proper procedure in case of a conviction for an offense under sec. 64 is that provided for by sec. 120.

P. McCarthy, Q.C., for defendant (appellant).

C. C. McCaul, Q.C. for North-West Government and prosecutor (respondents.)

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

RICHARDSON, J.
In Chambers

[Jan. 10.

ROSS *v.* MACKINTOSH.

Irregular judgment—Setting aside preliminary objections—Judicature ordinance, ss 540, 542—Varying judgment—Judicature ordinance, sec. 95 and E. Rule 308.

Plaintiffs sued on three promissory notes and entered judgment by default of appearance. Subsequently defendant, on an affidavit that he was entitled to credit of $60 paid on account of one of the notes sued on, which sum had not been credited in statement of claim, obtained a summons to show cause why the judgment should not be set aside. The objections to the judgment were not stated in the summons, nor was a copy of defendant's affidavit served. On preliminary objection that the summons did not comply with sec. 542—objection overruled—and

Held, that the summons was to be treated as amended under sec. 540, and as objecting to the judgment as being for an excessive amount: *Baillie* v. *Goodwin*, 33 C.D. 604; *Petty* v. *Daniel*, 34 C.D. 180.

Upon the hearing on the merits the plaintiffs filed an affidavit of their book-keeper controverting defendant's assertions and stating that the judgment was for the amount justly due. On behalf of the plaintiffs it was contended that the case differed from *Hughes* v. *Justin*, 9 Reps. 213; *Anlaby* v. *Praetorius*, 20 Q. B. D. 764, and *Rodway* v. *Lucas*, 10 Ex. 667. in that here the parties were at issue quoad the $60, while in cases cited there was no room for any issue that the affidavits disclosed alleged merits for defence only, consequently defendant could only have the judgment reduced by $60, and trial of an issue quoad the $60 upon terms, and that in any event the judgment should only be varied by being reduced, as section 95 gives the Court or a Judge power to do this, in which respect it differs from E. Rule 308.

For the defendant it was contended that the judgment was irregular and for an excessive amount—that the entry of it was an abuse of the process of the Court, that the defendant was entitled ex debito justitiæ to relief.

Held, that the plaintiffs had no right to enter judgment for the amount they did, that the judgment as signed was irregular, that were it not for the power to vary given by section 95, in addition to the powers contained in E. Rule 308, there would be no other course open than to order the judgment set aside ex debito justitiæ. Order that the Clerk of Court revise the calculation from the plaintiffs' statement of claim on file, and credit $60 and interest from date of payment; tax defendant's costs of application, and, crediting same, amend the judgment by inserting the amount resulting as above in the place of the sum at which it then stood.

Hamilton, Q.C., for applicant.

Ford Jones, for plaintiffs.