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DIARY FOR JANUARY.

1. Tues...**New Year's Day.**
3. Thur ..Toronto and Hamilton Assizes commence.
5. Sat ....Christmas vacation H. C. J. ends.
6. Sun ...*Epiphany.*
7. Mon...Co. Court Term commences. Sur. Ct. Term commences. Christ. vac. in Exch. Ct. Canada ends.
8. Tues...Court of Appeal Sittings begin.
10. Thur ..Christmas vacation in Sup. Ct. of Canada ends.
11. Fri ....Sir Charles Bagot, Governor-General, 1842.
15. Sat ...County Ct Term ends Surrogate Ct Term ends
23. Sun....*First Sunday after Epiphany.*
18. Mon. ..Primary Ex. for Students and Articled Clerks begin.

TORONTO, JAN. 1, 1884.

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IN *Re Sneyd ex p. Fewings* (*Law Times* Rep., Dec. 8th, 1883, p. 103), recently before the English Court of Appeal (Cotton, Landley and Fry, L. J J.), the question as to the amount of interest recoverable after judgment on a covenant for the payment of money with interest, was again considered, and it was held that the covenant was merged in the judgment, and that although the covenant was for the payment of interest at five per cent.; yet after judgment only four per cent. could be recovered. Fry, L. J., however, referring to *Popple* v. *Sylvester*, 22 Ch. D. 98, pointed out that the covenant might be so framed as to enable the covenantee to recover the covenanted rate even after judgment.

MECHANIC'S LIENS.

McPherson v. *Gege*, noted in our last issue at p. 400, is an important decision on the practice in suits to enforce mechanics' liens. The 15th section of the *Mechanic's Lien Act* (R. S. O. c. 120) provides that "any number of lien-holders may join in one suit, and all suits brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class; and in the event of the death of the plaintiff therein, or his refusal or neglect to proceed therewith, may by leave of the court in which the suit is brought, on such terms as may be deemed just and reasonable, be prosecuted and continued by any other lien-holder of the same class."

In *McPherson* v. *Gege* it seems that the original plaintiff in the action had, before judgment, consented to its dismissal, but the court, on the application of another lien-holder of the same class, restored the action except as to the claim of the original plaintiff, and permitted the applicant to prosecute the action. Usually in a class suit the plaintiff is *dominus litis* until judgment, and may, before judgment, consent to its compromise or dismissal, and the rest of the class for whose benefit the action is brought cannot intervene to prevent the dismissal. This principle was recognized by the Court of Appeal in the case of *Smith* v. *Doyle*, 4 App. R. 471. Burton, J. A., at p. 477, thus refers to it:—"No authority was cited for the position that a creditor, who could file a bill in his own behalf to set aside a fraudulent conveyance, could, by suing on behalf of other creditors, preclude them from taking similar proceedings on their own behalf. *It continues until decree to be the suit of the actual plaintiff alone.* He has a right either to dismiss, or compro-

mise it. But when a decree is made, the case is different. He ceases then to have absolute control, and the general body of creditors, for whose benefit the decree is made. become entitled to intervene."

It will thus be seen that the result of *McPherson* v. *Gege* is to establish that suits to enforce mechanics' liens differ from other class suits so far as regards the rights of other members of the same class as the actual plaintiff to intervene therein. In such actions they have not only the right to intervene and prosecute the action before or after judgment, where the original plaintiff neglects, or refuses to do so, but the latter's right to consent to a compromise, or a dismissal, of the action, is practically confined to his own claim, and the action may be restored if any other member of the class choose to intervene. We observe that Mr. Justice Galt is reported to have dissented from the majority of the court, on the ground that the applicant was not of the same class as the original plaintiff; we are inclined to think too, that the decision goes a little beyond the strict letter of the Act. The intervention which the 15th section appears to contemplate is an intervention in an existing action, not an intervention in an action which has been dismissed. The conclusion which the court arrived at, however, is a very reasonable and proper one, even if it does savor a little of judicial legislation, but we fear it may be found to lead to some difficulty in practice. The question must inevitably arise, as to the effect of parties acquiring rights between the dismissal of an action, and its subsequent restoration on the application of another lien-holder of the same class. Will persons thus acquiring rights, be nevertheless bound by the claims of other lien-holders who apply to restore the action? or will they take free from such claims? Until this question is determined, it is clear that another and very dangerous obstacle is placed in the way of persons dealing with lands on which mechanic's liens exist. The difficulty is complicated by the fact, that after an action is commenced, it ceases to be necessary for any lien-holder of the same class as the plaintiff to register his lien; consequently it must become a matter of serious difficulty to ascertain, when an action is dismissed, who the other lien-holders of the same class are, who are entitled to intervene, and whether or not their claims have been satisfied.

STANDARD TIME.

"Time was made for slaves." So thought the freeborn Britons at Quebec, when the garrison gun, fired by a Dominion officer, made it "eight bells," when old Sol made it 25 minutes past twelve. The same thought occurred to the clerks in government offices at Ottawa, when the clock of the House of Parliament was put on three minutes for the same reason. And for *what* reason? Because the railway magnates thought proper to reconstruct their time tables on some arbitrary system arranged for the convenience of their traffic.

It may be good for us, living in the City of Toronto, to be compelled to go to bed 17 minutes earlier than usual; but what about getting up so much earlier in the morning. We are creatures of habit as well as freeborn Britons, and we object to what is left to us of life being made more of a burden than necessary by having to breakfast by gaslight.

But let us look at the effect of "following a multitude to do evil" in this matter from some less personal points of view. It goes without saying that a railway company cannot alter the time of day except for its own servants or service. Yet with an amusing lamblike passiveness the clocks of the country have been set by those of the railway companies. This must be discouraging enough for some unhappy wight who walks across an imaginary line and finds he is an hour behind time; but the present situation has some consequences of a more serious character.

Suppose for example a poll closed by the "current" railway time, when by the true local time it should have been kept open some minutes longer. How would an election be affected by this action under certain circumstances, or what would be the position of a returning officer as to rejecting or receiving votes in the debateable *mauvais quart d'heure*. Night, in legal parlance, is defined for certain purposes of the criminal law as being "the time between nine o'clock in the evening and six o'clock in the morning of the succeeding day." It is easy to see how important the question of "What o'clock"? might become to a prisoner. So also in regard to an information for keeping a public house open beyond the lawful hour. Again, in matters of contract what about the expiration of a policy of fire insurance at noon on a certain day, or, finally, what would be the result of a registry office being open before or after the legal time, and an instrument recorded before or after proper hours and a loss occurring, what would be position of the parties or the Registrar? We might refer to a number of other cases where difficulties might arise, but these are sufficient.

We are not advised as to whether there is any pretended authority for the change of time that has so quietly taken place without a thought of possible consequences; but we apprehend there can be no legal authority inasmuch as neither Parliament nor Legislature has met since the change. We understand that the Attorney-General of Ontario has issued instructions that all offices under control of the Ontario Government, wherein the office hours are fixed by statute shall be opened and closed according to local time. Hence an intelligent official of our acquaintance in Toronto will have to discontinue displaying his impartiality by opening by the old time and closing by the new. Doubtless, good worthy man, he thought, like Charles Lamb, to compensate for coming late to his office in the morning by going away early in the afternoon. Some legislation will probably be introduced on the subject next session either by the Dominion or Provincial Government. The former *may* consider it necessary for "the peace, welfare and good government of the Dominion" to do so, or the latter may find it desirable for the more safe conduct of business in public offices. It would be well that any uncertainty or cause for litigation in the premises should be removed.

That serious legal complications may arise from changes in time is illustrated by a story for the truth of which we can vouch. Mr. G. O. the head of a well known landed family in England, came to a conveyancing counsel of our acquaintance for advice under the following circumstances. It appeared that his family held certain lands under a lease for two hundred years, granted in the time of Charles II. . These lands were at the time of our story in the hands of a tenant from year to year. By an excusable, but apparently fatal over-sight, no notice to quit had been served on the tenant from year to year, and the two hundred year lease would terminate before the requisite six months' notice could be given; for only five months and twenty-nine days remained before the two hundred year lease would be over, which would not be till after the close of the current year of the tenancy of the tenant from year to year. The tenant from year to year had got wind, it was feared, of the position of the title. The reversioners, after the two hundred year lease, were of course unknown. The consequence was at the end of the two hundred year lease the tenant from year to year would be in the position of a disseisor, having a good title against every one but the disseisee, the original reversioners; and consequently Mr. G. O. would see a valuable property go out of his family to one who had apparently a good legal, but no moral right to it. The conveyancing counsel got him out of the difficulty. But how? We leave it to our ingenious reader to reply, and will give him till February 15th to do it in.

RECENT ENGLISH DECISIONS.

The November numbers of the Law Reports, which now come under review, consist of 8 App. 577-779; 11 Q. B. D., 609-626; 8 P. D., 185-204; 24 Ch. D., 1-252. In the first of these the case of *Ayr Harbour Trustees* v. *Oswald*, p. 623, though a Scotch appeal, demands notice :—

COMPULSORY PURCHASE OF LAND—PUBLIC POLICY—INVALID CONTRACT.

The principle which this case illustrates and enforces is thus expressed in the judgment of Lord Blackburn: "I think that where the legislature confers powers on anybody to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case, the powers conferred on the body empowered to take the land compulsorily, are entrusted to them and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers, is void." In the present case, the Ayr Harbour Trustees, having statutory power to take lands for the purposes of their trust, sought to restrict their rights of user of certain lands so taken, in a manner rendering the taking of them less injurious to the owner from whom the land was being taken, and thus to procure the land for a less compensation than would otherwise have been awarded to the owner, and the Board held, on the above principle, that any contract which the trustees might enter into so restricting their rights, would be invalid.

POWER TO LEVY TOLLS—REASONABLENESS OF CHARGES.

It is next necessary to glance at the case of *The Canada Southern R. W. Co.* v. *The International Bridge Co.*, p. 728, in which the decision of our Court of Appeal is affirmed. The interpretation placed upon the acts relating to the International Bridge Company, does not come within the scheme of these articles to dwell upon, but the principle laid down in respect to the determination of whether the tolls and charges made by such a company are reasonable or not, demands notice. That principle is thus stated in the judgment: "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined, of the results to a company being so enormously disproportionate to the money laid out upon the undertaking, as to make that of itself possibly some evidence that the charge is unreasonable with reference to the person against whom it is charged."

PROMISSORY NOTE—LIABILITY OF INDORSERS INTER SE.

The next case of *Macdonald* v. *Whitfield*, p. 733, is of great interest. The question was as to the rights, inter se, of the indorsers of a note made by the St. John's Stone Chinaware Company, and indorsed by the directors of the company, and discounted by the Merchants' Bank of Canada, and the appeal was from the Province of Quebec. The facts cannot well be stated shortly, nor is it necessary to state them here. The principle governing the case is thus stated, at p. 744 seq. of the judgment: "Their Lordships see no reason to doubt that the liabilities inter se of the successive indorsers of a bill or promissory note must, *in the ab-*

sence of all evidence to the contrary, be determined according to the ordinary principles of the law-merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note, may be legitmately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even investing the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such acts or circumstances, he may still obtain relief by shewing that the party from whom he claims indemnity agreed to give it him; but in that case he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the Statute of Frauds. * * But the respondent insists, and the Court below seem to have held, that, in determining the rights and liabilities inter se of these indorsers for the accommodation of the company, regard must be had, not to the contract in pursuance of which they became indorsers, but to the order of their indorsements, as evidencing the terms of their contract. That doctrine appears to their Lordships to be at variance with the principles of the English law. In a case like the present, the signing of their names on the note, by way of indorsement, in order to induce the bank to discount it to the promissor, is not, as between the indorsers, pars contractus, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities inter se, irrespective altogether of the rules of the law-merchant, which will nevertheless be binding upon them in any question with parties to the note who were not likewise parties to the agreement. The law upon this point was correctly laid down by the Court of Common Pleas in *Reynolds* v. *Wheeler*, 10 C. B. (N. S.), 561."

The importance of the principles thus enunciated will excuse the length of the above extract; and it must be added that, referring to the cases in our own Courts of *Clipperton* v. *Spettigue*, 15 Gr. 269; *Cockburn* v. *Johnston*, 15 Gr. 577; *Janson* v. *Paxton*, 23 C. P. 439; *Fisken* v. *Meehan*, 40 U. C. R., 146, their Lordships observe that so far as they contain any dicta which seem to recognize the doctrine contended for by the respondent in this case, they cannot be accepted as conclusive of the law of England.

The next case requiring notice is *Ward* v. *National Bank of New Zealand*, p. 755.

PRINCIPAL AND SURETY—CO-SURETIES IN SEVERALTY.

This case illustrates the relation of co-sureties in severalty between themselves and to their principal. The judgment shows the difference in this respect between the position of joint sureties and several sureties, thus: "A long series of cases has decided that a surety is discharged by a creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed. In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured, and may even be benefited thereby. * * On the same principle it has been held that when the creditor releases one of two or more sureties

who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each. * * But where it is no part of the contract of the surety that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety; the surety cannot therefore claim to be released on the ground of breach of contract. It is true that he is entitled to contribution against other several sureties to the same extent as if they had been joint, but the right of contribution among such sureties depends not upon the contract, but on principles established by courts of equity. * * *The claim of a several surety to be released upon the creditor releasing another surety, arises not from the creditor having broken his coutract, but from his having deprived the surety of his remedy for contribution in equity. The surety, therefore, in order to support his claim, must shew that he had a right to contribution, and that that right has been taken away or injuriously affected.*"

BRITISH NORTH AMERICA ACT—ESCHEATS.

This valuable number of the appeal cases ends with the important Ontario Appeal of *The Attorney-General of Ontario* v. *Mercer*, p. 767, in which the question of the right to escheated lands in the Dominion is finally set at rest in favor of the Provinces, on the ground that such escheats come within the words "lands, mines, minerals, and royalties", reserved to the Provinces by sec. 109. It is unnecessary to follow out the minute reasoning by which this result is arrived at; but attention may be called to that passage in the judgment, at p. 779, where it is said: "Their Lordships are not now called upon to decide whether the word 'royalties' in sec. 109 of the B. N. A. Act of 1867, extends to other royal rights besides those connected with 'land,' 'mines,' and 'minerals.' The question is, whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense. The larger interpretation (which they regard as, in itself, the more proper and natural) also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective Provinces."

The cases in the November numbers of the Q. B. D. and P. D. are few and can be noted very briefly.

The first one, *Webb* v. *Beawan*, 11 Q. B. D. 609, decides that words imputing that the plaintiff has been guilty of a criminal offence will support an action of slander, without special damage; and it is not necessary to allege in the statement of claim that they impute an indictable offence. The slanderous words as set out in the statement of claim demurred to, were: "I will lock you (meaning the plaintiff) up in Gloucester gaol next week. I know enough to put you (meaning the plaintiff) there." Which, said the pleader, meant, "that the plaintiff had been and was guilty of having committed some criminal offence or offences." Pollock, B., with whom Lopes, J., concurred, said: "The expression 'indictable offence' seems to have crept into the text books, but I think the passages in Comyns' Digest (tit. Action on the case for Defamation, D. 5 and 9) are conclusive to shew that words which impute any original offence are actionable per se. The distinction seems a rational one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporeally."

MORTGAGE—ATTORNMENT BY MORTGAGEE—DISTRESS.

The only other case in this number requiring notice is *Kearsley* v. *Philips*, p. 621,

in which the full court held that if a mortgage is created by way of demise for a term of years, and the mortgagor attorns and becomes tenant to the mortgagee at a certain rent, the relation of a landlord and tenant is created, and upon failure to pay the rent the mortgagee is entitled to distrain the goods even of a stranger. "The decisive question in these cases," says Lindley, L. J, "is, whether there was a tenancy and not merely a personal contract on the part of the mortgagor."

The cases in the November number of the Probate Division all relate either to divorce or ecclesiastical law, and do not require notice here.

A. H. F. L.

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

COUNTY COURT OF THE COUNTY OF SIMCOE.

SOMERS V. KENNY.

Revival of judgment—R. S. O. chap. 116—Duration of judgment—R. S. O. chap. 108—Imp. Act, 37 & 38 Vict., chap. 57.

A judgment having been entered against both plaintiff and defendant, as co-sureties upon a promissory note, and the plaintiff in the original suit having since died, the now plaintiff having satisfied the judgment, applied for leave to revive the same, in the name of the deceased's administrators, and for an order for contribution against his co-surety, the present defendant. An order was made for the trial of an issue between the parties, questions both of law and fact being involved.

Held, that the proceedings were regularly taken, and that the judgment, if not barred by the statute, might be revived, either in the name of the administrator to the plaintiff in the original suit, or in the name of the present plaintiff himself (under R. S. O. c. 116).

Held, also, that the judgment referred to having been entered up on the 23rd May, 1865, was barred by R. S. O. chap. 108, and the present application came too late.

Held, also, that *Allan* v. *McTavish*, 2 App. R. 278, and *Boice* v. *O'Loane*, 3 App. R. 167, were over-ruled by *Sutton* v. *Sutton*, L. R. 22 Ch. D. 511.

[Barrie, September 8, 1883.

The facts, so far as material to the real points in issue, are set out in the judgment.

Lount, Q.C., for plaintiff.

Pepler, for defendant.

ARDAGH, CO. J.—On the 19th March last, in an action in this Court, in which one William Holt was plaintiff, and Samuel Palk, Thomas Kenny and Joseph Somers, were defendants, (the two last being the defendant and plaintiff, respectively, in the present proceeding), an application was made by the said Somers, as assignee of the judgment in the said action, for an order for leave to revive the action in the name of James Hay Campbell, the administrator, with the will annexed of the said Wm. Holt, deceased, and to issue execution against his co-defendant, Kenny.

It was thereupon ordered that the said defendants, Somers and Kenny, should proceed to the trial of an issue before a Judge, without a jury, in which issue, the said Somers was to be the plaintiff and the said Kenny was to be the defendant, and that the question to be tried should be whether the said Somers was entitled to proceed on the said judgment, by way of execution against the said Kenny for contribution, either by reviving the judgment in the name of the said J. H. Campbell, as administrator, or in his own name, or otherwise.

This issue was tried before me, without a jury, at the sitting of this Court in June last, and judgment was reserved.

(After setting out the facts and history of the case in full, the judgment proceeds.)

On the argument, Mr. Pepler, for the defendant, contended:

1st. That under *The Real Property Limitation Act*, R. S. O. chap. 108, sec. 23, plaintiff's right to recover is barred.

2nd. That there is no provision for a proceeding of this nature, inasmuch as the plaintiff (Holt) in the original suit, is dead, and his administrator is his only representative.

3rd. That this is a wholly unnecessary proceeding, as plaintiff, (assuming his right to enforce his claim against the defendant) might

have issued execution on the judgment without taking the present steps.

As to the first objection: there is no doubt that if the judgments of the Court of Appeal in this Province, are to govern, the judgment in question is still in full force, notwithstanding the lapse of more than ten years since it was entered up.

It will help to have before us the decisions that have been given on this point, both in this country and in England, that we may see how the former are affected by the latter.

And first I may say that section 8 of the English Act (37-38 Vict., c. 57), corresponds in every material point, with sect. 23 of our own Act (R. S. O. chap. 108), excepting, of course, that "twelve years" in the former is "ten years" in our Act.

The latter reads; "No action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless," &c.

It will be borne in mind, too, that by the Act 24 Vict., c. 41, s. 10, it was enacted that "no judgment, rule, order, or decree for the payment of money of any Court of Upper Canada, shall create or operate as a lien or charge upon lands or any interest therein."

We come now to the cases decided in our own Courts.

(1). *Allan* v. *McTavish*, 41 U. C. R., 567, (June 1877) in which it was held by Morrison, J., that a covenant in a *mortgage* was good for ten years only.

This case was reversed on appeal (see below).

(2). *Caspar* v. *Keachie*, 41 U. C. R., 601 (Oct. 1877) in which it was held by Wilson, J., that a *judgment* is to be considered as "charged upon or payable out of land"; that a writ of revivor or suggestion is a "proceeding" under the Act, and that a judgment is valid for ten years only. *Watson* v. *Birch*, 15 Sim. 523, quoted.

(3). *Allan* v. *McTavish*, 2 App. R. 278, Jan. 3rd, 1878, (see above) in which the judgment of Court below was reversed; and held that a covenant in a mortgage was valid for 20 years. *Hunter* v. *Nockolds*, 1 Mac. & G. 640, followed.

(4). *Boice* v. *O'Loane*, 28 U. C. C. P. 506 (12th Feb., 1878), where Gwynne, J., held that the statute applied to all judgments, and that ten years was a bar. *Watson* v. *Birch*, *(supra)* approved of. *Hunter* v. *Nockolds*, *(supra)* not cited.

This case was also reversed on appeal, by (4) *Boice* v. *O'Loane*, 3 App. R. 167 (June 1878). Moss, C. J., approved of the reasoning of Gwynne, J., in the Court below, but said it was not consistent with *Hunter* v. *Nockolds*; which case was approved of and followed.

The only English cases I refer to, are,

(1). *Watson* v. *Birch*, 11 Jur. 195, S. C. 15 Sim. 523 (1874), deciding that all judgments came within the Act then in force, and not only such as affected land only. Followed by Gwynne, J., in *Boice* v. *O'Loane*.

(2). *Hunter* v. *Nockolds*, 1 Mac. & G. 640: which decided that in actions upon covenant, or debt upon specialty, the limitation is 20 years. Approved of and followed in *Allan* v. *McTavish* and *Boice* v. *O'Loane*, both in appeal, *(supra)*.

Since the decision in *Boice* v. *O'Loane* in our own Court of Appeal, two other cases have been decided in England:

(3). *Sutton* v. *Sutton*, L. R. 22 Ch. D. 511 (1882), in which it was held that the limitation of 12 years applied to the personal remedy on the covenant in a mortgage deed, as well as to the remedy against the land; and that the action (one on a covenant in a mortgage) was barred as well as regards the covenant, as the right to sue.

(4). *Fearnside* v. *Flint*, L. R. 22 Ch. D. 579, (1883). Here the mortgage debt was secured by a collateral bond, and it was held by Fry, J., following *Sutton* v. *Sutton* *(supra)* that no distinction existed between the covenant in the mortgage and the bond, and that the remedy on both was barred after twelve years.

The point raised in all these cases seems to be simply this: do the words "or otherwise charged upon, or payable out of any land," relate back to, and are they to be read in connection with, the previous words, "secured by any mortgage, judgment" (R. S. O. chap. 108, sec. 23).

If then it has been expressly decided that the personal remedy on the covenant in a *mortgage* is barred after the lapse of twelve (i.e. *ten*, in

our Act) years; or, what amounts to the same thing, that the words, "charged upon and payable out of land," do not relate back to the previous word "mortgage", does it not follow, by the same *ratio decidendi*, that they do not relate back to the word "judgment", and so that *every* judgment is barred by the lapse of ten years?

In *Sutton* v. *Sutton (supra)*, at page 516, Jessell, M. R., after reading the section in question, says, "now the words that are material are, 'no action suit or other proceeding shall be brought to recover any sum of money secured by any mortgage.' It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage. Those who say that these words are not to be read literally must shew some reason why they should not. What they say is that it does not mean to recover any sum of money secured by a mortgage, but that it means to recover the money so far as it can be recovered by a sale of the land, or by the receipt of the rents: that is to say, so far as you can get it out of the land. That construction puts words there which are not to be found in the section. . . . . . But . . when you consider that a proceeding at law is an action, and a proceeding in equity is called a suit, and when you get the two words 'action' and 'suit' together, it is plain to my mind that those who framed that section meant any proceeding in which any sum of money secured by a mortgage might be recovered. . . . . . . The principle on which the law has always been based is either actual satisfaction, or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay. It seems absurd that you should get rid of the greater, so to speak, namely, the security upon the land, and should nevertheless retain the lesser, namely, the personal liability to pay. The result to my mind, would be too absurd. It is not a decisive or conclusive reason, but it is a reason."

In *Boice* v. *O'Loane*, Moss, C.J., takes a different view; at page 172, after referring to 24 Vict., c. 41, (enacting that no judgment should create a lien or charge upon lands) and Con. Stat., ch. 88, in which the same language is used, he goes on to say, "The suggestion therefore is that the section shall be read thus: 'no action shall be brought to recover any sum of money secured by any mortgage, or any sum of money secured by any lien, or otherwise charged upon or payable out of any land.' I cannot assent to that construction of the statute. It is in conflict with the decision in *Allan* v. *McTavish*, because if the effect of that construction is to limit the period of recovery in an action at law upon a judgment to ten years, it should have the same effect upon a mortgage."

We must therefore come to the conclusion that looking at the decisions in our own Court of Appeal (the point has not yet been raised before the Supreme Court), the law in this Province is that this judgment is still in force, inasmuch as 20 years have not elapsed since its recovery. [The learned judge then went on to speak as though *Sutton* v. *Sutton (supra)* was a judgment of a Divisional Court in which case it would not be binding on him, in the face of the judgments to the contrary in our Court of Appeal, but his attention being directed to the fact that *Sutton* v. *Sutton* was a decision of the Court of Appeal in England, he went on to say,] As *Sutton* v. *Sutton* is a decision of the Court of Appeal at home (and I find it is on referring to it again), I think it ought to be binding on me. I am under the impression (whether rightly or wrongly I cannot say positively as I have no means of informing myself on the point), that if either *Allan* v. *McTavish*, or *Boice* v. *O'Loane* were now to be brought before the Supreme Court here that Court would feel itself bound to override them, and follow *Sutton* v. *Sutton*. I think also that if the judgment I now give (holding that the judgment in *Holt* v. *Palk et al.* is barred by the lapse of ten years) be appealed from, that the Court of Appeal would follow *Sutton* v. *Sutton*, and not deem itself bound by its previous judgments in *Allan* v. *McTavish* and *Boice* v. *O'Loane*. That being my opinion, it would be putting the parties to needless expense, it seems to me, to refrain from giving now the judgment which I think the defendant would ultimately be entitled to.

Now as to the next objection, that there is no provision for a proceeding of this sort.

In *Smith* v. *Burns*, 30 U. C. R. p. 630, Cameron, J., remarks:—"If, therefore, the judgment in question could be properly revived in the name of the administrator, as to which, no ex-

ception having been taken to the writ of revivor on that ground, I express no opinion," &c.

This remark may throw some doubt on the proper practice to be pursued in such a case as this. I am unable to see, however, how this objection ought to have any weight. The plaintiff here is assignee of the original judgment. He is one who comes within the 2nd section of "The Mercantile Amendment Act," (R. S. O.. chap. 116), as a person who being liable with another for any debt or duty, "and having paid such debt," is "entitled to have assigned to him every judgment . . . held by the creditor in respect of such debt." The judgment, then, having been assigned to the plaintiff on his satisfying the debt of the creditor, sec. 3 enacts that "such person shall be entitled to stand in the place of the creditor and to use all the remedies, and if need be . . . to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from . . . any co-surety indemnification," &c.

If the judgment were still in force, the original creditor, if alive, might, if still the holder of the judgment, take steps to revive it, should the lapse of time render such a step necessary. In his lifetime, too, his assignee (the present plaintiff) might take the same step. But as the original creditor is dead, his assignee is desirous of reviving the judgment by reason of the death of one of the parties, and he proceeds to call upon the administrator, the only legal personal representative of the deceased creditor, and upon his (the assignee's) co-surety, to shew cause why the judgment should not be revived. The administrator has no cause to shew, or, rather, does not appear to shew any cause. What is there to prevent the judgment being revived, if necessary, in the name of the administrator, who makes no objection—of course on proper indemnity being given—or even in the name of this plaintiff himself. It does appear from the 6th section of the last mentioned Act (R. S. O. chap. 116), coupled with the general tenor of the A. J. Act and the Ont. Jud. Act, that such an order in the last alternative might properly be granted.

As to the 3rd objection, that this is an unnecessary proceeding and that plaintiff might have issued execution on the judgment without taking the present steps.

I think it is rather late for the defendant to take this objection. On the return of the summons, inasmuch as certain facts were in dispute and could not be agreed upon, and it seemed inadvisable to try these facts upon affidavits, and moreover, the question being one of mixed law and fact, it was proposed by one of the parties and assented to by the other, that an issue should be directed to be tried, without a jury, when the whole question could be more satisfactorily disposed of. The defendant then being an assenting party to this proceeding, ought not to be heard now, when he says it was unnecessary.

The defendant refers to *Beminger* v. *Thrasher*, 9 P. R. 206 (affirmed in 1 Ont. R. 313), establishing that where an execution was issued and returned within six years after judgment entered, there wasno necessity for a *sci. fa.*, or writ of *revivor*. See also, *Johnson* v. *Wilkinson*, 3 P. R. 229, and *Jenkins* v. *Kirby*, C. L. J., 164.

This of course was during the lives of the parties; but could execution issue after the death of either party? I think not.

The case of *Holmes* v. *Newlands*, 5 U. C. R. 367 and 634, lays it down that even though plaintiff has issued execution within the six years, it does not prevent him from proceeding by *sci. fa.*

The result of this whole proceeding then will be that no order shall be made to revive the judgment in question, and that the plaintiff pay all the costs occasioned by his application.

THIRD DIVISION COURT, LEEDS AND GRENVILLE.

CONNERS V. BIRMINGHAM.

Division Courts—O. J. A., Rule 80.

Held, that the provisions of marginal Rule 80 of the Judicature Act apply to a Division Court cause.

Action upon a promissory note made by defendant in favor of one C. W. Taylor, and endorsed by Taylor, who was not sued.

Notice of defence disputing plaintiff's claim in full.

W. B. Carroll moved, upon notice, for an order under marginal Rule 80 of the Judicature

Act, to sign final judgment. He filed affidavit of plaintiff, and cited section 77 of the Judicature Act.

W. H. Jones showed cause, contending that the County Judge has no jurisdiction to take such a matter in the Division Court

McDONALD, Co. J. —In my judgment the provisions of the Judicature Act extend to any Division Court matter in which the machinery of that Court will enable effect to be given to them. The order allowing plaintiff to sign final judgment for the amount of his claim and costs will go—with permission to him to issue immediate execution upon such judgment.

NOTES OF CANADIAN CASES

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[Dec. 11, 1883.

COURT V. WALSH.

Mortgage—Insolvency—Limitations.

Held, affirming the judgment of Boyd, C. in 1 O. R., 167, Spragge, C. J. O., dissenting, that the fact of a mortgagor becoming insolvent and an assignee in insolvency having been appointed, does not stay or suspend the running of the Statute of Limitations, so as to keep alive the claim of the mortgagee.

Bethune, Q.C., and *Clute*, for the appellant.

Maclennan, Q.C., and *Biggar*, for respondent.

VANVELSOR V. HUGHSON.

The judgment of the court below (reported 45 U. C. R., 252) was affirmed, without costs, the plaintiffs having failed at the first hearing of the case to prove a link in the title set up by them, but which they subsequently established.

Robinson, Q.C., for appellant.

C. R. Atkinson, for respondent.

THOMPSON V. TORRANCE.

An appeal against the decree of the Court of Chancery pronounced by Blake, V. C. (28 Gr. 253), dismissed with costs, there being an equal division of this court on the effect of the evidence adduced in the case.

Robinson, Q.C., for appellant.

McCarthy, Q. C., *Mortimer Clark* and *W. Cassels*, for respondent.

KEEFER V. MCKAY.

The court being equally divided as to the proper construction of the will and Act of Parliament in this case set out 29 Gr. 162, the appeal against the judgment there reported was dismissed with costs.

Bethune, Q.C., and *ormully*, for the appellant.

Maclennan, Q.C., *S. H. Blake*, Q.C., *Black* and *Plumb*, for other parties.

PROVINCIAL INSURANCE CO. V. WORTS.

An appeal from the judgment of the Court of Common Pleas (31 C. P., 523) was dismissed with costs, in consequence of an equal division of the members of the Court of Appeal.

Bethune, Q.C., *S. H. Blake*, Q.C., and *Biggar*, for appellants.

Robinson, Q.C., and *H. W. Murray*, for respondents.

FULTON V. U. C. FURNITURE CO.

Contract by letter.

"In order to convert a proposal into a promise, the acceptance must be absolute and unqualified." When therefore the plaintiffs had agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants in a subsequent letter assumed that this was to be "American inspection," and the plaintiffs answered, "We do not know anything about American inspection, but will submit to any reasonable inspection," and no formal waiver of the inspection claimed by the defendants was made, neither was there any agreement by the plaintiffs to submit to such inspection :

Held (reversing the judgment of the court below, 32 U. C. C. P. 422), that there had not been shewn "a clear accession on both sides to one and the same set of terms," and that a concluded and binding agreement had not been made out between the parties.

Robinson, Q.C., and *Crothers*, for appeal.

F. Hodgins, contra.

SOUTHAM V. NORCOMBE.

Married woman—Separate estate.

The defendant, a married woman, entitled to dower out of the estate of a former husband, but which had not been set out, she residing on the lands for upwards of sixteen years, indorsed a note for the accommodation of her son, and on being sued thereon, she objected that, having been an accommodation indorser only she was not liable, and a verdict having been rendered against her, she moved the Judge for a new trial, alleging also want of notice of dishonor. The Judge refused the application, and on appeal to this court this ruling of the Judge was affirmed and the appeal dismissed with costs, the production of the protest for non-payment being sufficient *primâ facie* evidence of the notice of dishonor, and there being no merits in the other defence sought to be raised.

R. Meredith, for appeal.

C. Ferguson, contra.

CROSSFEILD V. GOULD.

Specific performance—Time of essence of the contract.

The defendant agreed to sell to the plaintiffs certain timber limits, for $25,000, stipulating that they should have a certain named time to inspect the property and arrange for payment of the price. Subsequently, and on the 20th August, the plaintiffs wrote excusing themselves for not having carried out the purchase and asking for an extension of time, for their accepting or refusing "your limits one or two weeks—two weeks if possible", such full further time so asked falling on the 10th of September, and the defendant granted such extension of time to make their *financial* arrangements only. The plaintiffs failed to complete the purchase at the time named, and the defendant sold to the other defendant, Miller.

Held, affirming the judgment of Boyd, C., that looking at the subject of this contract, and express limitation of time between the parties, although time was not originally of the essence of the contract, their correspondence subsequently had shewn it to have been made so, and therefore that the plaintiffs were not entitled to a specific performance of the contract.

Moss, Q.C., and *Miller*, for the appellants.

S. H. Blake, Q.C., and *W. Cassels*, for respondent Gould

Osler, Q. C., and *Creelman*, for respondent Miller.

CHAMBERLIN V. CLARK.

Administration.

Held, affirming the judgment of the court below (1 O. R. 135) that where in the administration of an estate an executor pays some creditors, leaving others unpaid, and the estate proves deficient, the creditors are liable, at the suit of an unpaid creditor, to be called upon to refund in order to a *pro rata* distribution of the estate.

Moss, Q.C., for the appellant.

S. H. Blake, Q.C., for respondent.

HARVEY V. HARVEY.

Sci. fa.—Irregular judgment—Fraudulent judgment—Collusive judgment.

In a proceeding by *sci. fa.* to enforce payment of calls upon stock by a shareholder. *Held*, Burton, J. A., dissenting, that he may set up as a defence irregularities in the recovery of judgment against the Company, and he is not bound to move to set such judgment aside.

Per Burton, J. A.—If the judgment is only irregular, the shareholder must move to set it aside, and he cannot raise the question by the pleadings: but where the judgment has been obtained by collusion or fraud, he may adopt either mode of defence.

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

Robinson, Q.C., and *E. Martin*, Q.C., contra.

QUEEN'S BENCH DIVISION.

EDGAR V. NORTHERN RAILWAY CO.

Negligence—Contributory negligence.

The plaintiffs, husband and wife, were on train going to Lefroy. Conductor before reaching the station, announced that the next station was Lefroy, knowing that there were passengers for that place. On approaching station he slowed train, but did not stop. Husband sprang

while train moving slowly and wife sprang after him and was injured. Left to jury to say whether she had acted imprudently in so doing. They found verdict for plaintiffs.

Held, that question of contributory negligence was properly left to them and court refused to disturb the verdict.

BUTTERFIELD V. WELLS.

Solicitor and client—Retainer by assignee under Insolvent Act of 1875—Liability of assignee for costs.

The defendant's testator was a sheriff and official assignee under Insolvent Act of 1875. The plaintiff was solicitor for the City Bank, and also for one Boupon, whose petition, G. F., was placed in insolvency. The official assignee became creditors' assignee. At first meeting of creditors, B. being chairman, the plaintiff representing the City Bank, whose claim amounted to nearly the whole indebtedness, moved a resolution whereby it was resolved to sell certain goods of the insolvent, that the assignee should take the necessary proceedings to realize the object and recover certain property alleged to belong to the insolvent, and for that purpose to retain counsel if necessary. W. became inspector of the estate and consulted with the plaintiff, and on his advice instructed the assignee to defend and bring actions. The assignee was obliged to pay costs and damages in action brought against him to recover goods wrongfully taken by him, and he also paid the plaintiff some costs, whereby the assets of the estate were exhausted, and a small sum in addition paid by the assignee out of his own funds. The defendant's testator was subsequently removed from office of assignee and a new assignee appointed, wherefore he presented a petition to the Insolvent Court, in which he alleged that he had retained the plaintiff and had been put to great expense in bringing and defending suits as assignee, and had become liable to pay large sums of money in respect thereof, and prayed payment by the new assignee, which was refused. The plaintiff delivered his bills to the defendant's testator in his lifetime; after death of testator, plaintiff wrote a letter to one of his sons about the costs, in which in relating the facts, he stated that he was attorney for the bank. The plaintiff now sued the personal representative for his unpaid costs of the proceedings carried on by him. Senkler, Co. J., who tried the case, found that the retainer was not a personal one by the assignee, but that the plaintiff had acted for the benefit of the creditors and was in fact their solicitor.

Held, ARMOUR, J., dissenting, (affirming the judgment of Senkler, Co. J.) it was a question to be determined on the evidence, whether the retainer was a personal one by the assignee, or whether he was acting merely on the instructions of creditors; that upon the evidence the plaintiff was solicitor for the creditors and not for the assignee personally, and notwithstanding the admission contained in the assignee's petition, he had not incurred any personal liability for the costs.

Per ARMOUR, J.—The presumption is that when a solicitor is retained, the person retaining him is liable for his costs, and to avoid liability he must shew some special agreement to the contrary. The evidence here not only did not displace the presumption, but shewed that the testator had always considered himself liable for the costs.

Per HAGARTY, C. J.—It is the duty of a solicitor to inform his client as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of a trust fund or estate.

REGINA V. WALLACE.

Canada Temperance Act of 1878—Conviction—Certiorari—Prior conviction.

Held, CAMERON, J., dissenting, that section 111 of Can. Tem. Act '78 takes away the right to certiorari in all cases except cases of want or excess of jurisdiction, and that it applies to conviction for all offences against the preceding sections of Pt. II of the Act and does not relate to merely offences against sec. 110.

Per HAGARTY, C. J., and ARMOUR, J.—An erroneous finding on the evidence by the magistrate is not such a want of jurisdiction as warrants the issue of a certiorari.

Per CAMERON, J.—There was no evidence of the commission of the offence charged in this case and therefore the magistrate acted without jurisdiction, and a certiorari would lie.

Per ARMOUR, J.—The omission of the magistrate to ask the accused whether he had been previously convicted did not deprive him of jurisdiction to receive proof of the prior conviction.

The allegation in the conviction that the offence was committed between 30th June and 31st July was a sufficiently certain statement of the time.

LEVAGE V. MIDLAND RAILWAY CO.

Railway Co.—Train moving backwards—Negligence.

The defendants were required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train.

Held, that defendants did not comply with the direction by having a man at the front end of the last car where he could see persons crossing the track.

In this case there was no brake at the rear end of the last car, the brakesman on last car seeing the track clear a few minutes before the accident, went to the front end, and plaintiff attempting to cross was injured.

Held, evidence of negligence to go to the jury.

WATERLOO MUTUAL INS. CO. V. ROBINSON.

Evidence—Collateral matters—Admissibility of—Pleading—Silence of party as to material fact alleged by opposite party.

In an action in a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud; the evidence of his co-defendant C. was tendered for the purpose of showing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible.

Held, that evidence of C. was admissible, as showing a fraud practised on him with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence, and a new trial was ordered.

Per ARMOUR, J.—Where a material fact is alleged in a pleading and the pleading of opposite party is silent with respect thereto, the fact must be cons dered as in issue. Therefore it was competent for C. to deny the execution of the bond, his pleading not expressly admitting it.

W. H. Bowlby, for the plaintiff.

R. M. Meredith, for defendant.

LIGHTBOURNE V. WARNOCK.

Principal and surety—Promise in writing—Sufficiency of.

F. being indebted to the plaintiffs who were pressing him for payment, the defendant signed the following document and delivered it to the plaintiffs in consideration of their giving time to F.: "I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within 10 days." The security referred to was a mortgage upon real estate to be executed and a paid-up life policy for $5000, which F. had agreed verbally to give to the plaintiffs, neither of which existed at the time of F.'s agreement or the defendant's guaranty. F. never gave security, and the plaintiffs by refraining from suing him lost their debt.

Held, affirming the judgment of BURTON, J.A., HAGARTY, C. J., dissenting, that the writing signed by the defendant was not sufficient to satisfy the 4th section ot the Statute of Frauds, which regarded as an original promise or a guarantee.

Per HAGARTY, C. J. The guarantee is divisible and the writing was not sufficient as to the mortgage of real estate, because the promise of the debtor himself was not enforceable against him, not being in writing, but as to the policy the writing was sufficient.

Osler, Q. C., for the appeal.

Mackelcan, Q. C., contra.

REGINA V. BERRIMAN.

Lord's Day Act—The Public Service.

Held, that the R. S. O., cap. 189, which forbids the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the service of Her Majesty, and therefore conviction of a lock tender on the Welland Canal for locking a ves-

sel through the canal on Sunday in obedience to the orders of his superior was quashed.

H. J. Scott, for the defendant.

J. R. Cartwright, for the Crown.

McClive, for the private prosecutor.

IN RE CLARKE V. MCDONALD.

Division Courts Act—Garnishee proceedings—Notice disputing jurisdiction filed too late—Prohibition—High Court procedure.

Held, affirming the judgment of Armour, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vic., ch. 8, sec. 14, though no objection can be taken to the jurisdiction of the Division Court in that Court, the jurisdiction of the H. C. J. to prohibit the proceedings is not ousted.

The garnishees, though partners, resided in different places, out of the jurisdiction of the Division Court, and but one of them was served. No order was made dispensing with service in the other. The learned Division Court Judge gave judgment against both in their absence.

Per ARMOUR, J., the prohibition might be supported on this ground; also R. S. O. cap. 47, sec. 134, construed.

The Judicature Act does not apply to a case of this kind, the proceedings of which are specially provided for in the Division Courts Act.

Lash, Q.C., for the appellant.

Aylesworth, contra.

COMMON PLEAS DIVISION.

DIVISIONAL COURT.—DEC 24.

RE MEEK V. SCOBLE.

Division Courts—Claim for damages and debt—Damages above jurisdiction—General abandonment—Prohibition.

The plaintiff sued in the Division Court on a claim which was originally composed of a solicitor's bill of costs, $36.06; damages, $69 33; due for advice, $6; total, $111.39. The plaintiff at the trial abandoned as to $11.39, without specifying from what items he threw the amount off. The learned Judge at the trial reduced the $69.33 to $62, the $6 item was struck out; and the total then stood $92.33.

Held, that the abandonment being general, it could not be assumed that the plaintiff had reduced his demand for damages so as to give the court jurisdiction, and a prohibition was ordered.

Meek, for the plaintiff.

A. C. Galt, contra.

OATES V. INDEPENDENT ORDER OF FORRESTERS.

Insurance—Suspended Court—R. S. O., ch. 167, sec. 11—Exhausting means of redress in order—Amendment—Pleading—Leaving County without permit.

One O. was a member of Court Maple of the Independent Order of Forresters, and under the endowment provisions was insured in the Order for $1000. This Court left the Order in a body, and joined another Order called the Canadian Order of Forresters, and the Court was in consequence suspended. Part of the agreement of joining the Canadian Order was that O., who was in ill-health and had gone to California for change, should be taken and insured with the others. By the rules it was provided that members of suspended Courts, who were in good standing at suspension, should, on application within 30 days to the Supreme Secretary, and payment of a fee of $1, receive a card of membership, and be entitled to the endowments, provided they paid all assessments as they fell due, and affiliated with another Order; but if after 30 days, they must pass a medical examination. O. on returning from California, being then in good standing, on ascertaining that the Court Maple had been suspended, and within the 30 days thereof, applied to the Supreme Secretary of the Independent Order for a card, tendering $1, and he also tendered all assessments due, but the card was refused unless he obtained a medical officer's certificate; he also endeavoured to affiliate with another Court, but was prevented doing so by reason of his not having a card. By the certificate of endorsement the $1000 was payable to the widow, orphans, or legal heirs of O.; and by endorsement thereon by O. he directed the amount to be paid to the plaintiff, the widow.

Held, under the directions so given, as well

as under the statute R. S. O., ch. 167, sec. 11, the widow was entitled to recover the amount; and that the fact of O. being a member of another Order, did not, *ipso facto*, deprive him of his rights and membership of defendants Order. It was objected that O. had not appealed through all the courts and functionaries of the Order against the refusal to give him the Supreme Court card; but *held*, that the evidence disproved this.

At the trial an amendment was asked for, to set up a forfeiture of the policy, by reason of O. going to California without a permit, which was refused.

Held, under the circumstances, that the refusal was proper.

Quære, whether the way, cause and manner, in and for which O. and the other members of Court Maple left it, and joined in a body another rival order, might not, if properly pleaded, have required some consideration.

The frame and effect of the pleadings in this case considered.

R. M. Meredith, for the plaintiff.
Osler, Q.C., for the defendant.

NOLAN V. DONELLY.

Goods, description of—Bills of sale act—Sufficiency.

In an assignment for the benefit of creditors, the description of the goods and chattels of the assignors was as follows: "All and singular the personal estate and effects, stock-in-trade, goods, chattels, rights and credits, fixtures, book debts, etc., and all other the personal estate and effects whatsoever and wheresoever, and whether upon the premises where said debtors' business is carried on or elsewhere, and which the said debtors' business is carried on or elsewhere. and which the said debtors are possessed of or entitled to in any way whatsoever, including among other things, all the stock-in-trade, goods and chattels which they now have in their store and dwellings in the village of Renfrew aforesaid: also all and singular their personal estate and effects of every kind and nature, etc.

Held, that this was not a sufficient description of the assignors' goods within the meaning of the Bills of Sale and Chattel Mortgage Act.

Delamere, for the plaintiff.
Moss, Q.C., for the defendant.

PATTERSON V. MCKELLAR (SHERIFF).

Fi. fa. goods—Delivering to sheriff—Sale by execution debtor thereafter—Right of sheriff to goods.

The defendant, the Sheriff of Wentworth, received two executions against one M.'s goods, namely, on the 18th January and 15th February respectively. The sheriff made a formal seizure on the delivery of the first writ, but left no one in possession, and the execution debtor remained in possession and carried on his business as before the seizure, because, as he said, he had the undertaking of the manager of a bank, interested as creditors in the goods, for their safe custody. There had been a stay upon the first execution, which was withdrawn on the delivery of the second one, and the sheriff directed to proceed. On the 6th March the goods were sold by the execution debtor, in connection with the bank, to the plaintiff, who removed them to his own place of business. On the 22nd March the sheriff seized all the goods then in plaintiff's possession which he had received from the execution debtor, as also certain goods of the plaintiff which he claimed to take in lieu of goods received from the execution debtor and sold by plaintiff. The sale to the plaintiff was found to be *bona fide* and for value, and without notice of the executions. In replevin for the goods.

Held, WILSON, C. J., dissenting, that the sheriff was entitled to the goods of the execution debtor then in plaintiff's possession; but not to the goods of the plaintiff's taken by the sheriff in lieu of those sold by the plaintiff.

On the sheriff making his seizure on the 22nd March, the plaintiff gave him an undertaking to answer for all goods sold by him thereafter, if the sheriff should be held entitled to the goods,

Held, under a counter claim setting up this undertaking, the sheriff was entitled to recover the value of the goods sold by the plaintiff after the 22nd March, and before the issue of the writ of replevin.

E. Martin, Q.C., for the plaintiff.
Osler, Q.C., for the defendant.

CHANCERY DIVISION.

Proudfoot, J.] [Nov. 23.

CLARKE v. THE UNION FIRE INSURANCE COMPANY.

MCPHEE'S CLAIM.

Joint contract—Insurance—New contract by one of two joint contractors—R. S. O., c. 160, secs. 21, 22.

James McPhee and Fanny McPhee jointly insured in the defendants' Company. The Company afterwards went into liquidation, and a Receiver was appointed by the Court, who, on January 10th, advertised for policy holders to file their claims before February 15th. On February 4th an agent of the Company procured James McPhee, but without the assent or concurrence of his wife, to sign and send to the Receiver a claim for rebate for unearned premium, under the statutory provisions, R. S. O., c. 160, secs. 21, 22, which claim was received by the Receiver on February 7th. The property insured was burnt down on February 24th. On February 27th a circular was sent to James McPhee by the Receiver, notifying the policy holders and all entitled to claim against the Government deposit, under R. S. O., ch. 160, of an agreement for re-insurance of outstanding risks with other Companies, and the policy holders were notified if they objected to such re insurance and desired to claim for rebate of premium, they were to send in their claim on or before March 15th. No acknowledgment of the receipt of James McPhee's claim for rebate had been sent to him. On March 3rd the Receiver received the regular notice of loss by fire, and on March 14th the claim papers; all before the expiration of the time limited by the said circular.

Held, on petition by way of appeal from the Master in Ordinary, that neither James McPhee nor Fanny McPhee were bound by the former's claim for rebate. The act relied on was not a release, it was an attempt to exercise a statutory power, which failed; or an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the Receiver before the loss occurred.

Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one, will prejudice the right of the other, as here an agreement to substitute a claim for rebate in lieu of the right under the policy.

A. C. Galt, for the petitioners.

W. A. Foster, for the plaintiff.

Bain, Q.C., for the defendants.

PRACTICE.

Rose, J.] [Dec. 31, 1883.

FORFAR v. CLIMIE.

Prohibition — Division Court — Jurisdiction— Order for Goods.

Motion for prohibition.

An action was brought in a Division Court upon the following order:

"Mr. Thos. Forfar.—Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7th, 1883, for the sum of $115 and shafting.—G. Climie & Son."

Held, that this order did not ascertain the amount due in such a way as to bring it within the increased jurisdiction of the Division Court.

Wiltsie v. *Ward*, 9 P. R. 216, followed.

Prohibition granted.

Staunton for the motion.

Sadleir, Q.C., *contra.*

LAW STUDENT'S DEPARTMENT.

We have from time to time published the questions given at the examination of the Law Society. The Benchers have recognized the value of our action by requesting us to continue their publication in a regular and complete manner. We gladly comply, and begin with this issue.

FIRST INTERMEDIATE.

Equity.

1. Write a note upon the maxim that equity will not suffer a right to be without a remedy.
2. A lessee covenants in his lease to keep the

demised premises in repair during the term of the lease, but without any fault on his part the property is destroyed by fire. Will he be liable on his covenant? Give reasons.

3. A. is the owner of a piece of land and agrees to sell it to B. for a price named. From independent inquiries made before the time of the contract, B. believes there are 100 acres, while A. knows, and the fact is, that there are only 75 acfes. After payment of the purchase money B. discovers his error and brings action to rescind the contract on the ground of mistake. What are the rights of the parties? Explain.

4. A post-nuptial settlement of the husband's property is upon its face expressed to be made in pursuance of ante-nuptial marriage articles, but by mistake an estate in fee is thereby conferred upon the wife instead of an estate tail, as provided for by the articles. Can the husband obtain any relief? Explain.

5. A. is the owner of a piece of land, and B. is mortgagee thereof. The owner procures the mortgagee to execute a discharge of the mortgage upon the representation that it will be paid off in a few days. The owner thereupon registers the discharge and sells the land to C., who has no notice that the mortgage has not been paid off. B. brings action for foreclosure, which C. defends. What are the rights of the parties? Explain.

6. With regard to voluntary trusts, what distinction does equity draw between enforcing trusts executed and trusts executory?

7. A testator makes a bequest for charity to such persons as he shall afterwards name as executors. He dies without having named any executor. Will the bequest be valid? Explain.

Real Property.

1. Explain what is meant by *tenure;* and state the effect of the Statute of *Quia Emptores* upon the doctrine of tenures.

2. Define *primogeniture.* Is the law of primogeniture in force in Ontario? Can the owner of an estate prevent the operation of the law of primogeniture, and if so, how?

3. On the death intestate of a tenant in tail, how does the estate descend? Why?

4. What is the earliest form of conveyance of land mentioned by Mr. Williams?

5. What was the origin of *Uses?* Explain the intention and effect of the Statute of Uses.

6. How long a period of time is allowed for the registration of a will? What is the effect of non-registry within the time allowed?

7. Name and explain the three kinds of incorporeal hereditaments.

Anson on Contracts and Statutes.

1. Give examples under the rule that Courts of Law hold a consideration to be unreal if it be impossible upon the face of it, or so vague in its terms as to be practically impossible to enforce.

2. Give the distinction drawn by Anson between Fraud and Misrepresentation.

3. Give examples of contracts void as tending to encourage litigation.

4. Give common rule as to the assignment of *rights* and *liabilities* under a contract. How has the common law rule been affected by statute?

5. Give exceptions to the rule that verbal evidence cannot be admitted to vary the written record of a contract.

6. What is the statutory consequence of an endorser of a promissory note failing to write his address after his name on the note?

7. State in general terms the cases in which the remedy of specific performance of a contract will not lie.

Anson on Contracts and Statutes.

(Honors.)

1. Discuss the proposition that an offer need not be made to an ascertained person in order that it may be binding.

2. Point out any difference between the note or memorandum in writing which will be sufficient to satisfy the 17th section of the Statute of Frauds, and that which will be sufficient under the 4th section.

3. To what extent is a purchaser of goods who is unable to inspect the thing purchased, protected by operation of law from mistakes as to the quality of the thing purchased? Answer fully.

4. Give a short history of the law respecting wagering contracts.

5. Distinguish between the words "void," "voidable," and "unenforceable," as applied to contracts, giving an example of each kind.

6. What rights are conferred on the assignee by the assignment of a bill of lading. Distinguish in your answer between Common Law and Statutory Rights.

7. Write short notes on the difference between Courts of law and equity, as to construction of terms of contracts respecting time and penalties. Give effect of any statute law on the subject.

Real Property.

(*Honors.*)

1. What is the effect of a conveyance to A. and B. (husband and wife), and C., a third person, and their heirs "as joint tenants"?

2. A devisee of lands finding that the devise is a burdensome one, will not take the estate, and disclaims, whereby the lands descend to the heir, can the heir disclaim?

3. Explain the rule in Shelley's Case, and illustrate your answer by an example.

4. Explain *merger*.

5. How must the witnesses to a will subscribe their names in order to make the execution of the will valid?

6. A grant is made to A. for life, and if C. be living at his decease then to B. in fee. What interest or estate, if any, does B. take? Explain.

7. What is the protector of the settlement? How many persons may be constituted protectors at the same time? How must the protector's consent to a disentailing deed be given?

Smith's Common Law.

(*Honors.*)

1. Explain the meaning of *retainer* and *remitter*.

2. After goods have been refused at the consignee's address, what is the responsibility of the carrier in respect of them?

3. Who owns the tree in each of the following cases? (1) The trunk and all the roots are on the land of A., but all the branches hang entirely over the land of B. (2) The trunk is on the land of A., but all the roots are in the land of B.

4. What implied warranties are there on the part of the owner of a vessel who holds a policy of insurance upon it? Explain fully the meaning and effect of such warranties.

5. What effect has excess of authority by an agent upon the liability of the principal to third parties (1) in the case of a particular agent, (2) in the case of a general agent?

6. Explain the meaning of *general average* and *salvage*.

7. Where the tenant of a dwelling-house has covenanted to repair, and the house is burnt down during the term, what is the tenant's position (1) as to liability to rebuild, (2) as to liability for the rent while deprived of the use of the house?

Williams on Personal Property and Judicature Act.

1. Define Bailment.

2. Define Charter Party, Bill of Lading and Freight. In case of the mortgage of a ship, who is entitled to the freight?

3. Point out the ways in which a surety may be discharged from his liabilities by the conduct of the creditor.

4. What was the distinction anciently drawn between a gift of goods to A. for life and after his decease to B., and a gift of the *use* or *enjoyment* of the goods to A. for life, and after his death, to B.? State the law on the subject as it now stands.

5. Can a voluntary settlement of personal estate be defeated by a subsequent sale of the property by the settor? Give reason for your answer.

6. Give the names of the ordinary pleadings in on action. State the times for delivery of each and shortly how the issues to be raised by the same are to be tried.

7. What are the liabilities of an executor in case of recovery against him on a debt of his testator which was barred by the Statute of Limitations.

SECOND INTERMEDIATE.

Broom's Common Law and O'Sullivan's Manual of Government in Canada.

1. What is the primary or "golden" rule to be observed in the interpretation of statutes?

2. Explain the meaning of *general customs* and *particular customs*; and mention the principal qualities which customs must possess in order to be binding.

3. Explain the meaning of *damnum sine injuria*, and *injuria sine damno*. Give an example of each.

4. What is the principal difference between a *tort* and a *crime*?

5. Explain the meaning of *independent covenants*, *dependent covenants* and *concurrent covenants*.

6. Where one partner enters into a contract expressly in the name of his firm, but without the knowledge or express authority of his copartners, by what test will it in general be determined whether the firm is liable on such contract or not? Illustrate by example.

7. Name the different departments presided over by the members of the Dominion Cabinet respectively.

FLOTSAM AND JETSAM.

STATEMENTS OF PRISONERS THROUGH COUNSEL.

On December 3, the Attorney-General wrote to the Lord Chief Justice, drawing his attention to the fact that on Saturday, during the trial of Patrick O'Donnell, Mr. Russell proposed to state to the jury the instructions he had received from the prisoner's solicitor, and thereby convey to the jury the prisoner's account of every detail of the transaction they were inquiring into. Upon objection being taken to this course, Mr. Justice Denman said that (there being authority in favour of the statement being made) he should, while refusing to allow Mr. Russell to proceed, reserve a case for the consideration of the question by the Court of Crown Cases Reserved. Sir Henry James pointed out the inconvenience of the state of practice as thus illustrated, and added that he was under the impression that the judges had held a meeting and come to a resolution upon the subject; but Mr. Justice Denman stated this was not so. Lord Coleridge replied as follows:—

Royal Courts of Justice: Dec. 4, 1883.

My dear Mr. Attorney-General,—I entirely agree with you as to the practical importance of the question you have brought to my attention. The paper I enclose will show you that it is no new subject to me. Immediately after the trial of Lefroy at Maidstone, in which, as you may remembe , Mr. Montagu Williams claimed to do what Mr. Russell did, I brought the matter before the judges, with the result which the paper will show you. At Maidstone the opinion of Lord Chief Justice Cockburn was said to have been founded on or supported by Lord Justice Lush and Mr. Justice Hawkins. Both those learned judges were present at the meeting called by me, and both disavowed in the strongest way ever having ruled or been inclined to rule in the manner suggested. Mr. Justice Denman authorizes me to say that if he had remembered the very strong judicial opinion which I enclose he should have acted on it, and have refused a case if one had been asked for. Mr. Justice Stephen authorizes me to say that he should, as at present advised, not vote against the rule as formulated by the Master of Rolls, but approves of it, and should act upon it.

My reason for bringing the matter before a meeting of the judges was this—that directly after the passing of the Prisoners' Counsel Act, Lord Denman, the then Chief Justice, called the judges together, and they (as appears from the Judges' Book) agreed upon a course of practice which has always since been followed. It seemed to me that the question discussed in your letter was one of practice also, and that the best way of settling it was to pursue the course I took. Perhaps it might be well to make this resolution generally known, as there may be considerable difficulty in making the question the subject of a case reserved. Generally I agree with you that the practice is wrong and not to be permitted, and that if permitted at all, it must, in justice and fairness, carry with it the right of reply on the part of counsel for the prosecution.—Believe me to be, my dear Mr. Attorney-General, your obliged and faithful servant,

(Signed) COLERIDGE.

The Attorney-General, Q.C., M.P.

The paper enclosed was as follows:—

At a meeting of all the judges liable to try prisoners, held in the Queen's Bench room on November 26th, 1881 (Present—Lord Chief Justice Coleridge, Lord Chief Justice Baggallay, Lord Justice Brett, Lord Justice Cotton, Lord Justice Lush, Lord Justice Lindley, Justice Grove, Justice Denman, Baron Pollock, Justice Field, Justice Manisty, Justice Hawkins, Justice Lopes, Justice Fry, Justice Stephen, Justice Bowen, Justice Mathew, Justice Cave, Justice Kay, Justice Chitty, Justice North), Lord Coleridge stated the subjects for which the meeting was summoned, and Lord Justice Brett moved the following resolution: 'That in the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence.'

Justice Stephen moved the following amendment: 'That in the opinion of the judges it is undesirable to express any opinion upon the matter.'

This amendment, having been put to the meeting, was negatived by nineteen votes to two. The original motion was then put, and carried by nineteen votes against two (Justice Hawkins and Justice Stephen *diss.*). The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing up of the judge, when their counsel have addressed the jury, was then considered, and after some discussion was adjourned for further consideration.—*Law Journal.*

BY clerical error in our Sheet Almanac, Mr. Winchester's name still appears as Clerk of Queen's Bench. The name of course should be James S. Cartwright.

LITTELL'S LIVING AGE—This excellent publication begins its 160th volume in January. Foreign periodical literature, and especially that of England, continues to grow both in extent and importance, and *The Living Age*, which presents with satisfactory freshness and completeness the best of this literature, cannot fail to become more and more valuable.

The first weekly number of the new year has the following able of contents:—The Literature of Seven Dials, *National Review;* Wravall's Memoirs, *Temple Bar;* In the Wrong Paradise, *Fortnightly Review;* The Baby's Grandmother, a Story, *Blackwood's Magazine;* A Florentine Tradesman's Diary, *Saturday Review;* A Dancing Epidemic, *Chamber's Journal;* The Clerical Caste in Scotland, *Spectator;* together with choice poetry and miscellany. This, the first number of the new volume, is a good one with which to beg a subscription. For fifty-two numbers of sixty-four large pages each (or more than 3,500 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4 monthlies or weeklies with *The Living Age* for a year, both post-paid. Little & Co., Boston, are the publishers.