CONTENTS.—PART II.

Canada Law Journal.

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NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

(Continued.)

CROSS v. CURRIE & BROWN.

Promissory note—Accommodation endorser—Innocent holder.

Defendant B. endorsed a promissory note made by defendant C. for the purpose of renewing a former note also endorsed by him for C.'s accommodation. C., instead of retiring the former note, parted with the renewal to plaintiff, a creditor of his, who was at the time aware that B. had been assisting C. in money matters. After the note had been endorsed by C. to plaintiff, C. procured B.'s endorsement of another note at a shorter date, stating that the holders of the original note would not accept the first renewal, and promising to return the latter with the original note. It was found that there was no bad faith on plaintiff's part in taking the note.

Held, that C. had B.'s authority to endorse the note to plaintiff, and that the only notice the law would impute to plaintiff taking the note from C., the maker, was that B. was a surety for him, and perhaps an endorser without value for his accommodation; and therefore,

Held, that plaintiff was entitled to recover against B.

J. A. Miller for plaintiff.

Bethune, Q.C., contra.

GOUINLOCK v. MANUFACTURERS & MERCHANTS' MUT. FIRE INS. CO. OF CANADA.

Insurance—Statutory conditions (Rev. Stat. O., cap.. 162.

To the question contained in an application for insurance, "For what purpose are the premises occupied," the answer was, "Dwelling, &c."

Held, that this meant, dwelling *et cetera*, and that the applicant thereby gave notice that the premises were otherwise occupied for another purpose also, which it appeared was as a drinking saloon. It also appeared that the Company's agent had the fullest knowledge of the saloon being there, and that its presence was in fact the subject of discussion between applicant and him, and it further appeared that the chief agent had certified on the back of the application that he had personally inspected the premises and recommended the risk.

Held, that there was no breach of the first statutory condition (R. S. O., ch. 162) and that plaintiff was entitled to recover.

Hardy, Q.C., for plaintiff.

F. Osler, contra.

DAVIDSON v. HOUSE.

Insolvency—Fraudulent preference—Estoppel.

Insolvent, within thirty days before his insolvency, executed a mortgage to defendant for alleged money advances. A composition was agreed on, and, as collateral security therefor, defendant assigned the mortgage to the assignee. The composition was, apparently, not carried out, and plaintiff—the assignee—brought ejectment to recover the mortgaged premises, claiming both under the assignment, and that the mortgage was fraudulent as against creditors.

Held, that the mortgage was a fraudulent preference, and that the assignee was not precluded, by having taken the assignment,

from so regarding it; that at the most it could only be upheld for the purpose for which it was assigned, which purpose had not been fulfilled.

Parsons v. Standard Insurance Company.

Insurance—Prior insurance—Substitution.

Held, in an action on a policy of insurance, that an unintentional error on the part of the applicant for insurance in the name of one of the companies in which he was already insured, where the true amount of the insurance was given, did not vitiate the policy.

Held also, that the true amount already upon the property being given, the fact that one policy was allowed to drop or be cancelled, and another for a like amount to take its place in a different company, did not avoid the contract of insurance, because of the non-communication of the substituted policy to the insurers; but that the 8th statutory condition (R. S. O. ch. 162) had been substantially complied with, it being merely directed against the increase of the risk without the consent of the insurer.

McCarthy, Q.C., for plaintiff.

Bethune, Q.C., contra.

Regina v. Ray.

Criminal law—Conviction—Mandamus to enforce.

The Court refused to grant a mandamus compelling the mayor of a municipality to issue a warrant on a conviction made by him, where the conviction was open to grave objections.

Johnson, for the Crown.

Ferguson, Q.C., contra.

Marrin et al. v. Stadacona Insurance Company.

Fire Insurance—Loss, if any, payable to third party—Cancellation—Right of insured to recover.

Plaintiffs effected an insurance with defendants, "loss, if any, payable to H.," as security for goods supplied by H. to them. The policy was held by H., and the judge found on the trial that it was handed over, by some mistake of the latter's clerk, among a number of other policies, to defendants, for surrender and cancellation.

Held, that plaintiffs were entitled to recover, and that the action could not have been properly brought in the name of H., whose interest, if any, was wholly contingent on the state of his account with the plaintiffs when the right of action accrued.

Held also, that in the case of a policy such as this, the payee cannot deal with it as his own, and agree to its cancellation. He may surrender his claim under it, but the owner of the property, who is named as the insured, if he retain his interest in the property, is entitled to the insurance to the extent of such interest.

Ferguson, Q.C., and *O'Sullivan*, for plaintiffs.

Robinson, Q.C., and *O'Brien*, contra.

Regina v. Wilson.

Criminal information.

The Court, following recent English decisions, confirming the granting of permission to file a criminal information for libel to the case of persons occupying an official or judicial position, and filling some office, making it for the public interest necessary that such jurisdiction should be exercised for the regulation of the libellous charges made, refused leave to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to.

Robinson, Q.C., and *E. Martin*, Q.C., for applicant.

McCarthy, Q.C., and *Watson*, contra.

Regina v. Bannerman.

Criminal law—Forgery—32, 33 Vict., cap. 19, sec. 54—Corroborative testimony.

On an indictment for forgery of the prosecutor's name as indorser of a promissory note, the prosecutor swore that he had not endorsed the note, that it was not his writing, that he had never authorized the prisoner to sign his name to the note, and that

he was himself unable to write his name, being, in fact, a marksman; and a son of the prosecutor also swore that his father was unable to write his name, and was a marksman.

Held, Cameron, J., dissenting, that a sufficient *prima facie* case was thus made out, and that the prosecutor's evidence was duly corroborated within the meaning of 32, 33 Vict., cap. 19, sec. 54, and that the onus was then on the prisoner to show that he was authorized to use or write the prosecutor's name.

J. G. Scott, Q.C., for the Crown.

McDougall, contra.

Hughes v. Brooke.

Devise in trust—Refusal to accept—Non-joinder—Continuance of tenancy—Right of devisees in trust to recover rent.

One of the devisees in trust under a will from the first always refused to accept the trust.

Held, that he was not a necessary party plaintiff in an action for the rent of the premises devised, although his formal renunciation in writing was not made until after the rent in question had accrued due.

Defendant was tenant from year to year of the premises in respect of which the rent in question was sought to be recovered, being for three quarters accruing due after the death of the lessor. No notice to quit was given, nor was the tenancy determined by the consent of the parties entitled; on the contrary, defendant recognized the continuance of the tenancy by the payment of rent falling due after the lessor's death.

Held, that the tenancy was not determined by the death of the lessor, and that plaintiffs, the devisees in trust under the lessor's will, were entitled to recover the three quarters in use and occupation.

Held also, that it was no answer for the defendant that he ceased to occupy, for he still held, and might have occupied had he chosen so to do.

Read, Q.C., for plaintiff.

McMichael, Q.C., contra.

Leslie et al. v. Canada Central Railway Company.

Railways and Railway Companies—Wrongful delivery of goods—Trover.

The plaintiffs, nurserymen in Toronto, sent by the Grand Trunk Railway Company fourteen packages of trees, addressed to their own order, to Cobden, a station on defendants' line of railway, receiving the usual shipping note issued by the Grand Trunk Railway Company. The goods were delivered by that company to defendants in the ordinary course, and carried to Cobden. They were intended for one S. there, who had agreed to purchase them from the plaintiffs, but the plaintiffs required payment from him before delivery. Several telegrams passed between S., the station-master, and the plaintiffs, and the station-master, being authorized by the plaintiffs to deliver only half of the packages to S., allowed him to take all, receiving from him the entire freight from Toronto.

Held, that the defendants were liable in trover for the packages thus wrongfully delivered, and that it made no difference that the contract to carry was with the Grand Trunk Railway Company only.

Reeve, for the plaintiffs.

McCarthy, Q.C., contra.

COMMON PLEAS.

IN BANCO. MICH. TERM.
December 27, 1878.

Regina v. Herod.

Criminal law—Evidence—Admissibility of.

On the trial of the prisoner on an indictment for murder, it appeared that the death of the deceased was caused by his being stabbed by a sharp instrument, and that the stabbing took place on the street on a very dark night, with a number of persons about, some hostile and others friendly to the prisoner. Two witnesses swore that they saw prisoner strike the deceased, one stating that he witnessed one, and the other two blows, but no knife or other instrument was seen in his hand. The prisoner's counsel

proposed to shew that the prisoner, on the day preceding the homicide, had a knife, which, according to the medical testimony, was not calculated to inflict the wound which caused the death of the deceased. The learned Judge, at the trial, refused to admit this evidence.

Held, Galt, J., dissenting, that the evidence was properly rejected.

J. Crerar, for the Crown.

McMichael, Q.C., for the prisoner.

Perkins v. Beckett.

Promissory note—Action on by insolvent—Non-intervention of assignee—Recovery.

To an action by the endorsee against the maker of a promissory note, it is no answer, where the assignee in insolvency does not intervene, that the defendant is an uncertificated bankrupt.

Robinson, Q.C., for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

Giraldi v. The Provincial Insurance Company.

Act relating to—Statutory conditions—Construction of—Non payment of premium—Effect of.

One of the conditions of a policy provided that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium. The defendant set this up and averred non-payment.

Held, that even although this could not be set up as a condition, not being one of the statutory conditions or a variation thereof, it might still be relied upon as an agreement of the parties which went to the foundation of the contract, and denied that the insurance ever came into existence.

Held, per Gwynne, J., dissenting from *Ulrich* v. *National Insurance Company*, 42 U. C. R. 141, and *Frey* v. *Mutual Insurance Company of Wellington*, 43 U. C. R. 102, that the proper construction of "The Fire Insurance Policy Act" was, that the statutory conditions are to be regarded and adjudged as part of every policy, whether without conditions at all or not, in accordance with the statute.

J. K. Kerr, Q.C., and *Smythe* (Kingston), for the plaintiff.

Robinson, Q.C., for the defendants.

Benedict v. Kerr.

Storage of grain—Fire—Recovery.

The plaintiff, a farmer, stored some barley with the defendant, a grain dealer, and received a receipt from the defendant acknowledging that he received from the plaintiff in store 552 bushels of barley. The plaintiff intended to sell to the defendant, but as the market price was low, it was left with the defendant in store, and mixed with other large quantities, and dealt with by defendant as his own, the plaintiff being at liberty at any time to accept the market price, or to call upon defendant to return him an equal quantity, though not the identical grain. No price was ever agreed upon, nor the barley returned. The defendant's store was subsequently destroyed by fire, and a large quantity of grain destroyed. The defendant having refused to pay for the barley or return a similar quantity, the plaintiff brought an action against the defendant to recover the amount of the same.

Held, that plaintiff was entitled to recover.

McMichael, Q.C., and *Smythe*, for the plaintiff.

Hardy, Q.C., for the defendant.

Murphy v. Yeomans.

Partnership—Sale after dissolution—Validity

G. D. and A. D., who were in partnership as bakers, purchased some wheat for their business, but which was not used by them, not being of the required quality. On January 28th, 1876, the partnership was dissolved by an instrument under seal, G. D. giving A. D. $165 in cash, and a note for $500, retaining the assets and continuing the business. On March 14th, G. D., on the ground of his being a minor and not bound by the dissolution, filed a bill in Chancery by his next friend, for a partnership account. On the 16th of March, G. D. sold the wheat for value to the plaintiff, who was aware of its being partnership property

but was not aware of the Chancery proceedings.

Held, that the sale was valid, for that notwithstanding that the sale took place after the dissolution, it was so made, as the evidence shewed, by G. D., the continuing trader, in the legitimate exercise of his right of disposal of the partnership assets to meet existing demands against the partnership, and for converting the assets into money in the interest of the partners.

Drew, Q.C., for the plaintiff.

Guthrie, Q.C., for the defendant.

Waffles v. Ball.

Assessment and taxes—Advertisement—Taxes in arrears for three years—32 Vict., cap. 36, secs. 18, 128, 155, O.

Held, that, under sec. 155 of 32 Vict., cap. 36, O., the insufficiency of the advertisement of a tax sale cannot be set up when the two years have elapsed after the execution of the tax deed without the sale being questioned.

On the 18th of July, 1873, a warrant was issued, and on the 18th of December following the land in question was sold for the taxes imposed in 1870, and in arrear for that year.

Held, that the sale was valid, for that under sec. 128, in conjunction with sec. 18 of the Act, the taxes must be deemed to have been due for and in the third year when the warrant issued.

McCarthy, Q.C., for the plaintiff.

Lount, Q.C., for the defendant.

Brogden v. Manufacturers' and Merchants' Mutual Fire Insurance Company.

Insurance—Title—Incumbrances—Pleading—Building—Ownership.

In an action on a policy of insurance on a frame building, it appeared that the plaintiff purchased certain land from an infant for $60, which he was to pay, and get a deed therefor, in three years, when the infant would come of age. The plaintiff erected on the land, on cedar posts, the frame building in question.

In the application the plaintiff stated, in answer to the questions as to title and incumbrances, that he was owner, and that the property was incumbered to $60. By a clause in the application the insured was stated to covenant the truth of the statements in the application, so far as known to him and material to the risk, and that the application was to form part of and be a condition of the policy, but there was no condition in the policy itself making the application part of the policy.

Held, that a plea setting up that by one of the conditions of the policy the application was to be part of the policy, and averring misrepresentation as to the ownership of the property, failed to raise the defence attempted to be set up.

Held, however, that the answer was correct as to the building, for that the defendant was the owner of the building, and if the minor, on his coming of age, had refused to carry out the agreement, the plaintiff could have removed it.

Guthrie, Q.C., for the plaintiff.

J. H. Ferguson, for the defendants.

Coulson v. O'Connell.

Costs—Title to land—Certificate.

To an action against the defendant for negligently setting out fire on his land, which spread to the plaintiff's land and damaged his woods, the defendant, amongst other pleas, pleaded that the land and property were not the plaintiff's. There was a verdict for the plaintiff, with $50 damages, but no certificate for costs.

Held, following *Humberston* v. *Henderson*, 3 P. R. 40, that the plea raised the question of title to land, and that the plaintiff was, therefore, entitled to full costs without a certificate.

Lount, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

McKenzie v. Montreal and Ottawa Junction Railway Company.

Debentures—Coupons—Assignee—Right to recover.

By sec. 13 of 34 Vict., cap. 47, D., the defendants' Act of incorporation, the defendants were empowered to issue bonds or debentures in such form and amount, and payable at such times and places, as the direc-

tors might from time to time appoint, &c.; and by 35 Vict., cap. 12, sec. 2, O., the bonds or debentures of corporations made payable to bearer, or any person named therein as bearer, may be transmitted by delivery, and such transfer shall vest the property thereof in the holder thereof, to enable him to maintain an action in his own name.

The defendants issued bonds or debentures payable to bearer, and delivered them to C. & Co., the contractors for the building of the road, with coupons attached, for the payment of the interest half yearly. The coupons for the first instalment of interest were not paid.

The plaintiff brought an action on the coupons, alleging an assignment thereof to him, and that he was the lawful holder thereof.

Held, that the plaintiff held the coupons freed from any equities arising between the defendants and C. & Co., and that he was, therefore, entitled to recover thereon.

McMichael, Q.C., for the plaintiff.
J. K. Kerr, Q.C., for the defendants.

Inglis v. Wellington Hotel Company.

Stock—Agreement to pay for work to be performed—Validity of—Interest—C. L. P. Act, sec. 267, sub-sec. 2.

Held, that it is not *ultra vires* of a joint stock company to agree to pay a person for work to be performed for the company, in shares of the capital stock of the company, and the acceptance of such shares in payment of the work so performed will not create a liability as against creditors for the amount of such shares.

Held, that plaintiff, having performed certain work under such an agreement, could not sue upon an implied assumpsit to recover the value of the work in money, unless it be shewn that the defendants had refused to give the shares.

Under sec. 267, sub-sec. 2 of the C. L. P. Act, when a claim is payable otherwise than by a written contract, interest may be allowed from the date of a demand therefor in writing.

In this case no such demand was made, and a claim for interest was therefore refused.

McCarthy, Q.C., for the plaintiff.
Guthrie, Q.C., for the defendants.

Sanderson v. Dickson.

Insolvency—Discharge—Supplementary list of creditors.

To an action of covenant in a mortgage, a discharge in insolvency was set up as a bar, but it appeared that the plaintiff's name and debt were not mentioned or set forth in the sworn statement of the insolvent's affairs exhibited at the first meeting of the creditors, but it was urged that a list, which contained a reference to the mortgage, and from which the sworn statement was made up, could be looked upon as the supplementary statement provided for by the Act.

Held, that it could not have such effect, and more especially so as it appeared that the plaintiff's name and debt had been intionally left out of the sworn statement.

The discharge was, therefore, held not to operate as a bar to the plaintiff's claim.

J. K. Kerr, Q.C., for the plaintiff.
Hector Cameron, Q.C., for the defendant.

Wilson v. Standard Insurance Company.

Insurance—Buildings within 100 feet—Warranty.

To an action on a fire insurance policy on a stock of goods, the defendants pleaded, setting up one of the conditions of the policy, that the application, survey, and diagram should be taken as part of the policy, and that an erroneous or untrue representation or statement in such application, &c., or omission to make known any fact material to the risk of the policy, should be null and void, and averred that there was a breach of warranty alleged to have been made by the applicant, that there were no buildings or premises within one hundred feet of that within which the insured property was situated other than those mentioned in the application, survey, and diagram, whereas there were other buildings, describing them.

Held, that there was no such warranty as was alleged, for that it appeared from the

application that the only warranty was as to the answers to the questions submitted, none of which referred to the existence of buildings within one hundred feet, and that the applicant was only required to make known such buildings as were material to he risk, and it was proved that the buildngs omitted were not of such a character.

Hardy, Q.C., for the plaintiff.

Bethune, Q.C., for the defendants.

Trotter v. Corporation of Toronto.

Water Commissioners of Toronto—Neglect of—Action against City—Limitation of action—Notice of action—35 V. c. 79, O.

This was an action against the City of Toronto for the non-repair of certain main pipes laid down in one of the streets for waterworks purposes, whereby the plaintiff's premises were injured. The pleadings are fully set out in the previous report of the case on demurrer : 28 C. P. 574.

Held, that the plaintiff could not recover, for that the claim was barred by reason of the action not having been brought within a year after the original cause of action arose, as required by 35 Vict., cap. 79, sec. 35, O. ; and also on the ground that the defendants were entitled to notice of action.

Bethune, Q.C., and *A. C. Galt*, for the plaintiff.

Biggar, for the defendant.

Fortier v. Royal Canadian Insurance Company.

Agreement—Correspondence—Surrounding circumstances.

By means of a correspondence which took place between plaintiff and defendants, commencing on the 27th of November, 1873, and ending on the 22nd of the month of December following, an agreement was concluded for the appointment of the plaintiff as the marine manager of the defendants' company.

Held, that upon the evidence as disclosed by the correspondence and surrounding circumstances, the duration of the contract was to be three years, to commence from the 1st of January, 1874, and not from the first of the previous month—namely, 1st of December, 1873, by reason, as was contended by plaintiff, of the defendants having paid plaintiff for services performed by him during that period, an amount proportionate to the amount of the salary agreed on.

Ferguson, Q.C., for the plaintiff.

Robinson, Q.C., and *J. Stewart Tupper* for the defendants.

Rooney v. Rooney.

Trinity Term—Sitting of Court in, dispensed with—Motion for rules nisi—When to be made—Power of Court.

Held, that notwithstanding the Court have by rule thereof dispensed with the sittings of the Court during Trinity Term, it is still a Term of the Court, and motions for rules nisi for new trials, &c., must be made during the first four days thereof.

Held also, that notwithstanding R. S. O., ch. 49, sec. 284, the Court have the power to entertain such motions after the expiration of the four days.

CHANCERY.

Blake, V.C.] [Dec. 20, 1878.

Barters v. Howland.

Patents—Prior disclosure—Similarity of claims—Evidence—General denial of invention—Pleading.

When the plaintiff had, more than one year previous to his application for a patent in Canada, obtained a patent in the United States substantially disclosing the same invention, though not containing all the claims contained in the Canadian patent :

Held, under section 7, Patent Act, 1872, that such foreign patent amounted to a publication of the whole invention in Canada, and imported a disclaimer of all parts not claimed in the foreign patent ; and that the Canadian patent for the parts so published and disclaimed was invalid, although such foreign patent was not technically a patent for the same invention.

Held also, that a patent in Canada granted to an independent inventor, after the plaintiff's foreign patent, but before his application for a patent in Canada, was valid against the plaintiff's subsequent patent.

Held also, that evidence of such prior Canadian patent to an independent inventor was admissible under a general denial that the plaintiff was the first inventor.

Blake, V. C.] [Jan. 4.

Dilk v. Douglas.

Mortgages—Fraudulent transaction.

C. created two mortgages in favour of M. B. and her two sisters to secure repayment of moneys advanced by them. C. subsequently sold the lands comprised in these mortgages to different parties, and after the death of the two sisters, procured M. B. alone to execute discharges of these mortgages, conveying to her other lands by way of security, which, however, were wholly insufficient in amount. After the the death of M. B. the personal representative of herself and her sisters filed a bill, seeking to charge the lands embraced in the original mortgages, with the amount remaining due on these securities, and the Court, under the circumstances, made a decree for payment of shares which should have been coming to the two sisters, with costs.

Proudfoot, V.C.] [Jan. 6.

Attorney-General v. O'Rielly.

Escheat—Jurisdiction—Demurrer.

Held, on demurrer (1), that the doctrine of escheats applies to lands held in Ontario; (2), that the Attorney-General of Ontario is the proper party to represent the Crown, and to appropriate the escheat to the uses of the Province; (3), that this Court has jurisdiction in such cases; and (4), that it was proper for the Attorney-General, if he saw fit, to file a bill in this Court to enforce the escheat.

Proudfoot, V.C.] [Jan. 6.

Rees v. Fraser.

Legacy to infant—Loco parentis—Residue—Next of kin—Maintenance.

A testator bequeathed $4,000 to his grandson, payable on his attaining 21, and in case of his death before that period, the amount was to revert to the residuary estate, and it had been decided (25 Chan. R. 253) that in the events that had happened the grandson was absolutely entitled to one-half of the residuary estate, the income of which was amply sufficient for his maintenance.

Held, that although the testator had been *in loco parentis* to the infant, the infant was not entitled to claim interest on the legacy for his maintenance; but that being entitled to one-half of the residue as next of kin, and there being a *quasi* intestacy as to the interest on the legacy, one-half of it should be paid into Court to the credit of the infant; the legacy itself to be paid into Court upon the trusts of the will.

Proudfoot, V.C.] [Jan. 6.

Emerson v. Canniffe.

Executors—Contribution—Lapse of time.

After the distribution of the personal estate, and the allotment to the devisees of the real estate of a testator, an action was brought against the executors on a covenant of the testator, in which a judgment was recovered, the amount of which the executors paid out of their own money. Twenty-seven years afterwards, and after the greater number of the devisees had died, and all but one had sold their property to *bonâ fide* purchasers without notice, the executors instituted proceedings in this Court against the heirs of that one, to compel them to recoup the executors. The Court, under the circumstances, refused to make a decree for more than a proportionate share of the demand, leaving the executors to litigate the question with the parties liable to contribute to the payment of the debt, as owing to their delay in suing, the obstacles in the way of the defendants recovering were quite as great as they were to the plaintiffs enforcing the claim.

Proudfoot, V. C.] [Jan. 6.

Johnson v. School Trustees.

Public School Trustees—Selection of School site—Tenant of lands selected.

In proceeding to select a site for a public school-house, no notice was given to a lessee

in possession of the property selected, of the proceeding to arbitrate upon the question of compensation, and in consequence he did not name an arbitrator, neither did he attend before or take any notice of the arbitration; and the arbitrators in fact did not take into consideration the value of his interest, or find that such interest was not of any value. The Court, at the instance of the lessee, declared that his interest had not been affected by the arbitration, and directed an inquiry as to damages sustained by him, and ordered the trustees to pay him his costs of suit.

COUNTY COURT OF THE COUNTY OF WENTWORTH.

(*Reported by* John F. Monck, *Esq., Barrister-at-Law.*)

Re Creen.

Insolvency—Setting aside attachment—Affidavit heading of, merely descriptive.

Upon an application to set aside a writ of attachment in insolvency, on the ground that it was issued on insufficient material, it appeared that the affidavit on which the order for the attachment was granted, made no reference to the debtor's occupation or business, except that it described him in the style of cause as a merchant, and afterwards stated that the deponent believed the debtor was insolvent within the meaning of the Insolvent Act of 1875.

Held, that the heading of an affidavit is merely descriptive, and not an allegation of fact.

Held, that the affidavit in question was defective in not stating facts sufficient to satisfy the Judge who granted the order that the debtor was a trader within the meaning of the Act.

[Hamilton, Nov. 28, 1878.

This was an application by John Creen to set aside a Writ of Attachment in Insolvency, issued against him, on the ground that the material on which the order was granted was insufficient, and also on the merits, the petition being presented within five days after the issue of the attachment.

The following is the affidavit on which the attachment was obtained :—

"Insolvent Act of 1875, and amending Acts.

Canada: Province of Ontario, County of Wentworth. } The Merchants' Bank of Canada, Plaintiffs, *vs.* John Creen, of the Village of Waterdown, in the County of Wentworth, Merchant, Defendant.

I, Edward Field Hebden, of the Town of Mitchell, in the County of Perth, Esquire, being duly sworn, depose and say—

1. I am the agent of the plaintiffs in this cause, duly authorized for the purposes hereof, and have full knowledge of the matters hereinafter deposed to.

2. The defendant is indebted to the plaintiffs in the sum of three thousand two hundred and forty nine (44-100) dollars currency, for the amount of a judgment recovered against him in the Court of Queen's Bench, and for which the plaintiffs hold no security.

3. To the best of my knowledge and belief, the defendant is insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and has rendered himself liable to have his estate placed in liquidation under the said Act, and my reasons for so believing are as follows :—The said defendant has permitted an execution issued against him, under which his lands and tenements have been seized and taken in execution, to remain unsatisfied for fifteen days after such seizure, and the Sheriff of the County of Wentworth has advertised defendant's lands for sale under a prior execution, and has stated that he must return the execution against goods *nulla bona*.

4. I do not, nor do the plaintiffs, act in this matter in collusion with the defendant, nor to procure him any undue advantages against his creditors.

5. The defendant resides at Waterdown, in the County of Wentworth, and I have signed.

Sworn, &c."

Laidlaw, for the petitioner.

W. Bell, for the Attaching creditors.

Sinclair, Co. J.—It is urged that the affidavit does not show that Creen was at the time of issuing the attachment "a trader" within the meaning of the Insol-

vent Act, or that the debt had been contracted while he was a trader.

This objection is open to him under the amending Statute of 39 Vict. cap. 30, sec. 3, as a "substantial insufficiency in the affidavits," and probably is so independently of that Statute*Mc." Donald* v. *Cleland*, 6 Prac. R., at page 290.

Under the Act of 1875, of course, no person can be placed in insolvency unless he is a trader within the meaning of that Statute and the amending Acts. It is admitted by counsel for the attaching creditors that the word "merchant," in the style of the cause or proceeding, is not a fact deposed to in the affidavit, and I imagine the concontrary could not be contended for with any show of reason. It is contended, however, that it is a description of the insolvent's business, and coupled with the statement in the third paragraph of Mr. Hebden's affidavit, that the person described as "merchant" is insolvent within the meaning of the Acts, shows sufficient to warrant the issue of the attachment. It appears to me that the word "merchant," as used in this affidavit, is merely descriptive. It forms no part of the facts deposed to. In *Hood* v. *Cronkite*, 4 Prac. R. 279, Draper, C. J., said, "the statement of addition as to the name of the deponent is merely descriptive. It is not an allegation of fact." I also refer to *Rogers* v. *Crookshank*, 4 U. C. L. J., O. S., 45. It was mentioned, though not decided, in *McDonald* v. *Cleland*, that the omission of the place of residence, and addition of the parties, did not invalidate an affidavit for attachment in insolvency. In the third paragraph of the form of affidavit appended to the Act of 1875, appear the words, "state concisely the facts relied upon as rendering the debtor insolvent, and as subjecting his estate to be placed in liquidation."

Is it a fact necessary to be shown that the insolvent is a trader within the meaning of the insolvent laws? Undoubtedly it is so, under the first section of the Act of 1875.

It gives a statutory description of those who are traders under that Act. No doubt a merchant is one who uses "the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or retail," within the meaning of the first section, but the fact that he carries on such business should be distinctly stated. What should be shown by the affidavit is such fact or facts as should reasonably convince the Judge to whom application is made for the order, that the debtor is an insolvent within the meaning of the Act. On the facts being shown, it is for the Judge to draw his conclusions of law, and I do not think a man's estate should be placed in liquidation, unless the affidavit discloses facts clearly establishing insolvency: *Bateman* v. *Dunn*, 5 Bing. N. C. 49.

This affidavit does not state that Creen is a merchant, from which I might deduce that he was a "trader," nor does it affirm, even in general terms, that he is "a trader" (which latter I think insufficient), but I am asked to say, because the person who drew the affidavit describes the debtor in the style of cause as a "merchant," that I should from that be satisfied he is so. The deponent is studiously made to avoid swearing even to that fact, yet I am asked to presume that that existed which is not sworn to. At page 872 of the third edition of Lush's Practice, it is laid down that to render an affidavit admissible, it must have been made by a person competent in point of law to give testimony, and before a person of competent authority to administer an oath, and its statement must be clear and unambiguous, and nothing left to implication, so that perjury may be assigned thereon if false. See *Classey* v. *Drayton*, 6 M. & W. 17. If perjury could not be assigned on the affidavit, it is defective: *Watson* v. *Walker*, 1 M. & W. 437.

What fact is sworn to in this affidavit showing Creen to be a trader? None whatever, and the case of *Hood* v. *Cronkite*, already cited, is authority for showing how the style of cause at the heading should be viewed. In matters of such serious consequence to debtors, involving, even if an attachment be improperly issued and afterwards set aside, perhaps the total destruction of a man's business and credit, it is all important to see that every necessary fact

is shown to authorize an attachment before a Judge should grant the order. In this case I do not think the affidavit on which the order was granted disclosed such facts, and I must set aside the order and attachment with costs. It is not necessary to consider the merits. I think the official assignee should, if necessary, be protected

Order accordingly.

RECENT ORDERS OF THE COURT OF CHANCERY.

January 10, 1879.

638. Any adult person entitled to apply under Orders 467 or 471 for an administration order may apply to the Master in the county town of the County (other than the County of York) where the deceased person, whose estate it is desired to administer, resided at the time of his death; and such Master may, on fourteen days' notice being given to the person or persons entitled under the present practice to notice of such an application, make an order for the administration of, and proceed to administer, such estate in the least expensive and most expeditious manner.

639. Such Master shall have full power to deal with both the realty and personalty of the estate the subject of administration and shall dispose of the costs of the proceedings, and shall finally wind up all matters connected with such estate, without any further directions, and without any separate, interim, or interlocutory reports or orders, except where the special circumstances of the case absolutely call therefor; and in so doing he shall be guided by the practice heretofore had in the administration of estates upon an application made in Chambers for an administration order: Provided always, that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise without an order of the Judge in Chambers or the Court; and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper.

640. Any adult person who has heretofore been entitled to a decree or order for the partition of an estate may, on serving one or more of the persons entitled to a share of the estate of which partition is sought, with a fourteen days' notice of motion, apply to the presiding Judge in Chambers, or to the Master in the County (other than the County of York) wherein the land sought to be affected by the proceeding lies, for an order for the partition or sale of the premises in question; whereupon such Judge or Master may make such order for partition or sale, or such other order as may be proper; and the Master shall thereupon proceed in the least expensive and most expeditious manner, according to the practice now in force, for the partition or sale of the premises, the ascertainment of the rights of the various persons interested-the adding parties, the taxation and payment of costs, and otherwise: Provided always, that where an infant is interested in the estate no order shall be made for partition or sale until such infant is represented by its guardian *ad litem*; and provided also, that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise without an order of the Judge in Chambers or the Court; and on application for such order the Judge may review, amend. or refer back to the Master his report or order, or make such other order as he deems proper.

641. When after an order has been made under Order 640 lands are discovered in another county, an application may be made to a Judge in Chambers for the partition or sale of such lands under the order formerly made, and where two or more orders have been made by masters in different counties an application may be made in Chambers for an order as to the conduct of the future proceedings.

642. There shall be an appeal to the presiding Judge in Chambers—on any day that he may sit in Chambers—against any decree, order, report, ruling, or other determination of any Master; the notice of such appeal shall be a seven days' notice, and shall set out the grounds of objection, and the

appeal shall be set down for argument not later than the Saturday preceding the day on which it is to be argued, and shall be brought on for argument within a month—not including vacation—of the making of such decree, order, report, ruling, or determination, or within such further time as a Judge may think proper, and the presiding Judge may then hear, or adjourn into Court, or otherwise dispose of such matters on such terms as he thinks proper.

643. In all suits hereafter instituted for administration, or partition, or administration and partition, unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff now in force, each person properly represented by a solicitor, and entitled to costs out of the estate—other than creditors not parties to the suit—shall be entitled to his actual disbursements in the suit, not including counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate a commission on the amount realized or on the value of the property partitioned in the suit, which commission shall be apportioned amongst the persons entitled to costs as the Judge or Master thinks proper. Such commission shall be as follows :—

On sums not exceeding $500	20 per cent
For every additional $100 up to $1,500	5 "
For every additional $100 up to $4,000	3 "
For every additional $1,000 up to $10,000	2½ "
For every additional $1,000	1 "

and such remuneration shall be in lieu of all fees whether between "party and party," "as between solicitor and client," or "between solicitor and client."

644. When two or more suits are instituted for administration, or partition, or sale, the judge may, in his discretion, disallow all, or any, of the costs of any suit or suits which, in his opinion, has or have been unnecessarily prosecuted.

645. Order 434 shall apply to cases in which an adult is interested in the estate as well as an infant, and also to suits for redemption.

646. Order 435 shall apply to redemption suits; and under Orders 434 and 435 there may be granted, where it is prayed for and notice is given in pursuance of Order 647, a decree embracing the additional relief which this Court is entitled, under "The Administration of Justice Act," to give, in mortgage cases, on the hearing of the cause *pro confesso*, and such a decree may be granted, notwithstanding that the defendant has been served by publication, or otherwise, or is a corporation; provided always that where the bill has not been personally served the claim of the plaintiff shall be duly verified by affidavit.

647. In suit for foreclosure or sale, where the plaintiff prays for an order for the immediate delivery of possession, or for an order for immediate payment against a defendant, he must, in addition to the notice required by Schedule S, endorse upon the office copy of the bill served upon the defendant for further notice :—

(Where order for immediate possession prayed :)

"And the plaintiff will be entitled to an order for the immediate delivery of possession of the mortgaged premises to him."

(Where order for immediate payment prayed :)

"And the plaintiff will be entitled forthwith to execution against the goods and lands of you (naming the defendant against whom the plaintiff is entitled to this relief) to recover payment of the amount due by you."

648. Every Deputy-Registrar shall have the same power, as to the issue of decrees on *recipe*, as by Order 646 and the Consolidated General Orders is given to the Registrar of the Court.

649. Every decree or order hereafter made by this Court, whether the service of the bill, or other proceedings on the defendant, has been personal by publication or otherwise, shall be absolute in the first instance, unless the Court shall otherwise order.

650. The Local Masters and Deputy-Registrars shall enter in a book or books, kept for that purpose, all decrees or orders made by them ; and they shall, on the conclusion of every suit or matter annex together all the pleadings and papers, filed with them in such suits or matter, and transmit the same to the Clerk of Records and Writs, who shall duly enter and file the same.

651. All orders and portions of orders inconsistent with these orders are hereby abrogated.

J. G. SPRAGGE, C.
S. H. BLAKE, V. C.
WM. PROUDFOOT, V.C.

Law Society of Upper Canada.

OSGOODE HALL,

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

CLASSICS.

Xenophon, Anabasis, B. I.; Homer, Iliad, B. I.; Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1-300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek:

FRENCH.

A Paper on Grammar. Translation of Simple sentences into French Prose. Corneille, Horace, Acts I. and II.

Or GERMAN.

A Paper on Grammar. Musaeus, Stumme Liebe. Schiller, Lied von der Glocke.

Candidates for Admission as Articled Clerk. except Graduates of Universities and Studentss at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examie nation in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

After Hilary Term, 1879, the Matriculation Examination will be as follows:—

SUBJECTS OF EXAMINATION.

Junior Matriculation.

CLASSICS.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. I.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem:—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

A Paper on Grammar.

GERMAN.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer.
Die Kraniche des Ibycus.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,