

the clerk, "How do you find on the second count?" saying, "On the second count we find the prisoner guilty," were obviously referring to the two propositions or branches of the case submitted to them by the learned Chief Justice.

Their verdict must, however, be taken to be the verdict recorded by the learned Chief Justice on the back of the indictment, and acknowledged by the jury to be their verdict in these words: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

The finding of the jury was, therefore, a proper one, and there was no mistrial.

The conviction will therefore be affirmed.

OSLER, J.A., delivered a written opinion concurring. MACLENNAN, MOSS, GARROW, JJ.A., verbally concurred.

MAY 21ST, 1902.

C. A.

FRANKEL v. G. T. R. CO.

*Appeal to Supreme Court of Canada—Leave.*

Motion, *ex cautela*, by defendants for leave to appeal to the Supreme Court of Canada from the judgment of this Court, ante p. 254.

H. E. Rose, for defendants.

G. F. Shepley, K.C., for plaintiffs.

The Court (OSLER, MACLENNAN, GARROW, JJ.A.) was of opinion that both on claim and counterclaim the defendants had the right to appeal without leave; but that, if leave were necessary, it was not a case in which it would be granted. Motion dismissed with costs, without prejudice, so far as this Court can say so, to the defendants' right to apply direct to the Supreme Court for the leave desired.

Decision of MACLENNAN, J.A., in Chambers, ante p. 339, approved.

MAY 30TH, 1902.

DIVISIONAL COURT.

RE CAMPBELL AND HORWOOD.

*Will—Construction—Power to Sell—Executors—Trust.*

Appeal by vendor from order of LOUNT, J., ante p. 139.

M. J. Gorman, Ottawa, for vendor.

F. C. Cooke, for purchaser.