

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

dated 15th January, 1879, and that \$300 were paid on this order on the 18th of March, 1879, and that he gave another order (no date mentioned) for the balance coming to him, and that \$300 were paid on this latter about April 10th, 1879, and that, as in the first suit only \$300 were credited, he now claimed \$300.

At the trial of the second action B. proved the giving of the first order in January, and swore that on the 18th March he endorsed a cheque or warrant for \$300 to A., but no such endorsed warrant, nor any receipt for same, is produced although D., another witness, swore that he paid it that day. B. also swore that he gave A. another order, the date of which he did not remember, and that A. had received \$300 on it on the 10th or 11th of April. D. also swore that the second payment was made on the second order, and a payment was proved by the production of an endorsed warrant or cheque that a \$300 payment had been then made. Defendant swore that he never received a payment on the 18th of March, and that the payment made 10th or 11th of April was made on the January order, and that he never received anything on the \$475 order.

Held (reversing the judgment of PROUDFOOT, J.), that A. was entitled to judgment on the defence of *res judicata*, the only issue in the first action necessary to be considered being that on the plea of payment, which, by the C. L. P. Act, sec. 113, is to be taken distributively.

Held, also, that such cases as *Sedden v. Tutop*, 6 T. R. 607, and *Chisholm v. Moore*, 11 C. P. 589 do not apply to such cases as this.

Bethune, Q.C., and *Jeffrey* for appeal.

Hoyles, contra.

SMITH V. SMITH.

Married women—Will—Estoppel.

L., a married woman, owner of certain land, at her death about 1830, assumed to devise it to her daughter P. and her husband O. for each of their lives, and thereafter to their children. T. went into possession of part of the land at the instance of O. about 1855. and built thereon and remained in undisturbed possession for over twenty-eight years. Those who claim in remainder under the will (the

life estates having expired), ask to have the land partitioned, and T. claims his part by length of possession.

Held (reversing the judgment of FERGUSON, J.), that although T. might be estopped from denying the title of L., still he was not estopped from denying that L. had transferred her title to those now claiming, and that as they claimed under the will of M. (a married woman) made in 1828 before there was power to devise, and so void on its face, they had no title, and T. must succeed.

J. Hoskin, Q.C., for infants.

Ermatinger, for defendant, T. J. Smith.

McBeth, for other adult defendants.

CORBETT V. HARPER.

Reservation of timber—Construction of words.

In a conveyance the grantor "reserves to himself all the standing timber upon the said lands, excepting that which measures eight inches through."

Held (reversing the judgment of PROUDFOOT, J.), that all the standing timber eight inches in diameter passed to the grantee, while all over that size was reserved by the grantor.

Poussette, for appellant.

Hoyles, for respondent.

BEATTY V. O'CONNOR.

Mortgage.

A mortgagee selling under the power of sale in his mortgage may sell on time without the mortgagor's consent, but he must treat the mortgage taken from the purchaser as cash. If a mortgagee, when selling, obtains the consent of the mortgagor to take a mortgage for part of the purchase money, he cannot cash such mortgage and charge the mortgagor with the expenses and discount without a distinct bargain to that effect.

Held (reversing the judgment of PROUDFOOT, J.) that the mortgagee herein had no right to sell the mortgage at the expense of the mortgagor, and that, as against a second mortgagee who did not consent to a sale on time, the mortgage must be treated on a cash basis.

Held, also, that this Court cannot interfere with the costs of the actions at law, of eject-