—JUDGMENT FOR CRIMINAL OFFENCE; AND AWARD OF DAMAGES TO INJURED PERSON—SEVERABLE JUDGMENT—PENAL LAW.

Ranlin v. *Fischer* (1911) 2 K.B. 93. It appears that according to French law, where a person is prosecuted for criminal negligence, the person injured may intervene in the proceedings and claim damages for the injury sustained, which claim is tried along with the criminal charge, and a judgment pronounced both as to the criminal offence, and the civil claim for damages. In the present case the defendant, an American lady, had recklessly galloped her horse in the Avenue du Bois de Boulounge, and had run into and seriously injured the plaintiff. The defendant had been prosecuted in the French court for the offence, and the plaintiff had made a claim for, and had been awarded damages for the injury he had sustained. This part of the judgment he now sued upon in this action. The defendant contended that as, under the well-settled rule of international law, that one country will not enforce the penal laws of another country the claim could not be enforced in England; but Hamilton, J., who tried the action, held that the judgment in question was severable and that an action might be maintained in England on that part of it which awarded damages.

ADMINISTRATION—CREDITOR OF DECEASED DEBTOR—APPEAL—"PERSON AGGRIEVED"—(CON. RULE 358).

In re Kitson (1911) 2 K.B. 109. In this case the appellants had obtained an order for the administration of their deceased debtor's estate in the Chancery Division of the High Court. On the same day the respondents, who also claimed to be creditors of the deceased in respect of goods supplied by them after his death to his executrix who continued to carry on the deceased's business, presented a petition in bankruptcy on which an order was made for the administration of the deceased's estate in bankruptcy, and it was to set aside the latter order that the present appeal was brought and it was held by Phillimore and Horridge, JJ., that the appellants were persons aggrieved, and therefore entitled to appeal from the order in question—(see Con. Rule 358)—and also that the respondents were not in fact creditors of the deceased, and therefore that the court had no jurisdiction on their application to make an order to administer the estate in bankruptcy. The order appealed from was therefore vacated.

POISON—SALE OF POISON—POISONOUS SUBSTANCE FOR USE IN AGRICULTURE—BOTTLE NOT LABELLED WITH NAME AND ADDRESS OF SELLER—PHARMACY ACT (31-32 VICT. C. 121) SS. 15, 17—POISONS AND PHARMACY ACT, 1908 (8 EDW. VII. C. 55) S. 2—(1 GEO. V. C. 40, SS. 28, 30, ONT.).

Pharmaceutical Society v. *Jacks* (1911) 2 K.B. 115. This was a prosecution for breach of the Pharmacy Act. The defendant, who was not a chemist or druggist, was duly licensed to sell poisonous substances to be used in agriculture and horticulture; he had sold a poisonous substance for that purpose in a bottle which was not labelled with his name and address. He was sued for a penalty; sec. 15 of the English Act forbids all sales of poisons by others than registered chemists (see Ont. Act, s. 28), and section 17 empowers persons not registered as chemists to sell certain specified poisonous substances for use exclusively in agriculture or horticulture, but provides that such articles are to be sold conformably to regulations; and by order in council it was provided that such sales must not be made except the substance be enclosed in a vessel or receptacle and labelled "Poison" and with the name and address of the seller (see 1 Geo. V. c. 40, s. 30, Ont.). The defendant having sold a poisonous substance but omitted to label the package with his name and address, it was held that he was guilty of an offence against the Act under s. 15, and that none the less because the facts shewed that he had also committed an offence against s. 17.

DISTRESS DAMAGE FEASANT—IMPOUNDING DISTRESS—POUND IN SAME HUNDRED BUT MORE THAN THREE MILES DISTANT—1 P. & M. C. 12, S. 1—(1 GEO. V. C. 37, S. 50).

Coaker v. *Wilcocks* (1911) 2 K.B. 124. The Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.) have affirmed the decision of the Divisional Court (1911) 1 K.B. 649 (noted ante, p. 298), to the effect, that under 1 P & M. c. 12, s. 1 (1 Geo. V., c. 37, s. 40, Ont.), a distress taken damage feasant may be impounded in a pound in the same hundred although it be more than three miles from the place of distress.

TRADE UNION—SICK BENEFIT—AGREEMENT TO REPAY SUM RECEIVED AS BENEFIT—TRADE UNION ACT, 1871 (34-35 VICT. C. 31) S. 4—(R.S.C., C. 125, S. 4.)

Baker v. *Ingall* (1911) 2 K.B. 132. The defendant in this case was a member of a Friendly Society registered under the

Trade Union Act, 1871 (34-35 Vict. c. 31)—(see R.S.C., c. 125). By one of the rules of the Society in case the defendant became incapicitated for work by accident he was entitled to receive from the funds of the society £100; and on receiving such payment, he was required to sign and did sign an agreement to refund the money to the society on his again becoming able to work; and if a member in such circumstances failed to refund, the officers of the society were authorized to sue for the recovery of the money. The defendant had been incapacitated by accident, and had been paid £100, and he had subsequently become able to resume work, but had failed to refund the £100, and the present action was brought for its recovery. The defendant contended that under s. 4 of the Trade Union Act, 1871—(see R.S.C. c. 125, s. 4), the action could not be entertained; but a Divisional Court (Phillimore and Bankes, JJ.), held that the action did not come within that section and was therefore maintainable.

COMPANY—JUDGMENT DEBT—EXECUTION—ISSUE OF EXECUTION STAYED BY TRICK—LIQUIDATION—LEAVE TO PROCEED ON EXECUTION NOTWITHSTANDING WINDING-UP PROCEEDINGS—WINDING-UP—COMPANIES ACT, 1908 (8 EDW. VII. c. 69) s. 140—(WINDING-UP ACT (R.S.C. c. 144, s. 22).

Amorduct Manufacturing Co. v. *General Incandescent Co.* (1911) 2 K.B. 143. In this case the plaintiffs obtained judgment against the defendants on February 24, 1911, and the plaintiffs' solicitor applied to the defendants' solicitor to obtain and send him the defendants' cheque in settlement of the judgment debt. The plaintiffs' solicitor was led by the defendants' solicitor to believe that this would be done and in consequence delayed issuing execution, but on 25th February, unknown to the plaintiff, or their solicitor, the defendants had sent out notice convening a meeting on March 6th for the purpose of passing a resolution for the voluntary winding-up of the defendant company. The meeting was held on March 6th and the resolution passed. On the same day the judgment debt not having been paid execution was issued. The sheriff took out an interpleader summons in which the liquidator was claimant. Lawrance, J., on the ex parte application of the liquidator ordered the sheriff to withdraw from possession and stayed the interpleader proceedings. The plaintiffs then took out a summons to set aside the order of Lawrance, J., or to

vary it by directing the trial of an interpleader issue between the plaintiffs and the liquidator; on this application Bucknill, J., made an order that the sheriff do withdraw from possession and from this the plaintiffs appealed; and the Court of Appeal (Farewell and Kennedy, L.JJ.), allowed the appeal, being of the opinion that the plaintiffs had been tricked into postponing the issue of their execution, and that neither the defendant company nor its other creditors, were entitled to any benefit from that trick.

MUNICIPALITY—FIRE PLUG—MISLEADING INDICATION PLATE—DELAY IN EXTINGUISHING FIRE—DAMAGE—LIABILITY OF MUNICIPALITY—MISFEASANCE—NON-FEASANCE,

Dawson v. *Bingley Urban District Council* (1911) 2 K.B. 149. By a statute, municipal authorities are required to cause fire plugs to be provided, and to paint or mark on the buildings and walls within the streets, words or marks to denote the situate of such fire plugs. The defendants provided a fire plug and placed on the wall in a street a plate intended to mark its situation, but in fact a line drawn straight across the street from this mark crossed the water main at a distance 6 feet 10 inches distant from the fire plug. A fire having occurred in the plaintiff's premises, the fire brigade was quickly in attendance, but there was considerable delay owing to the inability of the firemen to find the exact position of the fire plug, and as a result the fire caused more damage than it would have done had the fire plug been promptly located. In these circumstances Grantham, J., held that the defendants were guilty of an act of misfeasance and not of non-feasance only, and were therefore liable to make good the extra loss the plaintiff had thereby sustained.

MASTER AND SERVANT—NEGLIGENCE—STATUTORY DUTY.

Watkins v. *The Naval Colliery Co.* (1911) 2 K.B. 162. This action was brought by the widow of a deceased workman of the defendants to recover damages for an alleged breach by the defendants of their statutory duty under the Coal Mines Regulation Act, 1887, by s. 49 of which it is provided: "The following general rules shall be observed so far as reasonably practicable in every mine," and rule 30: "There shall be attached to every machine worked by steam, water or mechanical power, and used for lowering or raising persons, an adequate brake or brakes . . .". In the defendants' mine in which the de-

ceased had worked, there was an engine used for lowering or raising persons in a cage. In August, 1909, a workman of defendants had been killed while being lowered in the cage. Some years before the accident now in question a new brake had been attached to the engine for the purpose of being used with a larger cage than had been theretofore used, and this cage had been used for raising or lowering 20 men at a time. A new manager in June, 1909, gave directions increasing the number to be raised or lowered to 26, and from that time until the accident, two months afterwards, that number had been raised or lowered in the cage. At the time of the accident 27 men were being lowered when a portion of the engine known as the spanner bar, which is part of the reversing gear broke, and the reversing gear failed to act, with the result that the cage, then 32 feet from the bottom of the shaft, fell violently to the bottom; and an empty ascending cage broke away and fell on the top of the cage in which the deceased was. The jury found that the accident was caused by a deficient brake coupled with a defective spanner bar. Pickford, J., who tried the action gave judgment for the plaintiff but the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.) reversed his decision on the ground that the statute did not impose an absolute duty to provide an adequate brake for all loads that might be carried in the cage, and that the defendants had sufficiently discharged their statutory duty by providing a brake which was sufficient in the judgment of their expert manager, and the defendants not being guilty of any negligence were therefore not liable.

SHIP—DISTRESSED SEAMAN—SEAMAN LEFT BEHIND AT FOREIGN PORT—INCAPACITY OF SEAMAN FOR DUTY OWING TO VENEREAL DISEASE—MAINTENANCE — SURGICAL ADVICE — MERCHANTS SHIPPING ACT, 1906 (6 EDW. VII. C. 48) SS. 32, 34, 35, 41, 42.

Board of Trade v. *Anglo American Oil Co.* (1911) 2 K.B. 225. This was an action under the Merchants Shipping Act, 1906, to recover from defendant shipowners the cost of board, lodging and conveyance home and surgical expenses of a seaman who had been in the defendants' employ who had been left behind when the defendants' ship left a foreign port, because he was incapacitated from duty owing to his being afflicted with a venereal disease. Scrutton, J., who tried the action held that

under the Act that the defendants were liable for the expense of board and maintenance and conveyance home of the seaman in question but not for any surgical or medical expenses, and that under the Act it is only where the seaman is suffering from any illness not being venereal disease or due to his own wilful act, default, or misbehaviour, that the shipowner is liable for medical attendance.

SHIP—GENERAL AVERAGE—EVIDENCE—ONUS OF PROOF—SEAWORTHINESS.

Lindsay v. *Klein* (1911) A.C. 194 may be briefly noticed. The action was by shipowners to recover from the cargo owners a contribution to general average for damage to the ship and expenses occasioned by its having to go into port and discharge and reload the cargo. The House of Lords (Lord Loreburn, L.C., and Lords Shaw, Kinnear and Dundas), affirming the First Division of the Scotch Court of Session, held that the onus of shewing that the ship was seaworthy at the commencement of the voyage, was on the plaintiffs, and having failed to discharge that onus the action failed.

MASTER AND SERVANT—SLANDER BY SERVANT—LIABILITY OF MASTER FOR SLANDER UTTERED BY SERVANT.

Glasgow v. *Lorimer* (1911) A.C. 209. This was an action brought by the plaintiff against the City of Glasgow to recover damages in respect of a slander by a tax collector, employed by the defendants. The plaintiff alleged that the collector in question went to the plaintiff's house to demand payment of taxes, and she produced a receipt for 7s. 6d., which the collector then declared had been altered from the sum of 4s. 6d. for which it had been made out, and when the plaintiff denied the charge, he threatened to lodge an information with the police authorities, which would result in her being put in gaol for three months for forgery, and that he repeated the slander in the house of a neighbour of the plaintiff. The Scotch Court of Session held that the averments were relevant, but the House of Lords (Lord Loreburn, L.C., and Lords Kinnear, Atkinson, and Shaw) were unanimously of the opinion that they disclosed no cause of action and that the tax collector had no authority from the defendants, express or implied to express any opinion as to the genuineness of the receipt.

ELECTION—INVALID EXERCISE OF POWER—CONDITION OF ACCEPTANCE OF LEGACIES—APPROPRIATE AND REPROBATE.

Pitman v. *Crum Euring* (1911) A.C. 217 is an instance that the law of Scotland is the same as that of England, in that it will not permit an person to accept a benefit under an instrument and at the same time reject other provisions thereof and refuse to renounce every right inconsistent therewith. The facts in this case were that a testator gave the life rent of a fund to his daughter and the fee to her children, "in such proportions . . . and subject to such restrictions, limitations as she may direct," and failing such directions, then equally among them. The daughter by a comprehensive trust disposition and settlement, which was not a good evercise of the power, gave the fund massed with her own estate to her children in life rent and to their children in fee. The children of the daughter claimed the fund in default of appointment, but the House of Lords (Lords Atkinson, Halsbury, Macnaghten, and Shaw), reversing the Scotch Court of Session, held that the children were put to their election between their rights in default of appointment and the benefits conferred by the will, as it was not open to them to accept or reject the will in part.

SALE OF GOODS—AGENT—AUTHORITY OF AGENT TO RECEIVE PAYMENT IN CASH—DIRECTIONS AS TO PAYMENT BY CROSSED CHEQUE—NOTICE AS TO FORM OF RECEIPT.

International Sponge Importers v. *Watt* (1911) A.C. 279. In this case the appellants employed a traveller to sell their goods and he carried with him parcels of sponges for that purpose. When a sale was made, it was his duty to forward to the appellants a sale sheet containing particulars of the sale. The appellants then forwarded to the customer an invoice of goods sold, which was followed by a monthly statement of account. This statement of account contained three notices. 1st. Cheques to be crossed;" 2nd "all cheques to be made payable to International Sponge Importers" and 3rd "no receipt valid unless on the firm's printed form, to be attached hereto." The appellants had for some years dealt with the respondents on this system. In 1905, 1907, and 1908, the traveller sold and delivered to the respondent, three parcels of sponges. In the first and second of these sales he induced the respondents to pay for the sponges by a cheque payable to himself and on the third occasion they paid him £120 in notes and gold. The traveller having no

authority to receive anything except crossed cheques in favour of the appellants, fraudulently appropriated the payments made to him by the respondents and by fraudulent entries in the appellants' books the fraud was concealed from the appellants for some years and the question at issue in the action was—who was to bear the loss? The appellants sought to recover the value of the sponges so delivered from the respondents, and the latter contended that the payments made to the traveller therefor were valid payments, as against the appellants; and the Scotch Court of Session so held, and the House of Lords (Lords Loreburn, L.C., and Lords Atkinson and Shaw), affirmed the decision being of the opinion that the notices above referred to did not contain a sufficient intimation to the respondents that the traveller was not entitled to receive payment in cash, or by cheque payable to himself, and as Lord Loreburn points out that the same conspiracy which cheated the plaintiffs had the effect of misleading the defendants and causing them to act on the supposition that the traveller actually had authority to receive payment in cash or its equivalent.

MINES—"COAL, IRONSTONE, SLATE AND OTHER MINERALS"—FIRE CLAY—MINERAL.

The Caledonian Railway v. *Glenboig Union Fireclay Co.* (1911) A.C. 290. In this case the difficult question as to the meaning of "minerals" was under consideration. By statute "mines of coal, ironstone, slate, and other minerals" are excepted from lands expropriated by railway companies for the purposes of their railway, and the question was whether a bed of fireclay under land expropriated by the appellants for their railway was a mineral within the meaning of the Act. The Scotch Court of Session held that it was, and the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Shaw and Robson), affirmed the decision.

BREACH OF CONTRACT—LATE DELIVERY OF GOODS SOLD—MEASURE OF DAMAGES—PURCHASER ONLY ENTITLED TO INDEMNITY AGAINST LOSS.

Werthim v. *Chicoutimi Pulp Co.* (1911) A.C. 301. This was an appeal from Quebec. The action was brought to recover damages for breach of contract to deliver goods at a specific time. The contract provided that the goods were to be delivered between September 1st and November 1st, and the plaintiff

claimed to recover 27s. 6d. a ton, being the difference between 70s., the market price at the post of delivery at the due date, and 42s. 6d., the market price at the same place on the date of actual delivery; it appeared, however, that the plaintiff had subsequently sold the goods at 65s. a ton, involving a loss to him of only 5s. a ton. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Collins, and Shaw), held that 5s. per ton was all that the plaintiff could recover. This case appears to bear out the view we expressed on this subject ante, p. 281.

DISCRETIONARY POWER TO PROVIDE MAINTENANCE—SEPARATE WILLS—SEPARATE TRUSTEES—DISCRETION—CONTRIBUTION.

Smith v. *Cock* (1911) A.C. 317 was a somewhat unusual case. The appellants as trustees under a will had discretionary power to pay to the testator's daughter £800 a year, the unpaid portion to fall into the residue. A like power was given to the appellant and a respondent as trustees under the will of her sister to pay such sums as the trustees should think fit in and towards her maintenance, the residue of the income of the testatrix's estate to be paid to her nephew, and the corpus to go in equal shares to his children on death. The trustees under the first will paid the daughter £400 a year, but on the death of the testatrix they reduced the allowance to £100 a year, while the trustees of the second will paid from £700 to £800 a year. This action was brought by the nephew and the trustee of his insolvent estate claiming that the daughter's maintenance should be provided by a proportionate contribution from each estate. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, Mersey, and Robson), reversed the decision of the High Court of Australia and held that the plaintiffs had no such equity as claimed and there was no common obligation and consequently no right to contribution, inasmuch as the trusts were discretionary and to be exercised by different trustees.

Correspondence

PROMISSORY NOTE IN BLANK—POSITION OF HOLDER IN DUE COURSE.

HUBBERT v. HOME BANK, 20 O.L.R. 651.
RAY v. WILLSON, 2 O.W.N. 1250.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—These decisions must be of very great interest and importance to banks and solicitors; but I must confess I cannot understand them; and thought that perhaps you would not object to throwing some light upon them.

We have here two cases, in which we may assume that promissory notes in due and proper form, for all that appears, in the hands of a bonâ fide holder for value, are held to be mere pieces of waste paper, because the maker has signed them in blank, left them with a trusted agent of his own, to be filled up in certain contingencies (which are profound secrets between the maker and his trusted agent) and this trusted agent has violated his trust, and has filled up those notes and put them into circulation. We can assume that the endorsees have no notice of the secret instructions, and we may further assume that all inquiry by him, if he made any inquiry, of the payee or prior holder, would not have made him any wiser, and that he could not by any means whatever have any knowledge of the secret instructions unless he applies for information to the maker himself. This latter course is inconceivable as to hold it necessary would be to destroy the negotiability of bills and notes. Does sec. 32, read with sec. 31, of the Bills of Exchange Act, preclude the endorsee from recovering against the maker?

In this inquiry, we are eliminating the question of the bonâ fides of the endorsee altogether—he is presumed to be in good faith.

Why should the bonâ fide holder of such an instrument be in a different position from one who takes a note which has been made without consideration, or obtained by fraud or duress? So far as the endorsee is concerned, a maker of such a note (in blank) should not be in any better position than the maker of a note without consideration or obtained from him by a fraud —in fact, one would rather be likely to think that a man who signs the form of a blank note is ready to accept all risks of what will happen to it—and properly so. If he trusts the payee

or custodian so implicitly, he ought to be compelled to answer whatever the custodian does with it.

The point, however, which strikes me most forcibly is that in the above cases, the courts, in holding that there was no delivery or issue of the notes, were not referred to sec. 40 of the Act, which provides that as between *immediate parties*, and as regards *remote parties other than holders in due course*, the delivery in order to be effectual, must be under the authority of the party drawing or accepting it, or if conditional, that the condition has been performed.

But, here comes the difference. By sub-sec. 2 of sec. 40, "If the bill is in the hands of a bonâ fide holder, a valid delivery of the bill to him is to be conclusively presumed." This section is not cited in *Ray* v. *Willson*, or in *Home Bank* v. *Hubbert*, and it is intended, no doubt, to preserve to a bonâ fide holder the protection he has always been entitled to. The delivery in both of these cases was, no doubt, in violation of the conditions upon which, as between the maker and his agent, the notes were to be delivered or circulated, but, for the protection of the bonâ fide holder, the valid delivery must be conclusively presumed.

The decisions above mentioned really place such notes upon the same plane as if the maker had signed a note, and put it in a drawer, from where it is stolen, and put in circulation by the thief. Of course, in such a case the maker would not be liable, because he never delivered or issued it, and an endorsee must take the risk of that, as he must of its being a forgery, but in these cases, the maker knew or should have known, that he was putting in the power of his custodian or agent, the power to swindle a bonâ fide endorsee by issuing the note contrary to instructions, and he, the maker, should suffer from the fraud of one whom he has trusted, rather than an innocent holder. It may be that I have not grasped the meaning of the decisions or rather the reasoning of them.

It appears that in *Smith* v. *Prosser* (1907), 2 K.B. 735, the endorsee was put upon inquiry by the fact that the note when offered to him was not complete, and he therefore knew that the custodian had received an incomplete instrument, and that very fact implies that he had some limited authority.

If *Ray* v. *Wilson* had been rested upon the ground that the plaintiff was not a holder without notice, and the other point not dealt with in the way it was, it would not have puzzled the writer so much.

I cannot see how sec. 40 is ever to have any application unless in a case like this.

Yours, J. R.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Britton and Riddell, JJ.] [July 19.

BONDY *v.* SANDWICH, WINDSOR AND AMHERSTBURG RY. CO.

Negligence—Duty towards trespasser—Ontario electric railway.

Appeal by the defendant from the judgment of the County Court of the county of Essex, awarding the plaintiff $200 for the loss of his horse, killed by the defendant's car. The defendant is an electric railway incorporated by the Ontario Legislature, and running between Windsor and Amherstburg along the highway and on an additional strip of land purchased from adjoining landowners. The track is partly on the highway and partly on the purchased strip. The horse in question had escaped from its pasture, and was standing upon the railway track, when the defendant's car, coming round a bend, struck the horse and caused its death.

The evidence shewed that as soon as the motorman saw the horse he did everything in his power to stop the car, but the jury found that he could have seen the horse in time to have stopped the car from striking it. There was a bend in the road which, together with the presence of trees on the adjoining land, to some extent obscured the vision

Held, reversing the County Court, that the horse was a trespasser, and that under the circumstances the motorman was under no obligation to keep a look-out, he having done all in his power to avert the collision after seeing the horse, and the appeal was therefore allowed and the action dismissed with costs.

C. A. Moss, for appellant. *J. H. Rodd*, Windsor, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] CHODERKER *v.* HARRISON. [June 13.

Landlord and tenant—Action by sub-tenant for wrongful distress.

Appeal from the judgment of ROBSON, J., noted ante, p. 75, dismissed with costs.

Full Court.] EGGERTSON *v.* NICASTRO. [June 13.

Fraudulent conveyance—27 Eliz. c. 4—Voluntary settlement.

Appeal from judgment of PRENDERGAST, J., noted vol. 46, p. 550, dismissed with costs.

Full Court.] [June 12.

DALZIEL *v.* HOMESEEKERS LAND, ETC., CO.

Vendor and purchaser—Cancellation of agreement of sale—Forfeiture—Repayment of monies paid on account—Damages.

Appeal from decision of ROBSON, J., noted ante, p. 153, allowed with costs.

Held, that, the plaintiff, having deliberately refrained from continuing his monthly payments for over two years and a half because the land had diminished in value and he was in doubt whether it "would do him any good" to pay any more instalments, was not entitled to any equitable relief against the forfeiture provided for by the contract, and, therefore, could not recover the amount he had paid. *Whitla* v. *Riverview*, 19 M.R. 746, distinguished, as in that case, because of the pleadings and the refusal of counsel to raise the point, the question of the purchaser's laches was, in the view of the majority of the Court, not before it for decision.

Hansford, for plaintiff. *Locke*, for defendants.

Full Court.] [June 12.

WINNIPEG OIL CO. *v.* CANADIAN NORTHERN RY. CO.

Railway Act, R.S.C. 1906, *c.* 37, *s.* 298—*Evidence—Fire started by sparks from locomotive—Contributory negligence—Action for injury to land out of the jurisdiction.*

Appeal from decision of PRENDERGAST, J., noted vol. 46, p.

703. The court affirmed the judgment except as to the amount allowed for damage to the building.

Held, that, as the building was part of the land, the title to which had been put in issue and which was in the Province of Saskatchewan, the courts of Manitoba have no jurisdiction to entertain an action for such damages. *Brereton* v. *C.P.R. Co.*, 29 O.R. 57, and *British S.A. Co.* v. *Mocambique* (1893), A.C. 602, followed.

Held, also, that, under s. 298 of the Railway Act, which makes the railway company liable for losses caused by a fire started by a locomotive, "whether guilty of negligence or not," no contributory negligence on the part of the owner, unless it is wanton or such as amounts to fraud in increasing the risk of fire, is available as a defence. *Vaughan* v. *Taff Vale Ry. Co.* 3 H. & N. 743; *Campbell* v. *McGregor*, 29 N.B. 644; *Jaffray* v. *T. G. & B. Ry. Co.*, 23 U.C.C.P. 560; *McLaren* v. *Canada Central*, 32 U.C. C.P. 341; *Bowen* v. *Boston & A.R. Co.*, 61 N.E.R., at p. 142; *Matthews* v. *Missouri Pacific*, 44 S.W.R. 802, and *Matthews* v. *St. Louis & S.F. Ry. Co.*, 24 S.W.R. at p. 602, followed.

Fillmore, for plaintiffs. *Clarke*, K.C., for defendants.

Full Court.] [June 12.

WATSON MANUFACTURING CO. v. BOWSER.

Partnership—Discharge of retiring partner by agreement with creditor inferred from course of dealing—Partnership Act.

The plaintiff company was a creditor of a firm composed of the defendant and one McDonald. This firm was dissolved in 1902, McDonald taking over the assets, assuming the liabilities and continuing the business. The plaintiff's manager took part in bringing about these arrangements and the company continued to sell goods and give credit to McDonald and subsequently to McDonald & Simmons. It took renewal notes from McDonald to cover the entire liability of the old partnership and the notes sued on were entered in the bill book as paid by these renewals. The balance due by the firm was charged up to McDonald in the new account opened for him in the books and the plaintiff, while persistently urging McDonald for payment during a period of nearly six years, never asked the defendant for payment, although it held the original notes of McDonald and Bowser now sued on. It sought security for this

debt from McDonald. Payments made by McDonald were credited directly to him in the plaintiff's ledger. Plaintiff allowed one of the notes sued on to become barred by the Statute of Limitations.

Held, that from these acts and conduct of the plaintiffs, there should be inferred an agreement by the plaintiff to discharge the defendant from his liability as a member of the firm and that the case comes within sub-section (*b*) of section 20 of the Partnership Act, R.S.M. 1902, c. 129. *Hart* v. *Alexander*, 7 C. & P. 746, 2 M. & W. 484, followed.

Fillmore, for plaintiff. *Fullerton* and *Foley*, for defendant.

Full Court.] [June 12.

SUTHERLAND *v.* CANADIAN NORTHERN RY. CO.

Limitation of time for commencing action—Injury received while working for railway company—What included in word "railway" as used in s. 306—Railways subject to Dominion legislation—Workmen's Compensation for Injuries Act—Distinction between rights of action arising under the Railway Act and those given by the common law or provincial legislation, as respects the limitation of time for commencing suit.

Held, 1. An injury caused by the defective state of a scaffold being used in the construction of an ice house for the use of a railway company is not one "sustained by reason of the construction or operation of the railway," within the meaning of s. 306 of the Railway Act, R.S.C. 1906, c. 37, and therefore an action to recover damages for such injury is not barred by that section by the lapse of a year.

Ryckman v. *Hamilton, etc., Ry. Co.*, 10 O.L.R. 419, and *Robinson* v. *C.N.R. Co.*, 43 S.C.R. 387, followed.

2. The limitation of time prescribed by section 306 relates only to actions against railway companies provided for in the Railway Act itself, and was not intended to apply to actions the rights of which exist at common law or under provincial legislation.

3. Dominion railways are subject to provincial legislation on the relations between master and servant, such as the Workmen's Compensation for Injuries Act, unless the field has been covered by Dominion legislation ancillary to Dominion legislation respecting railways under the jurisdiction of Parliament, and

sub-section 4 of section 306 qualifies its main clause and excludes its operation where the injury complained of comes within the jurisdiction of, and is specially dealt with by the laws of, the province in which it takes place, provided such laws do not encroach upon Dominion powers. *C.P.R. Co.* v. *Roy* (1902), A.C. 220, distinguished. *Canada Southern* v. *Jackson,* 17 S.C.R. at 325, followed.

Per CAMERON, J.A.:—Although the definition of the word, "railway" in par. (21) of s. 2 of the Railway Act, would seem to include the icehouse in question, yet that is subject to the qualifying provision "unless the context otherwise requires," at the beginning of s. 2, and the context in s. 306 does otherwise require.

McMurray and *Davidson,* for plaintiff. *Clarke,* K.C., for defendant.

Full Court.] [June 22.

BANK OF BRITISH NORTH AMERICA *v.* MCCOMB.

Bill of exchange and promissory notes—Holder in due course—Bills of Exchange Act—Consideration — Unfair dealing — Setting aside transaction for fraud or illegality—Recovery of money paid under protest.

Held, 1. The mere existence of a liability of a customer to a bank on a promissory note not yet due is not a sufficient consideration, under s. 53 of the Bills of Exchange Act, for the transfer by the customer to the bank of the promissory note of a third party as collateral security so as to constitute the bank the holder in due course of such promissory note or to give the bank a better title to it than the customer had as against the maker, unless there is evidence that such note was transferred pursuant to a previous agreement to give security. *Canadian Bank of Commerce* v. *Waite,* 1 Alta. 68, followed. *Currie* v. *Misa,* L.R. 10 Ex. 153, and *MacLean* v. *Clydesdale Banking Co.,* 9 A.C. 95, distinguished, on the ground that the debts there secured were overdue at the time the collaterals were received.

2. Where a promissory note has been given in respect of an indebtedness incurred, that indebtedness will not furnish a consideration for another simple contract made during the currency of the note, the original consideration having been merged in the note. *Hopkins* v. *Logan,* 5 M. & W. 241; *Roscorla* v. *Thomas,* 3 Q.B. 234, and *Kaye* v. *Dutton,* 7 M. & G. 815, followed.

The defendant was a young man without experience and of little business capacity and without independent advice when he was induced by one Bartlett to enter into a very disadvantageous bargain for the sale of his land which he could not carry out. Bartlett then made false representations as to the defendant's liability to him for damages and, assisted by his own solicitor, succeeded in procuring from the defendant the promissory note for $1,015 sued on in settlement of the supposed damages. He then indorsed over this note to the plaintiffs to be held as collateral security for a note of his own which was then current.

Held, that the issue of the note was affected with fraud or illegality within the meaning of s. 58 of the Bills of Exchange Act, that the dealings between Bartlett and the defendant were unfair and should be set aside, and that the plaintiffs, not being holders in due course and having no better title to the note than Bartlett, could not recover in an action against the defendant upon it. *Evans* v. *Llewellin*, 1 Cox 333; *Clark* v. *Malpas*, 4 De G. F. & J. 401; *Baker* v. *Monk*, 4 De G. J. & S. 388; *Fry* v. *Lane*, 40 Ch. D. 322; *Slator* v. *Nolan*, Ir. R. 11 Eq. 367, and *Waters* v. *Donnelly*, 9 O.R. 391, followed.

Held, also, that the defendant was entitled to recover from the plaintiffs the amount which he had paid them under protest to prevent the seizure and sale of his gods under a chattel mortgage which he had been induced to give to Bartlett to secure the note in question, and which Bartlett had assigned to the plaintiffs.

Curran, K.C., for plaintiffs. *Kilgour*, for defendant.

Full Court.] JOHNSON *v.* HENRY. [July 5.

Vendors and purchasers—Return of payments when vendor unable to make title—Payments in shares which afterwards became worthless—Right of vendor to return the shares instead of the amount at which they had been valued in the exchange —Estoppel by recovery of judgment.

The defendant sold 18 parcels of land to the plaintiff at an average price of $1,040 each and accepted shares in a company of the par value of $6,400 in lieu of the first payment to be made under the agreements. Plaintiff paid in cash by way of second instalment $794.56. Defendant recovered judgment against

plaintiff for the third instalment due on twelve of the agreements, and plaintiff paid the judgment. He afterwards discovered that defendant was unable to make title under thirteen of the agreements and brought this action.

Shortly after defendant acquired the shares, the company failed and the shares became worthless.

Held, 1. Plaintiff was entitled to recover back the cash he had paid on the lands for which defendant could not make title, including the amount paid to satisfy the judgment referred to, though not the costs of that action.

2. The said judgment was not, under the circumstances, an estoppel against the plaintiff, as he was ignorant of his rights when he failed to defend the action. *Jackson* v. *Scott*, 1 O.L.R. 488, followed.

3. RICHARDS, J.A., dissenting. In respect of the first payments, defendant should only be ordered to transfer back the shares he had received from the plaintiff and was not liable for the amount in cash at which he had taken them over. *Snider* v. *Webster*, 20 M.R. 562, distinguished.

Per RICHARDS, J.A.:—The defendant should be ordered to pay in cash what the shares were worth at the time he received them, and there should be a reference to ascertain that value.

Galt, K.C., and *C. S. Tupper*, for plaintiff. *Symington*, for defendant.

Full Court.] [July 5.

COX v. CANADIAN BANK OF COMMERCE.

Bills of exchange and promissory notes—Holder in due course—Consideration.

Appeal from decision of Mathers, C.J., noted ante, p. 236, allowed with costs. RICHARDS, J.A., dissenting, and judgment given for the defendants for payment by the plaintiffs of the amount of the note in question and costs of the action and counterclaim.

The court agreed with all the findings of fact of the trial judge and all his conclusions of law except his holding that, because the overdrafts and new discounts had been paid off, therefore there was no consideration left.

The note had been pledged as collateral to the then existing indebtedness, there was a good consideration given for such pledging and, therefore, the bank was entitled to hold the note as

against the original indebtedness, although the subsequent advances had been paid off. *Lloyd's Bank* v. *Cook* (1907), 1 K.B. 794, and *Brockelsbury* v. *Temperance P.B. Co.* (1895), A.C. 173, followed.

Coyne, for plaintiffs. *Dennistoun*, K.C., and *Craig*, for defendants.

KING'S BENCH.

Mathers, C.J.] DAVIS v. BARLOW. [June 12.

Contempt of court—Injunction, disobedience of—Notice of injunction by telephone and telegraph—Agent—Company—Contempt committed by its officer.

The defendant, as returning officer at an election of a member of the Provincial Legislature, had deposited his return with the Canadian Northern Express Co. at Neepawa, for transmission to the clerk of the Executive Council at Winnipeg. Later in the same day a judge of this court made an interim injunction order restraining the defendant, his servants and agents from making the return. The defendant was served with the order in sufficient time before the actual delivery to enable him to instruct the express company by telegraph or telephone not to deliver the return, but made no effort to do so, saying that he supposed he could not stop the delivery.

Held, that the defendant was bound to the utmost diligence in carrying out the order and was guilty of contempt of court, for which he was ordered to pay the costs of the motion. *Harding* v. *Tingley*, 12 W.R. 684, followed.

The officer of the express company whose duty it was to attend to the delivery of parcels was notified of the issue of the injunction both by telephone and telegraph the day it was issued, but nevertheless delivered the return the next morning shortly before the order itself was served upon him.

Held, that, the express company was guilty of a serious contempt of court and could not excuse itself by shewing that the disobedience was an act of its officer done without instructions or even in breach of duty. *Stancomb* v. *Trowbridge Urban Council* (1910), 2 Ch. 184, and *Rantzen* v. *Rothschilds*, 13 L.T. 399, followed.

His Lordship fined the express company $1,000.

A. V. Hudson, for plaintiff. *Dennistoun*, K.C., for defendant. *Clarke*, K.C., for the express company.

Full Court.] GREEN *v.* DENNISON. [June 12.

Sale of goods—Repudiation of contract by buyer—Failure of seller to prepay freight as agreed—Damages for refusal to accept—Duty of seller in making re-sale of the goods.

When the purchaser of an article has absolutely refused to accept it because he had changed his mind about buying it, he cannot avoid paying damages on the ground that the seller was to prepay the freight and had not done so. *Braithwaite* v. *Foreign Hardwood Co.* (1905), 2 K.B. 543, followed.

When the seller of the rejected goods has re-sold them by auction fairly conducted and reasonably advertised, due notice having been given to the buyer, he is entitled to recover the difference between the contract price and the net amount realized, and he is not required to exercise the utmost amount of diligence and skill and the most accurate judgment in an endeavour to save the wrong-doer from loss. *Dunkirk Colliery Co.* v. *Lever*, 41 L.T. per James, L.J., at p. 635, followed.

The expenses of storing the article in question in this case, a cab, for an unnecessary length of time and of sending it from Brandon to Winnipeg to be sold were disallowed. RICHARDS, J.A., agreed with the trial Judge in holding that the plaintiff could and should have sold the cab at a higher price than that obtained at the auction and should therefore be charged with such higher price as against the contract price.

Galt, K.C., and *J. S. Tupper* for plaintiff. *Kilgour*, for defendants.

Macdonald, J.] KING *v.* STARK. [June 21.

Criminal law—Criminal Code, s. 781—Bawdy house—Excessive fine—Summary trial of indictable offence.

A conviction adjuding a fine of $100 without any mention of costs upon the summary trial before a police magistrate of a charge of keeping a common bawdy house sufficiently complied with s. 781 of the Criminal Code, which provides that the magistrate may condemn the party convicted to pay a fine not exceeding, with the costs of the case, one hundred dollars. *Regina* v. *Cyr*, 12 Pr. R. 24, distinguished.

Hagel, for prisoner. *Patterson*, K.C., D.A.-G., for the Crown.

Robson, J.] CAISBERY *v.* STEWART. [June 27.

Description of land, sufficiency of—Statute of Frauds—Evidence.

A written offer, signed by the defendant in Manitoba, to purchase from the plaintiff land described only as N½ 23-4-3 E, and accepted by the plaintiff, sufficiently describes the land to satisfy the Statute of Frauds. *Abell* v. *McLaren*, 13 M.R. 463, followed.

The same writing contained an offer to convey land described as 6 lots in Winnipeg listed with J. P. Bucknam & Son.

Held, that parol evidence was admissible to ascertain the identity of these lots, and, that being proved, the Statute of Frauds was sufficiently complied with. *Shardlow* v. *Cottrell*, 20 Ch. D. 90, followed.

Hoskin, K.C., and *Coulter*, for plaintiff. *Haggart*, K.C., for defendant.

Robson, J.] VASSAR SCHOOL DISTRICT *v.* SPICER. [June 30.

Contract—Ratification—Principal and agent—Adoption of acts of agent—Effect of taking possession of building—Corporation—Money advanced by officer for corporation expenses.

On the failure of the contractor to complete the erection of a school for the plaintiff school district, the defendant as secretary-treasurer and another trustee, without the authorization of formal trustee meetings, expended certain moneys of the corporation in completing the building which was afterwards taken over by the corporation and used as a school house. There were only three trustees and the third was not in the province that season.

Held, 1. There had been such an adoption by the plaintiff corporation of the acts of the defendant and the other trustee, that the defendant was entitled to credit in his accounts as treasurer for the moneys so paid out. *French* v. *Backhouse*, 5 Burr. 2728; *Sentance* v. *Hawley*, 13 C.B.N.S. 458, and *Bristow* v. *Whitmore*, 31 L.J.N.S. ch. 466, followed.

2. As the school building was built upon land which was not the property of the school district, the rule that an employer does not, as against a contractor, accept the work done in the erection of a building merely by re-occupying his own land, did not apply.

A. C. Campbell, for plaintiff. *Trueman*, for defendant.

Metcalfe, J.] RE LANDSBOROUGH. [July 12.

Prohibition—Jurisdiction of judge in chambers.

A judge in chambers has no jurisdiction to entertain a motion for a prohibition to a County Court judge. *Watson* v. *Lillico*, 6 M.R. 59, followed.

Bonnar, K.C., for applicant. *Tench* and *Devaux*, for Landsborough.

Robson, J.] NOBLE *v.* CAMPBELL. [July 11.

Mortgage — Foreclosure under Real Property Act — Right of action against mortgagor on covenant for payment—Liability of transferee from mortgagor to indemnify him against mortgagee's claim for payment.

Held, 1. Under sections 114 and 126 of the Real Property Act, R.S.M. 1902, c. 148, as they stood prior to the amendments of the Act by 1 George V. c. 49, a mortgagee, even after foreclosure under the Act, may, if he still retains the property, sue the mortgagor on his covenant for payment; and therefore, in such a case, the mortgagor, if he has transferred the property, may call upon his purchaser to pay the mortgage money under the implied covenant to indemnify him set forth in section 89 of the Act. *Williams* v. *Box*, 44 S.C.R. 1; *Platt* v. *Ashbridge*, 12 Or. at p. 106; *Campbell* v. *Holyland*, 7 Ch. D. 166, and *Blunt* v. *Marsh*, 1 Terr. L.R. 126, followed.

2. Payment by the plaintiff in such a case is not a condition precedent to his right of action on the purchaser's obligation to indemnify, but the purchaser may be ordered to bring the money into court to be paid to the mortgagee. *Cullen* v. *Rinn*, 5 M.R. 8, and *Mewburn* v. *MacKelcan*, 19 A.R. 729, followed.

Haggart, K.C., and *Sullivan*, for plaintiff. *Hoskin*, K.C., and *Huggard*, for defendant Campbell. *Hull*, for the mortgagee.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [June 20.

KELLETT *v.* BRITISH COLUMBIA MARINE RY. CO.

Master and servant—Injury to servant in the course of his employment.

Plaintiff, a workman in the defendants' employment, lost the sight of an eye through being struck with a splinter from the

iron ring of a wooden hammer used in caulking operations. The condition of the tool was brought by plaintiff to the foreman's notice immediately before the accident, not in the sense of its being dangerous, as similar tools in similar condition were often used, but as to its condition to do the work effectively. The foreman directed plaintiff, as time was important, to try to do the work with the hammer, and the accident occurred. There was no question of the foreman's competence, nor that the tool as supplied by the employers was defective or dangerous.

Held, on appeal, affirming the judgment of HUNTER, C.J.B.C., setting aside the verdict of the jury in favour of the plaintiff, that there had been no negligence on the part of the defendants; that if there was any negligence it was on the part of the foreman, a fellow servant, and it was shewn that he was a competent person for the position.

Aikman, for plaintiff. *Harold Robertson*, for defendant company.

Full Court.] [June 20.

TAYLOR *v.* BRITISH COLUMBIA ELECTRIC RY. CO.

Damages—Assessment of under separate heads—Excessive verdict—New trial.

Following *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222, a jury should not be asked to assess separately damages resulting from shock caused by blows and those resulting from bodily injury independently of nervous shock. Remarks per IRVING, J.A., as to cases in which damages were so assessed.

In this case a new trial was ordered (IRVING, J.A., dissenting) on the ground that the damages awarded were excessive.

L. G. McPhillips, K.C., for appellant (defendant) company. *McCrossan* and *Harper*, for respondent (plaintiff).

Full Court.] [June 21.

RATHOM *v.* CALWELL AND CALWELL.

Vendor and purchaser—Agreement for sale of land—Interim receipt—Specific performance—Statute of Frauds—Memorandum within—Names of parties—Agent—Authority to make contract.

In a real estate transaction a firm of brokers arranged terms with the vendor, and on themselves paying a deposit of $50, pro-

cured the following receipt: "Received from Marriott & Fellows the sum of fifty dollars, being deposit on account of purchase of lot numbered 799 in block 10 in section 18, Victoria, at the price or sum of six thousand dollars ($6,000) two thousand five hundred on the execution of agreements, and the balance as follows: Assume mortgage for $3,500 (three thousand five hundred) at 7½ per cent. interest. Five per cent. commission to be paid to Marriott & Fellows when sale is completed. Taxes, insurance, rent, etc., to be adjusted to date of sale. Mrs. Minnie Calwell, wife of Hugh E. Calwell."

Held, on appeal, IRVING, J.A., dissenting, that this was not a sufficient memorandum within the Statute of Frauds so as to entitle the purchaser to specific performance, as the name of the purchaser did not appear, nor was there any evidence in it by which to identify the purchaser.

Davis, K.C., and *Davie*, for appellants. *Maclean*, K.C., for respondent.

Bench and Bar.

JUDICIAL APPOINTMENTS.

William Seton Gordon, Counsellor at law, to be a Commissioner for taking affidavits in the city of New York, for use in the courts of Ontario.

Evaristo Brassard of the City of Montreal, advocate, to be a Commissioner for same purpose. Gazetted, July 1, 1911.

United States Decisions.

BANKS.—A bank which accepts a deposit of money needed by the depositor for a special purpose, under the agreement that it will pay the amount when needed for that purpose, is held in Smith v. Sanborn State Bank (Iowa) 30 L.R.A. (N.S.) 517, to have no right to apply it upon the depositor's general indebtedness to it.

BILLS AND NOTES.—A note which, on its face, is subject to the terms of a contract between maker and payee, is held in *Klots Throwing Co.* v. *Manufacturers' Commercial Co.* (C.C.A. 2d C.) 30 L.R.A. (N.S.) 40, not to be negotiable.

CARRIERS.—A passenger who accepts from a carrier's agent a ticket for interstate passage at a through rate which, under the rules of the Commission, does not allow stopover privileges, is held in *Melody* v. *Great Northern R. Co.* (S.D.) 30 L.R.A. (N.S.) 568, not to be entitled to hold the carrier liable in damages for his expulsion from the train in case he attempts to exercise such privileges, although the marks necessary to shew the limited character of the ticket are not placed upon it.

That no recovery can be had for the death of one thrown by a jerk from the top of a car, on which he was riding in preference to riding with the crowd within, in the absence of anything to shew that the jerk was so violent as to shew want of proper care in the operation of the train, is declared in *Patterson* v. *Louisville & N. R. Co.* (Ky.) 30 L.R.A. (N.S.) 425.

That it is not negligence per se for a passenger to ride upon the step of the platform of an electric street railway car is declared in *Trussell* v. *Morris County Traction Co.* (N.J.) 30 L.R.A. (N.S.) 351.

That one injured by attempting to alight from a street car moving at the rate of 6 miles an hour was a foreigner, recently arrived in this country, and that he did not understand English, and was inexperienced in street car travel, but had seen other passengers leave moving cars, is held in *Fosnes* v. *Duluth Street R. Co.* (Wis.) 30 L.R.A. (N.S.) 270, not to relieve him from the charge of contributory negligence in making the attempt.

CONTRACTS.—A contract by a manufacturer of dishes to fill an order for a certain number, bearing the monogram of the purchaser, is held in *Re Gies* (Mich.) 30 L.R.A. (N.S.) 318, to constitute a contract for work and labour, not within the statute of frauds, where the value of the undecorated dish is a small part of the final cost, although compliance with the contract will result in a sale of the dishes.

A contract to secure evidence of a given state of facts, which will permit the winning of a lawsuit, is held in *Neece* v. *Joseph* (Ark.) 30 L.R.A. (N.S.) 278, to be void as against public policy.

Agents of a foreign corporation which was organized for legitimate business purposes, and has fully complied with the laws entitling it to do business in the state, are held in *International Harvester Co.* v. *Smith* (Mich.) 30 L.R.A. (N.S.) 580, to have no right to defeat an action by it to compel them to pay over money belonging to it, arising from goods sold and collections made on the theory that it is a trust or monopoly, either at common law or under a statute making illegal contracts in re-

straint of trade or commerce, although the statute denies to a foreign corporation violating its provisions, the right to do business in the state.

DAMAGES.—The damages to be allowed for the enforced idleness of a mill because of a carrier's neglect to transport machinery to it are held in *Harper Furniture Co.* v. *Southern Exp. Co.* (N.C.) 30 L.R.A. (N.S.) 483, not to include lost profits.

MASTER AND SERVANT.—That a street car company is not, although it is disobeying a statute in using a car without a vestibule in front in the winter time, liable for injury to a conductor who falls from the running board while attempting to raise a side curtain to collect a fare, is declared in *Rich* v. *Asheville Electric Co.* (N.C.) 30 L.R.A. (N.S.) 428, since the injury was held not to be one which should have been anticipated, and was therefore not the proximate cause of the wrongful act.

A telephone company sending a man to straighten an angle pole which is leaning because of the strain of the wires is held in *Willis* v. *Plymouth & C. Teleph. Exch. Co.* (N.H.) 30 L.R.A. (N.S.) 477, to owe him the duty of doing what an ordinary man would do under the circumstances to ascertain whether or not the pole was originally set the proper depth into the ground, or whether it had pulled out, it being unsafe to climb a leaning pole subject to the angle strain if it is not sufficiently deep in the ground.

A servant who repeatedly violates different rules of the master, and disobeys different express orders, is held in Robbins v. *Lewiston,* A. & W. Street R. Co. (Me.) 30 L.R.A. (N.S.) 109, to be legally incompetent; and if the master continues to employ him with knowledge of such incompetence, it is held that he will be liable for injuries to other employees through such disobedience of orders.

The operation of a machine in a factory is held in *Lowe Mfg. Co.* v. *Payne,* (Ala.) 30 L.R.A. (N.S.) 436, not to be justified in obeying an order of his boss to clean the machine while it is in motion, if he knows the operation to be dangerous, so as to be entitled to hold his master liable for an injury resulting from the attempt.

The electrician and engineer of an electric light company are held in *Shank* v. *Edison Elec. Illuminating Co.* (Pa.) 30 L.R.A. (N.S.) 46, to be fellow servants of a lineman, where they exercise no supervisory power over him or the work, so that the company is not liable for their negligence in turning on the current while he is in a position of danger, so as to cause injury to him.

Flotsam and Jetsam.

Dillon on Municipal Corporations:—

A fifth revised and greatly enlarged edition of "Dillon on Municipal Corporations" is announced for immediate publication by Little, Brown & Co., Boston. It was over 45 years ago that the author, then a Judge of the Supreme Court of Iowa, commenced the preparation of this authoritative treatise, and the work appeared in one volume in 1872. Because of the growth of the law on the subject the new fifth edition will appear in five octavo volumes, containing 2,034,878 words. Judge Dillon, after serving as Chief Justice of the Iowa Supreme Court, Judge of the United States Circuit Court, President of the American Bar Association, and professor in the Columbia University Law School, is now an eminent railroad attorney in New York City.

A shoe company in St. Louis is giving some trouble to a judge. The company sues a railway company for the loss of 449 left shoes which were destroyed in a fire in the railroad warehouses. The shoe company wants $965.37 for the loss, while the railway company contends the shoes were valueless because the right shoes were missing. The shoe company admits that a left shoe alone has no value as an article of wear except to a one-legged man, but it insists that the shoes burned were used by a travelling salesman as samples and that the right shoes were in the possession of another salesman. With the loss of the left shoes they declare they have lost the entire 449 pairs. The travelling salesman testified that his samples, as he carried them, possessed no market value, he having only the left shoe of the many kinds in his three trunks, and added that to have a right shoe made to match the left would cost more than the original pair would have sold for. The judge said that in a long judicial experience he had never heard of such a case before, and would therefore take it from the jury for examination of the law. He further stated that if the plaintiff could recover for 449 pairs of shoes lost in Florida, and the right-foot shoes were similarly destroyed in some other state, the plaintiff might recover for 898 pairs of shoes.

Two Grumblers:—"MacMahon, J.:—I give a grumbling assent. Teetzel, J.:—I agree." See McKeown v. Toronto R.W. Co., 19 O.L.R. 361, 369.—*Law Notes.*