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DIARY FOR FEBRUARY.

1. Tues....Solicitors' exam. Sir Edw. Coke born 1552.
2. Wed....Barristers' examination.
5. Sat.....W. H. Draper, and C. J. of C. P., 1836.
6. Sun.....*Septuagesima Sunday.*
7. Mon....Hilary sittings begin.
10. Thur...Canada ceded to G. B. 1763. Union of U. & L. C. 1841.
13. Sun.....*Sexagesima Sunday.*

TORONTO, FEBRUARY 1, 1887.

WE publish in another place a communication from an old friend of this journal on the subject of the article which appeared in our last number on the Limitation of Actions, which will be read with interest. The subject is an important one, and the law is not as clear as it ought to be. We may take occasion to refer to it again, and would in the meantime be pleased to hear from any of our readers who have considered the subject.

WE are indebted to a correspondent for a copy of a judgment by His Honor Judge Jones, of Brantford, on the subject of "Tax Exemptions" which, however, want of space compels us to hold over for the present. It discusses the right of a superannuated minister to exemption from taxation, and is an interesting addition to the decisions on this subject already reported in this journal. The learned judge agrees with the view of the law taken by Judge McDonald in a judgment reported in our last volume at page 341.

A MOST extraordinary, and we are inclined to think, unprecedented occurrence has taken place recently in regard to the Chief Justiceship of New South Wales. On the death of Sir James Martin, the late Chief Justice, the appointment was offered to Mr. Julian Solomons in a letter from the Premier of the colony, couched in the most flattering and complimentary terms. Mr. Solomons accepted the position, but three days afterwards withdrew his acceptance on the ground that he had learnt that his appointment was distasteful to the two senior members of the bench, viz.: Mr. Justice Fawcett and Mr. Justice Manning, and that to the third, Mr. Justice Windeyer, it appeared to be not only distasteful, but so wholly unjustifiable as to have led to the utterance by him of such expressions and opinions respecting his fitness as to make it quite impossible to hold any intercourse with him in the future either as a Judge or otherwise. The reasons for his withdrawal were stated in his letter to the Premier, which has been made public, and has occasioned quite a hubbub in the colony. The Judges, whose hostility is alleged as the reason of Mr. Solomon's resignation of the office of Chief Justice, have disclaimed any such feeling. Mr. Justice Windeyer, however, frankly admits that he did express himself to Mr. Solomons that he was of the opinion that he was not fit for the office, and that he thought his appointment was a grave mistake; but he says, notwithstanding that, he was prepared to give him his loyal support, and there the matter rests. Altogether the affair is a painful and unpleasant one, and we are glad to think, altogether unique.

RECENT ENGLISH DECISIONS.

(Continued from page 30.)

Practice—Third party procedure—Indemnity after service of writ.

The short point decided by Bacon, V.-C., in *Edison* v. *Holland*, 33 Chy. D. 497, is that a third party against whom the defendant claims indemnity may be notified whether the contract to indemnify has been entered into by such third party before or after the service of the writ.

Solicitor and client—Bankruptcy of client—Purchase by solicitor from trustee in bankruptcy—Concealment of facts.

Luddy's Trustee v. *Peard*, 33 Chy. D. 500, was an action brought by a trustee in bankruptcy, to set aside a sale made by a former trustee of the same estate to the defendant, who had been solicitor of the bankrupt, and by means of such relationship had acquired peculiar information as to the subject-matter of the sale, which he had concealed from the trustee. The sale was set aside by Kay, J., who held that the obligations on a solicitor dealing with his client, extend to the case of a dealing between the solicitor and the trustee in bankruptcy of his client, the purchase in question having been effected by the solicitor in the name of his brother for a grossly inadequate price, and upon a suggestion that he was acting for the benefit of the bankrupt's family.

Company—Power of directors—Payment of costs of legal proceedings for libel against company and directors—Payments for proxy papers.

The action of *Studdert* v. *Grosvenor*, 33 Chy. D. 528, was brought by the shareholder of a company, to compel the directors to refund moneys alleged to have been misapplied by them. Part of the moneys in question had been expended in payment of the costs of a criminal prosecution instituted by the directors against the publishers of a newspaper for a libel impugning the directors' honesty in the management of the company, and in which the publishers had been convicted. As to these costs, the libel not being against the company, Kay, J., held that they ought not to have been paid out of the company's funds, but he refused an injunction, and following *Pickering* v. *Stephenson*, L. R. 14 Eq. 322 (the payments having been sanctioned at a general meeting), he also refused to direct repayment by the directors.

Another part of the moneys in question had been applied in the successful prosecution of one B. for libelling both the company and the directors, and it was held that these costs were properly paid out of the company's funds. A third part had been applied in printing and transmitting 150,000 circulars to shareholders, and enclosing proxy papers in favour of the directors, and postage stamps for their return, and it was held that this was an unauthorized application of the company's funds beyond the power of a general meeting to sanction, and a perpetual injunction was granted restraining the company and the directors from thus applying the company's funds. But an order to refund the moneys, expended was refused.

Executor—Interest on moneys ordered to be refunded—Payments made in mistake of law.

In re Hulkes, Powell v. *Hulkes*, 33 Chy. D. 552, Chitty, J., took occasion to dissent from *Saltmarsh* v. *Barrett*, 31 Beav. 349, in which Sir J. Romilly, M.R., had held that where an executor is ordered to refund moneys which they have *bona fide* distributed upon what turns out to be an erroneous construction of his testator's will, should not be required to pay interest on the sum refunded. This he held to be a departure from the principle established by the higher authority of *Attorney-General* v. *Kohler*, 9 H. L. C. 654, and the *Attorney-General* v. *Alford*, 4 M. & G. 843. But although deciding as a general rule that executors are chargeable with interest on such sums, yet he held they should not be charged with interest in favour of a person who had participated and acquiesced in the erroneous distribution.

Lessor and lessee—Prehistoric chattel discovered in demised premises.

The case of *Elwes* v. *Brigg Gas Co.*, 33 Chy. D. 562, presents a curious state of facts. The plaintiff had leased land to the defendants for ninety-nine years, reserving all mines and minerals, the lessees were authorized to erect gas works on the premises. In the course of excavating for these works an ancient prehistoric boat about forty-five feet long, and

apparently hollowed out of a large oak tree, and supposed to be 2,000 years old, was discovered about six feet below the surface. The action was brought to compel the defendants to deliver up this boat, and it was held by Chitty, J., that the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor, though he was ignorant of its existence when granting the lease.

RAILWAY COMPANY — UNPAID VENDOR — LIEN FOR PURCHASE MONEY—INJUNCTION.

In *Allgood* v. *Merrybent & Darlington R. W. Co.*, 33 Chy. D. 571, Chitty, J., granted an injunction restraining the defendants from using the plaintiff's land, which they had expropriated, but had not paid for. An order to wind up the company had been made, and the present action was brought to enforce the plaintiff's vendor's lien. An order for payment of the purchase money had been made, but not complied with, and it was proved that the land would be unsaleable at the price agreed to be paid by the company. At page 575 he says:

It is said that the public will be inconvenienced. That probably is so, but the public have no rights as such against an unpaid vendor.

We may observe, that in *Slater* v. *Canada Central*, 25 Gr. 363, it seems to have been assumed, that the only remedy in such cases to enforce the lien is by sale.

MARRIED WOMAN—FUNERAL EXPENSES—SURETY—(R. S. O. c. 116, s. 2).

In re McMyer, Lighthouse v. *McMyer*, 33 Chy. D. 575, two points were decided by Chitty, J. First, that when a married woman dies leaving separate estate, and having made a will in pursuance of a power whereby her husband is appointed executor, he is entitled to retain out of her estate the expenses of her funeral, although such estate is insufficient to pay creditors, and the will contains no direction for payment of debts, or funeral expenses. And second, that the right of a co-surety under the *Mercantile Law Amendment Act* (R. S. O. c. 116, s. 2), who has satisfied a judgment obtained by the creditor against the debtor and his sureties, to stand in the place of the judgment creditor, is not affected by the fact that the surety has not obtained an actual assignment of the judgment.

BANKER'S LIEN—MEMORANDUM OF DEPOSIT

In re Bowes, Strathmore v. *Vane*, 33 Chy. D. 586, North, J. decided that when a customer deposited a life policy with his banker, accompanied by a memorandum of charge to secure overdrafts not exceeding a specified amount, the lien of the banker was limited to the amount specified, and he could not assert a general lien.

TRUSTEE ACT, 1850—BANKRUPT TRUSTEE — REDUCING NUMBER OF TRUSTEES.

In re Gardner's Trusts, 33 Chy. D. 590, was an application under the *Trustee Act*, 1850. One of three trustees had become bankrupt and absconded. The application was to appoint the two solvent trustees in place of themselves and the bankrupt, and for an order vesting the trust estate in them, on the ground of great difficulty in getting a third person to act as trustee. This North, J. declined to do, on the ground that the court will not reduce the number of trustees of a continuing trust: and also because there is no power to appoint existing trustees to be new trustees.

SETTLED ESTATE—SANCTION OF COURT—COVENANT TO RENEW LEASE AT A FUTURE TIME—APPOINTMENT OF NEW TRUSTEES.

In re Farnell, 33 Chy. D. 599, it was held by North, J., that the court has no power under the English *Settled Estates Act*, 40 & 41 Vict., c. 18, ss. 4 & 5, to sanction a sub-lease of settled land (held under a renewable lease), for the unexpired residue of the time, with a covenant for the extension of the time by a further sub-lease after the renewal of the head lease. Because, as regards the further lease, it would not be a lease taking effect in possession. We need hardly point out that under the R. S. O. c. 40, s. 85, the court has no greater power, and that such a covenant would be equally beyond the jurisdiction of our courts to sanction.

It was also held by North, J., that where some of the trustees of a will had died, and the will contained a power for the trustees or trustee to appoint new trustees, that the taking of a renewal lease of part of the trust estate to persons described as "the present trustees," and to which the surviving trustee was a party, and in which the demise was expressed to be by his direction, was a sufficient appointment of the new trustees.

Recent English Decisions.

PATENT ACTION—AMENDMENT AT TRIAL OF PARTICULARS OF OBJECTION.

In *Moss* v. *Mallings*, 33 Chy. D. 603, which was an action to restrain the infringement of a patent, during the trial, after the examination and cross-examination of the plaintiff, the defendant applied to postpone the trial and to amend the particulars of objection, alleging that since the conclusion of the cross-examination of the plaintiff he had discovered new facts, showing that the alleged invention was not new at the date of the patent. No affidavit was tendered in support of the application, but the defendant asked leave to recall the plaintiff, or step into the box himself to prove the facts. North, J. refused the application, holding that it could only be granted on its being shown that the defendant could not, with reasonable diligence, have discovered the new facts sooner.

PRACTICE—FIRM OUT OF JURISDICTION—SERVICE ON AGENT WITHIN JURISDICTION—(ONT. RULES 40 & 41).

In *Ballie* v. *Goodwin*, 33 Chy. D. 604, the defendants were a Scotch firm, having an agent within the jurisdiction whose authority did not extend to taking orders: but the name of the firm was affixed to the agent's office. It was held by North, J., that the office of the agent was not a place of business of the firm for the purpose of serving the writ, and the service of the writ on the agent was accordingly set aside.

BILL OF EXCHANGE ON DEMAND—STATUTE OF LIMITATIONS.

In re Boyse, Crofton v. *Crofton*, 33 Chy. D. 612, is a decision of North, J., on a question of mercantile law. In 1872 a Mrs. Boyse, an Englishwoman, living at Marseilles, with one Gautier as his wife, though not married to him, drew a bill of exchange on the Bank of England, at sight to her own order. She indorsed the bill to Gautier, who, in 1876, indorsed it to the claimant. The bill was presented for payment in 1880. It was held by North, J., that the time did not begin to run for the purpose of barring the right of action against the drawer or her estate until the presentation of the bill. It was also held that the bill which stated that the sum for which it was drawn was "on account on the dividends and interest due on the capital and deeds registered in the books of the" bank in the name of Colclough & Boyse, "which you will please charge to my account, and credit according to a registered letter I have addressed to you," was a negotiable bill. At the time the bill was drawn, the drawer had no account with the Bank of England, but she had government securities on which large dividends were due—the bill not having been presented until after her death. It was held that the delay in presentment had not released her estate, as she had no reason to believe when she drew the bill that it would be paid if presented.

SHARES IN INCORPORATED COMPANY—CHOSES IN ACTION

Turning now to the Appeal Cases, the first to which we desire to draw attention is *The Colonial Bank* v. *Whinney*, 11 App. Cas. 426, which is useful for the discussion it contains of the question whether shares in an incorporated company came within the designation of "things in action" as used in the Bankruptcy Act. It was contended by counsel for the respondent that this expression had a technical sense limited to the right to sue for a debt or damages, an argument which had prevailed with Cotton and Lindley, LL.J., in the Court of Appeal, but the Lords were unanimous against this view.

LOST WILL—EVIDENCE OF CONTENTS OF LOST WILL—POST-TESTAMENTARY DECLARATIONS BY TESTATOR.

The case of *Woodward* v. *Goulstone*, 11 App. Cas. 469, is important, not for the point actually decided by it, but for the *dicta* it contains as to the admissibility of the post-testamentary declarations of the testator as to the contents of a lost will: all the learned Lords who took part in the judgment, viz., Lords Herschell, Blackburn and Fitzgerald, guarded themselves against being in any way committed to the view that such declarations are admissible, as was held in the celebrated case of *Sugden* v. *Lord St. Leonards*, 1 P. D. 154.

RES JUDICATA—ESTOPPEL—JUDGMENT IN REM.

The House of Lords in *Concha* v. *Concha*, 11 App. Cas. 541, affirm the decision of the Court of Appeal, 29 Chy. D. 268, which we noted *ante* vol. 21, p. 213.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY.

Taylor v. *Bank of New South Wales*, 11 App. Cas. 596, appears to be one of those cases which turn principally on the evidence. The action was brought by sureties, praying a declaration that they had been released from their

liability as sureties to the defendants, under the following circumstances: The appellants became sureties to the respondents, on the faith of a mortgage granted by the principal debtor to the respondents upon certain sheep. The sureties claimed to be released on the ground that the respondents had sold the sheep without notice to them, in a manner not warranted by the mortgage; and that, inasmuch as the purchaser had failed to pay the price, they had been deprived of a security upon which they were entitled to rely for protection. But it appearing that the sale in question had been effected by the mortgagor with the consent of the mortgagees, in the due course of management, and in a manner contemplated by the mortgage, it was held by the Judicial Committee of the Privy Council that the liability of the sureties was not affected thereby.

NEW TRIAL — NEGLECT TO MOVE IN COURT OF FIRST INSTANCE.

In *Dagnino* v. *Bellotti*, 11 App. Cas. 604, the Judicial Committee determined that where an appellant objected to a verdict on the ground that it was against evidence, but neglected to move the court of first instance for a new trial, according to the practice of the court, Her Majesty in Council could not be advised to alter the verdict or set it aside, or direct a new trial.

PETITION OF RIGHT—DAMAGES FOR BREACH OF CONTRACT.

In *The Windsor and Annapolis Ry. Co.* v. *The Queen*, 11 App. Cas. 607, the Judicial Committee (approving *Thomas* v. *The Queen*, L. R. 10 Q. B. 31, and *Feather* v. *The Queen*, 6 B. & S. 293) held it to be settled law that a petition of right will lie for damages resulting from a breach of contract by the Crown, and that it is immaterial whether the breach is occasioned by the acts or the omissions of the Crown officials.

REAL ESTATES DISTRIBUTION ACT, N. S. W.

Wentworth v. *Humphrey*, 11 App. Cas. 619, is a decision of the Privy Council upon the construction of a Statute of New South Wales, having for its object the vesting of real estates of intestates in their personal representatives. The Statute, though not framed in the same terms, is similar in effect to the recent Statute of this Province, 49 Vict., c. 22, and this case will no doubt assist in the construction of our Statute. The Act in question provided, "From and after the passing of this Act, all land which, by the operation of the law relating to real property now in force, *would, upon the death of the owner intestate in respect of such land, pass to his heir-at-law*, shall, instead thereof, pass to and become vested in his personal representatives in like manner as is now the case with chattel real property."

In this case the intestate was a bastard, and the question was whether the Act applied as against the Crown's right of escheat. The Colonial Court had held that it did not, but the Privy Council held that it applied to al lands to which a person died intestate, irrespective of the question whether he had actually left an heir entitled to inherit under the former law.

CONSTRUCTION OF STATUTE — REJECTION OF WORDS INCONSISTENT WITH INTENTION OF STATUTE.

The Judicial Committee in *Salmon* v. *Duncombe*, 11 App. Cas. 627, were called on to construe a Statute which contained a clause inconsistent with its apparent intention, to give effect to which would be to nullify the Act. The Statute in question gave to any subject of the Queen, resident in Natal, the power of disposing by will, according to the English law, of property both real and personal, which would otherwise devolve according to Natal law; but the section which thus provided concluded with the provision "as if such subject resided in England," the effect of which is to leave both the *lex situs* and *lex domicilii* in operation, thus reducing the section to a nullity. Their Lordships held that these words ought not to be construed so as to destroy all that had gone before, and therefore, should be rejected, the powers conferred not being affected by the question of residence in England.

MORTGAGEE—STATUTE OF LIMITATIONS—PAYMENTS.

Lewin v. *Wilson*, 11 App. Cas. 639, is an important decision of the Privy Council upon the construction of the Statute of Limitations, and in which they determine that the rule that the only person whose payment on account will prevent the mortgagee from being barred by the Statute of Limitations is the mortgagor, or his privy in estate, or the agent of either of them, must be qualified so as to

include any person who, by the terms of the mortgage contract, is entitled to make payments.

In this case H. and W. each mortgaged some property to the same mortgagee, W. being as between himself and H. a surety. Both mortgages contained a proviso that they should be void on payment by H. or W. Payments were made by H., but none by W., within the statutory period. It was nevertheless held that the payments by H. kept alive the right of the mortgagee against the property covered by W.'s mortgage.

The gist of the decision may be best stated in the words of Lord Hobhouse:

> Payments made by a person who, under the terms of the contract, is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeasance or redemption of the mortgage, are payments which by section 130 give a new starting-point for the lapse of time.

The decision of the Supreme Court, 9 S. C. R. 646, was reversed.

REHEARING OF APPEAL BY PRIVY COUNCIL.

The only other case which is necessary to be noted here is *Venkata* v. *Court of Wards*, 11 App. Cas. 660, in which the Judicial Committee discuss the question under what circumstances a rehearing of an appeal before the committee can be entertained, and they came to the conclusion that it can only be allowed, if ever, as an indulgence and not as of right in cases to prevent irremediable injustice being done by the court of last resort, when by some accident, without any blame to the party who has not been heard, an order has been made inadvertently as if the party had been heard. Where both parties have been fully heard, such an indulgence is rarely if ever to be granted.

SELECTIONS.

ASSIGNMENT OF AFTER-ACQUIRED BOOK-DEBTS.

The expression "book-debts," observed Lord Esher, M.R., in *The Official Receiver, Trustee in the Bankruptcy of Izon* v. *Tailby* (reported in this month's *Law Journal*), "means debts arising in a trade or business in which it is useful to keep books—not necessarily those actually put into books, but those which ought to be booked in the ordinary course." But though not in itself a vague expression, the description of the book-debts purported to be there assigned could not well have been more indefinite, though the Queen's Bench Division thought otherwise, relying on *Clements* v. *Matthews* (11 Q. B. D. 808), but, said Lopes, L.J., "they paid too much attention to what was said by Lord Justice Bowen, and not enough to what was said by the majority of the Court.

It appears that Izon, a packing-case maker of Birmingham, made an arrangement with his creditors for the payment of a composition on his debts by instalments, for the last of which instalments one Tyrrell became surety. Izon gave to Tyrrell a bill of sale to secure payment to him of any sums which he might be called upon to pay as such surety. By the bill of sale, which was dated before the first of November, 1882, when the Bills of Sale Act of that year came into operation, Izon assigned to Tyrrell all and singular the stock-in-trade, fixtures, shop and office furniture, tools, machinery, implements, and effects now being, or which during the continuance of the security might be, in, upon, or about the premises of the mortgagor situate at 87 Parade, or any other place or places at which during the continuance of the security the mortgagor might carry on business, and also all the book-debts due and owing, or which might during the continuance of the security become due and owing, to the said mortgagor. The bill of sale, among other usual clauses, gave power to the mortgagee to take possession of and get in the subject-

matters of the assignment, if, upon a demand in writing served as therein specified, the moneys secured were not paid. Upon default of payment, the executors of Tyrrell, who had died, gave, in November, 1885, notice to the then debtors of the mortgagor of the assignment of the book-debts, and sold and assigned the said debts to the defendant in this action. The defendant thereupon gave notice of the assignment to him. On the 9th of January Izon was adjudged a bankrupt on a petition filed in December. The official receiver in this action sought to recover the amount of one of the book-debts which came into existence subsequently to the bill of sale, and had been paid to the defendant by the debtor since the bankruptcy. On appeal from the County Court Judge of Birmingham, who held, on the authority of *Belding* v. *Read* (34 L. J. Ex. 212) and *In re Count d'Epineuil* (20 Ch. D. 758), that the assignment of the future book-debts in the bill of sale was invalid, the Queen's Bench Division (Hawkins and Mathew, JJ.) ordered the judgment for the plaintiff to be set aside, and that the judgment should be entered for the defendant. "It was urged, by way of illustration," said Mathew, J., "that an assignment of all that a man might earn in future, or of all the goods a man might acquire during the rest of his life, would not be a good assignment, on the ground that it would be too indefinite. That may be so, because it may be said in such a case that there is nothing to show to what particular objects the assignment applies; but it does not appear to me that such cases are analogous to that now before us, because, although a future book-debt, cannot be said to be defined at the time when the assignment takes place, it sufficiently defines itself as soon as it comes into existence. There is no doubt that there may be a valid assignment of after-acquired chattels. In one sense such an assignment is indefinite, because the future chattel is not specified at the time of the assignment; but when a chattel comes within the description in the instrument, as, for instance, by being brought on a certain farm or place of business, as the case may be, the conveyance applies to it, and it becomes sufficiently defined. That is the effect of the well-known decision in *Holroyd* v. *Marshall* (10 H. L. 191.) If future stock-in-trade may be assigned, why not future book-debts? The future stock-in-trade takes the place of, and is substituted for, the present stock-in-trade. The book-debt arises from the disposal of, and takes the place of, stock-in-trade present or future. When the book-debt comes into existence by the disposal of any portion of the stock, which as present or future stock was the subject of the assignment, why should not the assignment be valid and take effect as far as such debt is concerned?"

There was no answer to this reasoning—save that it did not apply. It would have been appropriate if the book-debts purported to be assigned were restricted to book-debts due to the mortgagor as packing-case maker, but the instrument went too far—all over the habitable globe, in effect, for what it affected to do was to assign all book-debts accrued in any business carried on by him in any part of the world. "Is such an assignment," said Lord Esher, M.R., "within the doctrine that where the description is vague nothing passes? That there is such a doctrine is assumed in all the cases; the difficulty in each has been as to its application. It is said that if in the end something arises which satisfies the description, the Court of Equity would decree specific performance, but I do not think that is so. As to vagueness, it would be difficult to find any description more vague than this." Not that it would be too vague to assign book-debts in a business carried on at a certain specific place, but when every business everywhere was included specific performance was out of the question. "We are asked," said Lindley, L.J., "to throw over the doctrine that there must be a case for specific performance. We cannot do so. Whether the assignment holds good depends on the question whether specific performance would have been granted. The reason is that you cannot in the nature of things assign that which is not in existence at the time. The most you can do is to agree to assign them." The learned County Court Judge was right. The assignment was clearly inoperative to pass such debts, and the plaintiff entitled to judgment.—*L* ..., Eng.

REPORTS.

COUNTY COURT OF THE COUNTY OF YORK.

HARRINGTON v. SAUNDERS.

Mechanic's lien—Failure of principal contractor—Ten per cent. lien postponed.

[McDougall, Co. J., 1886.

H., a material man, supplied S., a sub-contractor, with bricks for a building being erected for the owner by one B., under contract. A term of the contract was that if B. failed to complete the work properly the contract could be relet by the owner, and B., charged with the difference in the cost (if any). B., the contractor, made an assignment for the benefit of creditors, and abandoned the contract after doing about $770 worth of work, for which he had been paid $543. The work was relet, and completed at an increased cost to the owner of $360 over the original contract price.

Held, that H. took nothing under his lien, as the increased cost of completing the contract exceeded the difference between the value of the work actually done by B., the contractor, and the moneys paid thereon.

Query: Would this ruling apply to a lien for wages (45 Vict. Cap. 15 sec. 4):

This was an action upon a mechanic's lien, brought by a material man against a sub-contractor who purchased the material from him, and also against the principal contractor and the owner of the land.

The facts, which were undisputed, were as follows: The defendant, Baillie, contracted in writing to erect for the sum of $2,183, a building for the defendant, Hewlett; Baillie sub-let the masonry and brickwork to defendant, Saunders, at the contract price of $956. The defendant, Saunders, purchased and had delivered to him by the plaintiff, bricks to the value of $240, which went into the building. Baillie, after performing a portion of the work, became embarrassed, and made an assignment for the benefit of creditors.

Hewlett, the owner, under the terms of his contract with Baillie, advertised for tenders to complete the work, and relet the contract to his brother, who was the lowest tenderer.

The parties to this action for the purpose of this suit admitted the following figures to show the state of the account as regards all parties:—

Value of work done under contract by Baillie and Saunders, $770; amount paid thereon, $543. Increased cost to owner of completing the house beyond balance of original contract price with Baillie, $360. This was a direct loss suffered by the owner by reason of his (Baillie's) default. Last bricks delivered 6th January, 1886, lien filed 1st February and notice given Hewlett, the owner, on 1st February.

Dr. Snelling, for the plaintiff, contended upon the authority of *Re Cornish*, 6 O. R. 259, that the plaintiff was entitledto recover 10 per cent. of the value of the work done, viz.: $77 (10 per cent. upon $770), as the owner is bound to pay that amount, and that the fact of the owner being put to an extra outlay of$360 beyond the contract price could not affect the result.

MCDOUGALL, Co. J.—The facts in this case bring it within the class of case suggested by the Chancellor in his judgment in *Re Cornish* (p. 265) and as to which he declines to express an opinion. He says: "It is not necessary to consider what would be the result if the contractor making default had occasioned damage to the owner above the balance of the contract price, a state of facts which is hinted at in sec. 4 of 45 Vict. cap. 15 (O.), but left for some future plaintiff to ascertain by the assistance of the courts."

In *Goddard* v. *Coulson*, 10 App. 1, a case very similar in its facts to this case, Mr. Justice Patterson holds that section 11, as amended by the Act of 1878, is only "to charge in favour of the mechanics, etc., 10 per cent, of the money which becomes payable by the owner to the principal contractor," and in the same case he holds that the mechanic cannot recover anything, because "the contract price agreed upon never became the price to be paid, because the contractor failed to do what was necessary to earn it or to earn more than he was in good faith actually paid, that amount being under 90 per cent."

The act of 1882 did not apply to *Goddard* v. *Coulson*, the litigation having arisen before the passing of that Act, but it does apply to the present case. Reading that statute as being a later expression of the legislative will, I am of opinion that section 4 of 45 Vict. cap. 15. (O.), favours the view that the Legislature regarded the 10 per cent. lien as postponed to an owner's claim for damages for a failure on the part of the contractor to complete his contract, and that in that view they thought it necessary to provide expressly for the lien of wages. Whether in the case of wages, even, they have successfully legislated an unfortunate owner out of 10 per cent. of a contract price, for which he never became indebted to the contractor, must be left to some future owner to have settled, but in the meantime, as to the claim of a material man (as he is styled in many cases), I am of opinion that in all cases where there has been a failure on the part of the principal contractor and the completion of his contract has

occasioned the owner an outlay beyond the balance of the original contract price, and at the same time the payments to the contractor, or for the work actually performed have been 90 per cent. or under of the value of such work, then in every such case the claim of any lien-holder (other than the claims for wages, which I do not deal with) must be postponed till the owner's damage is satisfied, and if such damage absorbs all amounts due the original contractor under his contract for the work performed by him, then such lien will not attach.

Plaintiff's action dismissed with costs, and lien ordered to be discharged.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS DIVISION.

Wilson, C. J.]

PETERBOROUGH REAL ESTATE INVESTMENT CO. v. PATTERSON.

Will—Estate by entireties—Estate tail—Mortgage.

Testatrix, by her will, devised to her "children A. P. and to M. P., wife of A. P., and to their children and children's children forever," the east half of lot 15 in the 8th concession of Asphodel; "Provided always, that the aforesaid A. P. and M. P. shall not be at liberty at any time or for any purpose to convey or dispose of the said lands, as it is my will that the same be entailed for the benefit of their children." The testatrix then devised all the rest and residue of her estate to M. P., wife of A. P., to have and to hold the same to her and her heirs, executors, administrators and assigns, to her and their use and behoof forever. M. P. and A. P. mortgaged the said lot 15 to the plaintiffs, purporting thereby to grant the said lands in fee simple.

Held, taking the whole will together, that A. P. and M. P. took an estate for life by entireties, and their children in fee tail in severalty.

Held, also, that the said will did not contain such a restraint on alienation as to render the mortgage void, but it was a valid charge for the lives of the said M. P. and A. P., and for the life of the survivor of them.

Pousette, Q.C., for the plaintiffs.

J. K. Kerr, Q.C., for the infant defendants.

Clute and *Wallace Nesbitt*, for the other parties.

HOWELL v. LISTOWEL RINK CO.

Distress—Sale—Illegality—Notice—Appraisement—More goods sold than necessary—Tender—Landlord purchasing at sale—Abandonment—Misdirection.

In an action for illegal distress and sale of goods distrained, no notice of legal appraisement of the goods distrained before sale was proved. It was proved that the actual value of the goods sold was greater than the amount due for rent—that the goods were sold for less than their value—and that the plaintiff proved a tender before sale to the bailiff. The damages found for the plaintiff were $475.

Held, that the plaintiff was entitled to recover, and that the damages would be not merely the difference between the rent and the value of the goods, but the whole damage sustained by him, by being deprived of his goods, and that the evidence of the actual loss sustained by the plaintiff justified the finding.

It was urged that plaintiff had abandoned the premises; but the evidence failed to substantiate this.

H. was the president of the defendants, an incorporated company, and also a member of a gas company, also incorporated, and at the bailiff's sale purchased the goods for the gas company.

The learned Judge at the trial directed the jury that H. was, in reality, both seller and buyer, and therefore the sale was void.

Held, that there was misdirection, but as it appeared that no substantial wrong or miscarriage was occasioned thereby, the court would not interfere.

Falconbridge, Q.C., for the plaintiff.

Shepley for the defendant.

Divisional Court.]

RE VOTERS' LISTS OF ST. THOMAS.

Order for holding court before expiration of thirty days allowed for appeals—Prohibition—Refusal of.

The voters' lists for the city of St. Thomas were posted up in the office of the city clerk on the 23rd October, 1886. On the 19th November, 1886, three days before the time for giving, by a voter, notice of any complaint against the list, had expired, the clerk made a report to the County Judge in the form No. 7 in the schedule to the Voters' Lists Act, R. S. O. ch. 9, and the said Judge thereupon on said 19th November made an order appointing the 30th November, 1886, for the holding a court to hear complaints of errors and omissions in the said voters' list, and notice of the time and place for the holding of said court was duly published in the St. Thomas *Daily Times*, a newspaper published in said city. Previous to the said 19th November a number of complaints of errors and omissions in the list was given to the said clerk.

An application was made for a writ of prohibition to the County Judge to prohibit him from holding said court, on the ground that he had no jurisdiction to make said order, inasmuch as the thirty days for filing appeals had not then expired.

Held, that the application must be refused with costs.

Colin McDougall, Q.C., for the application.

Ermatinger, Q.C., contra.

LANGDON V. ROBERTSON.

Carriage of goods—Contract—Principal and agent—Damages—Bill of lading—Foreign law—Contract contrary to public policy.

In 1882 S., one of the plaintiffs, then being in Winnipeg, ordered goods of K., L. & Co., of Montreal, through L., also then at Winnipeg, and ordered them to be shipped to plaintiff, at Flat Creek, Manitoba, via Milwaukee and the C. etc. Ry., by which line plaintiff had an arrangement for a special rate of freight, of which they informed K., L. & Co., but did not notify them of the terms thereof. K., L. & Co. delivered the goods to C. and M., at Montreal, as agents of the Western, etc., boats, consigned by plaintiff to be sent as directed by plaintiffs. The bill of lading which C. and M. gave for the goods was prepared by a clerk of K., L. & Co. which he stated he got from C. and M., and that he attached thereto a ticket marked "Ship our freight by C. etc. Ry., great bonded fast line low rates." The goods were carried by defendants' vessel, though not to Milwaukee, but to Duluth, and from thence by rail to their destination and were accepted by plaintiffs, but who had to pay higher freight than if carried as directed. The distance from Milwaukee to Flat Creek was longer than by Duluth, but by reason of the special agreement the freight was less. S. proved the terms of the contract, and that it was made with the general freight agent of the railway company.

Held, that a contract between the plaintiffs and defendants to carry via Milwaukee was proved, as it clearly appeared that C. and M. were defendants' agents to make the contract; and that plaintiffs were entitled to recover for the breach thereof in not carrying to Milwaukee; but that, under the circumstances, the plaintiffs could only recover nominal damages.

Held also, following *Friendly* v. *Canada Transit Co.*, 11 O. R. 756, the plaintiffs were owners of the goods, and entitled to maintain the action.

Held, also, that the contract for the low rates could not be assumed to be illegal as contrary to public policy, as being lower than the ordinary local rates, for, even if it could not be enforced by plaintiffs against the company, that would not be a defence to the defendants.

Held, also, that the fact of the bill of lading having been made in the Province of Quebec did not deprive plaintiffs of the benefit of R. S. O. ch. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario, and in the absence of proof it would be assumed to be the same.

O'Heir, for the plaintiff.

Mackelcan, Q.C., for the defendants.

COWAN v. LANDELL.

Slander—Privilege—Malice—Father and child.

The defendant's son, alleged to be an infant within twenty-one years of age, was brought before a magistrate charged with assault. The defendant, the father, attended before the magistrate. The plaintiff was called as a witness on the prosecutor's behalf when defendant objected to his evidence, stating that "he," plaintiff, "is a perjurer; he perjured himself three times at Betts' trial before you." There was no evidence to show that the defendant was acting by and on behalf of his son with his son's consent, nor was it absolutely proved that the son was a minor.

Held, that the communication was not absolutely privileged, and a nonsuit entered by the learned judge at the trial was therefore set aside, and a new trial directed with costs to the plaintiff if he succeeded, but if not without costs, unless the parties would agree to the action being dismissed with costs, to be paid by the defendants.

Alan Cassels, for the plaintiff.

Musgrove, for the defendant.

MERCHANTS' BANK v. LUCAS.

Bill of exchange—Forgery—Estoppel.

Y., who had been in partnership with L. and I. Y., under the name of H. C Co., withdrew from the firm, and assumed the position of general manager, but had no power to sign drafts. For purposes of his own, Y., among other bills on 25th June, 1883, drew a bill of exchange on M. & Co., a firm in Montreal, for $2,760, which was discounted by the plaintiffs and sent to Montreal, where it was duly accepted. The bill would mature on 28th September. About 25th August Y. called at the bank, and got them to recall the bill, as he said they were settling with M. & Co. The bill was received back by the bank on the 27th August; on the 25th August Y. wrote to the defendants requesting them to retire, and charge to his account, among others, the draft in question stated to be made in their name discounted at plaintiffs' bank, but which he said was discounted for his accommodation and the proceeds applied to his own use, and defendants should pay no part of it. On 27th August the defendant L. called at the bank and asked the acting manager to allow him to see the draft, and when it was shown to him he examined it very critically, and when asked why he did so he said, referring to I. Y.'s signature, that it was not usually so shaky, and he said he would call in a day or two to see if the bill was taken up. A few days afterwards I. Y. called at the bank and asked to see the bill, and examined it very carefully, and the acting manager asked him if he would send a cheque for it; he said it was too late that day, but he would do so next day. No cheque was sent. About the 13th September the acting manager and the bank solicitor called to see I. Y., and asked him why he had not sent his cheque, when he replied he did not know, but admitted having promised to do so, and said that at that time he had thought he would send it. In answer to inquiry he refused to say whether or not the signature was his. When the draft was returned to the bank, and shown to L., Y. had a large sum at his credit with the firm, and a considerable sum even after commencement of this action.

Held, ROSE, J. dissenting, that under the circumstances the defendants were estopped from denying their liability on the note.

Robinson, Q.C., and *E. Martin*, Q.C., for the plaintiffs.

McCarthy, Q.C., and *Bruce*, Q.C., for the defendants.

LEGATT v. CLARRY.

Sale of goods—Promissory note therefor—Acceptance of goods — Latent defects — Damages — Counterclaim.

Action on three bills of exchange drawn by plaintiff on and accepted by defendants for the price of certain boots and shoes bought by defendant for plaintiff. The goods were ordered by defendant through G., plaintiff's agent, who showed defendant samples of the goods, some of which were what is known in the trade as "solid leather" and others as shoddy. The defendant stated he bought what was represented as solid leather, which G. stated he sold by sample, and that the goods delivered were in accordance with the sample. The

order for the goods was given on the 5th September, 1885, and part of the goods sent to defendant, another portion was delivered in November, and the residue somewhat later. In January the defendant went to Montreal, and asked to get an extension of time, as he said, to see if the goods would turn out all right which the plaintiff refused to give, and defendant said if they did not turn out all right he would ship them back. A large quantity of the goods were sold. In February the defendant claimed to be entitled to return the goods because, as he alleged, they did not answer the contract, the defect being a latent one, and not discoverable by ordinary inspection and examination. There was no evidence to show what defendant's alleged loss was.

Held, that under the circumstances there was no defence to the action on the notes; but that the defendant's remedy, if any, for the plaintiff's alleged breach of contract in supplying goods not as ordered must rest on the counter-claim; but that there could be no judgment thereon, as there was not sufficient evidence of the loss sustained, and as the learned judge at the trial has entered judgment for the plaintiff without prejudice to the defendant bringing an action for damages if so advised.

Aylesworth, for the plaintiff.

McCarthy, Q.C., *S. M. Jarvis*, for the defendant.

WELSH v. CORPORATION OF ST. CATHARINES.

Municipal corporations—Public drain—Private drain connecting therewith—Water backing—Liability of corporation.

To render a corporation liable for injury from the overflow of a drain it must be shown affirmatively that the corporation required the property owners to use the public drain by connecting their private drains therewith; that the drain has been improperly and negligently constructed, or that it has become obstructed, and the corporation have negligently omitted to remove the obstruction within a reasonable time after knowledge or notice, and injury resulting therefrom; or that the corporation have brought more water to the plaintiff's land by means of the drain than would otherwise have come thereto, and wilfully poured it thereon, or negligently allowed it to escape and flow on the land.

The plaintiff had a house on a street in the city of St. Catharines which was drained by a drain running through private grounds to and under a raceway; but this was stopped by the persons owning the lands on the other side thereof, in which the water flowed. There was an open ditch, or drain, on the east side of the street connecting with the raceway. The raceway, which was no higher than the street, was afterwards banked up, whereby the flow of the water was stopped and was spread over the adjoining lands, whereupon R., the then owner of plaintiff's house, and others, petitioned the council to construct a drain under the raceway, which was done by means of a well at the raceway and a five-inch pipe under it. R. then connected his box drain with the well. The only evidence of acquiescence by the corporation was the knowledge thereof by O., the defendant's street inspector, and no objection made by him; afterwards the defendants connected the drainage of other streets with the well, whereby more water was brought down to the well than the five-inch pipe would carry off, and it flowed back on the plaintiff's premises.

Held, following *McConkey* v. *Corporation of Brockville*, 10 O. R., that the defendants were not liable for the damage sustained by the plaintiff.

Lash, Q.C., and *R. G. Cox*, for the plaintiffs.

Moss, Q.C., and *Macdonald*, for the defendants.

RAE v. MCDONALD.

Insolvency—Preference—R. S. O. ch. 118, 48 Vict. ch. 26, sec. 2, construction of—Donee—Misdirection.

Under R. S. O. ch. 18, as amended by 48 Vict. ch. 26, sec. 2 (O.), one of three things must occur before a conveyance, assignment, etc., of any real property can be impeached, viz., the person making the disposition of his property by any of the modes indicated must (1) at the time be in insolvent circumstances, or (2) be unable to pay his debts in full, or know that he is on the eve of insolvency; and in addition the (1) disposition must be made by the owner of the property with the intent to defeat,

delay, or prejudice his creditors, or to give to any one or more of them a preference, or (2) it must have that effect.

In an action by the plaintiff, a creditor, to set aside a mortgage made by the debtor to the defendant,

Held, on the evidence set out in this case, that the debtor was insolvent when he made the mortgage, and that the defendant obtained a preference thereby over the other creditors, and must be set aside.

Per ROSE, J.: The value of dower is properly admissible in determining the value of the debtor's liabilities.

The learned judge charged the jury that there was a difference between the debtor, who was a farmer, and a trader on whom calls for payment may be made day by day; that a trader was not expected to meet demands exactly in that way. The principal question was whether he owned property at that time, which with reasonable management, with proper care, and with reasonable time, would enable him if he was pressed, to pay his debts in full or not.

Per ROSE, J.: That there was misdirection in that he did not guard his direction by stating that there was no difference in principle, where the question to be determined was whether there were assets out of which the liabilities could be collected, if necessary, by levy and execution.

Two of the debts owing were to relatives, being for $1,840 and $800, secured by mortgage and promissory notes. The learned judge charged the jury that because the debts were under the control of the debtor they must not be included in estimating the liabilities.

Per ROSE, J.: This was misdirection also.

Held, following *Macdonald* v. *McCall*, that a creditor, to maintain an action of this kind, need not be a judgment creditor.

Held, also, that there is nothing to prevent a judge at the trial directing equitable issues being tried by a jury.

Per CAMERON, C.J.: In determining whether a debtor is insolvent, etc., his assets or effects are not to be estimated at what they might bring at a forced sale under execution; but at the fair value in cash on the market at any ordinary sale.

Shepley, for the plaintiff.

Woods, Q.C., for the defendant.

STEVENSON V. TRAYNOR.

Assessment and taxes—Onus of proof—Arrears of taxes.

In ejectment the plaintiff claimed under a patent from the Crown, dated 15th June, 1878. The defendant claimed under a tax deed dated 10th November, 1881, made under a sale for taxes on 21st October, 1880. The taxes for which the land was sold were $1.13 for school rate in 1877, and $1 for 1878. There was no evidence as to the rights of the plaintiff prior to the issuing of the patent, nor was it shown that the Commissioner of Crown Lands had made any return to the treasurer of the land having been located as a free grant, "sold or agreed to be sold" under R. S. O. ch. 108, sec. 106.

Held, that the production by defendant of the tax deed did not cast the onus on the plaintiff, the patentee, of proving that no taxes were in arrear; but that the plaintiff by the production of his patent made out a *prima facie* case, and the defendant, relying on his tax deed, was bound to prove the tax sale and that some portion of the taxes were in arrears for three years, which the evidence failed to show.

Laidlaw, Q.C., for the plaintiff.

J. B. Clarke, for the defendant.

COCKBURN V. MUSKOKA LUMBER COMPANY.

Free grant lands—Locatee cutting timber for clearing—Timber licensee—Damages—Loss of profits.

Under sec. 10 of R. S. O. cb. 24, as amended by sec. 2 of 43 Vict. ch. 4 (O.), the locatee may cut and use such pine trees as may be necessary for the purpose of building and fencing on the land so located, and may also cut and dispose of all trees, including pine trees, required to be removed in the actual clearing of the land for cultivation, but no pine trees (except for the necessary building and fencing as aforesaid) shall be cut beyond the limit of said clearing.

Held, that there was nothing to prevent the cutting, clearing and cultivating the land in several parcels in various shapes and forms, it not being necessary that the clearings should

be together and contiguous, so long as such is done in good faith for clearing and cultivation, as was found as a fact here; and that the locatee may cut such pine trees as may be necessary for the purpose of building and fencing wherever he choses on the land; but they can only be used for such purpose; but when the trees are cut in the actual process of clearing for the purpose of cultivation they may be sold and disposed of.

Trees so cut by the locatee in the actual process of cultivation, etc., were sold to the plaintiff, a mill owner, but were seized by defendants, the timber licensees, who also had a mill, and were taken by them thereto, and cut up into lumber. It was proved that the plaintiff could not get other logs at this season of the year.

Held, CAMERON, C.J., dissenting, that the plaintiff was entitled to the loss of profits sustained by him by being deprived of cutting the lumber into logs at his mill.

Pepler, for the plaintiff.

Robinson, Q.C., and *J. H. Mayne Campbell*, for the defendants.

REGINA v. MCFEE.

Criminal law—Forgery—Uttering -Promissory note.

W., a Division Court bailiff, who had an execution against P. M. and H. M., arranged to accept a note to be made by A. M., payable to the order of A. D. M. The note was drawn up by W., and handed to the prisoner to obtain A. D. F.'s endorsation. The prisoner took it away, and shortly afterwards returned with the name A. D. F. endorsed to it. The prisoner then handed the note to A. F., who signed his name as maker, and A. F. then delivered the note to W., who subsequently negotiated it. The name A. D. F. was a forgery.

Held, that an indictment for forgery would not lie, for at the time when A. D. F.'s name was signed to the note it was not a promissory note, by reason of the maker's name not being then signed to it; and neither would a count for uttering lie, for after it was signed by A. F. it was never in the prisoner's possession, but was delivered by A. F. to W.

McMahon, Q.C., for the Crown.

John Dickinson, contra.

JAMES v. CLEMENT.

Party-wall—Evidence of—Injunction—Damages.

The plaintiff claimed that the foundation of the dividing or partition wall between his and defendant's building was his and on his premises, and that the upper part thereof had always been used as a party-wall; that the defendant, without his consent, raised the said wall a foot above plaintiff's premises, and altered the roof from a flat roof to a slanting one, whereby water, etc., was thrown on plaintiff's premises, and plaintiff asked for a declaration that the wall was a party-wall and that defendant be restrained from preventing plaintiff from using same, together with the new part in continuation thereof, on payment by plaintiff of half the costs thereof, and that defendant be also restrained from permitting the water, etc., to be discharged on the plaintiff's premises.

The jury found that the plaintiff had sustained damage to the extent of $35, and also that the wall was a party-wall. The learned Judge thereupon entered judgment for the plaintiff, and made the decree as asked for.

Held, on motion to set aside the declaration that there was no evidence to sustain the finding, that the wall was a party-wall, for the evidence showed that the wall was wholly built on the defendant's land, and there was no agreement to show that it was to be deemed a party-wall. The decree was therefore set aside; but as regards the damages, as these were not moved against, they were not interfered with.

Hardy, Q.C., for the plaintiff.

Robertson, Q.C., for the defendant.

GRAHAM v. LONDON MUTUAL INS. CO.

Insurance—Further insurance—Assent thereto—Mutual company.

To an action on a fire insurance policy in a mutual company, the company set up as a defence the eighth statutory condition endorsed on the policy, whereby the company were not to be liable for any loss "if any subsequent insurance is effected in any other company, unless and until the company assent by writing, signed by a duly authorized agent."

By 44 Vict. ch. 20, sec. 28 (O.), the Fire Insurance Policy Act was made applicable to mutual insurance companies, except when the provisions of the Mutual Fire Insurance Companies Act is inconsistent with or supplementary and in addition thereto. By the Mutual Companies Act, R. S. O. ch. 161, sec. 29, it is provided that "if an insurance subsists by the act, or with the knowledge, of the insured in any company and in any other office at the same time, the insurance in the company shall become void, unless the double insurance subsists with the assent of the directors signified by endorsement on the policy signed by the secretary or other officer authorized to do so, or otherwise acknowledged in writing"; and by the 40th section that "whenever notification in writing has been received by a company, from a person already insured, of his having insured an additional sum on the same property in some other company, the said additional insurance shall be deemed assented to, unless the company so notified, within two weeks after receipt of such notice, signify to the party in writing their dissent." The policy in defendants' company was effected on 31st July, 1884. On the 4th January, 1886, the plaintiff effected a further insurance in the Ontario Mutual for $1,000, of which no notice was given until the 8th March, when plaintiff wrote to the defendants, "I hereby notify you that I have put a second insurance on my stock and barn and implements," to which the defendants replied on 18th March, informing plaintiff that he had not given the number of the policy, nor the amount of the other insurance, or the name of the company. The plaintiff did not reply to this, because, as he said, he was away from home at the time. A fire took place on the 16th March, and destroyed the insured property. The jury found that the plaintiff did not, within a reasonable time after effecting the further insurance, notify the defendants, but that the notice was reasonably sufficient so far as the plaintiff knew.

Held, that under sec. 39 of ch. 161, the insurance was void, and that it was immaterial whether the plaintiff had or had not notified the defendants within a reasonable time when there were no assets, and that plaintiff could not avail himself of section 40, as there was no sufficient notice given.

Held, also, that under the eighth statutory condition the policy was void, and if sec. 40 could be held as supplementary, etc., of it, the plaintiff, by reason of his insufficient notice did not come within it.

Maclennan, Q.C., for the plaintiff.

McMillan, of London, for the defendants.

CHANCERY DIVISION.

Proudfoot, J.] [October 23, 1886.

RE CANNON, OATES v. CANNON.

Administration action—Champertous agreement to get control of a claim on which to apply for administration order—Petition to set aside administration order—Creditors rights thereunder—Champertous claim disallowed.

O., assuming that the firm of T. & O., of which he was a member, had a small claim of about $300 against the estate of A. M. C., a deceased intestate, ascertained that H. & Co. had a large one of over $7,000 on promissory notes, and tried to induce H. & Co. to join him in an action for the administration of A. M. C.'s estate, which they declined to do. H. & Co. offered to sell their claim to him for $2,000, which offer O. refused to accept, but finally, without the payment of any valuable consideration, obtained an assignment of H. & Co.'s claim for the purpose of collecting it under an agreement by which he was to pay H. & Co. one-half of the amount collected on said claim after payment of costs. H. & Co. did not make themselves responsible for any costs. O. brought his action on these notes against M. E. C., the administratrix of A. M. C., who, not knowing anything of the claim, did not resist the making of the administration order; but when the facts were elicited in the Master's office, and when O.'s own claim was disallowed by the Master, filed a petition to have the order set aside on the ground of champerty.

Held, that as a decree for administration is for the benefit of all the creditors, and as another creditor had established a claim under it, the administration order could not be set aside.

Held, also, that the agreement between O. and H. & Co. was champertous, or so strongly savouring of it that it could not be maintained and that O.

could not prove on the notes in this administration suit, *Reynell* v. *Sprye*, 1 D. M. & G. 671, and *Hutley* v. *Hutley*, L. R. 8 Q. B. 112, considered.

McMichael, Q.C., and *A. Hoskin*, Q.C., for the petitioner.

Foster, Q.C., and *J. B. Clarke*, contra.

Boyd, C.] [Nov. 24, 1886.

BEATTIE v. SHAW ET AL.

Mortgage by executor to co-executor—Death of mortgagee—Discharge by survivor—Validity of discharge—Improvements under mistake of title.

The Rev. W. H. died, leaving F. H. and W. H. his executors, who both proved the will. F. H., on January 17, 1874, mortgaged certain lands to W. H., his co-executor, to secure certain moneys due by F. H. to the estate of Rev. W. H., both mortgagor and mortgagee being described as executors of that estate. Interest was paid on that mortgage up to April 1, 1885. The executor, W. H., died intestate in July, 1879. On April 10, 1884, F. H. sold the lands to M., and on same day executed a discharge of his own mortgage, which was registered April 15, 1884, in which the mortgage was misdescribed as if it had been taken to the Rev. W. H.

In an action by the plaintiff, who had been appointed by an order of court to represent the estate of Rev. W. H. on the mortgage against several defendants who had become owners of the land, in which the defendants contended that the discharge of F. H. was valid, and claimed for their improvements under mistake of title, it was

Held, that the mortgage was not discharged, nor the estate reconveyed to F. H. by what was done, and that the legal effect of the mortgage was to enable W. H. to hold the estate in his own right as against F. H., although, as regards the beneficiaries under the Rev. W. H.'s will, W. H. was only a trustee. R. S. O. c. 3, s. 67, contemplates the action of two parties, one to pay and the other to receive, and not both represented by one and that one whose duty and interest were in direct conflict; and under these circumstances such a transaction cannot stand. The defendants had actual notice by the registered discharge that F. H., as surviving executor of the Rev. W. H., was attempting to deal with himself as mortgagee, and it was at their peril they took such a title without satisfying themselves that there was a real satisfaction and discharge of the mortgage moneys as regards the persons entitled under Rev. W. H.'s will. But a reference was ordered as to improvements under mistake of title. *Bacon* v. *Shier*, 16 Gr. 485, considered and distinguished.

J. C. Hamilton and *Alan Cassels*, for plaintiff.

Bain, Q.C., for defendants.

Divisional Court.] [January 8.

COYNE v. BRODIE ET AL.

Trustee and cestui que trust—Principal and agent—Statute of limitations.

J. C. died in 1876, and left an estate, very much embarrassed, to his wife; the plaintiff, B., an active business man, acted as agent for the plaintiff in settling up the estate, and induced a very large majority of the creditors to give up their claims, or settle them on terms very favourable to the plaintiff. He also sold a house, part of the estate, for her, and part of the purchase money was taken in the notes of F., the purchaser. The notes came to the hands of S., a brother of the plaintiff, who held them and collected some of them for her.

Some little time after, B. asked S. if the notes were all paid, and when he was told some of them were not, he said the money for a loan to F. was then going through his hands, and if he had the notes he could collect them, and so save them for the widow and orphans out of that money. The notes were given to him and he collected them; but the money was left in his hands unclaimed for eight years, until he made an assignment for the benefit of creditors.

In an action against him and his assignees, in which the defendants set up the Statute of Limitations as a bar, and the plaintiff contended that B. was a trustee, and that the statute could not be pleaded,

Held, CAMERON, C.J. C.P. (at the trial), that B. received the notes as agent of the plaintiff for the purpose of collecting the money as agent for the plaintiff, and that the statute was a bar. There was no express trust, only such a trust as arose from the relation of principal and agent, which does not prevent the operation of the statute.

On appeal, as the Divisional Court was evenly divided, this judgment was affirmed.

Per BOYD, C.—B. undertook to hold the notes, not for safe custody as a deposit, nor for investment as a scrivener, but as an attorney or agent to collect and remit. This establishes a fiduciary relationship, but not that of a trustee and *cestui que trust*, to all intents. A breach of trust arose on B.'s part, when he failed to remit and kept the money an unreasonable time, which indicated his intention to convert it to his own use. From the time plaintiff knew, or might have known, that, they were at arms' length, the retention was an adverse possession. Plaintiff's duty then was to make him pay as a debtor, and if she failed to resort to the usual remedy within six years he had the right to plead the statute. Substantially, B.'s position was not different from that of a solicitor who received notes and securities to collect for his client. The moneys he collects are recoverable by a legal action to which, if not prosecuted within six years, the statute is a bar. *Cook* v. *Grant*, 32 C. P. 511, distinguished.

Per PROUDFOOT, J.—A trust attached upon the notes given to B. They were not to become his property; a special confidence was reposed in him to secure their payment out of an entirely distinct transaction, and "to save them for the widow and orphans." The trust continued until the completion of the transaction by the money being placed in the widow's hands. The notes were not due when confided to B. He was not a mere agent to collect, but he was to use an influence to get better security or anticipated payment. *Cook* v. *Grant*, *supra*, considered.

Bain, Q.C., for plaintiff.

J. H. McDonald, Q.C., for defendants.

Divisional Court.] [January 8.

MCMULLEN v. FREE.

Damages to present crops—To farm permanently—Evidence of—Improper rejection—Action by mortgagor—Joinder of mortgagee.

Plaintiff bought seed barley from defendant guaranteed to be clean. The seed was sown, and it was afterwards discovered that it was mixed with a weed called wild vetches, or wild peas, which took root and grew up with the barley.

In an action to recover damages for depreciation in the value of the farm the evidence showed that the plaintiff had not sustained any damage to his crop, but he tendered evidence to show depreciation in the value of the farm, which the learned Judge refused to receive.

On motion to the Divisional Court for a new trial,

Held (reversing Galt, J.) that the plaintiff should have been allowed to substantiate, if he could, that the necessary consequence of sowing the foul seed was to lower appreciably the value of the farm.

On the argument it was contended that as the farm was mortgaged the plaintiff (mortgagor) could not maintain the action.

Held, that in equity the mortgagor is the owner in a case like this, where the land is worth considerably more than the mortgage, and it is for the Judge to direct the mortgagee to be added or to direct the sum recovered to be paid into court for his protection, if it appears that his interests are being affected prejudicially by the litigation; but it is no reason for dismissing the action, and a new trial was ordered.

Riddell, for the plaintiff.

Clute, for the defendant.

Divisional Court.] [January 8.

ST. DENIS v. BAXTER.

Findings of jury in answer to questions—Recommendation of verdict—Entry of verdict by judge on findings.

In an action for wrongful dismissal the jury found (1) That there was a final bargain made between the parties: (2) That the plaintiff was to get $900 a year, and in answer to the question: "It being a condition of the bargain that the plaintiff's term of service should end if he were not fit to do the duties of a captain, was the plaintiff fit to do the duties of a captain?" Ans. (3) It has not been satisfactorily shown by the evidence, and (4) The plaintiff was dismissed, and added as a rider the following: "Your jury, believing that the plaintiff did not receive proper aid in the discharge of his duty, would recommend a verdict for plaintiff of $100."

The judge entered a verdict for the defendant, and the plaintiff moved to set it aside.

Held, as the Court being evenly divided that the verdict should not be disturbed, and leave to appeal was granted.

Per BOYD, C.—The onus was on the defendants to prove the unfitness, and the jury, as is manifest by their recommendation, did not intend to pronounce against the plaintiff's competency. The findings were left in too uncertain a state to enter a verdict for either party against the will of the other. No material part of what the jury returns to the judge should be disregarded.

Per PROUDFOOT, J.—The duty of the jury was completed when they answered the questions. It was for the judge to determine what the legal result of the answers was. The jury's recommendation would rather seem to have been done more for sympathy for the plaintiff than with the desire of affirming his competency, which they had previously found was not proved.

Aylesworth, for the plaintiff.

Cassels, Q.C., for the defendants.

Divisional Court.] [January 8.

BUDD v. BELL.

Negligence of master in instructing a servant respecting machinery.

The plaintiff having had years of experience in running iron work machines, and having been previously employed by the defendants in their wood working manufactory, hired a second time, and was injured in working a jointer, which he was told other men had been injured at. In an action against his employers,

Held, that plaintiff knew from his own inspection and experience that the machine was dangerous, that it needed caution and firmness in operating, that the risks were open to his observation, and that his opportunities and means of judging of the danger were, at least, as good as those of his employers, and a motion to set aside a nonsuit entered at the trial was dismissed.

Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established, as a foreman is but a fellow-servant, though it may be of a higher grade.

J. L. Murphy, for the plaintiff.

A. H. MacDonald, for the defendant.

Divisional Court.] [January 8.

MEYER ET AL v. BELL.

Seduction—Right of mother and stepfather to maintain action when daughter not living with plaintiffs.

In an action for seduction brought by the mother and stepfather of the daughter, it appeared that at the time of the seduction the daughter was not living at home with the plaintiffs, but was out at service.

Held (affirming Galt, J.), that the plaintiff had the right to maintain the action.

German, for the plaintiff.

Osler, Q.C., for the defendant.

PRACTICE.

Ferguson, J.] [January 17.

SNOWDEN v. HUNTINGTON.

Chambers appeal—Time—Christmas vacation—Extending time.

The time of Christmas vacation is not to be excluded in reckoning the eight days within which an appeal from the Master in chambers, or local Judge, or Master sitting in chambers, is to be brought on as required by Rule 427.

As such appeals are not heard in vacation, the time for appealing will be extended as a matter of course upon an *ex parte* application.

Hoyles, for the plaintiff.

W. M. Douglas, for the defendants.

Ferguson, J.] [January 17.

RE S., INFANTS.

Habeas corpus—Evidence—R. S. O. ch. 70, sec. 1—Foreign commission—Discovery.

Held, that the provision in R. S. O. ch. 70, sec 6, that the court or Judge before whom any writ of habeas corpus is returnable may proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation is permissive only, and that a Judge has power in such a case to direct that the evidence shall be taken *viva voce* before him.

And in this matter it was directed as in *Re Murdoch*, 9 P.R. 132, that the evidence should be taken *viva voce*, and it was ordered besides that a foreign commission should issue to take evidence abroad and that the parties to the application should be at liberty to examine each other for discovery before the hearing.

Maclennan, Q.C., and *H. J. Scott*, Q.C., for the father of the infants.

S. H. Blake, Q.C., and *H. Cassels* for the mother.

Ferguson, J.] [Jan. 24.

RE ALLISON ET AL., SOLICITORS.

Solicitor and client—Delivery of bill of costs—Offer by solicitor—Taxation.

Where a solicitor has offered to take in full settlement less than the amount of a bill of costs as rendered, and has made the offer in a manner unequivocal and binding upon him, then, and not otherwise, he is allowed the benefit of the offer, if the client reject it, and proceed to tax the bill.

Re Freeman et al., 1 P. R. 102, and *Re Carthew* and *Re Paull*, 27 Ch. D. 485, considered and explained. And where the offer to make a reduction in the bill was not upon the face of it, nor in any letter accompanying it, but was made verbally, and in the course of a conversation on the subject after the delivery of the bill,

Held, that the offer was not of an unequivocal character, made so as to be binding upon the solicitor, but left him free, when it was not accepted, to claim all he could get upon a taxation, and he was therefore not entitled to the benefit of it.

Macnee, for the solicitors.

Watson, for the client.

Boyd, C.] [Jan. 25.

MACDONALD V. MCCALL ET AL.

Costs as between solicitor and client—Creditor's action—Contribution—Payment out of fund—Appeals.

In a creditor's action to set aside a chattel mortgage as preferential, the judgment at the trial declared that the mortgage was fraudulent and void as against the plaintiff and such other creditors of the defendant, C., as may contribute to the expenses of the suit. This judgment also directed that the plaintiff should be paid his party and party costs by the defendant, McC., and his additional costs, as between solicitor and client, out of the fund recovered for the creditors by setting aside the mortgage. The case was carried by the defendants to the Court of Appeal and the Supreme Court of Canada, and the judgment at the trial was finally affirmed in all respects, bu the additional costs, as between solicitor and client, were not given by the Court of Appeal or the Supreme Court.

Held, that the plaintiff's expenses in saving the fund were not limited to party and party costs, but extended to those incurred, as between solicitor and client, to the end of the proceedings in the appeal to the Supreme Court. The principle is that when, in a creditor's suit, the fund is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree must contribute to make good that loss which the plaintiff has borne on behalf of all creditors. The plaintiff had a right, therefore, to object to the other creditors coming in to share in the fund, until they had contributed to these extra costs; and, in order to avoid circuity, it was directed that they should be taxed and paid out of the fund.

Middleton, for the plaintiff.

George Kerr, for the defendant, McCall,

CORRESPONDENCE.

LIMITATION OF ACTIONS.

To the Editor of the CANADA LAW JOURNAL:

DEAR SIR,—I have read your editorial article in the last number of the CANADA LAW JOURNAL on the subject of the period of limitation for enforcing a mortgage or judgment.

No one will, I suppose, question the propriety of adhering to the course of decision in England in all branches of our law which are founded upon the law of England, and amongst others to English authorities as to the meaning of a Statute which has been copied from an Imperial Act, "*if*," (as put by Judge Rose in *Macdonald* v. *Elliott*, 12 Ont.

100), "upon examination of the English Act and ours, it appears that there is no substantial difference in the language, and that the same rules of construction should be applied."

I wish, however, to make a humble remonstrance against such an indiscriminate adoption of English decisions as you would seem to advocate, and more especially against the English decision in *Sutton* v. *Sutton*, 22 Chy. Div. 511 (the text of your article), being taken to be "the very opposite" of the decisions you mention of our Court of Appeal. Is it not possible that the Court of Appeal in *Sutton* v. *Sutton*, and the other recent English cases has rightly construed the Statute upon which it was required to adjudicate, and that *Allan* v. *McTavish*, 2 Ont. App., and *Boice* v. *O'Loane*, 3 Ont. App., are also correctly decided in view of the condition of our legislation on the same subject

The two latter cases, as I understand them, proceeded on the ground that Con. Stat. U. C. c. 78, named the period (20 years) of limitation for a personal action, and Con. Stat. U. C. c. 88, the period of limitation (also 20 years) for enforcing a charge against land, and that the Act of 1874 (reducing certain periods of limitation to ten years) was only enacted in amendment of Con. Stat. U. C. c. 88, leaving c. 78 unaffected, so that practically there was existing in this Province a state of things similar to that which existed in England when *Hunter* v. *Nockolds*, 1 Mac. & G. 640, was decided, the two corresponding Imperial Statutes having been passed in the same Session.

In *Sutton* v. *Sutton*, the court had to deal with an Act of 1833 and an Act of 1874, and held that the latter Act effected a repeal of inconsistent provisions in the former.

Allan v. *McTavish* and *Boice* v. *O'Loane* were decided upon the legislation prior to the Revision of 1877, and, assuming for the sake of argument, (though only for the sake of argument), that the court was not correct in holding that the Act of 1874 was merely an amendment of Con. Stat. c. 88, and had no effect upon Con. Stat. c. 78, did not the Revised Statutes, which came into force on the 1st January, 1878, adopt the construction afterwards put by the Court of Appeal upon the two chapters of the Con. Stat.? We there find in chap. 61, sec. 1, the period of 20 years as the limitation of the personal action, and in chap. 108, sec. 23, a clause identical with the English clause in question in *Sutton* v. *Sutton*, and with our Provincial enactment of 1874 (except that ten years instead of twelve is the reduced period of limitation). Further, in regard to judgments, on turning to chap. 50, sec. 330, we find a section which contemplates proceedings to enforce a judgment, upon which writs of execution have never been issued, after it is more than 15 years old.

In view of the above three provisions occurring in the Statutes passed in the same Session, is it not reasonable to conclude that our Court of Appeal, if the matter again arose, might properly hold that the circumstances existing here are practically those which existed in England when *Hunter* v. *Nockolds* was decided, but which had ceased to exist before *Sutton* v. *Sutton* was decided, and that therefore, the decisions in this country should still follow *Hunter* v. *Nockolds*?

Further, is it not also reasonably arguable that if the tribunal which decided *Sutton* v. *Sutton* had been then construing our Acts, its decision would have been in accordance with *Allan* v. *McTavish* and *Boice* v. *O'Loane*?

In *Sutton* v. *Sutton*, at page 518, Cotton, L J., says:—

"One difficulty I have felt has been in consequence of the case of *Hunter* v. *Nockolds*, 1 Mac. & G. 640, decided by Lord Cottenham, in which he expressed an opinion that although in actions brought to recover money issuing out of the lands, only six years' interest could be allowed, yet he based his decision upon this ground that one must take the two Statutes, 3 & 4 Will. IV., c. 27, and 3 & 4 Will. IV., c. 42 together. That might be right under the circumstances. He was driven to that by this consideration, that the one Act was only passed three weeks before the other, and therefore he said you must read the two together, and take the latter one only as an explanation of the other Act. I think we are not in any such difficulty here, because the section we have to construe is contained in an Act passed in the year 1874, and therefore there is no necessity for construing this so as to leave the same bar to an action on the covenant, as that which is provided by section 42 of the earlier Act. There is no necessity to follow in this case the way in which Lord Cottenham dealt with the two Acts passed almost simultaneously."

Yours truly,

THOMAS LANGTON.

Toronto, Jan. 28th, 1887.

[The point aimed at was not so much whether the case of *Sutton* v. *Sutton* did override *Boice* v. *O'Loane* and *Allan* v. *McTavish*; as whether assuming it did so (and as the learned judges quoted from appear to have assumed), the decision of the Court of Appeal in England should be held to override a decision of our Court of Appeal, where such decisions were, on the same point, to the opposite effect.—Ed. LAW JOURNAL.]