DIARY FOR FEBRUARY.

2. Sun....4th Sunday after Epiphany.
3. Mon....Hilary Term begins. Convocation meets.
4. Tues ..Convocation meets.
6. Thur...Hagarty, C. J., sworn in as C. J. of C. P., 1856.
8. Sat ...Convocation meets.
9. Sun....Septuagesima.
10. Mon ...Queen Victoria married, 1840.
11. Tues...Hon. R. E. Caron, Lieut.-Governor of Quebec, 1873.
14. Fri....Convocation meets.
15. Sat ...Hilary Term ends.
16. Sun. ..Sexagesima.
17. Mon. ..Last day to move against Municipal Elections.
18. Tues ..Canada settled by the French, 1534.
20. Thur ..Rehearing Term in Chancery begins.
23. Sun. ..Quinquagesima.
26. Wed...Ash Wednesday.
27. Thur..Sir John Colborne, Administrator, 1838.

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Canada Law Journal.

Toronto, February, 1879.

WE direct attention to a number of cases decided in Chancery Chambers published in this issue. They have been prepared expressly for this journal and will be of interest to many of our readers. We shall continue to give our readers from time to time early reports of such cases as are of importance to practitioners, both in Common Law and Chancery Chambers.

In *Wheelhouse* v. *Darch*, 28 C. P. 269, the Court affirmed the law to be that, by twenty years' user, a right of lateral support for the wall of a house will be presumed as against the adjacent owner. In a contemporaneous decision in England, *Angus* v. *Dalton*, L. R. 3 Q. B. D. 85, the majority of the Court held this presumption to be rebuttable, and that if it appears that no grant were made, or if this can be implied from the circumstances, the presumption fails. This case was carried to appeal, and the Lords Justices have, by a majority, reversed the decision. The effect of this case in appeal is to establish the law that a grant of support to buildings by adjacent lands is presumed from undisturbed user for twenty years, and the fact that there was no grant will not displace this presumption.

Apropos of the discussion in our columns not long since, as to the advisability of publishing the dissenting opinions in Appellate Courts, we find the following observations in the *Solicitors' Journal* of December 14th, 1878:— "We have never hesitated to say that we think the rule adopted by the Privy Council of not promulgating dissentient

opinions is a good one in the case of a Court of final appeal. We venture to think, with Lord Selborne, that in the case of a court from which there is no further appeal, the judgment should always be an authoritative one, free from the expression of individual opinions calculated to detract from its weight. A final tribunal which gives forth an uncertain sound is a very unsatisfactory institution. Moreover, the fact that but one judgment can be delivered is likely to exercise a beneficial influence on the care with which the judgment is prepared. It may be that the minority of the judges will devote more pains to finding out and laying bare the weak points in the draft judgment of the majority than they would if they were at liberty publicly to state the view which occurred to them, and it seems certain that the majority will be more anxious to appreciate and give effect to the opinions of the minority than if the latter had the opportunity of stating these opinions for themselves." These are wise and weighty words, and are singularly applicable to some of the deliverances of the Supreme Court at Ottawa, where unity has been lost sight of in the desire to emphasise points of judicial divergence.

On the 14th January last, Secker Brough, Esq., formerly Judge of the County Court of Huron, died at his residence, in Goderich.

Mr. Brough was born in Ireland in 1813. He was educated at Trinity College, Dublin. Shortly after he emigrated to Halifax to join his uncle General Brough, R.A., then commandant at that place. He came afterwards to Toronto, where he entered the office of Messrs. Hagerman & Draper, then practising in partnership. He was called to the bar in 1840, and shortly afterwards became partner of Mr. Draper, with whom he continued to practise until the elevation of that gentleman to the Bench.

During this period Mr. Brough was engaged in many of the leading cases of the day, and was employed in several confidential matters by the Government.

Upon the establishment of the Court of Probate for Upper Canada, he was appointed Judge, and continued to hold the office until the abolition of the Court and the distribution of its functions among the various County Surrogate Courts. Mr. Brough for several years had one of the most extensive practices at the Chancery Bar, and took a very active and prominent part as a bencher of the Law Society. In 1859 he was appointed Queen's Counsel. In November, 1866, he was appointed Judge of the County Court of the County of Huron by Sir John A. Macdonald. Infirmity of health obliged him to abandon that position in the summer of 1877.

A meeting of the bar and county officials of the County of Huron was held after his death, and resolutions were passed expressive of regret at his loss and of sympathy with his family.

THE SUPREME COURT BENCH.

The retirement of Sir Wm. B. Richards from the distinguished position of Chief Justice of the Supreme Court has caused no surprise. He has well earned repose, even were his health better than it is. This Court can ill afford to lose the one of its Judges who, most of all, gave the public confidence in its future at its first organization. We have recently spoken at length of this learned Judge; but we cannot chronicle his retirement without expressing great regret that it must be so. His broad sagacious mind, cool clear head, intimate knowledge of

the business of the country, and the instincts of the people, combined with his large legal attainments eminently fitted him for the position he has just resigned. Failing health, however, has recently prevented his taking that active control of the business of the Court which is one of the duties of its chief. His successor is Hon. William Johnston Ritchie, who has heretofore been one of the Justices of the Court. Mr. Ritchie is admitted to be an excellent lawyer and will, we trust, in his new position develope many of the qualities which rendered the appointment of his predecessor so acceptable to the country as chief of the court of highest resort in the Dominion. We congratulate him upon his promotion.

The seat rendered vacant by the promotion of Mr. Justice Ritchie has been filled, as of course, from the Province of Ontario, and the Senior Puisne Judge of the Court of Common Pleas, Mr. Justice Gwynne, has been selected. We are very glad and very sorry. Glad that such a conscientious, hardworking public servant should receive a promotion to which he is justly entitled, and sorry that a Judge in whom both the profession and the public in Ontario have such entire confidence, and a man so esteemed by all, and so beloved by his own intimate circle of friends, should be removed from our midst. We venture to predict that he will not be the least important factor in the Supreme Court, either in the keenness of his intellect or the extent of his learning. His extensive knowledge of equity jurisprudence, also, will render him a most useful member of a Court where so large a portion of the work that falls to it is based on the civil law.

The Supreme Court, for years before its organization, was thought to be almost a necessity. There are those now who think that, owing to the peculiar circumstances of this Dominion, it cannot be of that great practical use and benefit which its founders expected. There are not wanting some who say that it has been in a measure a failure. It is not, therefore, saying too much when we assert that it is now, and will be for some few years to come, on its trial. It has great disadvantages to contend against. If it succeeds in retaining that confidence which the public and the profession were so willing to accord to it when it commenced its labours, those who compose the Court may take credit for having succeeded in a difficult task. We shall not now suggest the possibility of a failure in this, and shall only wish it all success for the future.

DOWER AS AFFECTED BY THE STATUTE OF LIMITATIONS.

(Continued.)

From the digression in the last paper on this subject advocating a change in the law so as to provide for the vesting of the widow's estate in dower immediately upon the death of her husband, we return to consider whether the widow's right is gone ten or twenty years from the husband's death (as the case may be), if she has been all the time occupying the land with her children, but without having her share set apart.

If then the mother remains in possession with her infant children, after her husband's death, by what right or under what title is she there? Not as dowress, it is true. Neither is she to be accounted as tortiously in possession as a trespasser though it is spoken of in the old books as an abatement or disseisin when the widow enters upon the freehold before the actual assignment of dower, yet this is only where she claims to enter *qua* dowress (Dalison 100), and after

the expiration of the forty days of *quarantine.* And upon this point the observations of Mr. Justice Gould are specially noteworthy. In *Goodtitle d. Newman* v. *Newman*, 3 Wils., 519, he is reported thus: "If dower be not assigned to her within forty days may she not continue until it be assigned to her? I think the court would not turn her out, until dower was assigned to her." Whereto counsel for the defendant responded: "It must be admitted that the heir has no right to turn her out before dower be assigned to her." The possession of the widow, in the case put, will be attributed to a rightful entry or continuance in possession in her character of guardian to her infant children, upon whom the estate has descended. In the case already cited, the court say the mother has the right to possession as being the guardian by law of her infant son. She is the guardian in soccage; that is, the person next of blood to whom the inheritance cannot descend: 3 Wils. 527-8.

Now, by Imp. Stat. 31 Geo. 3., c. 13, s. 43, lands in Upper Canada are to be granted in free and common soccage in like manner as lands are held in free and common soccage in England. And it has been held that soccage guardianship is recognized by Canadian law, just as in England. In *Doe d. Moak* v. *Empey*, 3 O. S. 488, it was decided that the possession of a mother during her son's minority was a possession for him, as his guardian. And in *Doe d. Murphy* v. *McGuire*, 7 U. C. R. 311, the mother of an infant on whom lands had devolved by descent from the father was said to be the guardian in soccage, and would have the right to make leases, &c. The same law obtains in many of the States: *Jackson* v. *Vredenbergh*, 1 Johns. R. 163, n; *Combs* v. *Jackson*, 2 Wend. 153; *Jackson* v. *Combs*, 7 Cowen, 36. This guardianship may determine when the ward is fourteen, but not necessarily so. Upon this rather obscure subject, it is said in *Rex* v. *Pierson*, Andr. 313, when the Court of Chancery appoint a guardian, such guardianship doth not cease on the ward's attaining fourteen, unless another guardian be then appointed. And so it is of a guardianship in soccage, though at that age the ward hath a right to choose another guardian.

In the case put by us, it may fairly be contended, then, that till the heirs attain majority, the mother remains in possession of the land as their lawful guardian. Then, are her rights as doweress gone by lapse of time? It will be observed that the Dower Act (Rev. Stat., c. 55, s. 7,) provides that every action for dower shall be commenced by writ of summons, which shall be addressed to the person in actual possession of the land out of which dower is claimed. Sec. 12 provides for service on the tenant of the freehold if no person is in actual occupation of the land. The mother, in actual possession and occupation as guardian, cannot be defendant in a suit wherein she claims as doweress against herself. The statute as framed evidently does not contemplate the case of the claimant being in possession on behalf of her children. But the Dower Act and the Limitation Act (Rev. Stat. c. 108, s. 25,) must be read together as *in pari materia*, and for the reason also given by Lord Westbury, that we are to deal with the Consolidated Statutes as one great Act, and to take the several chapters as being enactments which are to be construed collectively and with reference to one another, just as if they had been sections of one statute, instead of being separate Acts: *Boston* v. *Lelievre*: L. R. 3 P. C. 152.

But without laying undue stress upon the frame of the Statutes as indicating a suspension of the right of suit for dow-

er in the circumstances under consideration, another aspect of the case may be adverted to as leading to the same conclusion. The law appears to be well settled by all the old authorities, that, when after the death of the husband the heir makes a lease for years of the land to the wife, her dower therein is suspended during the lease, because she cannot demand it against herself: Jenk. Cent. p. 73, pl. 38; Vin. Abr. Dower, x, pl. 20; Perkins, s. 350; Fitz. N. B. 149 E. and note; Watkins on Descent, pp. 76, 77. Being in possession as guardian, she is the proper person to assign dower, and is for that reason not competent to endow herself: *Shipland* v. *Ryder*, Cro. Jac. 98; Litt. Sec. 48 and 123; *Osborne* v. *Carden*, Plowd. 293. The reasons against dower being assigned while she is in as guardian are quite as strong as in the case of her holding under a lease from the heir. We submit that in such case the right to bring an action of dower is suspended, and that the period of limitation is also suspended, and does not run so long as the double character of guardian in possession and claimant in dower co-exists in the same person. This class of exception from the Statute of Limitations does not fall under the category of any of these disabilities, but is akin to cases of exemption enjoyed, when, for example, the debtor takes out administration to his creditor: *Seagram* v. *Knight*, L. R. 2 Ch. Ap. 629.

SELECTIONS.

MECHANICS' TOOLS.

In looking over the subject of statutory exemptions from execution, of late, we have been somewhat amused by the different interpretations which courts have put upon some words, as for example the word "mechanic." It would naturally be supposed that the meaning of this word is settled beyond cavil. Webster defines it, "a person whose occupation is to construct machines, or goods, wares, instruments, furniture, and the like." But in the construction of the statutes in question, the courts have been so liberal as to strain this word, as it seems to us, beyond its normal capacity, and to embrace within its scope some occupations which can hardly be said, in the proper and ordinary use of language, to be "mechanical." For instance, in the case of *Maxon* v. *Perrott*, 17 Mich. 332, the court held that a dentist is to be regarded as a "mechanic," within the intent of the statute. The court observed: "A dentist in one sense is a professional man, but in another sense his calling is mainly mechanical, and the tools which he employs are used in mechanical operations. Indeed, dentistry was formerly purely mechanical, and instructions in it scarcely went beyond manual dexterity in the use of tools; and a knowledge of the human system generally, and of the diseases which might affect the teeth and render an operation important, was by no means considered necessary. Of late, however, as the physiology of the human system has become better understood, and the relations of the various parts and their mutual dependence become more clearly recognized, dentistry has made great progress as a science, and its practitioners claim, with much justice, to be classed among the learned professions. It is nevertheless true that the operations of the dentist are for the most part mechanical, and, so far as tools are employed, they are purely so, and we could not exclude these tools from the exemption which the statute makes, without confining the construction of the statute within limits not justified by the words employed."

On the other hand, in *Whitcomb* v. *Reid*, 31 Miss. 567, the court says: "A dentist cannot be properly denominated a 'mechanic.' It is true that the practice of his art requires the use of instruments for manual operation, and that much of it consists in manual operations; but it also involves a knowledge of the physiology of the teeth, which cannot be acquired but by a proper course of study; and this is taught by

learned treatises upon the subject, and as a distinct though limited department of the medical art, in institutions established for the purpose. It requires both science and skill, and if such persons could be included in the denomination of 'mechanics,' because their pursuit required the use of mechanical instruments, and skill in manual operation, the same reason would include general surgeons under the same denomination, because the practice of their profession depends in a great degree upon similar instruments and operative skill. Nor could such a pursuit be properly said to be a trade."

Here we have both sides of the question judicially presented, and we must vote with Mississippi. The only operations of dentistry that seems to us to be *mechanical* are those connected with the manufacture of artificial teeth. It is unquestionable that one who makes cork limbs or glass eyes is a "mechanic," and the mere operation of making artificial teeth is mechanical; but the fitting of such teeth requires so much knowledge of the human body as to remove it from the domain of mere mechanical art, and to render it a species of surgery, like the operation of forming a new skin from pieces of skin taken from other living persons. A surgeon constructs a new nose over a silver plate, and sews a wound, and wires together a fractured limb to assist the process of knitting, and trepans a skull, and we do not denominate these operations mechanical. Certainly, the removal of the whole or part of a deceased tooth is no more mechanical than the surgical operation of removing a portion of the deceased jaw itself, and the question of the propriety of removing a tooth sometimes involves the exercise of considerable physiological knowledge. So of the treatment of the nerves of the teeth. It is true that we usually speak of a dentist's *tools*, and of a surgeon's *instruments*, but the latter are really just as much tools as the former. A chiropodist is defined "a surgeon for the feet," and could scarcely be regarded as a *mechanic;* and yet his calling involves much less professional knowledge than, and is commonly regarded as much inferior to, the occupation of a dentist. The numerous "colleges of dentistry" would feel quite hurt by the imputation that their graduates are "mechanics," and so, we suppose, would the profession at large, especially those who have taken their degree, and write themselves D. D. S. But these honours have to be paid for, just as the lawyer, of whom we recently heard, resenting the inquiry by the innkeeper, whose guest he was, if he was a "commercial traveller," was charged a dollar a day extra for his pride.

As to the words "furniture," "tools," or "implements," "necessary to a trade or business," there has been an extreme liberality of construction. Possibly a piano may reasonably be called an "implement;" certainly not "furniture," or a "tool:" *Amend* v. *Murphy*, 69 Ill. 337. And a cornet may be a tool of trade: *Baker* v. *Willis*, 123 Mass. 194. Doubtless a merchant's commercial books, counting-house furniture, and iron safes, may be regarded as "instruments necessary for the exercise of the trade, or profession:" *Harrison* v. *Mitchell*, 13 La. Ann. 260. So a shovel, pickaxe, dung fork, and hoe are "tools of occupation:" *Pierce* v. *Gray*, 7 Gray 67. But how about a farmer's plough, cart wheels and rigging, harrows, drag, etc., which have been held "tools?" *Wilkinson* v. *Alley*, 45 N. H. 551. Webster defines a *tool*, "an instrument of *manual* operation." Printing presses, cases and types may come within this definition: *Patten* v. *Smith*, 4 Conn. 450. A fisherman's net and boat have been held *tools*: *Samis* v. *Smith*, 1 T & C. 444. The *net* certainly is, but is the *boat?* The *boat* comes nearer to it, at all events, than cart wheels, harrow or drag. A milliner's clock, stove, screen, pitcher, and table cover must have been regarded as "fixtures;" certainly not tools nor implements: *Woods* v. *Keys*, 14 Allen, 236. In regard to a book-binder's stove, desk, etc., it has been said, "being common to most kinds of business, they cannot in any proper sense be said to be the tools of any particular trade:" *Seeley* v. *Gwillim*, 40 Conn. 106. A canal boatman's tow line was exempted as a working tool (*Fields* v. *Moul*, 15 Abb. 6), but what then is *manual* about it, unless the claimant was destitute of a horse and towed his boat by hand, we

fail to see. A hunter's gun, where there is no statute exempting arms, is very properly regarded as a *tool*: *Choate* v. *Redding*, 18 Tex. 581. Thus we have soldiers taught the "*manual* of arms." But the longest stretch of construction we know of is that which holds a watch, hung up in the house of a family having no clock, or necessary to the prosecution of the debtor's business, to be a working *tool*: *Bitting* v. *Vandenburg*, 17 How. (N. Y.) 80. A decidedly more reasonable view, it seems to us, is taken in *Rothschild* v. *Bolten*, 18 Minn. 361, where it is held that a cigar-maker's watch, used to time his workmen, is not exempt as an *instrument* used and kept by the debtor for the purpose of carrying on his trade. The court says: "It is not kept or used for the purpose of carrying on his trade, *i. e.*, to make cigars with, but for his own convenience in keeping the account between himself and those by whom he makes cigars. His workmen could make as many and as good cigars, if he were to keep their time, and 'regulate his duties,' whatever that may mean, by the sun."—*Albany Law Journal.*

NOTES OF CASES.

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

COURT OF APPEAL.

From Q.B.] [January 15.

EGLESON v. HOWE.

Assignee of mortgage—Right of mortgagor to set up payment under former mortgage.

Held, reversing the decision of Harrison, C. J., sitting alone and overruling *Henderson* v. *Brown*, 18 Gr. 79, that a mortgagor who has purchased land subject to a mortgage which the vendor has agreed to pay off, and has himself given a mortgage to the vendor for the balance of purchase money, cannot set up payment of such prior mortgage under threat of proceedings against the land in an action upon such mortgage, brought by the person to whom it had been assigned.

Beaty, Q.C., and *A. Cassels*, for appellant.

Robinson, Q.C., and *H. J. Scott*, for respondent.

Appeal allowed.

From Chy.] [January 15.

CROSSMAN v. SHEARS ET AL.

Partnership — Sale of chattel — Notice — Estoppel.

In 1867 the defendant S. entered into an agreement with the plaintiff for an advance of money to enable him to perform a stipulation in a lease made to him a short time before for the period of seven years by the Rossin House Hotel Co., that he would expend $10,000 in providing furniture, &c. for the hotel. The agreement was as follows: "Said E. D. C. agrees to advance the money necessary to open the Rossin House in Toronto, not exceeding the sum of $10,000, and G. P. S. to pay interest on one half the amount till repaid to E. D. C., and each party to share equally in all profits, articles of furniture, supplies, &c. put in the said house, and E. D. C. to have a chattel mortgage on everything belonging to both parties, until the half of all the money advanced is repaid to E. D. C., signed G. P. Shears." After the expiration of the term there were negotiations between the plaintiff and S. for a settlement. in the course of which the latter rendered statements to the plaintiff in which he assigned a value to the furniture and treated it as an asset belonging to them jointly. After these negotiations S. continued to carry on the business of the hotel without any dissent by the plaintiff under a new lease, which had been granted to him by the Hotel Company before the expiration of the original term. In 1875, S. becoming embarrassed, a new arrangement was concluded between him and the company, by which he surrendered the old lease and obtained a new one for term of 10 years; and, in consideration of an advance of money and arrears of rent, he executed a bill of sale to the company of the furniture. The lease contained a stipulation, that on certain conditions being performed, the furniture should at the end of the term belong

to S. Subsequently S. assigned this lease to one I. who had actual notice of the plaintiff's interest in the furniture. Evidence was given to prove that the company had notice of the relation existing between S. and the plaintiff in reference to this furniture. There was no evidence to shew that the plaintiff knew of this transaction until after it was consummated, when he promptly repudiated it.

Held, reversing the decree of Blake, V.C., that the evidence proved a partnership between the plaintiff and S.; and being joint owners of the furniture, S. had no power to convey the plaintiff's interest therein, even in the absence by the company of any notice of the partnership.

Held also, that the plaintiff was not estopped by his conduct from asserting his right to the furniture.

C. Moss (*J. T. Small* with him) for the appellant.

Crooks, Q.C., (*Kingstone* with him) for the respondent, the Rossin House Hotel Co.

Howell for official assignee.

Morphy (*Winchester* with him) for the respondent Irish.

Appeal allowed.

From Q. B.] [January 15.

ERB ET AL. V. GREAT WESTERN RAILWAY.

Bill of lading.—Liability of railway company for fraudulent receipts issued by agent.—31 Vict., c. 11, R. S. O., c. 116.

The agent of defendants at Chatham, a station on their line, having authority to grant bills of lading and shipping receipts for goods to be forwarded by the railway from that station, issued such documents representing certain flour to have been shipped by or received from B. & Co., and to be delivered to the plaintiffs at St. John, N.B. B. & Co. were a firm of millers at Chatham, of which the defendants' agent was a partner, and the bills of lading and receipts were fraudulently issued by such agent, no flour having been received by him. Bills of exchange drawn by B. & Co. on the plaintiffs and annexed to these bills of lading and receipts were discounted by a bank at Chatham, for B. & Co., and forwarded to the plaintiffs, by whom they were accepted and retired.

Held, per Moss, C. J. A. and Burton, J. A., that defendants were not liable to the plaintiffs, for the agent in giving receipts for goods never received, was acting outside his authority and ceased to represent his principals. A principal is only liable for tort of agent when the misrepresentation is made, or other wrongful act is committed by the agent in the usual course of his employment and for the benefit of his master, or where the master has authorized, sanctioned, or ratified it.

Per Moss, C. J. A.—Entrusting an agent with certain powers and given duties is not a guaranty that he will not abuse those powers for his own fraudulent ends.

Per BURTON, J. A.—A bill of lading is not a representation to the persons to whom it is endorsed, that the statements therein contained are true and may be relied upon.

Per PATTERSON, J. A, and BLAKE, V.C.—The defendants were liable to the plaintiffs for the damage they suffered.

Per PATTERSON, J. A.—Bills of lading are made effectual by statute as securities or representatives of value, on which money may be obtained, and persons dealing with them are not bound to enquire into the truth of the facts stated therein. Being by statute negotiable and representing goods, and being securities upon which advances can be obtained, the carrier gives them, not only with the knowledge that they may be acted upon, but with the intent that they shall be acted upon. They are representations that the facts are as therein stated, and on the faith of which money may be advanced.

Per BLAKE, V.C.—The plaintiffs were, under the circumstances, entitled to conclude that whatever the agent could do as shipping agent and did do, was done by the company, and that in this case the company intended to and did represent that the flour was shipped according to the tenor of the bill of lading.

Bethune, Q.C., (*Durand* with him) for the appellant.

M.C. Cameron, Q.C. and *C. Robinson*, Q.C., for the respondent.

Appeal dismissed.

From Q.B.] [January 15.

LUCAS V. CORPORATION OF MOORE.

Highway — Want of repair—Misdirection. 36 Vict. c. 48, sec. 409.

The plaintiff's husband lost his life by falling with his horse and sleigh into a ditch or drain, which occupied part of an allowance for road in the township of Moore, along which deceased was driving at night. The ditch was about 12 feet deep and 32 feet wide, extending about half-way into the travelled road, which was 30 feet wide. The road had been in this state for some years, but it appeared to serve the purpose of the neighbourhood as a highway. There was no railing or other guard round the ditch, and nothing to indicate the situation on a dark night, such as the night in question was. It was alleged that the deceased was under the influence of liquor, but there was no direct evidence as to how he fell into the ditch.

The learned Judge, at the trial, told the jury that if the defendants were indicted for having the road in the position described they would be directed to find them guilty of having the road out of repair. He also told them that where a ditch became such a deep and dangerous place as this the Corporation were bound to put a guard on it, otherwise as a matter of law they were guilty of neglect in not guarding it ; but he proceeded to say :—I declined to withdraw the case from you on the ground of there being no evidence to show a want of repair, not because I was going to rule to you that the road was out of repair, but because I thought there was ample evidence to go to you as twelve reasonable men that this road was out of repair. It is a matter entirely for you—was that road in such a reasonable state of repair that it was safe for persons passing and re-passing at all times night and day? If so you will find a verdict for the defendants.

Held, reversing the judgment of the Queen's Bench, that the remarks above referred to were more than a strong comment on the evidence, and that there was clearly misdirection, as it was impossible to say as a matter of law that the statutory duty to keep the road in repair had been neglected by the existence and continuance of the ditch or by its being without a guard, that being a deduction of fact to be made by a jury upon a consideration of all the circumstances.

Held, that the obligation expressed by the words "keep in repair," as used in 36 Vic. c. 48, sec. 409, is satisfied by keeping the road in such a state of repair as is reasonably safe and sufficient for the requirements of the particular locality ; and that there was non-direction in the attention of the jury not being called to the duty of modifying the force of the word "repair" by reference to surrounding conditions.

Robinson, Q.C., and *Ferguson*, Q.C., for the appellants.

Bethune, Q.C., for the respondents.

Appeal allowed.

From Q.B.] [January 15.

McARTHUR V. EAGLESON.

Ejectment—Statute of Limitations—Estoppel.

The plaintiff left his wife and home more than thirty years ago, and went to the United States where he remained until a short time before this action. He held no communication with his wife or friends while absent, and was, until his return, believed to be dead. Seven years after his departure his wife acting on this belief married again, and lived with her new husband on plaintiff's farm. They both mortgaged the farm to a building society which sold it under a power of sale in the mortgage. On his return the plaintiff brought ejectment against the purchaser from the company.

Held, affirming the judgment of the Queen's Bench, that he was not estopped by his conduct from claiming the land, and that he was not barred by the Statute of Limitations, as the possession of his wife was his possession.

Robinson, Q. C., (*G. McKenzie* with him) for the appellants.

Rock, Q. C., and *Ferguson*, Q. C., for the respondent.

Appeal dismissed.

From Q. B.] [January 15.

DENNISON V. LESLIE.

Railway Company—Proof of defendant being a shareholder.

In an action against defendant as a shareholder for unpaid stock, it appeared that the defendant signed the stock book which was headed with an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of any of our said respective shares," they covenanted to pay the company ten per cent. of the calls of said shares and all future calls. The directors subsequently passed a resolution directing the secretary to issue allotment certificates for each shareholder for the shares held by him. The secretary accordingly prepared such certificates, which certified to the subscriber that the company in accordance with his application for—shares * * had allotted to him--shares amounting to ——. The certificates were delivered to the company's broker to deliver to the shareholders. A ledger account was also opened with each subscriber in the books of the company. There was no evidence to show any formal notification to the defendant of the above resolution, or that a certificate of allotment had been issued; and he never paid the 10 per cent. He said that he had no recollection of being asked for the 10 per cent.; but he admitted that he had received notices asking for payment, and that he supposed the first notice he received was for the 10 per cent. The evidence showed that he did not consider that he was entitled to any notice, and that he based his belief that he was not a shareholder simply on the ground that he had not paid the 10 per cent.—never even in the witness-box setting up his want of knowledge of the acceptance by the company.

Held, affirming the judgment of the Queen's Bench, that the evidence was sufficient to show that knowledge of an acceptance of his offer by the company had reached the defendant, and that he was therefore liable as a shareholder.

McDonald for the appellant.

Kennedy for the respondent.

Appeal dismissed.

From C. C. Lanark.] [January 15.

RE CODE V. CRAIN.

Insolvent Act of 1875—*Deed of composition to co-partners—Requisite number and proportion of value.*

Code and Crain became insolvents as a firm and individually. As co-partners they were indebted to 25 creditors. Claims to a large amount were proved against Crain individually by 29 of his separate creditors. No separate creditor of Code proved against him individually. A deed of composition and discharge providing for a cash payment of two cents on the dollar, in full of claims against the insolvents, whether as partners or as individuals, was signed by a majority of the whole body of creditors, taking those who proved claims against the joint estate and against the separate estate as one class. These signing creditors also represented three-fourths of the claims proved against the joint and separate estates. The deed was also signed by a majority in number of the separate creditors of Crain, representing three-fourths of all claims proved against him individually. But the deed was not signed by a majority in number, or by representatives of three-fourths in value of the creditors who had proved against the firm.

Held, reversing the judgment of this County Court, that the deed of composition and discharge could not be confirmed, as the insolvents had not obtained, within the meaning of the Act, the assent of the proportion of their creditors in number and value required by law.

Crerar, for the appellants.

Boyd, Q.C., and *Cassels*, for the respondents.

Appeal allowed.

From C.C.. Norfolk.] [January 15.

FURNESS V. MITCHELL.

Married woman—Tenant by the curtesy.

Held, (Patterson, J. A. dissenting) that under 35 Vic., c. 16, sec. 10, a husband was not deprived of an estate by the curtesy in any lands of his wife which she had not disposed of *inter vivos* or by will.

Bethune, Q.C., for the appellant.

Barbour and *H. J. Scott* for the respondent.

Appeal allowed.

CHANCERY.

Proudfoot, V. C.] [January 6.

SANDS V. THE STANDARD INSURANCE CO'Y.

Fire insurance—Alienation—Mortgage—Additional condition.

By an additional condition endorsed on a policy of insurance against fire, covering chattels, it was declared that "when property (insured by this policy) or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or any interest therein without the consent of the company, first endorsed hereon, or if the property hereby insured shall be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or in equity, this policy shall cease to be binding on this Company:"

Held, that this did not prevent the owner from creating a mortgage on the property covered by the policy, without notice to or assent of the Company.

Moss, C. J. A.] [January 7.

PRESSY V. TROTTER.

Mortgagor and mortgagee—Assignee of mortgage—State of accounts—Existing equities.

The rule that an assignee of a mortgage takes, subject to all the existing equities and the state of accounts between the mortgagor and mortgagee was acted upon and applied in a case where, in 1875 a married woman created a mortgage, in which her husband joined, and it was agreed that any balance then due by the mortgagee to the husband as soon as ascertained should be applied on the mortgage, and that any future accounts that might become due to the husband for lumber and work supplied to or done for the mortgagee should also be so applied; which mortgage was about fifteen months afterwards sold and assigned by the mortgagee to a purchaser without notice of such understanding or agreement, he having obtained such assignment as security for any deficiency that might be found to exist upon the realization of a mortgage then held by the purchaser against the mortgagee; and having taken the assignment without inquiring as to the state of accounts, or the title to the lands.

CANADA REPORTS.

ONTARIO.

CHANCERY CHAMBERS.

(*Reported for the* LAW JOURNAL *by* F. LEFROY, *Barrister-at-Law.*)

BICKFORD V. PARDEE.

Execution—Setting aside—R. S. O. c. 66, sec. 72.

Where a decree ordered B to give A a note as the price of certain railroad iron to be forthwith delivered to B by A, the quantity and weight thereof to be ascertained by the Master, and the price adjusted accordingly; and also, in another clause, ordered A to deliver to B selected rails up to a certain value, and B forthwith to give A a note for the value thereof, and that A should thereupon enter into a certain covenant in regard to them; and that in default of delivery of the said notes the amounts should become immediately due from B: *Held*, such a decree is not a "judgment" within R. S. O. cap. 66, sec. 72, on which a *fi. fa.* could, on such default, be issued *ex parte* on mere filing of affidavit with C. of R. and W., but that a reference was necessary.

[Mr. Stephens, Referee.

In this suit a decree had been obtained, by which it was decreed (1) that a certain agreement, as subsequently modified, should be carried into execution; (2) that the defendants, L. and P., should forthwith deliver to the plaintiffs the promissory note of the defendant P. for $17,000 as the price of the railroad iron on the wharf at Belleville, and that the plaintiffs thereupon should deliver to the defendants the said railroad iron, and on this delivery the quantity and weight should be ascertained, and, in case of disagreement, the Master should determine it, and if the value at the prices in the said agreement fixed fell short of the said sum of $17,000, the deficiency should be credited by endorsement on the said note, and if in excess, the defendants should deliver a similar promissory note of the said defendant P. for the excess; (3) that on the plaintiffs delivering to the defendants selected rails not exceeding a certain value then lying at Port Stanley, the said defendants should deliver to the plaintiffs the promis-

sory note of the said defendant P. for the value of the said rails at the rate named in the said agreement, and that the plaintiff should thereupon covenant that the said rails should be accepted by the Government engineer for the purpose of certifying for Government aid ; and (4) the Court further ordered that on default of delivery of the said notes, the amounts should immediately become due and payable by the defendants.

Executions were afterwards issued on the clauses (2) and (3), upon affidavits filed with the Clerk of R. and W.

Arnoldi now moved on behalf of defendant L. to set aside these executions, on the grounds (1) that the Clerk of R. and W. had no right to issue execution in such a case as this, but that application ought to have been made in chambers, and all the material facts disclosed, and the execution should not have been issued *ex parte ;* (2) that there was a fresh agreement subsequent to the decree and superseding it, by which defendant L. was released from liability ; (3) that the Master had given no decision under clause 2 of decree, nor had the engineer's certificate been obtained as required by clause 3 ; (4) that as the whole state of the facts referred to in (2) and (3) had not been called to the attention of the Clerk of R. and W., there was a *suppressio veri*, and, therefore, the executions should be set aside.

H. Cameron, Q.C., *contra.*—(1) The original agreement shewed that L. & P. were jointly liable, and the decree was drawn on that supposition ; (2) as to amount due on part of the Belleville iron, there had never been any dispute, and if execution had been properly issued for any part it could not be set aside *in toto* ; (3) as to the Port Stanley iron, the provision as to the certificate was only a covenant, not a condition precedent ; and a sufficient certificate had been obtained.

Hoyles, for defendant P. submits that the writs, if set aside as to one defendant, must be set aside as to both.

The Referee held that the decree in this cause was not a "judgment" within the meaning of the Act (Rev. Stat. O., cap. 66, sec. 72), on which a writ of *fi. fa.* could properly be issued *ex parte*, and on the mere filing of an affidavit in the office of the Clerk of R. and W., but that some further adjudication was necessary by which the amount due to the plaintiff should be ascertained and determined. That, as to the Belleville iron, in clause 2, a *fi. fa.* could not properly be issued merely because the delivery of *a portion* of the iron was not disputed. The parties failing to agree, the whole amount due under this section should have been ascertained and determined by the Master. That, as to the Port Stanley iron, numerous points had arisen requiring judicial decision, *e. g.*, as to the alleged new contract, and as to whether a sufficient certificate by the Government engineer had or had not been obtained. The learned Referee concluded as follows. "I think that these are points which could not properly be decided in his own favour by the plaintiff himself, by the mere filing of an affidavit. The quantity of rails delivered has not been ascertained by any agreement of the parties. . . . I think the last clause of the decree expressly provides for a reference to the Master to determine all such points as these, and this not having been done, the *fi. fas.* should be set aside."

Order granted.

McTaggart v. Merrill.

Service by publication—Notice of motion to confirm decree—R. S. O. c. 40. secs. 93, 94.

Where leave had been obtained to serve an order of revivor by publication, leave was also given to serve a notice of motion to confirm decree by publication, though contrary to English Practice.

[Mr. Stephens—Blake, V. C.

In this suit a decree was obtained after the decease of the original defendant and before revivor. Afterwards leave was obtained to serve an order of revivor by publication.

Hoyles now moved for an order allowing service by publication of notice of motion to confirm decree or substitute a new decree. He read the affidavits filed on obtaining leave to serve the order of revivor by publication, and cited Daniel, 5th ed., p. 723 ; *Lechmere* v. *Clamp*, 29 Bea. 259 ; 30 Beav. 218 ; R. S. O. c. 40, secs. 93, 94 ;

Taylor's Orders, 3rd ed., p. 35, 76; Morgan's Chy. Stats., 4th ed., p. 422, 425, 478.

The REFEREE held that, since under the English decisions above mentioned (29 Beav. 259, and 30 Beav. 218), although notice of motion for decree was not allowed to be served by publication, yet, by a more roundabout process, the decree was actually pronounced, with no other notice to the defendants than by advertisements—and seeing that under our practice the only mode of bringing a defendant before the Court is by serving him with notice of motion, and that R. S. O. c. 40, secs. 93, 94, seems to allow a much wider latitude as to service—it appears only in accordance with the decisions to allow the orders asked for. But, before incurring the expense of advertising, &c., he thought it was desirable to take the opinion of a Judge.

BLAKE, V.C., on reference to him, held that the view taken by the Referee was correct.

WILSON V. WILSON.

Costs—Interpleader Issue in Co. Ct.—Conflicting decision in Q. B. on the same point.

Where the Court of Chancery had, with consent of all parties, directed an interpleader issue to be tried by the County Court, which was settled on a point of law, and not as a question of fact, and judgment obtained by the defendant, he was allowed the usual order for costs, although notice of appeal had been served, and although there was a conflicting decision in the Q. B. on the very same point.

[Mr. Stephens, Referee.

In this matter an execution creditor declining to admit the *bona fides* of a mortgage, under which the property in question was claimed, an issue was directed by the Court of Chancery to be tried by the County Court. At the trial no oral evidence was given, but the attack on the mortgage was confined to points of law. A formal verdict was entered for the claimant, which was afterwards set aside in Term.

Donovan now moved, on behalf of the execution creditor, for an order for costs of the trial of the interpleader issue.

Doyle, contra: (1) notice of appeal has been served, and until the appeal is disposed of the application for costs is premature; (2) upon similar objections to the same mortgage the Queen's Bench had lately decided in favour of its validity, and as it is a pure question of law, this Court wil accept the decision of the Queen's Bench in preference to that of the County Court; (3) there was no jurisdiction in the Court to make the interpleader order, and therefore the trial and all proceedings under it are a nullity: R. S. O., cap. 40, sec. 99. When the interpleader order was obtained it was not stated that the matter in dispute was a pure question of law, and not a question of fact, *O'Donohoe* v. *Wilson*, 42 U. C. R. 329; (4) the order was granted under R. S. O., cap. 40, sec. 99, not under R. S. O., cap. 54, sec. 22.

Donovan, in reply: (1) the order was granted under R.S.O., cap. 54, sec. 22. The County Court Judge is, in such cases, in the position of arbitrator, and there is no appeal except to the Court of Appeal: R.S.O., cap. 54, sec. 23; (2) the fact that the higher Court gave a different decision makes no difference as to the costs: *Craig* v. *Phillips*, W. N. 271; L. R. 7 Chy. Div. 249; *Queen* v. *Doty*, 13 U.C.R. 398. The Court will not review the decision on the interpleader issue: *Gourlay* v. *Ingram*, 2 Chy. Ch. 309.

Hoyles, for Sheriff: Claimant cannot now raise such an objection, as he submitted to the order. It was at the request of all parties that the issue was tried in the County Court.

The REFEREE—As to the first objection, the interpleader order was granted on the application of the Sheriff on the usual material, and the issues are drawn in the established form. All parties were represented on the application, and no objection was then taken by the claimant that such an order could not properly be made. On the contrary he pressed his claim; the execution creditor resisted it, and both assented to the order. If any one knew at that time that there would be no issues of fact to be tried it must have been the claimant, but he did not take the objection. The interpleader issue was prepared and delivered and both parties appeared at the trial and submitted to the jurisdiction. If there is anything in the point raised, I think it is to

late for the claimant to take it now. I do not think that the trial and all the previous proceedings became a nullity merely from the fact that after the plaintiff in the interpleader issue had completed the evidence in support of his case, the defendant chose to submit to the Court that in law the plaintiff had not established his right to the goods, rather than offer evidence on his own behalf on questions of fact.

Then the application is resisted on the ground that the Court of Queen's Bench has given a different decision in a case that came before it on the same chattel mortgage. The case of *Craig* v. *Phillips*, L. R. 7 Chy. Div. 249, is authority for the position that this is no reason for extending the time for appealing, and it necessarily follows that it is no ground for refusing to give to the successful party the fruit of his judgment. There is in this case a verdict and a decision of a Court which has not been reversed or varied. I think the usual order for costs must follow. Of course if any proceedings are taken by way of appeal or otherwise to set aside the judgment, application can be made to stay execution.

Order granted.

On appeal, the order of the Referee was confirmed, and the appeal dismissed with costs.*

SADLIER V. SMITH.

Scandal—Taking affidavit off the files—Motion or petition.

Held, That an application may be made on behalf of the solicitor of a party, to take an affidavit off the files for scandal, without special leave of the Court;—and such an application may be made on motion. *Semble*, such an application may properly be made against a witness, as well as against a party.

[Mr. Stephens—Proudfoot, V.C.

Donovan moved for an order to take off the files of the Court, or to refer to the Master, a certain affidavit for scandal, as to the plaintiff's solicitor, and for impertinence as to the plaintiff, citing *Ex parte Simpson*, 15 Ves. 476 ; *Bishop* v. *Willis*, 5 Beav 83 (n).

Morphy, contra. (1.) No such application can be made without special leave of the Court so far as the solicitor is concerned: Dan. Chy. P., 5th Ed. 293 ; *Williams* v. *Douglas*, 5 Beav. 82, 6 Jur. 379, over-rides *Ex parte Simpson* ; (2.) no such practice now exists as referring for impertinence: Dan. 789, 292 ; Taylor's Orders, p. 158, G. O. 70; (3.) notice of motion did not specify parts complained of ; (4.) application must be made when the motion on which affidavit is issued comes on to be heard: *Reeves* v. *Baker*, 13 Beav. 437.

Ewart, for the witness who had sworn the affidavit, viz., the clerk of the defendant's solicitor, contended: (1.) such an application cannot be made against a mere witness: *Ex parte Kirby*, Mont. 68 ; (2.) the application should be made by petition ; (3.) exceptions for scandal or impertinence being now abolished, the scandalous matter must be pointed out. He cited Taylor's Orders, G. O. 6, 69, 70, 71.

The REFEREE held on authority of *Williams* v. *Douglas*, that the leave of the Court must first be obtained before a solicitor can make such a motion ; which is laid down as still the law in Dan. 5th Ed., 294 ; and that no such order could be made against the clerk who had sworn the affidavit, unless perhaps where a case of gross personal misconduct was made out against him, as, in the absence of evidence to the contrary, he must be taken to have acted under the direction of his principal.

Application dismissed.

On appeal, PROUDFOOT, V.C., held in effect : (1) There are not two distinct statements, but the same statements are in one point of view scandalous as to the solicitor, and in another impertinent as to the plaintiff. It was, perhaps, unnecessary to refer to the impertinence, but if an impertinent affidavit is also scandalous, it may be taken off the files. (2) As to the notice not specifying the scandalous parts, this omission was not considered by the Referee and is not now in question. It may be the whole affidavit is scandalous. (3) As to special leave being necessary for the solicitor to join in the motion, *Williams* v. *Douglas*

* See the note on this case in the Notes on Cases, ante, p. 25—Rep.

seems to be misapprehended. The whole reasoning of the M. R. therein proceeded upon the fact that that was an *ex parte* order; and all he meant by saying that a person not a party to the record needed *special leave* and a *special order* before he could apply to get scandalous matter expunged, was that the application and order could not be made and obtained *ex parte.* (4) As to whether the application should be made on motion or petition, the learned V. C. said: "There is no very definite principle by which to determine when the proceeding should be by petition and when by motion. It is said the only approximation to a rule is that a motion is proper when the issue tendered is simple, though it may involve a great mass of evidence; and a petition is the proper course when several distinct issues are tendered, though each may require very little evidence to support it: Drew Eq. Pl., 93. And under the present practice many matters are brought up on motion that formerly required a petition, or may be applied for indifferently in either way." He referred, in illustration, to *Harris* v. *Meyers*, 1 Chy. Ch., 262, and *Jones* v. *Roberts*, 12 Sim. 189, and then continued: "In the present case the issue is a simple one, scandal or no scandal, and I see no reason why the application may not be made on motion. There are no new facts to be introduced into the cause, it is only sought to determine if statements in an affidavit imputing improper conduct to a solicitor, for which there is no adequate remedy if improperly introduced and allowed to remain on the files of the Court, a standing and continuous slander—are to be allowed to remain on the files." (5) As to whether the motion could properly be made against the clerk who swore the affidavit, the learned Vice-Chancellor, after remarking that *Ex parte Kirby*, Mont. 68, which was the precedent the motion followed in this respect, did not dispose of the point, said: "I have not been furnished with any case in which the order has been made against the clerk, and, perhaps, it is premature to discuss the question until it is ascertained that the affidavit is scandalous. I may say, however, that if no precedent is to be found, I am prepared to make one, and I think that the application, under the circumstances of this case, may properly be made against an offending witness as well as an offending party. See Story Eq. Pl., sec. 881, a. I therefore reverse the order of the Referee, with costs, and direct him to hear the application of the plaintiff and his solicitor."

*Appeal allowed.**

SIMON V. LA BANQUE NATIONALE.

Security for costs—Application to have amount increased—G. O. 421.

Where an order for a certain sum, as security for costs, had been obtained, and the cause coming on, the hearing was postponed. *Held*, on appeal, that then, if ever, was the time to apply for further security—*i. e.* as one of the terms of allowing the postponement.

[Mr. Stephens—Blake, V.C.

In this suit the defendants had already obtained an order for $400 as security for costs, and when the cause came on for examination and hearing, the hearing had been postponed, but no application had at that time been made for further security.

Snelling now moved for an order that plaintiff should give further security. He cited *Imperial Bank of China* v. *Bank of Hindostan*, L. R. 1 Chy. App. 437; *Western of Canada Oil Company* v. *Walker*, L. R. 10 Chy. App. 628; *Republic of Costa Rica* v. *Erlanger*, L. R. 3 Chy. Div. 62.

Cassels, contra, referred to G. O. 321 The defendants had themselves taken out the order with the amount settled at $400, and no leave to apply to have the amount increased was reserved. There was no special order in this country to help defendants as in *Costa Rica* v. *Erlanger*. He also cited *Ganson* v. *Finch*, 3 Ch. 296.

Snelling, in reply: It is not necessary to ge rid of first order before applying. Defendant could not know before answer that the costs would be so heavy.

The REFEREE—I do not think the defend-

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* This matter was afterwards heard before the Referee on the merits and an order was made, expunging a large portion of the affidavit for scandal- -containing, as it did, personal matter not relevant to the matter in issue.—Rep.

ants are estopped from applying for further security merely because they have already obtained an order for $400.

On appeal, BLAKE, V. C., held that the defendant should have applied for an order requiring the plaintiff to give fresh security for costs, when the cause came on for examination and hearing, and as a term of allowing the postponement of the hearing. It was not done then, and should not be allowed now.

Appeal allowed. No costs to either party, the point not having been taken in the argument before the Referee.

FINKLE V. DATE.

Leave to appeal from Master's decision after the fourteen days.—G. O. 253.

Where the nominee and confidential agent of one party had been appointed receiver against the wish of the other party, and where the delay had not been great and was in some measure explained, leave was given to appeal, though the fourteen days had expired.

[Mr. Stephens—Sept. 6, 1878.

In this suit an appeal had been made to the Referee from the Master's decision appointing a Receiver. This application was made within the fourteen days (G. O., 253) —but was dismissed.

Murdoch now moved for leave to appeal from the said decision. The fourteen days had now expired. He urged that part of the delay was caused by hesitation as to whether to appeal from former order, and he cited *Simpson* v. *Ottawa and Prescott Railway Co.*, 1 Chy. 99; *Nash* v. *Glover* 6 Prac. R. 267.

Hoyles, contra. Court will not interfere with appointment of Receiver except in extreme cases: Kerr on Receivers, 108. The delay had not been accounted for. The Receiver could be removed if he misconducted himself.

The REFEREE—I am not strongly impressed with the merits of the defendant's case for appeal, but there is the question whether Mr. S., the nominee and the confidential agent of the plaintiffs, should have been appointed Receiver in opposition to the wish of the defendant, and this is one which I think should be finally disposed of by a Judge. The defendant showed his dissatisfaction with the Master's finding and his intention to appeal by his former unsuccessful motion in Chambers which was made in time, and a portion at least of the delay since, which has not been very great, was taken up in considering whether to appeal from that order or make the present application. Under all the circumstances of the case, the delay is not, I think, so great as to preclude me from making the order asked.

Order granted on payment of costs of application.

RE GILCHRIST.
BOHN V. FYFE.

Execution—Orders for payment out of money to an execution creditor.

An execution creditor, with writs in the Sheriff's hands, is entitled to an order for payment of any fund out of court standing to the credit of the debtor, in satisfaction of his judgment and costs.

[Mr. Stephens—Oct. 15, 1878.

This was an administration suit. The report of the Master found Hugh Gilchrist entitled to a legacy, under the will of the testator, of $275, and the decree on further directions ordered payment out of this among other claims. Several years previously one Hugh McD., had recovered judgment against Gilchrist for an amount which, with subsequent interest and costs, now exceeded the amount of the said legacy. From time to time writs had been issued upon the judgment, but it appeared that Gilchrist possessed no property whatever, except the said legacy. A writ of *fi., fa.*, against goods was now in full force in the hands of the Sheriff of York. A stop order was obtained Oct. 2, 1878.

Seton Gordon moved on petition for payment out of the legacy in satisfaction *pro tanto* of the judgment. He submitted that an execution creditor, with writs in the Sheriff's hands is entitled to an order for payment out of any fund in court standing to the credit of the debtor, in satisfaction of his judgment and costs: but the sanction of the court was asked lest otherwise a contempt might be construed and the eizure nullified: *Ex parte Reece*, 16 Law

Times, 501; *Courtoy* v. *Vincent*, 15 Beav. 486; *Wilson* v. *McCarthy*, 7 Prac. R., 132; *Robinson* v. *Wood*, 5 Beav. 388.

Armour, for Gilchrist. Until a cheque is actually made out, the interest of Gilchrist is a mere chose in action, which is not liable to execution: *Quarman* v. *Williams*, 5 Beav. 133; *Wood* v. *Vincent*, 4 Beav. 419. There is no precedent for the order asked.

The Referee held that he was at liberty to take the simpler course and order payment out to the petitioner directly, inasmuch as, if it were necessary, he could direct the cheque to be forthwith made out, in which case it was admitted the Sheriff could seize.

Order granted.

Varden v. Varden.

Examination of opposite party—R. S. O., c. 62, sec. 18—C. S. U. C., c. 32, sec. 15—C. S. C., c. 79, sec. 4.

Held, that R. S. O. cap. 62, sec. 18 does not authorize calling the opposite party as a witness, *except only at the hearing or trial.*

[Mr. Stephens, Nov. 9—Proudfoot, V.C., Dec. 2, 1878.

In this case the plaintiff had given eight days' notice to the defendant's solicitors, pursuant to R. S. O., cap. 62, sec. 18, of his intention to cross-examine the defendant upon her answer. She, however, failed to appear.

H. Cassels now applied to the Referee for an order to take the answer off the files, and to note the bill *pro confesso* against her under the provisions of R. S. O., cap. 62, sec. 18. He cited *Moffatt* v. *Prentice*, 6 Prac. R. 33, and urged that the statute rendered it unnecessary to personally serve the subpœna. He also cited *McMurray* v. *G.T.Ry. Co.*, 3 Chy. Ch. 130.

Hoyles contra, urged that the statute did not apply, inasmuch as it only speaks of calling the opposite party as a witness *at the hearing on trial*, and that *Moffatt* v. *Prentice* was not in point. He referred to *Sefton* v. *Lundy*, 4 Chy. Ch. 33. The subpœna must be personally served before punishment can be awarded.

Cassels, in reply: *Sefton* v. *Lundy* does not apply.

The Referee: I think the application under the wording of the statute is intended to be made to the Court at the hearing.

Application dismissed, without costs.

On appeal Proudfoot, V. C., held that the language of the statute was quite clear, and continued: "But it was contended that in this section the Revised Statute only consolidated the previous Act C. S. U. C., c. 32, sec. 15; and that in *McMurray* v. *G. T. R.*, 3 Chy. Ch. 130, it was assumed that this applied to such an examination. This Act, C. S. U. C., cap. 32, sec. 15, however, is general in its terms, and contains no such limitation of the examination to the hearing or trial, as in the Rev. Stat., and it might very well bear the construction assumed in the case cited, and yet give no countenance to this application. The Rev. Stat. indeed refers to the other as its original, but the revisers were not confined to mere consolidation, or at all events, these variations have been sanctioned by Parliament (41 Vic., c. 6, Ont.)" As to the argument that the construction placed on the C. S. C., cap. 79, sec. 4, in *Moffatt* v. *Prentice*, 6 Prac. R. 33, was an authority for the present application, the learned Vice Chancellor held that that statute empowered the judge to compel the attendance at *any* examination of witnesses, but that this is not the case with R.S.O., cap. 62, sec. 18.

Appeal dismissed with costs.

London and Can. L. and A. Co. v. Pulford.

Costs—Deposit on sale by subsequent incumbrancer —G. O. 429, 456.

Where, under G. O. 456, a subsequent incumbrancer had demanded a sale and paid $80 into court as deposit; *held*, he could not, after the expenses of the sale had been incurred, be called on to pay any more, although the actual costs were taxed at $165. *Semble*, the plaintiff should

have objected to the deposit as insufficient when the precipe order for sale was obtained.

[Mr. Stephens, Oct. 19.—Proudfoot, V. C., Dec. 2.

In this case Molson's Bank, a subsequent incumbrancer, had demanded a sale under G. O. 456 and had deposited $80 in court. The costs of the sale, which proved abortive, were taxed at $165.

Arnoldi applied for an order on the Bank to pay the difference between the amount of the deposit and the taxed costs. He urged that in equity the Bank ought to pay the deficiency, and referred to the analogy of payment of $40 deposit for rehearing and the bond for $400 as security in case of appeal (R. S. O., c. 38, sec. 26); in each of these cases the appellant paid the whole amount of costs without regard to the deposit or penalty. The General Orders do not fix the deposit at $80. The schedule endorsement for the bill shows the intention of the deposit to be to cover all costs of a sale. The order was *ex parte*. In England the deposit is settled in the presence of both parties, hence this application cannot arise there, and the English cases show it must be sufficient to cover all costs: *Bellamy* v. *Cockle*, 18 Jur. 465; *Whitfield* v. *Roberts*, 5 Jur. N. S. 113; Dan. 4 Ed. 1167. The granting a sale at all in a foreclosure case is an indulgence and the party must pay for it. He also referred to *Goodall* v. *Burrows*, 7 Gr. 449; *Taylor* v. *Walker*, 8 Chy. 506, Chy. Orders 429, 456.

Hoyles, contra, urged there was no equity in the case, and that although there were no reported cases on the subject, yet the contrary practice had long been established. At any rate the application is too late, plaintiffs having acquiesced in the order. Had a larger deposit been demanded the Molson's Bank might not have been willing to go to such expense. The case of *Corsellis* v. *Patman*, L. R. 4 Eq. 156, shows that no order can be made such as asked.

The Referee dismissed the application on the ground that the order had been acquiesced in by the plaintiffs, and that there was no equity to compel the defendants to pay more than they had been required to pay under the General Orders, and the practice of the court thereunder, after al the expenses had been incurred, and when it was too late to determine whether they would be willing to incur the additional liability or not.

Application dismissed.

On appeal, Proudfoot, V. C., held: It was not possible to read the orders of the Court in such a way as to justify the order applied for, though he regretted that such was the case. Under G. O. 429 the deposit is to be "a reasonable sum fixed by the court," and "the necessary deposit" under G. O. 456 must refer to such reasonable sum, but neither order determined the amount of the deposit. But Sched. S, required to be endorsed on the bill under G. O. 456, contains a notice to the defendants, that if they desire a sale they are to deposit a sum of $80 to meet the expenses of such sale. He continued :—"That is the only place where the amount appears. The proper defendants to such a bill are the owners of the equity of redemption, and this notice therefore is intended for, and according to the practice need only reach, them, for the notice T, to be served upon subsequent incumbrancers, made parties in the M.O., contains no mention of any deposit. When a subsequent incumbrancer, therefore, desires to obtain a sale and makes a deposit for the purpose, he must run the risk of paying in enough; for if he does not pay in a sufficient sum, reasonable in the opinion of the court or a judge, I have no doubt that the order for a sale obtained upon *præcipe* would be discharged. Whether the same could be varied in the case of a sale desired by an owner of the equity of redemption, or whether he would be liable for the additional expenses, I need not now inquire, for this is the case of a subsequent incumbrancer, and there are considerations applying to the owner that do not apply to the subsequent incumbrancer. Nor need I inquire whether the language in the endorsement, "to meet the expenses of such sale," could be construed so as to imply an undertaking to pay what was necessary to meet such expenses beyond the $80, for I do not think that notice applies to a subsequent incumbrancer. And when the plaintiff was content to allow the sale to go on with the deposit of only $80, it would not be fair to the defendants to im-

pose a larger liability upon them now than they thought they were incurring. Had the plaintiff objected to the deposit, they would have had an opportunity of considering whether the chance of getting more than enough to liquidate prior incumbrances was probable enough to justify the hazard of a larger sum, and no objection having been made, they had reason to assume that no greater risk than the $80 was incurred.

*Appeal dismissed with costs.**

London and Can. L. and A. Co. v. Morrison.

Costs—Deposit on sale by subsequent incumbrancer —G. O. 429, 456.

Under similar circumstances as those in the last case, an application was made for an increased deposit immediately after the settlement of the advertisement; *held:* application made too late. *Semble,* incumbrancer might be compelled to increase deposit, or have no sale, if called on promptly to do so.

[Mr. Stephens, Dec. 17, 1878.—Blake, V. C., Jan. 13, 1879.

This case, following close upon the case of the same Company v. Pulford, confirmed the decision therein, and carried still further the principle on which that decision proceeded.

The dates of the proceedings in this case, from the decree onwards, were :—

Decree for foreclosure, Jan., 1878.

Deposit and order for sale, May 3, 1878.

Master's report, May 13, 1878.

Final order for sale, Nov. 12, 1878.

Letter from plaintiffs' solicitor, asking for increase of deposit, Dec. 12, 1878.

Refusal of subsequent incumbrancer to increase the same, Dec. 13, 1878.

Advertisement of sale settled a few days prior to the notice of this motion, which was served Dec. 14, 1878.

Arnoldi now moved for an order for payment into Court by the subsequent incumbrancer of a larger sum than the $80 already deposited. He used similar arguments and referred to the same authorities as in the late case against Pulford, and dwelt upon the judgment of the Vice-Chancellor therein. He proved that the costs of the sale would be more than $120. The plaintiff could not prove to the Court what the expenses of the sale would be until the directions for advertising were given. It could not be said that the plaintiff should have given the conduct of the sale to the defendant: *Taylor* v. *Walter*, 8 Gr. 506. The amount of $80 was settled long ago, under the old tariff, when the amount was probably sufficient. He was not asking to vary the order, but only to increase the security. He asked that, in default of payment of the increased deposit, the order for sale should be vacated and the property foreclosed.

Kingston, contra, read G. O. 429 and 456. Until G. O. 456 and F. O. S. were set aside the application could not be granted. The proper time for taking the objection was when the order for sale was granted, and before the defendant had been put to expense under it; as it was, the plaintiff had acted on the order, and had taken out F. O. S. and settled advertisement. The plaintiffs might have given the conduct of the sale to the defendants.

The Referee held that if such an order could be made at all, it ought to be made earlier—that is, as soon as the order for sale had been obtained, and before the incumbrancer had incurred expense. He, however, referred the point to the Judge, as it was averred to have been already decided the contrary way by Vice-Chancellor Proudfoot in the case against Pulford.

On reference to him, Blake, V.C., dwelt on the injustice of calling on the subsequent incumbrancer to pay in a larger deposit, after he had incurred expense and was helpless. He continued : "I will follow *London and Can. L. and A. Co.* v. *Pulford,* decided by V. C. Proudfoot, in holding that the deposit is the price paid by the subsequent incumbrancer for a sale. The plaintiffs cannot, after so long a time, and after taking the proceedings for sale taken in this place, apply for an increase in the deposit. They cannot approbate and reprobate the order for sale. They should have said promptly to the incumbrancer, 'You may withdraw the deposit and have no sale,

* This case stands for appeal.—Rep.

or you must pay in sufficient to meet the costs of the sale.' I cannot see that this has been done. The application must be dismissed."

Application dismissed.

N. BRUNSWICK REPORTS.

NOTES OF CASES.

SUPREME COURT OF NEW BRUNSWICK.

From reports by William Pugsley, B.C.L., *and* Geo W. Burbidge, A.M,, *Barristers at Law. (Vol. II. No. 2.)*

Action against Servant of Crown.

Staying Proceedings—Trespass—Where defendant committed alleged trespass as Superintendent of Government Railways.

Defendant was sued for trespass to land, claimed to belong to plaintiff, but which had been taken and used for the Intercolonial Railway. Defendant was Superintendent of Government Railways, and an application was made for a stay of proceedings on an affidavit alleging that the alleged trespass was committed by him in the employ of the Government as such superintendent, and not otherwise. Plaintiff in answer swore that the action was brought against the defendant for personally trespassing on his land, and denied that the land had been legally taken by the Government.

Held, per Allen, C.J., and Fisher and Wetmore, J.J., Weldon, J., dissenting, that the Court ought not, on a summary application, to stay the proceedings, but should leave the defendant to resist the action by plea in the ordinary way. *Milner* v. *Brydges*, 113.

Contract by Government Official.

Intercolonial Railway Commissioners—Personal liability—Where contract verbal—Whether should be submitted to jury.

Defendant was one of the Commissioners for the construction of the Intercolonial Railway, appointed by the Governor-General. Plaintiff had a contract with the Commissioners to grade the station grounds at M., according to a certain plan and specification. While plaintiff was performing his contract, defendant directed him to fill up a cellar where he was working, and upon the railway grounds, which required attending to at once, and was not included in plaintiff's contract. Plaintiff stated that he would do the work if defendant would pay him, and defendant stated that he would, and told him to do the work immediately. On being applied to afterwards for the pay, defendant told plaintiff he would see the Engineer in charge and have the amount put in the estimates, to be, paid by the Government. The amount however, not being paid, plaintiff sued defendant, personally, and was nonsuited.

Held, on motion to set aside the nonsuit, per Duff, J., that, as in the case of contracts with public agents, the presumption is that the public faith or the justice of the Crown is relied upon, and the work in question was done for the public, and defendant in ordering it done was acting within the scope of his authority as a Railway Commissioner, he did not incur any personal liability, and that the nonsuit was therefore right; but per Fisher, J., that, as the contract was entirely verbal, it should have been left to the jury to determine, under the direction of the Judge as to the relationship of the parties, whether the defendant had personally contracted and agreed to pay for the work. *Sumner* v. *Chandler*, 177.

Conveyance.

After acquired property—Does not pass—Remedy in equity—Statute—Construction of—Merchant Shipping Act—Ferry-boats.

At law, a bill of sale or conveyance cannot pass the property in goods which are not in existence or which do not belong to the grantor at the time the deed is given; though in equity such a contract would operate to transfer to the vendee the beneficial interest in the property as soon as it was acquired by the grantor, and the grantee might enforce specific performance of the contract.

The Legislature may authorize after acquired property to be transferred, but inasmuch as such a mode of conveyance would conflict with the rule of law "that a man cannot grant or charge that which he hath not," it would require very clear and unambiguous words in the Act to show that such was the intention.

An incorporated company has no power to change its corporate name without the authority of the Legislature. Where property was conveyed to a company under the name by which it was afterwards incorporated, but which had no legal existence at the time, it was held that nothing passed by the conveyance.

The title to ferry-boats running in the harbour of Saint John, must be transferred according to the provisions of the Merchant Shipping Act. *Lloyd* v. *E. & N. A. Railway Co.*, 104.

CRIMINAL LAW.

Power of the Crown to enter nol. pros.—Second indictment for same offence—Where bill contains two counts, each a separate indictment.

The prisoner was convicted of receiving stolen goods, on an indictment containing two counts, one for stealing the goods, and the other for receiving them, knowing them to have been stolen.

The prisoner had, on a former day in the same Circuit, been indicted for stealing the same goods as those which he was charged with stealing by the first count of the present indictment. A jury was impanelled and the trial of the prisoner begun; but in consequence of it appearing from the testimony that the prisoner could not be convicted for larceny, the Clerk of the Crown, who was conducting the prosecution by direction of the Attorney-General, entered a *nolle prosequi*, and then sent another bill before the Grand Jury, containing a count for receiving, the indictment on which the conviction took place, and on the trial he consented that the prisoner should be acquitted of the charge of stealing alleged in the first count, and he was acquitted accordingly:—

Held, on a case reserved,

1. That the Clerk of the Crown has authority to enter a *nolle prosequi.*

2. That a *nol. pros.* being entered the prisoner could again be indicted for the same offence.

3. Even admitting that the Clerk of the Crown has no authority to enter a *nol. pros.* the conviction upon the count for receiving would be good, each count being a separate indictment in itself. *Regina* v. *Thornton*, 140.

FIRE INSURANCE.

Plaintiff must have insurable interest—Where plaintiff has made advances to build vessel but no transfer made.

Plaintiff, in 1872, commenced supplying B. with advances for building a vessel, under a verbal arrangement that he was to supply B. to build the vessel, and hold her as security for his advances. He was to dispose of her in shares, or in the whole, as he saw proper, and when the vessel was disposed of, whatever was remaining after he got his pay, was to go to B. When she was well advanced, in August 1874, plaintiff effected insurance on her in his own name. He, however, never had possession of the vessel, nor held any bill of sale or transfer of her.

Held, in an action on the policy, that plaintiff had no insurable interest, and could not recover. *Clarke* v. *Scottish Imperial Insurance Co.*, 240.

INSOLVENT ACT OF 1869.

Fraudulent preference—Where mortgage given five months before issue of attachment—Burthen of proof.

Where a mortgage to secure an antecedent debt was given by a trader more than five months before the issue against him of a writ of attachment under the Insolvent Act of 1869, the Court held that, as the burden of proving that the mortgage was given in contemplation of insolvency was upon the assignee of the estate, in which he had wholly failed, and as fraud was not to be presumed unless the conveyance was made within thirty days of the issuing of

the attachment, the mortgage was therefore not void under sec. 89 of the Act, as being a fraudulent preference. *Ex parte Jones; In re Raymond*, 136.

Discharge—Where insolvent has not kept a cash book.

A trader who does not keep a cash book is not entitled to a discharge under the Insolvent Act of 1875. *Gilbert* v. *Girouard*, 148.

Fraud.

Where charged in action against insolvent—Judgment by default—How to proceed next.

In an action brought by plaintiff against defendant (an insolvent), the declaration charged defendant with fraud under section 136 of the Insolvent Act of 1875, and, interlocutory judgment having been signed, a motion was made for an order for a writ of enquiry to issue to assess the damages, and for the Court to pronounce judgment on the fraud; but, *Held*, that the Court had no authority to make any such order.

Quære, as to what is the proper course to pursue in such a case. *Moss* v. *Kirkpatrick*, 220.

Replevin.

Pleading—Estoppel.

In replevin plaintiff may shew, the same as he might in trover—that defendant by his acts is estopped from denying that the property in question is the plaintiff's, and if the alleged estoppel is *in pais*, it may be relied on in evidence without being pleaded.

A mere representation of a fact will not amount to an estoppel unless it was made with the intention of inducing another party to act upon it, and he does act upon it and alter his position. *Hegan* v. *Fredericton Boom Company*, 105.

Trespass.

Forcible entry by owner—Whether has right to eject by force a person whose possession was originally lawful, but who continues in, having no longer right to do so.

Where the defendant was the owner, and entitled to the immediate possession of a dwelling house, occupied by the plaintiff's wife, who detained it, after demand, by refusing to give it up and locking the doors against the defendant's entry; *Held*, by a majority of the Court, (Allen, C. J., Fisher and Wetmore, J.J., Weldon and Duff, J.J, dissenting) that the defendant was justified in forcing open the door, so locked—entering and taking possession of the house, and had thereby obtained such a lawful possession of it, as proved the allegation in his plea of justification, viz.: "that he was in possession of the dwelling house." *Napier* v. *Ferguson*, 255.

LAW STUDENTS' DEPARTMENT.

First Intermediate Examination: Michaelmas Term, 1878.

Smith's Manual of Equity—Act Respecting the Court of Chancery.

1. In what case has the Court power to decree alimony?

2. Under what circumstances has the Court jurisdiction to relieve against a forfeiture for breach of a covenant to insure?

3. Describe the procedure by which issues in Chancery proceedings may be tried by a jury.

4. Define *accident*, and give an example in which Equity would grant relief.

5. In what cases will the Court relieve against the defective execution of a power? What is the essential distinction between a defective and a non-execution of a power?

6. Explain the application of the maxim, *Ignorantia legis non excusat.*

7. What was the distinction in regard to the effect of joining in receipts between Executors and Trustees?

Second Intermediate Examination: Michaelmas Term, 1878.

Broom's Common Law—A. J. Acts, &c.

1. An attorney is retained to sue John Smith, and by mistake sues the wrong man, and puts the latter to the expense and trouble of a defence. Would the person sued have any remedy against the attorney, and why?

2. Illustrate and explain the rule, that "the law gives no private remedy for anything but a private wrong."

3. What is the general rule as to the liability of executors for the covenants and contracts of the testator (*a*) broken in his lifetime, (*b*) broken after his death?

4. "Covenants when viewed in relation to each other will be found to be divisible into three classes—independent, dependent, and concurrent." Explain and distinguish these classes of covenants.

5. Give the substance of the 17th section of the Statute of Frauds.

6. What provision is made for the trial of County Court cases at the sittings of Assize and Nisi Prius?

7. A cause in a Common Law Court is referred by the presiding Judge at Nisi Prius to the Master in Chancery to take the accounts, and the Master has made his report. What proceedings are then necessary, and what provisions are made for an appeal from the Master's report?

CERTIFICATE OF FITNESS: MICHAELMAS TERM, 1878.

Leith's Blackstone—Taylor on Titles—Statutes.

1. An intestate in his lifetime gave lands to one of his children. Is that child entitled to share equally with the others in lands of which the intestate died seized? Explain fully.

2. A, being seized of a paternal estate, executed a conveyance by which he granted to B an estate for life, with remainder to himself and his heirs. He died intestate without issue, and leaving no brothers or sisters. In what manner would his estate descend under the three periods? Give the effect of any statutory enactment which applies to the circumstances, and the reasons for your answers.

3. How do you reconcile the rule in Shelley's case with the usual provisions of a marriage settlement in which an estate is given to the grantor for life, with the remainder to his intended wife for life, and remainder to any child or children of the marriage in fee. What estate has the grantor?

4. State the effect of Provincial Statutes as to escheat or forfeiture in cases of attainder.

5. State shortly the effect of the Statute of Mortmain, of 9 Geo. II., and of any Provincial statutory modification of it.

6. Is it necessary to the validity of a conveyance by lease and release that the grantee should take actual possession of the lands granted? Explain fully.

7. A tenant in common brings an action of ejectment against his co-tenant, who does not dispute his title. What course should be pursued in order that the defendant may be entitled to the costs of the action?

8. What is the effect of the statutory provision as to the relative positions of landlord and tenant, and the mortgagees of the tenant after judgment in ejectment for forfeiture or non-payment of rent?

9. Is there any, and if so what, necessity for the registration of a deed of bargain and sale?

10. A solicitor takes a conveyance of land from his client, and agrees for the sale of it to a purchaser. The purchaser refuses to take the title on the ground of the fiduciary relationship. Is this a *marketable title?* Explain the meaning of that term.

CERTIFICATE OF FITNESS: MICHAELMAS TERM, 1878.

Smith's Mercantile Law—Common Law Pleading and Practice.

1. What differences are noted by Mr. Smith between a principal's rights against a remunerated and against an unremunerated agent?

2. What effect has payment on the negotiability of a bill of exchange? Explain your answer fully.

3. Define *affreightment by charter party.* What is meant by conveyance of goods by general ship? Mention some of the chief incidents of these two kinds of contracts of affreightment.

4. What is meant by "stranding" of a vessel in reference to marine insurance. State how it arises that an accurate definition of this word became very important in connection with marine insurance.

5. A makes a wager of $1,000 with B that a particular individual will win a race, and loses. A is unable to pay the money at once, but promises to pay it in future, and B takes out a policy of life insurance on the life of A for $1,000 to secure the debt, and A dies before payment of the debt. Can B recover on the policy? What would have been the effect if the debt had been paid? State fully the grounds and principles on which your answers depend.

6. What are the provisions of the fourth section of the Statute of Frauds in respect to guaranties? How was the intention of the Statute in this respect evaded, and what remedy was afterwards provided for such evasion?

7. A agrees in writing to sell to B certain specific goods on six months' credit. Can B insist on immediate delivery of the goods? Would it make any difference if the agreement was for payment by note at six months? What would be the effect of the insolvency of B before delivery of the goods in each of these cases? State the principles involved in your answers.

8. What is the effect of a bill of lading in the hands of an endorsee for value as evidence against the signer? Answer fully, giving reasons.

9. Under what circumstances and subject to what limitations can a transfer by way of endorsement of a warehouse receipt be taken as security for debt?

10. What statutory powers of dealing with goods have been conferred on an agent entrusted with the possession of them?

For Call—Michaelmas Term: 1878.

Stephen on Pleading—Byles on Bills—Common Law Pleaidng, and Practice, and the Statute Law.

1. What was the original method of commencing an action of replevin and how it is now commenced? State fully the statutory provisions involved in your answer.

2. In an action on a bond the plaintiff declares that at the time of the sealing and delivery the defendant was of full age, would it be good pleading to traverse this allegation? Give the reason for your answer, state the general rule on which your answer depends, and draw the plea as it ought to be, the action being in the Queen's Bench, A *v.* B.

3. State and exemplify the rule as to pleadings with respect to acts valid at common law, but regulated as to the mode of performance of them by statute.

4. In an action of assumpsit for work and labour done the defendant pleads that the work was done under a contract that no remuneration should be claimed except for money out of pocket, and also in another plea that the work was done under a contract that no remuneration should be claimed if the work should turn out to be useless, and that it had done so. State any faults you can discover in these pleas, and the plaintiff's remedy, with special reference to any general rules of pleading which may be involved in your answer.

5. What provisions have been made in regard to seizure of promissory notes and bills of exchange under *fi. fa.* goods? Answer fully.

6. What difference is there in respect to the burthen of proof between the position of a holder without value and a holder with notice? Answer fully.

7. A is indebted to B in a sum of $200. A comes to B with some bills and notes, and leaves them with him, with directions to collect them and apply the proceeds in payment of a debt due from A to C. B. takes the bills and notes, collects them, and has sufficient proceeds to pay off the debt to C, but retains 200 dollars in his own hands, and refuses to pay C. What is the legal position of A and B in regard to the transaction? Answer fully, referring to any Statute which may incidentally be introduced in discussion of the question.

8. A foreign Bill of Exchange is made in three parts, and A, B, and C, become respectively *bona fide* holders of the first, second, and third parts respectively. Which of these holders would be entitled to the bill, and what remedies would they have as between themselves?

9. A witness resides in the Province of Quebec. What methods are provided of obtaining his evidence? State fully the various steps to be taken as to these methods.

10. State shortly the various steps necessary to be taken where an appeal is to be had from a County Court

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Lewis's Equity Pleading—Taylor's Equity Pleading and Practice.

1. What are the various kinds of demurrers? Can there be a demurrer in any case if the plaintiff is entitled to some of the relief that he has prayed?

2. What is the rule as to the plaintiff's right to ask alternative relief in his bill? Give an example in which it might be prayed, and one in which it could not.

3. Apply the rule that all persons interested in the subject matter must be parties to a bill, giving one case in which a demurrer would be allowed and one in which it would be overruled.

4. If an answer neither traverses nor confesses, and avoids the statements in the bill, what is the plaintiff's course.

5. The rights of A and B depend upon the sanity or insanity of a testator. A compromise is effected. A afterwards files a bill against B to avoid the compromise on the ground that the latter "knew the testator was sane." Is this bill open to objection?

6. What is the real objection to a bill which alleges that "one of the defendants alleges, and the plaintiff believes," some material fact?

7. What is a supplemental statement, and when and how may it be filed?

8. Mention the grounds upon which the Court will decree the dissolution of a partnership. Is incompatibility of temper a ground?

9. Previous to his marriage, A covenanted to pay his intended wife a sum of money at a certain time. He died intestate, without having paid anything, and his widow became entitled to a share of his personalty. Can she recover, in addition to her distri-

butive share, the amount agreed to be paid her? Explain.

10. After making his will, A becomes indebted to B, to whom he had, by his will, bequeathed a sum of money. He dies so indebted. Can B recover both debt and legacy? What is the principle upon which the Court acts? In what way does the Court lean in deciding upon analogous points?

Blackstone Vol. I—Smith on Contracts, and Best on Evidence.

1. Define after Blackstone, "Municipal Law," and explain its several properties as they arise out of his definition.

2. State the duty of a privy councillor of England as defined by Blackstone and the power possessed by the privy council.

3. What are the disabilities and privileges of infancy as stated by Blackstone?

4. In how far is parol evidence admissible to annex customary incidents to written contracts?

5. A Toronto merchant goes to Buffalo and purchases on credit a large quantity of brandy from a Buffalo merchant, for the avowed purpose of smuggling it into Canada, which is actually done, and the Buffalo merchant commences an action for the price here. State fully the circumstances on which his success will depend, and the general rule illustrated by this case.

6. State the law in regard to the power of a wife to bind her husband by contracting with third parties.

7. State the principal securities for the truth of evidence noticed by Mr. Best.

8. What statutory provision is there by which evidence of a witness can be given in criminal cases without the presence of a witness in Court? Answer fully, showing the circumstances under which such evidence is admissible or inadmissible, and compare the law in that respect with the law in civil cases.

9. Discuss, after Mr. Best, the advantages of direct over presumptive evidence, and the advantages of presumptive over direct evidence.

10. Explain and illustrate the rule, that *there must be clear and unequivocal proof of the corpus delicti.*

Dart—Walkem—Statute Law.

1. Upon what ground does the jurisdiction of the Court of Chancery to sell real estate of infants depend? What expedients were sometimes resorted to in order to create jurisdiction?

2. In a will there is a bequest of the residue of personalty to be divieed among testator's relations "mentioned in this my will." By a codicil, the testator gave legacies to two relatives who were not mentioned in his will, and directed that the codicil should be taken as part of his will. By a second codicil, he gave legacies to two additional relatives, but made no direction as to the first codicil. Who are entitled to share in the residue? Give your reasons.

3. What were, and what are now the rules as to the operation of wills upon after-acquired personalty and realty?

4. What power had a married woman prior to the Con. Stat to devise or bequeath by will? Detail particularly the nature and requisites of such a will. Give some reasons for the opinion that this power no longer exists.

5. Distinguish between separate real property of a married woman under the doctrine of the Court of Chancery, under the Married Women's Acts in the Consolidated Statutes, and under the more recent statutes.

6. A testator by his will directs his debts to be paid. Has the executor, under any circumstances, the power to sell the realty in case the personalty is insufficient to pay the debts? Give your reasons.

7. What do you understand by an estate passing by estoppel? Is there any difference as to estoppel between a conveyance by grant, and a conveyance by lease and release? Explain.

8. State shortly the effect of Locke King's Act.

9. What interests in land are now saleable under execution.

10. In taking proceedings for the partition of real estate, it appears that one of the parties interested has not been heard of for a long period, and it is uncertain whether he is alive or dead, what course would you adopt?

CORRESPONDENCE.

County Court Appeals—County Courts and Quarter Sessions.

To the Editor of THE LAW JOURNAL:

SIR,—Spare me space in your paper to call attention to a couple of legal matters.

(1.) Could not Mr. Mowat be induced, at the next Session of the Legislature, to amend the practice respecting County Court appeals. At present it is about as expensive as an appeal to the Supreme Court.

Either do away with the right of appeal, or give a simple and inexpensive remedy. Why should not these appeals be heard by one Judge of Appeal instead of the full Court, as Insolvency appeals are now disposed of? This would save the time of the Court. The papers could be certified, and on a simple notice and deposit, as in appeals from a single Judge to the Court in Banc., the case could be re-argued at any time. The opinion of one Judge of the Court of Appeal would, in almost every case, be perfectly satisfactory to the parties interested. This would reduce the expense and trouble to something like commensurate with the amount usually involved.

(2.) Should not the Sessions and County Court be held quarterly as formerly in the country? When the late Sandfield Macdonald passed the Act doing away with the March and September sittings he provided that County Court cases could be tried at the Assizes. This provision has practically been done away with, no doubt for excellent reasons. But it is a hardship on a man now who has a contested case, and when a jury is required, to have to wait six months. I think there is a strong feeling too, that many of the criminal cases so silently disposed of at the Interim Sessions and Police Courts should be tried at some Court having a better class and larger number of people attending it, than usually graces the Interim Sessions or Police Court.

(3.) At present the Sessions have no jurisdiction to try forgery or perjury, though they can try more important cases. Surely there is no reason now in the reason for this limitation.

Yours, &c.,

Country Practitioner.

REVIEWS.

A Treatise on the Law of Judicial and Execution Sales. By David Borer, of the Iowa Bar. Second edition. Chicago: Callaghan & Company. 1878. R. Carswell, Toronto.

This edition has been nearly doubled in size since the first edition, and re-arranged. We can well think that it deserves the good reception it has met with in the United States. As however, the authorities cited are almost entirely from the reports of that country, and as these necessarily depend upon legislation somewhat different from ours, the book will not be of the great practical use in this country that it certainly must be across the border. The arrangement of the subjects seems to be very good, and the diligence and learning of the author cannot but be considerable, when we consider that he had but little to help him in the way of previous works on the same subject.

An English Version of Legal Maxims; with the original forms. By James Appleton Morgan A.M., author of the Law of Literature, &c. Cincinnati: Robert Clark & Co. 1878.

This is, we suppose, the largest collection of Legal Maxims ever attempted, aad as they are alphabetically arranged, and the book supplemented by an Index (which by the way might be fuller), it will be a useful addition to a library and for occasional reference. We are inclined to think it would be well for students to become more familiar with them, and to impress them upon their minds for reference in after years. We cannot therefore agree with a contemporary that does not appreciate the *raison d'être* of its publication. The collection contains 2882 maxims culled from various sources; we certainly admit our utter ignorance until now, that there were so many in existence. This book does not pretend to be more than a compilation, but it is a very perfect one, and we should not expect anything else from the author of the "Law of Literature."

A Manual of the Practice of the Supreme Court of Judicature in the Queen's Bench, Common Pleas, Exchequer and Chancery Divisions. Intended for the use of students. By John Indermaur. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1878.

Everything that Mr. Indermaur presents to the public is worthy not only of general notice but of attentive perusal by

those for whose use it is intended. His books are essentially practical; but, for this very reason the one before us is of no present use in this country, though interesting to all who may wish to know the practical working of the English Courts as at present established. The work is of an elementary character, but complete so far as it goes. The time may soon come when this and kindred works will be more sought after in this Province.

FLOTSAM AND JETSAM.

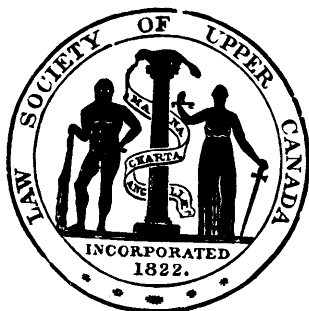
HUSBANDS BEWARE. — Mr. Justice Fry has added a new terror to matrimony. A lady who was left executrix under a will had in hand upwards of £400 invested in Consols. In that condition of things she married; and after her marriage, and without disclosing her state of coverture, and without the knowledge of her husband, she sold out of the Funds and spent the money. After this she died, and then an action was brought to compel her innocent husband to refund the money. Thereupon Mr. Justice Fry ordered payment by the husband, with interest at the rate of 4 per cent. from the death of the wife. At common law no liability attached to the husband after the wife's death, but in equity the liability survived. In the face of this judgment it becomes necessary for intending husbands to make diligent inquiries, and, perhaps, to administer full and searching interrogatories to their intended brides. From the days of Benedict to those of Thistlethwaite and Nunn, the perils and dangers of the married state have been very great. But this case of *Stewart* v. *Stewart*, reveals a pit more dreadful than any of those into which those unlucky men fell. Perhaps in future marriage settlements the lady will be called upon to find a trustee to enter into a covenant to hold the husband indemnified against a call of this character.

COMPULSORY LIQUIDATION IN QUEBEC.—We inserted last week a note of a decision in the case of *Anderson* v. *Gervais*, in which the Court held that it had no jurisdiction to permit a trader, against whom a writ of compulsory liquidation had issued, to continue his trade while the contestation of the attachment was pending. This decision was opposed to one rendered in 1876, in *Fisher* v. *Malo*, Bainville, J., in which it was held that the Judge may, under special circumstances, permit the insolvent to continue his trade. In that case the writ of compulsory liquidation had been quashed, but an appeal had been taken from the judgment. The Court held that the judgment had the effect of giving back to the trader the possession of his effects, and he was allowed to continue his trade while the case was pending in review. This decision has been followed by the Court of Review in *Anderson* v. *Gervais*, the decision noted last week being reversed. The Court of Review holds that a trader may be allowed to continue his business, pending proceedings to set aside a writ of compulsory liquidation, on giving security to the full value of his stock. —*Legal News*.

AN INTRICATE QUESTION, LOGICALLY DECIDED. —Four men in India, partners in business, bought several bales of Indian rugs, and also some cotton bales. That the rats might not destroy the cotton, they purchased a cat. They agreed that each of the four should own a particular part of the cat; and each adorned with beads and other ornaments the leg thus apportioned to him. The cat, by an accident, injured one of her legs. The owner of that member wound around it a bag soaked in oil. The cat, going too near the hearth, set this rag on fire, and being in great pain, rushed in among the cotton bales, where she was accustomed to hunt rats. The cotton and rugs thereby took fire, and they were burned up—a total loss. The three other partners brought a suit to recover the value of the goods destroyed against the fourth partner, who owned this particular leg of the cat. The Judge examined the case, and decided thus:— "The leg that had the oiled rag on it was hurt: the cat could not use that leg; in fact, it held up that leg, and ran with the other three legs. The three unhurt legs, therefore, carried the fire to the cotton, and are alone culpable. The injured leg is not to be blamed. The three partners who owned the three legs with which the cat ran to the cotton will pay the whole value of the bales to the partner who was the proprietor of the injured leg."

GREAT LAWYERS AT DRILL.—Ellenborough and Eldon were both turned out of the awkward squad of Lincoln's Inn corps for awkwardness. The former's attempt at this military training gave him an opportunity to utter a memorable jest. When the drill serjeant reprimanded the company for not preserving a straiter front, the great judge replied, "we are not accustomed to keeping military step, *as this indenture witnesseth.*"

GENERAL NOTES.—It is related of Judge Walter T. Colquitt, an old-time justice of the Georgia Supreme Court, that he once condemned a man to be hanged, preached a sermon, reviewed the militia, married two couples at night, and then conducted a prayer meeting—all in one day.



Law Society of Upper Canada.

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During this Term, the following gentlemen were called to the Bar; namely :—

FREDERICK PIMLOTT BETTS
(Who passed his examination in Trinity Term).
WILLIAM BARTON NORTHRUP.
JAMES ALBERT MANNING AIKINS.
EDMUND LINDSAY DICKINSON.
ALBERT JEFFREY.
WALTER MACDONALD.
DUNCAN DENIS RIORDAN.
WILLIAM HENRY BEST.
THOMAS ROLLO SLAGHT.
BARTLE EDWARD BULL.
JOHN BALL DOW.
ROBERT HODGE.

And the following gentlemen were admitted as Students of the Law and Articled Clerks, namely :—

Graduates.

JOHN HENRY D. MUNSON.
HENRY NASON.
WILLIAM JOHNSTON.
JOHN FRAVERS LEWIS.
ALBERT JOHN WEDD MCMICHAEL.

Matriculants.

EDMUND BELL.
GEORGE KAPPELLE.
FERGUSON JAMES DUNBAR.
EDMUND SWEET.
FREDERICK A. MUNSON.
HARRY O. MORPHY.
JAMES C. FRASER.

Juniors.

ARTHUR ALEXANDER WEBB.
JOHN CHRISTOPHER DELANEY.
THOMAS CARR SHORT.
ALBERT EDWARD BARBER.
W. TAYLOUR ENGLISH.
F. X. MURPHY.
THOMAS H. STODDART.
JOHN WORKMAN BERRYMAN.
WILMOT CHURCHILL LIVINGSTON.
ALEXANDER W. AMBROSE.
SAMUEL THOMAS HAMILTON.
JOHN SOPER MCKAY.
ABNER E. DECOW.
WM. JOHN CODE.
JOHN EDWARD MOBERLY.
EDMUND WELD.
JOHN EDWARD BULLEN.
ROBERT W. WITHERSPOON.
CHAUNCEY G. JARVIS.
ISAAC N. MONK.
EDWARD W. M. FLOCK.
JOHN M. BEST.
ALEXANDER DARRACH.
WM. FRED D. MERCER.
JOSEPH BRAUN FISHER.

Articled Clerk.

WM. EDWIN SHERIDAN KNOWLES.

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 articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

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.

Students-at-Law.

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. II.
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 instead of Greek.

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.

or German.

A Paper on Grammar.
Musaeus, Stumme Liebe.
1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.
1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination 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.

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,

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