REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Queen's Bench, Manitoba.

WITH

TABLE OF CASES AND PRINCIPAL MATTERS.

EDITED BY

JOHN S. EWART,

ONE OF HER MAJESTY'S COUNSEL.

VOLUME V.

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TABLE OF CASES.

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A TABLE OF CASES CITED IN THIS VOLUME.

MANITOBA LAW REPORTS.

VOLUME V.

BALFOUR v. DRUMMOND.

(IN APPEAL.)

Costs.—Taxation.—Separate defences.

Held, 1. That no general rule can be laid down upon the question as to the taxation of separate bills of costs to defendants appearing by separate solicitors.

2. At the present day the court is much more inclined than formerly, to insist upon parties, having the same, or a common interest, joining in their defences.

3. The rule as to joining in defences is not limited to the cases of trustee and *cestui qui trust*, mortgagor and mortgagee, assignor and assignee.

4. Residences widely separated, may be a reason for answering separately, but not for representation by separate counsel.

5. The question may be raised, as well upon taxation under interlocutory orders, as after decree.

A number of persons joined together and purchased property in the name of a trustee, who executed to the plaintiff a mortgage upon it to secure money borrowed. Some of the purchasers joined in a bond to the mortgagee to secure the repayment. In a suit for sale under the mortgage and for a personal order against the bondsmen, an order was made postponing the hearing and ordering the plaintiff to pay to the defendants the costs of the day. Under this order the taxing officer gave one bill of costs to A. B. and C. three defendants who had not signed the bond; one bill to D. and E., who had executed the bond; and no bill at all to F., an assignee of one of the purchasers against whom no relief was prayed other than the sale and who had answered consenting to a sale. Upon appeal,

Held, (Affirming Dubuc, J.) That the officer had exercised a proper discretion as to A. B. C. D. and E. but that as to F., the order having directed his costs to be paid, he should have a bill taxed to him, but as he should not have answered or appeared it should be the smallest possible.

Appeal from an order of Dubuc, J., affirming the master's certificate of taxation.

W. E. Perdue, for defendants Cruthers and Braithwaite.

It is not disputed that one solicitor appearing for several defendants is entitled to only one set of costs. *Macdonald* v. *Cunningham*, 3 Man. L. R. 39.

Counsel fees should be allowed for each defendant when represented by different counsel, *Re Colquhoun*, 5 D. M. & G. 36.

If plaintiff had sued in law he would have had to bring a separate action against each defendant, they should be allowed to defend separately in this court, *Morgan & Wurtzburg on Costs*, 126; *Reade* v. *Sparkes*, 1 Molloy, 10; *Gaunt* v. *Taylor*, 2 Beav. 346. Each case must be considered on its own merits, *Woods* v. *Woods*, 5 Hare, 229. Many of the parties defendants have contradictory interests.

They will have to fight when they come to determine how each will have to contribute, *Shaw* v. *Johnson*, 9 W. R. 629; *Barrett* v. *Campbell*, 7 Pr. R. 150; *Conolly* v. *Hill*, 7 Pr. R. 441; *Eden* v. *Naish*, 7 Ch. Div. 781.

W. R. Mulock, for defendant Slavin. Slavin has a separate interest, *Greedy* v. *Lavender*, 11 Beav. 417; *Hoops* v. *Lord Kingston*, 11 Ir. Eq. R. 471; *Von Bolton* v. *Cruden*, 21 W. R. 356; *Stinson* v. *Martin*, 2 Ch. Ch. 86; *McLaren* v. *Coombs*, 2 Ch. Ch. 124; *Petrie* v. *Guelph*, 10 Pr. R. 600; *Remnant* v. *Hood*, 27 Beav. 613.

S. C. Biggs, Q. C., for plaintiff. The defendants are numerous, but are in the same interest so far as the plaintiff is concerned. The bill sets up the relation of defendants as trustee and *cestuis que trustent*, they cannot have separate bills of costs, *Reid* v. *Stephens*, 3 Ch. Ch. 372; *Harmer* v. *Harris*, 7 Russ. 155; *Farr* v. *Sheriffe*, 4 Hare, 527; *Crawford* v. *Lundy*, 23 Gr. 244; *Course* v. *Humphrey*, 26 Beav. 402.

(*17th December, 1887.*)

TAYLOR, C.J.—By an order of 4th May, 1887, the plaintiff was at liberty to set this cause down for hearing at the next sittings of the Court, upon payment to the answering defendants, who were represented upon certain proceedings referred to in the order, of the costs of the day at the last sittings, and the costs of a petition presented on the 30th of April. The order also contained an order for the absolute payment of these costs. Upon the taxation under this order the master ruled, that the defendants Braithwaite Vanwort and Howard, were only entitled to one set of costs between them all, and that although represented by separate counsel upon the hearing, and upon the petition, only one counsel fee should be taxed for the three. He also ruled, that the defendants Slavin and Molesworth should not have severed in their defences, and were entitled to but one set of costs and no more, although each of them was represented by a separate solicitor, and at the hearing of the cause and petition by separate counsel. To the defendant Cruthers the master allowed no costs, on the ground that he should not have answered the bill or defended the suit. From the certificates of the master setting out these rulings, Braithwaite, Slavin and Cruthers, each brought a separate appeal, and these appeals came on to be heard before Mr. Justice Dubuc, who dismissed them all. From the orders made by him, these defendants now appeal to the Full Court. The three appeals were argued together.

The suit is one brought upon a mortgage made by the defendant C. S. Drummond to the plaintiff. The land embraced in the mortgage, was purchased by a number of persons for the purposes of speculation, they having varying interests, some one-fifteenth, some one-thirtieth, and so on. The title was vested in Drummond as trustee for all. The bill, besides setting out the mortgage, and the dealings with the land, alleges that by way of further security a bond was executed by certain of the defendants. The bill prays, that the land may be sold, that C. S. Drummond may be ordered to pay the amount due, that the defendants who signed the bond may be ordered to pay, according to its terms, and that those who were the original purchasers of the land, who it is claimed by Drummond, agreed to share the responsibility of the purchase, and of the mortgage, may be ordered to contribute as Drummond may be entitled to require.

The defendants, Braithwaite, Vanwort and Howard, are among the original purchasers, and they executed the bond. given by way of further security for the mortgage debt. The defendants, Slavin and Molesworth are two of the original purchasers, but they did not execute the bond. Cruthers, is not one of the original purchasers, but is the assignee of the share or interest of Molesworth.

Upon the argument of the appeal, almost all the cases bearing in any way upon the question of defendants severing in their defences, were cited and remarked on.

What is to be gathered from these seems to be only, that no general rule upon the subject can be laid down, each case, as it arises, must be governed by the special circumstances of that case. One thing, however, the cases cited do show, and that is, that it is not merely at the hearing of the cause, that this question of the propriety, or impropriety, of severing in defences, and of the costs thereby occasioned, can be considered. The case of *Vansandau* v. *Moore*, 1 Russ. 441, was one in which the Court was asked, at an early stage in the cause, to compel defendants who had put in separate answers to join in their defences, and to direct an enquiry as to the necessity or expediency of filing these separate answers. The Court very properly declined to do so at that stage, intimating that a time might arrive in the history of the suit, when the defendants might be dealt with by the court for oppressive pleading, and causing unnecessary expense.

At the present day the court is much more inclined to insist upon parties having the same interest, or a common interest, joining in their defences than formerly. Here it is urged that the defendants living in different parts of the country were compelled to appear by different solicitors and to answer separately, or that at all events, they were, under such circumstances entitled to do so. No doubt that has been held in some cases a ground for defendants severing in their defences, although in ***Farr*** v. *Sheriffe*, 4 Ha. 529, V.C. Wigram said, he could not admit that difference of residence alone was sufficient to justify parties who *prima facie* ought to join in their defences in severing. At present, it is not the putting in of separate answers with which we are called upon to deal, it is with counsel fees mainly, as was admitted by counsel upon these appeals. Even if the defendants were compelled by difference of residence to answer separately, surely those in the same interest might have agreed upon some counsel to be retained to represent them at the hearing. The propriety of such a course has been plainly indicated by the court, when by General Order, creditors in the master's office of the same class, are not only required to appear by the same solicitor, but in the event of their failing to agree upon one the master is empowered to name a solicitor for them.

It cannot be said that now, the rule requiring parties to join in their defence is limited to the cases of trustee and *cestui que trust*, mortgagor and mortgagee, assignor and assignee. Although it has been said that the court does not compel persons who have different shares in an estate, to appear by the same solicitor, because their interests as regards their opposition to the claim of the plaintiff are identical, yet, *Crawford* v. *Lundy*, 23 Gr. 244, shows, that even in such a case, separate defending is a matter to be taken notice of by the taxing master, and as to which he is to exercise a discretion. Indeed, if *Beattie* v. *Lord Ebury*, 22 W. R. 68, is to be followed, there is no question of principle involved, the whole matter is in the discretion of the taxing officer from which there is no appeal.

We can see no reason why Braithwaite, Vanwort and Howard could not have been represented by the same counsel, and cannot say that the master erred in classing them together. They are all original purchasers of the land who executed the bond securing payment of the mortgage in question, and in no way do their defences conflict.

Molesworth and Slavin are original purchasers who did not execute the bond. They have a common interest, and appeared and answered by the same firm of solicitors. That this firm has since been dissolved, and that one of these defendants employed as his solicitor one member of that firm, and the other has employed the other members of it, can be no reason for giving separate sets of costs.

Following the example of V.C. Proudfoot in *Crawford* v. *Lundy*, it would have been quite in place for the judge to have directed the attention of the master to the attendance of separate counsel for these parties, so that he might on taxation deal with the matter, and when the master, without having his attention called to it, has so dealt with the matter, should the Court now interfere. In the judgment, pursuant to which the order of 4th May was drawn up, no such expression as "costs of the answering defendants," indicating that every defendant who answered should have a separate bill of costs, is used.

As to Cruthers, he stands in a somewhat different position from any other defendant. He is the assignee of one of the original purchasers. McGoun is also an assignee of an original purchaser, but his position differs from Cruthers in this, that he, it is claimed, agreed to indemnify his assignor against all liability. Nothing of that kind is alleged in the case of Cruthers.

The master has allowed him no costs on the proceedings dealt with by the order of 4th May, and this, it is contended upon the authority of *Reid* v. *Stephens*, 3 Cham. Cham. R. 372, it was beyond the power of the master to do.

It was said by counsel, and his answer states the same thing, that he has no objection to the plaintiff obtaining a foreclosure or sale of the land, and that he defended and answered, solely, because a personal order for payment of money was sought against him. Now how any solicitor reading the bill could suppose that a personal order against Cruthers could be made, or was even desired, is what we cannot imagine. The bill contains no allegation of his having come under any personal liability. The prayer is that Drummond may be ordered to pay the mortgage money, that the defendants who executed the bond may be ordered to pay according to its terms, and that those of the defendants who were the original purchasers, who were "members of said syndicate," as it is expressed, may be ordered to contribute to the payment of the mortgage money. There is no prayer for payment by Cruthers, as having come under any obligation to do so, or as representing an original purchaser. That the bill may have had on it the long form of endorsement, stating that the plaintiff would be entitled to execution to recover payment of the amount due, can make no difference. That only notifies a defendant of the mode in which payment of what the bill shows the plaintiff to be entitled to, and for which he prays, may be enforced. It can never give a plaintiff a right to enforce payment by personal order and execution, against a defendant of that to which his bill does not show him to be entitled, and for which he does not pray. We cannot see what reason Cruthers had for appearing in the suit at all, if he does not, as his answer says he does not, object to the plaintiff obtaining an order for foreclosure or sale. As his appearing and answering was not necessary, so his appearing by counsel at the hearing and on the petition was unnecessary. The difficulty is that the order does not deal with his case specially, but in its literal terms includes him among those entitled to costs given under it. That being so the master could not wholly deprive him of costs and there seems to be no other defendant with whom he can be classed. It must therefore be referred back to the master, if desired, to allow him a bill of costs, which, however, should be only a nominal one, a hand brief and the lowest fee that can be allowed to counsel.

As the result of the whole we are satisfied that the master exercised a proper discretion in dealing with the costs of Braithwaite and Slavin and their appeals should be dismissed with costs. The appeal of Cruthers must be allowed, but as the matter is so trifling it should be so without costs. The matter of Cruthers' costs must be referred back to the master for taxation.

DUBUC, J.—I thought when the matter was first brought before me, and I think still, that there was no necessity for Cruthers to be represented by counsel at the hearing of the petition; and the master was right in so holding. But, as under the strict literal construction of the wording of the order made on the 4th May, he might technically claim some nominal costs, although they were unnecessarily incurred, I concur in the judgment of the learned Chief Justice.

KILLAM, J., concurred.

Appeals of Braithwaite and Slavin dismissed with costs.

Appeal of Cruthers allowed without costs.

CULLIN v. RINN.

(IN APPEAL.)

Covenant of indemnity.—Action on, before payment by covenantee.

A. the owner of land subject to two mortgages, conveyed to B. subject to the mortgages, and B. covenanted "to pay off and discharge the above recited mortgages and interest as the same shall become due, and forever save harmless the said party of the second part from any loss, costs, or expenses connected therewith."

Held, That an action might be brought upon this covenant and the amount due upon the mortgages recovered before payment of any part of them by the covenantee.

The plaintiff, being the owner of N. E. ¼ 32 & S. W. ¼ 33, township 4, range 6 west, executed two mortgages thereon. He afterwards sold the land to the defendant, and conveyed it by deed dated 4th February, 1884. In that deed the habendum is expressed to be, subject to the reservations, &c., "and also subject to two mortgages and interest, both given by the party of the first part, the first to The Manitoba and North West Loan Company, for $760 and interest, and the other to Robert Semple, for $600 and interest." The deed, which was executed by both grantor and grantee, also contained the following covenant, "The said party of the second part, hereby covenants with the said party of the first part, to pay off and discharge the above recited mortgages and interests, as the same shall become due, and forever save harmless the said party of the first part from any loss, costs or expenses connected therewith."

The mortgage to Semple not being paid when it became due, the mortgagee issued a writ against the plaintiff who the next day issued his writ against the present defendant. At the trial before the late Chief Justice Wallbridge without a jury, it was admitted that the plaintiff had not, before issuing his writ, paid off the Semple mortgage, but that he had paid $10 costs incurred in the action begun by Semple.

A verdict was entered for the plaintiff for $760, leave being reserved to the defendant to move to enter a nonsuit and proceedings were stayed until Term, to give him an opportunity of doing so.

H. M. Howell, Q.C., moved accordingly to enter a nonsuit pursuant to the leave reserved, or to reduce the verdict to $10, citing and remarking on *Prescott* v. *Trueman*, 4 Mass. 627; *Grant* v. *Tallman*, 20 N. Y. 191; *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *Leith* v. *Freeland*, 24 U. C. Q. B. 132; *Horsman* v. *Burke*, 4 Man. L. R. 245; *Rawle on Covenants*, 94.

P. A. MacDonald relied on *Leith* v. *Freeman*, 24 U. C. Q. B. 132; *Furnas* v. *Durgin*, 119 Mass. 500.

(*17th December, 1887.*)

TAYLOR, C. J.—The contention of the defendant that the plaintiff cannot, until he has paid off the incumbrance, recover more than nominal damages, seems supported by American authorities. It was so held in *Prescott* v. *Trueman*, 4 Mass. 627, and this case was followed by *Delavergne* v. *Norris*, 7 Johns. 358, in which the court held, that in a suit upon a covenant against incumbrances, unless the covenantee has extinguished them, and they are still outstanding, the damages to be recovered are but nominal, for there ought not to be a recovery of the amount of an incumbrance upon a contingency where the covenantee may, perhaps, never be disturbed by it. *Stanard* v. *Eldridge*, 16 Johns. 254, is to the same effect, and in *De Forest* v. *Leete*, 16 Johns. 122, it was said that if the plaintiff has extinguished the incumbrance he is entitled to recover the price he has paid for it, but if he has not, and it is still an outstanding incumbrance, his damages are merely nominal.

In *Chace* v. *Hinman*, 8 Wend. 452, a distinction was drawn between a covenant of indemnity against the payment of money, against actual damage or expense, and one of indemnity against any liability for such damage or expense. The court there held that if the indemnity be against the payment of money the plaintiff must, in general, prove actual payment, or that which the law considers equivalent to actual payment, and mere legal liability to pay is not in such case sufficient. But if the indemnity be not only against actual damage or expense, but also against any liability for such damages or expenses, then the plaintiff need not wait until he has actually paid such damages, his right of action is complete when he becomes legally liable for them. The general proposition laid down in *Rockfeller* v. *Donnely*, 8 Cow. 639, that even when the obligation is simply to indemnify against damage or expense, and the obligee has become absolutely bound and liable to pay the expense or damage, and the amount is liquidated so that his demand against his obligor upon the bond of indemnity, by reason of the charge against himself, is reduced to a certainty, he may enforce his demand against his obligor in the first instance, before he satisfies the charge against himself, was spoken of as carrying the doctrine further than warranted by the authorities.

In the more recent case of *Furnas* v. *Durgin*, 119 Mass. 500, the defendant conveyed land to the plaintiff, covenanting against incumbrances. A mortgagee under a statute of the State recorded a certificate of entry to foreclose the mortgage, but there was no actual ouster or eviction of the plaintiff. He then brought an action for breach of the covenant, claiming as damages the amount of the mortgage. Counsel for the defendant asked the judge to direct the jury that the measure of damages would be the amount paid by plaintiff to remove the incumbrance, and if he had paid nothing he would be entitled to recover only nominal damages. This the judge refused to do, and the plaintiff had a verdict for the full amount. On an appeal the full court upheld the ruling and decided that a promise to pay a debt due from the promisee, even where it has not been paid by him, is one upon which an action may be maintained, and damages recovered to the amount of such debt.

While such is the state of the law in New York and Massachusetts, the view taken in England and Ontario, is adverse to the contention of the defendant.

Lethbridge v. *Mytton*, 2 B. & Ad. 772, was a case in which tne defendant covenanted with the trustees of his marriage settlement to pay off within twelve months from his marriage, the incumbrances upon certain of his estates, conveyed to the trustees by the settlement. At the end of ten years, the incumbrances not having been paid off, although the defendant had regularly paid the interest, the trustees brought an action upon the covenant. No special damage was stated in the declaration or proved. Judgment was suffered to go by default and on a writ of enquiry being executed before the under sheriff nominal damages were given. The Court *in banc* set aside the inquisition and directed a new enquiry holding that under the covenant the plaintiffs were entitled to recover the whole amount of the incumbrances. In *Carlisle* v. *Orde*, 7 U. C. C. P. 456, the defendant had sold land to the plaintiff, covenanting against incumbrances, and giving at the same time a bond conditioned for the payment by the defendant of £75, on a day named in discharge of a mortgage on the land sold to the plaintiff. The learned judge before whom the case was tried, doubted if the plaintiff could recover the amount claimed, without first paying off the mortgage, particularly as he had not been disturbed in the possession of his land and might never be so, he therefore directed a verdict to be entered on the breach assigned in the bond for nonpayment of the mortgage, for one shilling with leave to the plaintiff to move to increase the damages on that breach to the full amount claimed, should the court be of opinion that under the facts shewn he was entitled to recover that amount. The plaintiff moved accordingly in Term and the court were of opinion that he should have recovered the full amount, Draper, C.J., who delivered the judgment of the Court, saying, "The law appears to me clearly settled, and the plaintiff is entitled to have his rule made absolute if properly served." But the defendant not appearing and the rule not having been properly served, the Court could not make it absolute. *Leith* v. *Freeland*, 24 U. C. Q. B. 132, was a case in which the plaintiff had conveyed land to one Brown, subject to a mortgage to Small, which contained a covenant to release in parcels. The plaintiff had previously sold to Nichols part of the mortgaged land, and Brown agreed to release this part by a day named, and to pay off the mortgage as it should fall due and the defendant gave his bond to the plaintiff, conditioned that Brown should do this. Brown made default in both respects and to an action on the bond a plea, pleaded by the defendant, on equitable grounds, that the bond was given only to indemnify the plaintiff from damage by Brown's nonperformance; that the plaintiff had not paid or been called upon to pay anything and had suffered no damage; that the defendant was ready to indemnify him according to the true meaning of the bond, and that he ought not in equity to enforce it until he had been damnified, was on demurrer held to be no defence. The Court said the law was perfectly clear that when a plaintiff is liable to another for moneys payable on a future day, and a third person for good consideration covenants that, on or before that or any other named day he will pay the money, the plaintiff on his default is entitled to recover the whole amount from him, and is not bound to wait till he has paid the same.

It was sought to distinguish the present case from these cases because here the defendant is not only the person who has covenanted to pay off the mortgage, but also the owner of the land upon which it is a charge. It was urged that if the plaintiff can in this action recover judgment for the full amount and collect that from the defendant and then does not apply it in paying off the mortgage, the defendant's land may hereafter be resorted to for satisfaction of the incumbrance, and thus the defendant will be made to pay a second time. On the other hand, if the defendant's contention be correct that the plaintiff can recover only nominal damages, as he is still liable upon the personal covenant contained in the mortgage, should the defendant continue to neglect paying it off, the mortgagee may proceed against the plaintiff and on payment from him being enforced, he would be without relief for having once recovered nominal damages, his cause of action against the defendant would be gone. It may be said, the plaintiff could protect himself against any such risk by going and paying off the incumbrance before bringing his action, and so recover not nominal but actual damages. And so the defendant, even if he had not before the plaintiff sued out his writ fulfilled his covenant, might at once have done so by paying off the mortgage and then have pleaded that as matter arising after action brought. The supposed hardship is no greater in the one case than in the other.

That the risk which the defendant may be supposed to run, if the plaintiff does not apply the money he may recover in satisfying the incumbrance, is not a ground for the Court refusing the relief the plaintiff seeks, seems settled by the case of *Loosemore* v. *Radford*, 9 M. & W. 657. There the plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default, and in an action on the covenant, the plaintiff was held entitled, though he had not paid the note, to recover the full amount of it by way of damages. Counsel urged that the plaintiff not having paid the note, there was nothing to prevent the payee from suing the defendant, in which case he would have to pay the money twice over. But Parke, B., said, "This is an absolute and positive covenant by the defendant to pay a sum of money on a day certain. The money was not paid on that day, nor has it been paid since. Under these circumstances, I think the jury were warranted in giving the plaintiff the full amount of the money due upon the covenant. . . . . . The defendant may perhaps have an equity that the money he may pay to the plaintiff shall be applied in discharge of his debt; but at law the plaintiff is entitled to be placed in the same situation under this agreement, as if he had paid the money to the payee of the bill." In the present case there is an absolute covenant by the defendant to pay off and discharge the mortgage and interest as the same shall become due.

The case of *Horsman* v. *Burke*, 4 Man. L. R. 245, does not touch the question raised here. My brother Killam said there, it was not necessary to consider whether an action at law could be maintained on the agreement of indemnity before payment by the plaintiff, and no doubt it was not.

The verdict of the Chief Justice in favor of the plaintiff should stand, and the defendant's motion to enter a nonsuit or reduce the verdict be refused with costs.

DUBUC, J.—It may appear to be a hardship on the defendant to be obliged to pay to this plaintiff the amount of the mortgage, while the lands in question remained charged and incumbered with the said amount to the mortgagee, and while, in case the plaintiff fails to satisfy the said mortgage by paying to the mortgagee the amount recovered from the defendant, the said mortgagee may still foreclose his mortgage or sell the lands, but such seems to be the law.

The English and Canadian authorities are at variance with the American cases on this point. In the United States, it is held that in an action on a covenant against incumbrances, the plaintiff, if he has paid nothing, can only recover nominal damages. *Prescott* v. *Freeman*, 4 Mass. 627; *Delavergne* v. *Norris*, 7 Johns. 358, followed by a number of other cases.

In England a different doctrine is followed. If a man covenants with another to pay off certain liabilities for which that other is primarily liable, or jointly liable with him, he is held strictly to his covenant, and the other party may recover the full amount of the liabilities, even he has not paid anything on it himself. *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *Loosemore* v. *Radford*, 9 M. & W. 657.

The same principle has been adopted in Ontario, *Leith* v. *Freeland*, 24 U. C. Q. B. 132; *Carlisle* v. *Orde*, 7 U. C. C. P. 456.

In the case before us, the defendant has made an unrestricted covenant with the plaintiff to pay off and discharge the mortgage in question and interest "as the same shall become due," and he has failed to do it. Under the above English and Canadian authorities, by which we are governed, the plaintiff is entitled to recover the full amount involved in the covenant, which the defendant has failed to pay off and discharge.

The verdict should stand and the appeal be dismissed with costs.

KILLAM, J., concurred.

Appeal dismissed with costs.

JUKES v. THE WINNIPEG AND HUDSON'S BAY RAILWAY COMPANY.

(IN APPEAL.)

Corporation judgment debtor.—Examination of officer.—Production of books of Corporation.—Costs.

Upon an application to examine an officer of a judgment debtor corporation there should be distinct evidence that the person named is an officer, of the corporation, and what office he holds.

No order can be made that an officer do produce the books, &c., of the corporation.

No order can be made directing that the costs of the application and examination be added to the plaintiff's debt.

On the 29th of August, 1886, the plaintiff recovered a judgment against the defendants and placed in the sheriff's hands an execution against goods under which a quantity of rails were seized. A claimant served upon the sheriff a notice claiming these rails, and on the 13th of September, the plaintiff obtained from Chief Justice Wallbridge a summons calling upon the defendants and D. J. Beaton, their secretary to show cause why the said secretary should not attend and be orally examined upon oath touching the estate and effects of the defendant company, &c., and why he should not at such examination produce such of said company's books, documents and papers as relate in any way to the subject of said examination and why the costs of and incidental to the application and the said examination should not be added o the plaintiff's judgment and execution therein.

On the 16th day of September, the learned Chief Justice made an order that D. J. Beaton, the secretary of the defendant company should attend, &c., and submit to be orally examined upon oath touching the estate and effects of the defendant company, &c., and that on such examination the said D. J. Beaton, the said secretary should produce such of said company's books, documents and papers as relate in any way to the subjects of said xamination and that the costs of and incidental to the application and said examination should be added to the plaintiff's judgment and execution.

There was no affidavit filed showing that D. J. Beaton was the ecretary of the defendant company, but the affidavit of service f the summons stated that it was served on D. J. Beaton, the ecretary of the defendants referred to in said summons. The laintiff in his affidavit swore that he had been informed by the resident of the company that they had no assets liable to seizure nder execution.

From this order the defendants appealed to the full court, upon he following grounds:—

1. That there was no evidence before the Chief Justice at the ime of the making of the said order or the issuing of the summons upon which the same was granted that D. J. Beaton the arty ordered to be examined was an officer of the defendant ompany.

2. The Chief Justice had no authority to order the defendants o pay the costs of and incidental to the said order and examina-

tion and to add the same to the plaintiff's judgment and execution in the cause.

3. That there was no evidence before the Chief Justice at the time of the making of the said order that the plaintiff had made any efforts to realize on his execution issued therein and had failed to do so.

4. That an order cannot be made for the examination of the judgment debtor, while the sheriff is in possession of goods seized, and taken under execution issued in the cause in which such order to examine is sought to be made, and the evidence before the Chief Justice in this case at the time of making the said order, showed the sheriff to be in possession of goods under the execution issued in the cause.

5. That the papers filed do not show that the amount due on the judgment cannot be made in the ordinary way.

6. That the Chief Justice had no jurisdiction to order said Beaton to produce defendants' books and papers on said examination.

J. Stewart Tupper, for defendants cited, *Ginty* v. *Rich*, 7 Ont. Pr. R. 319; *Rex* v. *Parrott*, 6 C. & P. 402; *Rex* v. *Rees*, Ib. 579; *Smith* v. *McGill*, 3 C. L. J. O. S. 134; *Cameron* v. *Brantford Gas Co.*, 2 C. L. J., O. S. 209; *Administration of Justice Act, 1885*, section 52.

T. D. Cumberland, for plaintiff cited, *Irvine* v. *Mercer*, 3 C. L. J. O. S. 49; *Arch. Pr.*, 1605.

(*1st December, 1887.*)

TAYLOR, C.J., delivered the judgment of the court: *(a)*

There was no evidence before the late learned Chief Justice, when he made the order moved against, that D. J. Beaton was secretary of the defendant company. We think that where an order is sought for the examination of a corporation as a judgment debtor, by examining an officer of the corporation, there should be positive and distinct evidence that the person proposed to be examined is an officer of the corporation, and what office he holds, so that the court may judge whether it is proper that an order for his examination should be made.

(*a*) Present: Taylor, C.J., Dubuc, Killam, JJ.

The order is also erroneous, in directing Mr. Beaton, even if he is secretary of the company, to produce books and papers. The power of the Court to order the examination of a judgment debtor is entirely statutory, and the provisions of the statute must be strictly followed. The Administration of Justice Act, 1885, section 52, gives the court power to order the examination of a judgment debtor, and to make an order, "for the production of all or any of his books, papers and documents.'' Sub-section 2 of that section provides, " In case the judgment debtor is a corporation, foreign or domestic, then any officer of such corporation liable to be examined under section 134 of this Act, may be examined under this section." All that the Court can require of the officer is that he attend to be examined, any order for the production of books, papers and documents, must be for the production of them by the corporation, the judgment debtor, not by the officer.

The order is also erroneous in giving the plaintiff the costs of the application and of the examination, to be added to the judgment debt. The statute says nothing as to costs, and the uniform practice of the court has been, to make no order as to costs. The statute being silent on the subject, the court seems to have no power to award any. Upon these grounds of objection we think the appeal should be allowed.

We do not deal with the third, fourth and fifth grounds of appeal, as we think the judge in chambers should have a wide discretion as to whether, on the merits, an order should or should not be made in any particular case.

The appeal is allowed with costs, to be set off, *pro tanto*, against the plaintiff's judgment.

Appeal allowed.

SINCLAIR v. MULLIGAN.

(IN APPEAL.)

Constitutional Law.—Laws in force in Assiniboia.

The laws of England as they existed at the date of the charter of the Hudson's Bay Company, so far as applicable, formed the body of laws in force in this Territory up to the Assiniboia Ordinance of 11th April, 1862.

Per Taylor, C.J. (Affirming Killam, J.) The Ordinances of 11th April, 1862, and 7th January, 1864, were limited to regulating the proceedings of the court, and did not introduce the general laws of England, (Dubuc, J., *dubitante.*) (*Keating* v. *Moises*, 2 Man. L. R. 47, not followed.)

Per Taylor, C.J. Persons entitled, under the H. B. Co., to estates less than estates in fee simple, are entitled to have such titles confirmed; but are not as of right entitled to a grant from the Crown of a larger estate.

F. McKenzie, Q.C., and *J. Rowe*, for defendant. The contract with Norbert Nolin was conditional and has been rescinded, *Matthews* v. *Cragg*, 38 U. C. Q. B. 330; *Demorest* v. *Miller*, 42 U. C. Q. B. 56. The plaintiffs' title tainted with champerty, *Walker* v. *Walker*, 19 Gr. 37; *Millette* v. *Sabourin*, 12 Ont. R. 248; *McIntyre* v. *Belcher*, 14 C. B. N. S. 654; *De Hoghton* v. *Money*, L. R. 2 Ch. 164; *Prosser* v. *Edmonds*, 1 Y. & C. 481; *Wigle* v. *Setterington*, 19 Gr. 512; *Re Paris Skating Rink Co.*, 5 Ch. D. 959; *Jenkins* v. *Jones*, 9 Q. B. D. 128. As to laches and improvements by defendant, *Plimmer* v. *Mayor of Wellington*, 9 App. Ca. 699; *Story's Eq.*, § 388; *Stevens* v. *Bucke*, 43 U.C. Q. B. 1.

As to Statute of Frauds not being in force, *Communis error facit jus*, *Caldwell* v. *McLaren*, 9 App Ca. 409.

J. S. Ewart, Q.C., and *J. D. Cameron*, for plaintiffs. Contract not conditional, *McIntosh* v. *Samo*, 24 U. C. C. P. 625. As to champerty, *Dickinson* v. *Burrell*, L. R. 1 Eq. 337; *Jenkins* v. *Jones*, 9 Q. B. D. 128.

The facts of this case are fully set out in the report in 3 Man. L. R. 481.

TAYLOR, C.J.—(After referring shortly to the facts). Now assuming that the possession of Genevieve Nolin, who is found by the learned judge to have been in possession on the 8th of March, 1869, enured to the benefit of Norbert Nolin, he having fulfilled his engagement to support and maintain his aunts, and that under the statutes he had a title which could not be disturbed, and that is assuming the utmost that the plaintiffs can ask to be assumed in their favor, what title had Norbert Nolin acquired? Genevieve Nolin had an estate for life in the land, and that life estate she had transferred to him by the written agreement of 3rd November, 1856, and by giving him possession of the land pursuant to that agreement. When the rights of the Hudson's Bay Company were transferred to the Dominion of Canada, Norbert Nolin as assignee of his aunts was entitled to an estate for the life of Genevieve Nolin in the land in question, and the Hudson's Bay Company were entitled to the reversion.

The address from the Senate and House of Commons of Canada to Her Majesty in 1867, respecting the cession of the North-West Territories to Canada, declared that Canada was ready to provide that the legal rights of any corporation company or individual within the Territories proposed to be dealt with should be respected. The agreement come to, on the 22nd of March, 1869, between the representatives of the Dominion and the Hudson's Bay Company, embodied the terms set out in a letter from The Under Secretary of State for the colonies of 9th March, 1869, and the 8th article of these was, "All titles to land up to the 8th March, 1869, conferred by the Company are to be confirmed." In the address presented by the Senate and House of Commons to Her Majesty in 1869, this 8th article was again repeated. The surrender by the Hudson's Bay Company to Her Majesty on the 19th November, 1869, repeated that provision as the 10th clause, and this surrender was accepted by Her Majesty. By the Order in Council of 23rd June, 1870, the North-West Territories were, from and after the 15th day of July, 1870, admitted into and became part of the Dominion of Canada, upon the terms and conditions of the address of 1867, which terms and conditions were approved of by Her Majesty, and in that Order in Council the provision "All titles to land up to the 8th day of March, 1869, conferred by the Company are to be confirmed," appears as the 10th clause. All that the words used, seem to provide for, is, that all persons having any title to land under the Company should continue to enjoy the rights they had acquired and to be confirmed in these. But the Dominion Parliaments appear to have taken a more generous view, and to have dealt with this matter more liberally. Accordingly the Manitoba Act, 33 Vic. c. 3, confirmed by Imperial Act, 34 & 35 Vic. c. 28. provides for the grants of land in freehold, made by the Company being confirmed by grant from the Crown and other interests in land being converted into estates of freehold by grant from the Crown.

On the 15th of July, 1870, whatever estate the Company had in the land in question, was acquired by the Dominion of Canada, subject to the terms of the agreement between the Company and Canada set out and confirmed by the Order in Council of 23rd June, 1870, and to the terms and provisions of the Manitoba Act.

Norbert Nolin plainly came under sub-section 1 of section 32 of The Manitoba Act. He had as assignee of Genevieve Nolin, the tenant for life, a grant of land in freehold from the Hudson's Bay Company, and he was entitled to have that confirmed by grant from the Crown. I do not pause to consider what may be the effect of the words in that sub-section, "if required by the owner," or what should be held to be the result of the owner not requiring the Crown to confirm the grant, but assume for the present, in favor of the plaintiffs that the effect of the statute was to give Norbert Nolin as good a title as if he had done so, and without any application to the Crown. But plainly, if he relied upon the title acquired by virtue of the provisions of the statute he could only claim that by the statute his estate was confirmed. It is true the Crown might, and very probably would, had an application been made for a grant, and there is no evidence that any such application was made, have granted the land to him in fee simple, but any grant so extensive as that would have been only by the grace of the Crown. He could not have insisted upon receiving such a grant, or upon anything more than having the estate for life confirmed and secured to him. The plaintiffs relying as they do upon the statute as securing a title to them, cannot in my opinion claim that they, by virtue of that statute, acquired anything more than the plain words of the statute could give them.

In October, 1876, the Crown granted the land in question to the defendant in fee. On the plaintiffs contention this could not in any way affect the estate which Norbert Nolin had, but surely it was at all events, a good grant of the reversion. Genevieve Nolin died in 1877 or 1878, and on her death the estate in the land, of Norbert Nolin as tenant for her life, determined, and the grant of the reversion to the defendant took effect. Whatever rights Norbert Nolin might have had as against the defendant, to possession of the land up to that time, he had none afterwards. It was only in 1883 that the deed from Nolin to the plaintiffs was executed, and at that time, and for five or six years before, he had no estate or interest in the land whatever.

When disposing of the case my brother Killam considered the question of what law was in force in this Province when the transactions between the parties took place, and came to the conclusion that at that time, and up to the time of the transfer of this Country to Canada, the laws in force were the laws of

England of 1670, the date of the Hudson's Bay Company's charter. As this is a matter of great importance I desire to express my opinion upon it.

In *The Canadian Bank of Commerce* v. *Adamson*, 1 Man. L. R. 3, my brother Dubuc when delivering the judgment of the Full Court, said, "We find that the laws of England were introduced in this Country by the Council of Assiniboia, by its ordinance or enactment of the 7th January, 1864, amending the ordinance on administration of justice of the 11th April, 1862." The question then before the Court was whether the Bills of Exchange Act, 18 & 19 Vic. c. 67, was in force here, and it was argued on the one side that it was not, because the Provincial Statute, Con. Stat. Man. c. 31 s. 4, introducing the law of England could not have the effect of introducing that Act, because bills of exchange and promissory notes, are subjects over which, by The British North America Act, the Parliament of Canada has exclusive jurisdiction, while on the other it was contended that the Act did not in any way affect the validity of such instruments, but was merely an Act regulating the procedure by which actions upon them may be instituted and carried on, and procedure is clearly a subject within the jurisdiction of a provincial legislature. When, a few days after that decision, disposing of *Keating* v. *Moises*, 2 Man. L. R. 47, I said, not after the full consideration which such an important question deserved, and not perhaps apprehending at the time its grave character, "Up to 11th April, 1862, the law in force here was the law of England at the date of the Hudson's Bay Company's charter. Then, on the 11th April, 1862, the law of England at the date of Her Majesty's accession was introduced. This continued to the 7th January, 1864, when the law of England, as it stood at that date, was declared to be the law of Assiniboia."

As the judgment in *The Canadian Bank of Commerce* v. *Adamson*, was really disposing of only a matter of procedure, and my judgment in *Keating* v. *Moises*, was only when sitting as a judge of first instance, the point now raised may still be considered as open for decision by the Full Court.

The ordinance of 11th April, 1862, is thus expressed, "In place of the laws of England of the date of the Hudson's Bay Company's charter, the laws of England of Her Majesty's accession, so far as they may be applicable to the colony, shall regulate the proceedings of the General Court, till some higher authority or this council itself shall have expressly provided, either in whole or in part, to the contrary."

This ordinance was passed apparently as part of a general consolidation of the laws or ordinances of the district of Assiniboia. It is one of fifteen ordinances relating to the courts and legal matters grouped under the general heading, "Administration of Justice." The other ordinance is headed "Administration of Justice, amended 7th January, 1864," and is worded as follows, "To remove all doubts as to the true construction of the 53rd article of the code of 11th April, 1862, the proceedings of the General Court shall be regulated by the laws of England, not only of the date of Her present Majesty's accession, so far as they may apply to the condition of the colony, but also by all such laws of England of subsequent date as may be applicable to the same; in other words the proceedings of the General Court shall be regulated by the existing laws of England for the time being, in as far as the same are known to the court and are applicable to the condition of the colony."

My brother Killam came to the conclusion, from the wording of these enactments, that they were directed to regulating the proceedings of the court, and nothing beyond that. He has called attention to the double repetition, in the article of the 7th January, 1864, of the expression "the proceedings of the General Court shall be regulated," as evidence of the intention of the council to confine itself to regulating procedure in the Court. Since the argument of the present case, I have found a decision of the House of Lords, which seems to me conclusive upon this point. *Whicker* v. *Hume*, 7 H. L. 124, was a case in which a will, under which lands in New South Wales were devised fo charitable purposes, was impeached as void under The Mortmain Act. The statute 9 Geo. 4, c. 83, was relied upon as an Ac which introduced the laws of England into that colony. Tha Act provided as follows, "That all laws and statutes in forc within the realm of England at the time of the passing of thi Act (not being inconsistent herewith, or with any charter letters patent, or order in council which may be issued in pursuance hereof), shall be applied in the administration of justic in the courts of New South Wales and Van Diemen's Lan respectively, so far as the same can be applied within the sai colonies." The House of Lords held that clause to refer onl to the laws regulating the administration of justice in the court and not to the general law of the colony. Indeed so decided seems to have been the opinion of the learned Judges, Lords Chelmsford, Cranworth, and Wensleydale, upon this point that counsel for the respondents were informed they need not argue it. Now, certainly the argument to be drawn from an Act saying that the laws of England shall be applied in the administration of justice, in favor of that Act introducing the laws of England as the general law of the country, is much stronger than can be drawn from one which says "the proceedings of the court shall be regulated by the laws of England."

I foresee the grave difficulties which must arise from holding that until 1870, the law of England of the date of the Hudson's Bay Company's charter 1670, was the law in force here, and that indeed, except as to matters which have been dealt with by the Dominion Parliament, or which are within the jurisdiction of the Provincial Legislature, and have been dealt with by it, that is the law of this Province at the present day, yet I do not see how I can, in the face of the decision of the House of Lords, in *Whicker v. Hume*, hold otherwise than that the ordinances of 1862 and 1864, were limited to regulating the proceedings of the court, and did not introduce the general laws of England. The remedy for the results which may follow from the law being in this state, must I presume be sought in legislation by the Dominion Parliament.

The rehearing should be dismissed and the decree appealed from affirmed with costs.

Dubuc, J.—The facts of this case are fully and clearly set out in the elaborate and able judgment of my brother Killam, before whom the case was heard. And I concur in his conclusion. He finds that the laws in force in this Country prior to 1862, were the laws in force in England at the date of the charter of the Hudson's Bay Company, 1670, and the Statute of Frauds which was passed a few years afterwards had no operation in the Red River settlement. I think there can be no doubt on that point. He holds also that the Statute of Frauds was not brought in operation by the Ordinance of the Council of Assiniboia, passed on the 11th April, 1862. This does not appear to me quite so clear. The Ordinance is as follows: "In place of the laws of England of the date of the Hudson's Bay Company's charter, the laws of England of Her Majesty's accession, so far as they may be applicable to the colony, shall regulate the proceedings of the General Court, till some higher authority or this council shall have expressly provided either in whole or in part, to the contrary." He is of opinion that this brings into operation here only the procedure of the English courts and not the general law of England. The ordinance is no doubt susceptible of that construction, and its wording does certainly favor it. But I am inclined to think that this is not what was meant and intended by the Council of Assiniboia. The procedure in the General Court of the colony of Assiniboia, though of the simplest and most primitive kind, appeared to be adapted to the requirements of the country, where litigation and the conflicting rights of parties were determined by the court without the assistance of lawyers. It was so before, and was continued after, 1862, until the transfer in 1870 without an iota of change. There was no need for a change, and we can hardly conceive that the legislators of the time, the members of the Council of Assiniboia, would have even thought of introducing the bulk of the English procedure in the General Court which had not the officials and the machinery required to have said procedure put in operation. But it is only natural to suppose that they desired to be governed and have their rights determined under the modern laws existing in England at the time of Her Majesty's accession rather than according to the laws in operation two hundred years ago. However, if, as I think, this was their intention, I must confess that the wording of the ordinance is defective, and leads to the construction put upon it by my brother Killam. But, as the plaintiffs claim title through Norbert Nolin, and as the transactions of Norbert Nolin, in regard to the land in question, were made before 1862, it does not matter whether the Statute of Frauds was, or was not, brought into force by the ordinance of 1862. Though not prepared to disagree with my brother Killam, I wish to express my doubt on that point.

(His Lordship then discussed the evidence at length and intimated his conclusion to be "that the first bargain was rescinded and the parties put in the same position that they were before," the agreement was made.)

The decree dismissing the bill should be affirmed with costs.

Appeal dismissed with costs.

ABELL v. ALLAN.

(In Appeal.)

Garnishing order.—Right of attaching creditor to enforce judgment recovered by debtor against garnishee.

Held, (Affirming Killam, J.) That the service of a garnishee attaching order binds the debt due by the garnishee, but does not transfer to the plaintiff the securities held for the debt or give any right to take advantage of the position of the debtor in respect of such securities.

An execution creditor cannot, under a *fi. fa.* lands, sell the charge which the judgment debtor may have upon the lands of a third party by virtue of a registered judgment.

If the interest which a judgment debtor might acquire in such lands by docketing his judgment under the English statutes, could be sold under execution, it would only be after such lands had been "delivered in execution by virtue of a writ."

This was an appeal from the judgment reported 3 Man. L. R. 467. The facts sufficiently appear in that and the following judgments.

W. H. Culver and *G. G. Mills*, for defendant McAllen, referred to the following cases *Chatterton* v. *Watney*, 16 Ch. D. 384; 17 Ch. D. 260; 44 L. T. N. S. 391; *Coote on Mortgages*, 363; *Greaves* v. *Wilson*, 25 Beav. 434; *Dart on Vendors*, 470; *Bank of Elgin* v. *Hutchinson*, 13 Gr. 59; *Clare* v. *Wood*, 4 Hare, 81.

H. M. Howell, Q.C., for the plaintiff. Garnishment is a pure creation of statute, *Drake on Attachment*, 451, a.

S. C. Biggs, Q.C., for defendant Leach.

W. H. Culver, in reply. The judgment of McAllen against Brown and Patterson bound the judgment of Brown and Patterson against Allan, *Coote on Mortgages*, 54; *Anglo Italian Bank* v. *Davies*, 9 Ch. D. 275; *Exparte Evans, re Watkins*, 13 Ch. D. 252; *Smith* v. *Cowell*, 6 Q. B. D. 77; *Leaming* v. *Woon*, 7 Ont. App. R. 51.

McAllen claims on three grounds:—1. He issued garnishee proceedings and the money being in court, the court will take the matter in hand and give him his *locus standi*. 2. By virtue of the *fi. fa.* goods and lands issued by McAllen, against Brown and Patterson, the equitable interest they had against Allan became bound. 3. McAllen by virtue of his judgment against Brown and Patterson became entitled to all rights of Brown and Patterson against Allan under their registered judgment, *Tidd's Practice*, 131; *Archbold's Practice*, 528; *Day's C. L. P. Act*, 579. A mortgagee's right could not be sold under a *fi. fa.*, *Dempsey*, v. *Boulton*, 9 U. C. Q. B. 532.

H. M. Howell, Q.C. The Act 27 & 28 Vic. c. 112, is not in force here.

(*17th December, 1887.*)

TAYLOR, C.J.—This is a rehearing, at the instance of the defendant McAllen, of an order made by my brother Killam, dismissing an appeal from the report of the master. (See 3 Man. L. R. 467.)

I fully agree with the judgment of my learned brother upon all the points raised on the argument before him, and he has so clearly stated his reasons for coming to the conclusion he did, that it is unnecessary for me to repeat them.

On the rehearing a further argument for claiming priority on behalf of McAllen was put forward. It is argued, that The Brown, Paterson Company, having registered the judgment recovered by them against Allen, they had under Con. Stat. Man. c. 37, s. 83, an equitable mortgage upon the lands of Allen, and the writ of execution against lands issued by McAllen upon the judgment recovered by him against The Brown, Patterson Company, attached upon, and bound, their interest as equitable mortgagees, entitling him to stand in their place, and enforce the equitable mortgage or charge according to its priority.

Assuming for the present that this contention is correct, McAllen could only enforce the equitable charge according to its priority, and stand, as to the plaintiff and Leitch, in the order of priority which the registration of The Brown, Paterson Company judgment against Allan entitled that company to. The master in his report has stated incidentally, and in a sort of parenthetical way, that this judgment was registered on the 2nd of May, 1882.

It is said that this finding is conclusive, the plaintiff and Leitch not having appealed against that part of the report. That is not a sound argument. The plaintiff and Leitch had no reason for appealing, for whatever the master may have found as to that fact, he, as his conclusion on the whole matter, placed McAllen last, and that satisfied them. McAllen has appealed, and by his appeal, the whole question of the priority of his claim, and everything affecting that priority is open.

Now, upon what did the master find that the judgment was registered on the 2nd of May, 1882. There were before him two certificates from the registrar of the registration division, in one of which the registration is stated to have been upon that day, but in the other the date of registration is given as 2nd May, 1883. Which is correct? If the first, then the registration was prior to the registration of the plaintiff's judgment, if the second, then it was subsequent.

Then no claim upon The Brown, Paterson Company judgment was proved in the master's office. A claim upon it, was brought in by some persons claiming to be the assignees of the judgment, which was disallowed. Some evidence in support of that claim, and of the amount due under the judgment, was given on the attempt to prove that claim, which perhaps McAllen is at liberty to use, but he brought in no claim under the judgment. The evidence of Mr. Howell does not prove the claim properly. He was only the attorney-at-law of The Brown, Paterson Company, who recovered the judgment, and it would be quite consistent with his evidence, that before the date of the garnishing order, his clients had received the balance he speaks of as due to them, or have released Allan. Then, the master has nowhere allowed that judgment, or found that any thing is due upon it. The statement or account set out by him in the 3rd paragraph of his report is of the amount due on the judgment recovered against Allan, on the proceedings, under the garnishing order. The amount for which The Brown, Paterson Company recovered judgment against Allan is nowhere, that I can see, mentioned in the report.

Then, there is no evidence that the writ of execution issued by McAllen against The Brown, Paterson Company, was in force at the time when he proved his claim in this suit. The execution was issued on the 15th of November, 1882, so it expired on the 14th of November, 1883, unless renewed, and there is no evidence that it ever was so. The statement in the affidavit of Mr. McCarthy, "and said writs . . . . are still in full force and virtue," plainly refers to the writs mentioned in the same paragraph of his affidavit, namely those issued on the garnishing proceedings, and under the order directing Allan to pay the amount he owed The Brown, Paterson Company.

But even if duly kept alive, would this writ of execution bind the interest The Brown Paterson Company had under their registered judgment against Allan. The interest the Company acquired by the registration of the judgment, was acquired only by virtue of the statute, and they had only such interest as the statute gave them. The words of the statute as to what estates and interests in land are bound by a *fi. fa.* when placed in the sheriff's hands, and which may be sold under it, are no doubt very wide indeed. They cover "all or any lands, tenements and hereditaments of the judgment defendant . . . . . both equitable and legal, and all his estate, right, title and interest therein, of what nature and kind soever." The judgment by virtue of its registration, is to "bind and form a lien and charge on all the estate and interest aforesaid in the lands of the person against whom judgment is recovered," that is, it is a lien or charge upon all the estates and interests of the judgment debtor, which by the previous part of the section it is said, are bound by a *fi. fa.* in the hands of the sheriff, and which may be sold and conveyed thereunder. As Blake, C., expressed it in *Strong* v. *Lewis*, 1 Gr. 443. "The judgment creditor has something in the nature of a lien upon the whole estate of his debtor, which he may enforce against any particular portion at his election." The lien acquired by the registration of a judgment cannot be regarded as of a higher character than that of a vendor for unpaid purchase money. Such an interest, it was held by Mowat, V.C., in *Parke* v. *Riley*, 12 Gr. 69, could not be sold under execution. This judgment was afterwards affirmed by the Ontario Court of Appeal, 3 E. & A. 215.

Mr. Culver addressed a very able argument to the Court based upon the provisions of the Imperial Acts, 1 & 2 Vic. c. 110; 23 & 24 Vic. c. 38 and 27 & 28 Vic. c. 112, contending that everything had been done by McAllen under his judgment, which is equivalent to docketing in England, or necessary to comply with the requirements of these Acts, and so he is entitled to the benefit of their provisions.

Now it seems to me, that if these are to be considered as in force here, notwithstanding our own statutory provisions as to registration of judgments, the express language of the 27 & 28 Vic. c. 112, s. 1, puts an end to the contention. The words of that section are, "No judgment, statute, or recognizance to be entered up after the pasing of this Act shall affect any land (of whatever tenure), until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute or recognizance." What is meant by "actually delivered in execution," has been considered by the Courts in England in several cases.

They mean that the writ has been executed by the sheriff, *Re Cowbridge Railway Co.*, L. R. 5 Eq. 413; *Guest* v. *Cowbridge Railway Co.*, L. R. 6 Eq. 619. In the former case, the Court held, that a judgment creditor could not on petition get summary relief under section 4 of the Act, because the lands having been extended and delivered to a prior execution creditor, the sheriff was unable to deliver them to him. In *Guest* v. *Cowbridge Railway Co.*, V.C. Giffard speaking of the first section said, "It must mean that no judgment creditor can have any right of any kind until he has put the writ into the hands of the sheriff. But it goes further, I think, because,, although possibly putting the writ into the hands of the sheriff may give him a right to file a bill to remove a legal impediment, I do not think he has any right in the shape of a lien on the land until he has got a return from the sheriff. That is pretty clear, I think, from the 3rd section, which is, "Every writ or other process of execution, and every such judgment, statute, or recognizance by virtue of which any land shall have been actually delivered in execution shall be registered in the manner provided by 23 & 24 Vic. c. 38, and no other or prior registration of such judgment statute or recognizance, shall be, or be deemed necessary for any purpose. We know under old law that registration was necessary to give a lien."

In *Mildred* v. *Austin*, L. R. 8 Eq. 220, several judgment creditors who had obtained judgments since the 27 & 28 Vic. c.

112, and who had not issued writs had been made defendants, and the question of their right to redeem was discussed, and it was argued that they had no right to do so, because under the 27 & 28 Vic. c. 112, s. 1, a judgment creditor had no charge on the land of his debtor until the land had been taken in execution. Lord Romilly, M.R., held, that any of the judgment creditors who had acquired a charge on the land at the end of six months must be allowed to redeem. The decree as drawn up was as to them, in these words, "Upon such of the defendants the judgment creditors as shall, within six months after the day of the date hereof acquire a charge upon the premises comprised in the mortgage by issuing writs or a writ of execution on their judgments or judgment and placing the same in the hands of the sheriff, and procuring a rerurn from the sheriff on such writ or writs or any of them, paying, &c." See also *Backhouse* v. *Siddle*, 38 L. T. N. S. 487.

In *Re The Duke of Newcastle*, L. R. 8 Eq. 700, a judgment creditor having taken out a writ of execution against his debtor who had an equitable interest in a leasehold house, the sheriff took possession under the writ, and sold part of the debtor's effects. He then presented a petition for an order for the sale of the debtor's interest in the house, which was refused, because the debtor's interest being an equitable one it had not been, and could not be, actually delivered in execution. As the Master of the Rolls said, "The present application is met by the insuperable difficulty that the property must be actually delivered which in this case it has not been and cannot be."

The appeal in my judgment should be dismissed with costs.

Dubuc, J.—I concur in the judgment of the learned Chief Justice, and think the appeal should be dismissed. Under *Chatterton* v. *Watney*, 16 Ch. Div. 378, I think the garnishee order issued by McAllen attached all debts due by Allan to the Brown, Patterson Company, but did not transfer the security. By said attaching order, McAllen did stand in the place of the Brown, Patterson Company as creditors of Allan, but was not substituted for them as holders of liens or other securities upon the lands of Allen. If it were so, the creditor of a mortgagee, upon issuing a garnishee order, would have the legal estate of the mortgaged lands vested in him, and could sell the property under the power of sale contained in the mortgage. I am satisfied that the statute respecting attachment of debts never contemplated and cannot be held to go so far.

Appeal dismissed.

POLSON v. BURKE.

Costs.—Withdrawal of record.—Discontinuance.

At the trial, after the case was called but before it was opened, the plaintiff withdrew the record and immediately afterwards took out a rule to discontinue.

Held, 1. That the defendant was entitled to tax the costs of preparing for trial and fees paid to counsel.

2. A fee to one counsel of $40 was allowed.

G. Davis, for plaintiff.

N. F. Hagel, Q.C., for defendant.

(*25th November, 1887.*)

TAYLOR, C. J.—The plaintiff gave notice of trial and entered his record. On the case being called the witnesses were not present, and the court adjourned for a short time, in order that their attendance might be procured. When the time at which the trial was to be proceeded with arrived, the plaintiff withdrew the record, and almost immediately after took out a rule to discontinue the action. A question is now raised as to what costs the defendant can tax. I find nothing in the books of practice to guide me in determining the question, and must determine it according to the best of my own judgment unaided by authorities.

Had there been no withdrawal of the record, the defendant would have been entitled, on the plaintiff discontinuing his action after giving notice of trial, to tax the brief and counsel fee with the other costs of preparing for trial. I do not see how the fact of the plaintiff having withdrawn the record, before taking out the rule to discontinue, should deprive him of these costs. On the other hand it would be unfair to the plaintiff to tax to the defendant on the withdrawal of the record, costs of the day which include as I understand an allowance for counsel, and then tax to him under the rule to discontinue, with the brief a full counsel fee. But I do not understand that the master has done this. He has if I understand the matter aright, proceeded very much as if the withdrawal of the record and the discontinuance were all part of one transaction, putting an end to the action, and taxed the costs of preparing for trial and counsel fee accordingly and I think he has done right.

The case is one of ejectment, I have examined the notices of title attached to the record and read the examination of the defendant with an affidavit of the plaintiff's attorney. There seems to be no contest as to the plaintiff's title to the land, but the defendant says he was in possession under the person from whom the plaintiff bought as a yearly tenant, and has never received notice to quit. The plaintiff on the other hand says that by the agreement under which the defendant held the land he was to give up possession at once upon his lessor selling the land. The question in dispute is really the terms upon which the defendant occupied the land. It does not seem to me a case for two counsel fees being allowed and I think if a fee of $40 is taxed, it should be enough.

BRITTLEBANK v. GRAY-JONES.

GRAY-JONES, Claimant.

(In Appeal.)

Married woman.—Separate estate.—N. W. Territories.

Certain moneys were settled to the separate use of a married woman, subject to her power of appointment. She appointed to her own use, received the moneys and with them purchased certain cattle and farm stock, which with her assent were used by her husband upon a farm. In an interpleader issue between the married woman and the execution creditors of the husband,

Held, 1. That the goods belonged to the husband by virtue of the marriage, notwithstanding the provisions of 43 Vic. (D.) c. 25, ss. 57 to 62.

2. That the husband was not a trustee for the wife, there being no evidence of his having acted in that capacity.

J. S. Ewart, Q.C., for claimant. 1st. Apart altogether from statute, but under equitable doctrines goods purchased with money, part of separate estate, are separate estate, *Gore* v. *Knight,* 2 Vern. 534; *Jarman* v. *Wolloton,* 3 T. R. 618; *Darkin* v. *Darkin,* 17 Beav. 578; *Fitzgibbon* v. *Pike,* 6 L. R. (Ir.) C. L. 487; *Duncan* v. *Cashier,* L. R. 10 C. P. 554. Not necessary that there should be trustees. If none the Court will hold the husband a trustee, *Exparte Sibeth,* 14 Q. B. D. 417. If husband in possession of property once, separate estate presumption is against a gift to him, *Gamber* v. *Gamber,* 18 Penn. St. 363; *Keeney* v. *Good,* 21 Penn. St. 349; *Newlands* v. *Paynter,* 4 My. & Co. 408; *Rich* v. *Cockell,* 9 Ves. 369; *Parker* v. *Brooke,* 9 Ves. 583. Upon interpleader equitable estates may be relied upon, *Shingler* v. *Holt,* 7 H. & N. 65; *Duncan* v. *Cashier,* L. R. 10 C. P. 554; *Exparte Sibeth,* 14 Q. B. D. 417. 2nd. Under "The North-West Territories Act, 1880, 43 Vic. c. 25, ss. 57 to 62, a married woman may have separate real estate. She may own a farm and therefore necessarily stock to use it, *Ashworth* v. *Outram,* 5 Ch. D. 933; *Lovell* v. *Newton,* 4 C. P. D. 11. Onus on plaintiff to shew that chattels are not part of separate estate, *Gore* v. *Knight,* 2 Vern. 534.

W. H. Culver, for plaintiff. Statute will be construed strictly, *Wishart* v. *McManus*, 1 Man. L. R. 213; *Kramer* v. *Glass*, 10 U. C. C. P. 475. By act of marriage goods become property of husband, *Snell's Equity*, 344. Goods purchased with wife's money become property of husband, *Carne* v. *Brice*, 7 M. & W. 183. If wife purchase chattels with her separate money and hand them over to husband without any agreement, they are his, *Shirley* v. *Shirley*, 9 Paige. N. Y. 363. To hold husband a trustee there must be clear proof of agreement, *Re Whittaker*, 21 Ch. D. 657; *Hopkins* v. *Hopkins*, 7 Ont. R. 224; *Woodward* v. *Woodward*, 19 Jur. N. S. 882. If cattle bought to enable husband to carry on farm they are liable for his debts, *Lett* v. *Commercial Bank*, 24 U. C. Q. B. 558; *Haslingdon* v. *Gill*, 3 Doug. 413. As to separate trading, *Campbell* v. *Cole*, 7 Ont. R. 127; *Murray* v. *McCallum*, 8 Ont. App. 277; *Harrison* v. *Douglass*, 40 U. C. Q. B. 410; *Laporte* v. *Costick*, 31 L. T. N. S. 444; *Lumley* v. *Timons*, 28 L. T. N. S. 668; *Meakin* v. *Samson*, 28 U. C. C. P. 355; *Irwin* v. *Maughan*, 26 U. C. C. P. 455; *Foulds* v. *Curtelett*, 21 U. C. C. P. 368.

(17th December, 1887.)

TAYLOR, C.J., delivered the judgment of the court.(*a*)

This was an interpleader issue, the question to be decided being, the ownership of certain cattle and farm stock. These were seized under an execution issued by the plaintiffs, upon a judgment against the defendant, and the wife of the latter claimed them as her separate property. The issue was tried in a summary way by Stipendiary Magistrate Richardson, and decided in favor of the execution creditor. From his finding the personal representative of the claimant, who has died, appeals.

The claimant, who was married in England, had certain moneys secured by marriage settlement to her separate use. Over these moneys she had a power of appointment, which she exercised by appointing part of the fund to herself, to her separate use. Under this appointment the money was paid over to her by the trustees, and she brought it, or had it sent, to the North-West Territories. In 1883, she bought land there, upon

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Present: Taylor, C.J.; Killam, J. Wallbridge, C.J., was present at the argument, but died before judgment was given.

which she went to live in the spring of 1884. About that time, a man was sent to Ontario to purchase, with money of the claimant, and he did purchase, some horses, cows and pigs. One horse had been bought before, and cattle were bought afterwards, with funds supplied by the claimant. In May, 1884, the husband, who had up to that time been carrying on business in Winnipeg, came to live on the farm. The magistrate finds that he was the farmer, and carried on the farming operations, the horses, cattle and stock being used for the purposes of the farm.

The laws in force in the North-West Territories, seem to be the laws which existed in England on the 15th day of July, 1870, except so far as these have been varied, or added to, by statutes passed by The Dominion Parliament, or by Ordinances made by the Lieutenant-Governor, under the authority of Dominion Statutes, 32 & 33, Vic. c. 3, s. 5; 34 Vic. c. 16, s. 4; 38 Vic. c. 49, s. 6; 43 Vic. c. 25, ss. 8 & 9; and Order in Council of 26th June, 1883.

The Imperial Act, 33 & 34 Vic. c. 93, is not in force there, having been passed only on the 9th of August, 1870. The rights of married women as to separate property are governed by the provisions of 43 Vic. c. 25, ss. 57 to 62, D., which are the same as those of the earlier Act 38 Vic. c. 49, ss. 48 to 53, D. Under these Acts, it would seem to be only the real estate of a married woman, the rents, issues and profits of that real estate, also her wages and personal earnings, any acquisitions therefrom, and all proceeds or profits from any occupation or trade carried on by her separately from her husband, or derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, money or property, which are separate property free from the debts or disposition of her husband. The reference to personal property in the 58th section, and to chattels in the 62nd section, cannot be taken as extending the provisions of the Act to personal property generally. In those sections the reference is plainly to personal property or chattels for carrying on a separate trade or business, or in which wages or earnings have been invested. In construing such a statute, which is a departure from the common law, it is against principle and authority, to infringe any further than is necessary, for obtaining the full measure of relief or benefit, the Act was intended to give, *Kramer* v. *Glass*, 10 U. C. C. P. 475.

The claimant here, having money settled to her separate use, executed a power of appointment in her own favor, and received the money from the trustees. It was after that no longer under the protection of the settlement. She then brought it to the North-West Territories, investing it in cattle and farm stock which at once, upon being purchased by her, became by force of the marriage the property of her husband, *Milner* v. *Milnes*, 3 T. R. 631; *Carne* v. *Brice*, 7 M. & W. 183.

The cases cited, to the effect that the husband will, in equity, be regarded as a trustee for his wife of her separate estate, which may be found in his possession, do not seem to apply. The property here had ceased to be separate property, properly speaking. Besides there is nothing in the evidence to show that the husband had constituted himself a trustee for her. In the recent case of *Whittaker* v. *Whittaker*, 21 Ch. D., it was said by Bacon, V.C., at p. 662, there must be some proof furnished of a clear and unequivocal determination and intention of the husband to constitute himself a trustee. In *Darkin* v. *Darkin*, 17 Beav. 578, there was produced a book in which the husband acknowledged that the dividends and interest were received for the benefit of the wife, and so, as Lord Romilly said, there was evidence in writing of a trust.

The appeal should in my judgment be dismissed with costs. This conclusion may be come to without any feeling of regret, such as exists in many cases, that the property of the wife is being taken to pay the debt of the husband, for here there is not a particle of equity in favor of the wife's claim. The judgment under which the goods were seized, was one recovered for the price of lumber supplied to the husband for the purpose of building a house upon land, which was under the statute, the wife's separate estate.

In dismissing the appeal I must not be taken to approve of the reason given by the Stipendiary Magistrate for his judgment. The conclusion he arrived at, that the execution creditor was entitled to recover, was correct, but I cannot say that I concur in the reason he assigned for that finding.

Appeal dismissed.

NORTH WEST NAVIGATION CO. v. WALKER.

(IN APPEAL.)

Navigable rivers.—Obstructions.—Reasonable use.—Negligence.—Pleading.

The judgment of Taylor, J., 4 Man. L. R. 406, was affirmed upon appeal to the full court.

CANADIAN PACIFIC RAILWAY CO. v. CALGARY.

(IN APPEAL.)

Tax sale.—Injunction.—Appeal to Court of Revision.

An injunction may be granted to restrain a tax sale. The limits of such jurisdiction discussed.

It is not necessary that exemption from taxation should be raised before the Court of Revision, and the party wrongly assessed is not estopped by not taking that step.

This was an appeal from the North-West Territories, from a judgment allowing a demurrer to a claim for an injunction to restrain the sale of the plaintiff's lands for taxes. Much of the judgment relating to the right of appeal, &c., is not reported, the appellate power of the Manitoba Court being now altogether abolished. The judgment upon the two points mentioned in the head note discusses law applicable to this Province.

J. S. Ewart, Q.C., and *J. Stewart Tupper*, for plaintiffs.

G. Davis, and *E. P. Davis*, for defendants.

(*17th December, 1887.*)

KILLAM, J., delivered the judgment of the court. (*a*)

This court has several times granted injunctions to restrain sales of land for taxes; and it appears proper that this should be done where a sufficient equitable ground for such relief is shown. The principles upon which such injunctions are issued are quite as applicable in the North-West Territories as in this Province. No case of the kind has come before the court *in banc*, and I can find none reported as having come before the courts of the Province of Ontario, from whose statutes both our Municipal Act and the Municipal Ordinance of the North-West-Territories are so largely derived. Suits of this nature have, however, been very common in the United States, and in many of the States such injunctions are very freely granted, though in many others and in the Supreme Court of the United States a much more limited view of the jurisdiction is taken. The proper limits of the jurisdiction seem to be most correctly stated in the courts of the State of New York and in the Supreme Court of the United States.

In *Dows* v. *The City of Chicago*, 11 Wal. 108, Field, J., says, "There must be some threatened injury of this kind distinguishing it from a common trespass and bringing the case under some recognized head of equity jurisdiction, before the protective remedy of injunction can be invoked . . . . It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked." Similar language is used in *Hannewinkle* v. *Georgetown*, 15 Wal. 547; *Heywood* v. *The City of Buffalo*, 14 N. Y. 534; and *The Susquehanna Bank* v. *The Supervisors of Broome County*, 25 N.Y. 312. While in the *State Rail Road Tax Cases*, 2 Otto, 615, the Supreme Court appeared inclined to extend this jurisdiction more widely in the case of municipal than in that of State taxes, yet the same principles were applied by that court to cases of municipal taxes in *The Union Pacific R. Co.* v. *Cheyenne*, 113 U.S. 516; and *The City of Milwaukee* v. *Koeffler*, 116 U. S. 219.

(*a*) Present: Taylor, C.J., Killam, J. Wallbridge, C.J., was present on the argument, but died before judgment was given.

In *Heywood* v. *The City of Buffalo*, it was held that if the tax be illegal and void on the face of the records showing the assessment, and evidence of extrinsic facts be necessary to show the tax to be illegally imposed, then there is not such a cloud on title as calls for the interposition of a court of equity.

For the purposes of this case we are not required to go farther than the most limited view taken by these courts, but we are of opinion that within the limits thus laid down the jurisdiction can properly be exercised.

If in assigning the reason first given by the learned stipendiary magistrate for allowing the demurrer, he meant to express the opinion that any objection to this assessment on the ground of exemption must be made to the Court of Revision, and that the decision rendered by that court, or upon appeal from it, would be final upon this point, we cannot agree with him. The contrary view appears necessarily to follow from the cases of *Charleton* v. *Alway*, 11 A. & E. 993; *The Governors of Bristol* v. *Wait*, 1 A. & E. 264; and *Marshall* v. *Pitman*, 9 Bing. 595. The principle of these cases was thus applied under the similar Municipal Act of Ontario, in *The Municipality of Berlin* v. *Grange*, 1 U.C.E.& A.R. 279; *The Township of London* v. *The G. W. R. Co.*, 17 U. C. Q. B. 262; and *McCarrall* v. *Watkins*, 19 U. C. Q. B. 248, and this application was approved in the Supreme Court of Canada, by Richards, C.J., in *Nicholls* v. *Cumming*, 1 Sup. C. R. 411.

Appeal allowed with costs and
a new trial granted.

MULLIGAN v. WHITE.

(IN CHAMBERS.)

Commission.—Interogatories or viva voce.

Prima facie the examination upon a commission is to be upon interrogatories.

And where an order for a commission made no provision for the mode of examination, depositions which had been taken *viva voce* were quashed.

F. McKenzie, Q.C., for plaintiff.

C. H. Allen, for defendant.

(*2nd May, 1887.*)

KILLAM, J.—Without expressing an opinion whether the doctrine laid down in *Gordon* v. *Elliott*, 2 Ont. Ch. R. 471, that a commission to take evidence otherwise than upon interrogatories will only be granted upon consent of both parties, is to prevail here, I do not think that we can entirely throw aside the English practice that *prima facie* the examination is to be upon interrogatories. Properly the order should have provided for the mode of examination, but I do not think that the absence of such provision warranted the issue of the commission for an examination *viva voce*. The case of *Pole* v. *Rogers*, 3 Bing. N. C. 780, would seem to show that even the allowing of additional *viva voce* questions must be subject of special order.

The order will go that the commission and depositions taken under it be suppressed and that the defendant pay the costs of the application and examination.

FAIRBANKS v. DOUGLAS.

(In Equity.)

Injunction to restrain assumption of Municipal office.

A court of equity will not upon an injunction bill try the validity of an election to office of mayor or councillor, even though the custody of the books and papers of the municipality be in question; at all events, not unless there be others claiming the right to hold the offices.

The bill in this case alleged the holding of an election in the Town of Emerson for the election of mayor and certain councillors; that the defendant Douglas was a candidate for the mayoralty and the defendant Macdonald for the office of councilman for Ward 3; that no poll was held on the proper day in Ward 3; that upon a subsequent day a poll was improvised and the defendants declared elected; that the other five councillors had assumed, under sec. 26 of the Municipal Act (49 Vic. c. 52), to appoint the defendants to the same offices respectively; that the defendants and the other councillors now assumed to act as mayor and council, had assumed to discharge the plaintiff from the office of clerk and treasurer which he theretofore held and still claimed to hold, had appointed another person to fill those offices, and now threatened to open the vault and take possession of the books and papers of the municipality. The bill prayed an injunction restraining the defendants from further sitting and serving as mayor and councillor and from in any way interfering in the business or with the books, records, etc., of the town.

The plaintiff moved for an interim injunction in terms of the prayer of the bill.

S. C. Biggs, Q. C., for the motion.

H. M. Howell, Q.C., for the defendants.

(*2nd November, 1887.*)

Taylor, C. J.—Upon the best consideration I have been able to give this case, I have come to the conclusion that I should not grant the injunction prayed.

A court of equity cannot, at least no authority has been cited showing that it can, try the question of the validity of the election of the defendants to the offices they claim to hold. To do that, proceedings by *quo warranto* or by the course substituted by the Municipal Act must be resorted to. It was said by Harrison, C.J., in *Askew* v. *Manning*, 38 U. C. Q. B. p. 355: "It is a maxim of corporation law that if a municipal officer is *bona fide* in possession of the office his title shall not be tried otherwise than by information in the nature of *quo warranto*," and he cites numerous authorities in support of this. In one of these—*Reg*. v. *Mayor, &c. of Chester*, 2 Jur. N. S. 114, Lord Campbell, C. J., used the same language. Here, the defendants claim that they are entitled to sit as mayor and councillor by virtue of an election held under sec. 120 of the Municipal Act, 1886 and that they were elected or appointed by the other members of the council under sec. 206 of the same Act. It was argued very forcibly by the learned counsel for the plaintiff that these sections are wholly inapplicable to the circumstances of the election in this case, and it may be a question if they do apply but the defendants are sitting and acting by virtue of an election or an appointment under this section. Can I then say they are mere usurpers or acting under a mere colourable election and not acting under a color of right? In the case of *Reg*. v. *Mayor &c. of Chester*, Coleridge, J., said: "Whenever a person is *bona fide* elected by persons having a general authority and they proceeded *bona fide* on a matter which admits of question their election is not colorable, although there may be a mistake in the time or mode of their proceedings."

Dillon in his work *on Corporations*, at sec. 272, lays it down that the right of the mayor to preside over the meeting of the council is a franchise, and may be tested by information in the nature of a *quo warranto* but cannot be determined, at least ordinarily, unless by statutory provision, on a bill in chancery to enjoin, or in any other indirect or collateral proceeding. In *Th* *People* v. *Stevens*, 5 Hill, 616, it was held that where the title to an office is in dispute, the only mode of trying it is by information in the nature of a *quo warranto*.

The case of *The Manitoba and Southwestern Railway* v. *Schultz*, decided by the full court in 1882, was relied upon fo the plaintiffs, but in that case there was a board of director alleged to be illegally elected acting to the exclusion of any other board claiming to be properly chosen, and Dillon says (sec. 275), where there are two bodies, each of which claims to be the regular organized council, and is acting as such to the detriment of the public, the body rightfully entitled to act may have an injunction to restrain the other from interfering with them. But nothing of that kind is suggested here. The town has a council consisting of a mayor and six councillors, five councillors have been properly elected and the election of the mayor and one councillor is objected to, but there is no suggestion that there is any other duly elected mayor and councillor. Then the protection of the books, records and seal of the town said to be improperly taken possession of or threatened to be taken possession of by the defendants is said to be a ground for a court of equity interfering. Now here the books and records have been taken possession of and are in the custody of a town clerk who has been appointed by a by-law. The legality or regularity of that by-law is impeached but it has never been set aside, and there are here five duly elected councillors who are surely competent to look after the records of the town. But I do not think this is a ground for the court exercising jurisdiction. There is at all events authority against its being so. In *Mozley* v. *Alston*, 1 Phill. 790, a bill was filed, the prayer of which was that the defendants might be restrained by injunction from voting or acting as directors, and that they might be ordered to place the common seal and all the books, documents and property of the company in their custody etc., under the control of the lawful directors for the purposes of the company. Lord Chancellor Cottenham said: "I asked several times, in the course of the argument, whether there was any instance to be found of a bill seeking such relief as is here prayed, solely on the supposed invalidity of the title of the persons claiming to be corporate officers. The argument was interrupted by an interval of several days, yet no such case was produced. I did not xpect to hear of one, and the search, which I must presume has een made by counsel, satisfies me that no such case exists. This, therefore, is the first time that the court has been called pon to interpose under such circumstances. That alone would e sufficient to deter me from assuming a jurisdiction which, it ppears my predecessors have never exercised, and of which it would be difficult to assign the limits or the end. The whole case depends upon a pure question of law, whether the parties claiming to be directors do or do not lawfully fill that character. That is a preliminary question which must be decided before this court can make any decree, there are other modes open to the parties by which it may be decided, and I will not be the first to bring it into a court of equity."

In my judgment, the motion for an injunction should be refused with costs.

Injunction refused.

RE LEWIS.

Real Property Act.—Proof of Intestacy.—Power of personal representative.

A mortgagor of lands died intestate. His administrator released the equity of redemption to the mortgagee, who applied for a certificate of title. The land had not previously been brought under the provisions of the Act.

Held, 1. That production of letters of administration were not sufficient proof of the death intestate.

2. That the administrator had no power to release the equity of redemption, because the property had not theretofore been brought under the provisions of the Act, and even in case of land under the Act, a personal representative cannot convey until he has been registered as owner.

The following case was sent by the registrar-general under the Real Property Act, 1885, section 110, for the opinion of a judge of the Court of Queen's Bench.

"The lands in question were not subject to the provisions of the said Act until the filing of the application in this case. Edwin Allsop mortgaged the lands in question to the applicant by indenture dated the 5th day of April, 1886. The mortgagor died at St. Paul, Minnesota, and it would seem intestate, on the 21st day of December, 1886, and during the month of June, 1887, letters of administration of the personal estate and effects of the intestate were granted to Mr. R. Ross Sutherland of Winnipeg, a creditor for $50 of the estate, by the Surrogate Court of the Eastern Judicial District of the Province of Manitoba. By a quit claim deed dated the 28th day of October, 1887, the administrator, Mr. Sutherland, assumed to release the equity of redemption in the lands comprised in the mortgage above mentioned, and the applicant's title depends upon the effect and validity of the said deed of equity of redemption from the administrator to him. It appears doubtful and uncertain whether the grant of administration is proof of the intestacy of deceased, and whether the administrator could validly convey the real estate. The questions arising out of the above statement and upon which a decision is requested, are as follows: (1.) Is the production of letters of administration granted under the laws of Manitoba to be received by the examiner of titles as evidence of the death and of the intestacy of the deceased? (2.) Did the land in question vest in the administrator of the personal estate; or did they pass to the heirs of the intestate? (3.) Can the administrator validly convey the lands of the deceased without the concurrence of or notice to the heirs; and would the purchaser be protected by such a deed; or required to see to the application of the moneys?"

(*28th December, 1887.*)

TAYLOR, C. J.—In this matter three questions have been referred to me as a Judge of the Court of Queen's Bench, under section 110 of the Real Property Act, 1885. They have been submitted to me without any argument by counsel.

The first question is: Is the production of letters of administration granted under the law of Manitoba to be received by the examiner of titles as evidence of the death and intestacy of the deceased?

By section 50 of the Real Property Act, 1885, the registrar-general or examiner of titles in investigating the title, may receive and act upon any evidence which is now receivable in any court of this Province. The Act differs as to the evidence to be received and acted upon, from the Quieting Titles Act, 47

Vic. c. 23, s 9, and the similar Act in Ontario, 29 Vic., c. 25, s. 9, for by these Acts, the judge may not only receive and act upon evidence received by the Court, but on any evidence which the practice of English conveyancers authorizes to be received on an investigation of a title out of Court; or any other evidence whether the same is or is not receivable or sufficient in point of strict law, or according to the practice of English conveyancers, provided the same satisfies the judge of the truth of the facts intended to be made out thereby.

By conveyancers, letters of administration have, from constant practice, been much relied upon as evidence of intestacy, but implicit reliance cannot be placed on them. *Lee on Abs.*, 315; *Cov. Con. Evid.*, 277. But in Court, letters of administration are not evidence of the death of the intestate. *Taylor on Evid.*, (8 ed.) s. 1617; *Thompson* v. *Donaldson*, 3 Esp. 63, and in *Moons* v. *De Bernales*, 1 Russ. 307, Lord Gifford, M. R., said that the letters of administration were not even *prima facie* evidence of the death of the intestate. In *Davis* v. *Van Norman* 30 U. C. Q. B., 437, the probate of a will was held sufficient proof of the death of the testator, but it was so held under the wording of the Con. Stat. U. C., c. 16, s. 51. That section provided that in any action in which it would be necessary to produce and prove an original will, the party intending to give such proof might give the opposite party notice of his intention to give in evidence the probate of the will, and then, unless notice was given that the validity of the will was disputed, "such probate shall be sufficient evidence of such will and of its validity and contents." On that the Court held the probate evidence of the death of the testator, as Wilson, J., said, "We have no doubt its production is evidence of the testator's death for it is evidence of the validity of the will, as well as of the contents, and the will (if it can be called a will) has properly no validity in the maker's life time."

I can see no reason why letters of administration granted under the law of Manitoba should have any greater force as evidence than those granted under the laws of England or Ontario. By secs. 125 and 126 of 44 Vic., 3rd sess., c. 28, certain facts are to be proved upon application for letters of administration in the case of, respectively, an intestate resident in Manitoba at the time of his death, and of an intestate having no fixed place of abode in or residing out of Manitoba at the time of his death. And by section 127 the affidavit as to the matters to be proved under the two next preceding sections, "for the purpose of giving a particular court jurisdiction, shall be conclusive for the purpose of authorizing the exercise of such jurisdiction." It is only for the purpose of giving a particular court jurisdiction to grant the letters of administration that the affidavit is made conclusive. I find nothing in the statutes of Manitoba requiring stricter proof of the death of an intestate to be given than is required in England or Ontario. By the rules of the Prerogative Court in England the time of his death was required to form part of the oath for obtaining letters of administration. *Williams on Executors* 330 note (*h*); 390, note (*d*); 458, note (*s*). In *Cootes Prob. Prac.* pp. 64, 98, it is said, "In the oath the administrator must specify the day 'on' which the deceased died." Among the rules, orders and instructions for obtaining probates and letters of administration given in *Coote* on p. 384, rule 10 is, "every applicant for a first grant of probate or letters of administration must produce a certificate of the death or burial of the deceased, or give a reason to the satisfaction of one of the registrars for the non-production thereof." As to the Ontario practice it is stated in *Howell's Probate Prac.* 177, that the Courts of Probate before making a grant require that the death should be proved. The objection to letters of administration, as proof of death and intestacy is that they are obtained upon *ex parte* evidence furnished by interested parties. *Lee on Abs.* 315, and this applies to cases in Manitoba as much as to cases in England or Ontario.

The first question must therefore be answered in the negative.

The second and third questions are, "did the lands in question vest in the administrator of the personal estate, or did they pass to the heirs of the intestate?"

"Can the administrator validly convey the lands of the deceased without the concurrence of or notice to the heirs; and would the purchaser be protected by such a deed; or required to see to the application of the moneys?"

The 21st section of the Real Property Act, 1885, as amended by the 49 Vic., c. 28, s. 5, provides that after the commencement of this Act all lands in the Province of Manitoba, which, by the common law are regarded as real estate, shall go to the executor or administrator of any person or persons, dying seized or possessed thereof, as other personal estate, now passes to the personal representatives. Why, when the section was amended, the word "other" was left standing it is impossible to say. That section is very wide in its terms and would seem to vest all real estate in this Province in the personal representative on the death of the owner. But its effect is narrowed by section 97 as amended by 49 Vic. c. 28, s. 14, that 97th section saying "Whenever the owner of any lands, subject to the provisions of this Act, dies, such lands shall, subject to the provisions of this Act vest in the personal representative of the deceased owner, &c." Apparently, it is no longer as in the 21st section, "All lands in the Province of Manitoba," which go to the personal representative but only lands subject to the provisions of the Real Property Act, that is, as I understand it, lands which, on the application of the owner in his lifetime, the registrar-general had brought under the Act, or which must be brought under it, such as lands unpatented at the time of the passing of the Act, or held under a tax sale deed.

The land in question was not brought under the provisions of the Act during the life of the owner, the first steps to do so being taken by the applicant Lewis. Then in case of lands which having been brought under the provisions of the Act, vest in the personal representative the 97th section makes it necessary for him before dealing with the land to make application to be registered as owner. It is only after being so registered that he can deal with the lands. Even before the amendment of the 97th section, and when the 21st section stood to all appearance applicable to all lands in Manitoba, it was necessary under the 97th section for the personal representative to have the lands brought under the Act and procure himself to be registered as owner before dealing with them. This was referred to by my brother Dubuc in *Re Bannerman*, 2 Man. L. R. 377.

The execution by the administrator here of a quit claim deed releasing to a mortgagee the equity of redemption to the lands in question was a dealing with the lands and he had not before so dealing with them procured himself to be registered as owner.

The answer to the second and third questions, so far as they apply to the present case, must be that the land in question did not vest in the administrator and he could not legally convey them.

The following certificate was sent:

This case has not been argued before me by counsel. I have considered it and I am of opinion that the answer to the first question must be, that letters of administration should not be received by the examiner of titles as evidence of the death, and of the intestacy, of the deceased; also, that the answer to the second and third questions, so far as they apply to the present case, must be, that the lands in question did not vest in the administrator, and he could not legally convey them.

T. W. TAYLOR, C.J.

MOORE v. THE PROTESTANT SCHOOL DISTRICT OF BRADLEY, No. 369.

(IN EQUITY.)

Amendment of defendants' name after decree.—Mechanic's lien against school house.—Costs.

Plaintiff filed a mechanic's lien against lands of "The School Trustees for the Protestant School District of Bradley, No. 369, in the Province of Manitoba;" and filed a bill upon such lien against the corporation using the name above set out. The bill was taken *pro confesso*. After decree and sale a petition was filed by the plaintiff to amend the style of cause throughout.

Held, 1. That the amendment should be allowed.

2. That the land, including a public school erected upon it, was liable to charge and sale under a mechanic's lien.

3. That the plaintiff should pay the costs of the petition.

S. C. Biggs, Q.C., for plaintiff.

H. M. Howell, Q.C., for defendants.

(*26th November, 1887.*)

Dubuc, J.—This was a petition filed by the plaintiff praying that the bill of complaint and all subsequent proceedings in this suit should be amended by changing the name of the defendants' corporation from "The Protestant School District of Bradley, No. 369," to "The School Trustees for the Protestant School District of Bradley, No. 369, in the Province of Manitoba."

The bill was filed upon a mechanic's lien in which the name was properly set out. It had been taken *pro confesso* and the land had been sold under the decree.

The defendants knew that there was a lien duly filed and registered against them in their proper and correct name, and that proceedings were taken against them to enforce said lien.

After the bill was filed, Anderson, the secretary-treasurer of the defendants, gave an order to McKay, defendants' solicitor, for the payment of the plaintiff's claim. But it is now disputed whether the said order was for the claim only, or for the claim and costs incurred.

The order was not produced. This is brought up for the purpose of showing that the defendants have recognized the claim of the plaintiff, and acquiesced in the proceedings.

I find that in Ontario, misnomer in the designation of municipal corporations, when the defendants were not misled by the variances, was held, in almost every case to be immaterial. I may mention the cases of *Fisher* v. *The Municipal Council of Vaughan*, 10 U. C. Q. B. 492; *Brophy* v. *The Corporation of the Village of Gananoque*, 26 U. C. C. P. 290; *Farrel* v. *The Town Council of London*, 12 U. C. Q. B. 343; *The Corporation of Bruce* v. *Cromar*, 22 U. C. Q. B. 321; *Brock District Council* v. *Bowen*, 7 U. C. Q. B. 471; *The Trent and Frankford Road Co.* v. *Marshall*, 10 U. C. C. P. 329, when the variances were held not to be fatal.

In *McDonald* v. *Roger*, 9 Gr. 75, the judgment was entered as against "*Matthew Roger*," and the certificate for registration was of a judgment against "*Matthew Rogers*." The misnomer was held to be such a mistake as to vitiate the registration. But in that case the dispute was against a third party who had appeared before the master as a subsequent incumbrancer.

As, in this case, the defendants knew of the plaintiff's claim; they were aware that it was duly registered in their proper name; they were duly served with the bill of complaint and other proceedings, and they could not be and were not misled by the misnomer, I think that under the above cases I might be justified, if such were the application before me, in holding that the variance should not be considered fatal. But this would not afford to the plaintiff the relief he desires to obtain. He asks that the proceedings be amended so that they might contain the name of the defendants correctly designated. A very forcible reason is advanced for the amendment. The Mechanics' Lien Act provides that if proceedings are not instituted to realize the claim within a certain period, the lien shall cease to exist. So that if the plaintiff was declared out of court in this suit, his claim on the mechanic's lien would be absolutely gone.

The court has generally felt disposed, when the Statute of Limitations is in question, to allow proceedings to be amended so as to save the claim of the plaintiff from being barred by limitation. *Craufurd* v. *Cocks*, 6 Ex. 287; *Gapp* v. *Robinson*, 22 L. J. Ex. N. S. 434; *Carne* v. *Malins*, 6 Ex. 803; *Cowburn* v. *Wearing*, 9 Ex. 207. Under these authorities, I think the amendment should be allowed.

Another objection has been raised by the counsel for the defendants. He claims that the court will not allow the proceedings to be amended, when the plaintiff, on his own showing, is not entitled to the relief sought for. In this case, the property sold includes the lands of the defendants and the school house erected upon it. He contends that the court would not grant a decree against a school corporation for the sale of a school house, as the school house is held by the school trustees for public purposes.

In the United States, we find the doctrine laid down in several states of the Union that, when, upon a general judgment no execution can be levied upon public property of a municipal corporation, no execution to enforce a mechanic's lien claim can be levied upon similar property. *Phillips on Mechanics' Liens*, 302; *Williams* v. *Controllers*, 18 Penn. St. 275; *Wilson* v. *Commissioners*, 7 Watts & S. 197; *Bouton* v. *McDonough*, 84 Ill. 396. But this appears to depend on the statutes of the different States, and cannot be applicable here. The same principle does not appear to have been adopted in the English and Ontario courts.

In *Scott* v. *The Trustees of Union School in Burgess*, 19 U.C. Q. B. 28, it was held that the land conveyed to school trustees for the purpose of a school could not be sold under execution against them on a judgment obtained for the money due for building the school house. But the said land had been conveyed to the school trustees in trust for the use of the school, with a proviso that if the land ceased for the space of three years to be used for common school purposes, it was to revert to the grantor, his heirs and assigns.

Another point raised was that by 47 Vic. c. 37, s. 8, a method is provided for raising money for school purposes by the school trustees laying before the municipal council an estimate of the amount required, and the council levying said amount for the school district. This was argued to mean that the legislature intended that no execution should issue against school property. But the money to be levied by this method is stated in said section to be for the purpose of supplementing the legislative grant for school purposes. And there is nothing in the clause, or in any other clause, to prevent ordinary judgments for claims against the school district or the school trustees from being enforced by execution in the usual manner.

The statute, 48 Vic. c. 27, s. 23, says the trustees of each school district may sue and be sued, and shall generally have the same powers which any other body politic or corporate has or ought to have with regard to the purpose for which it is constituted. If they can be sued, judgments may be recovered against them, and they would become judgment debtors. As judgment debtors, I do not see how they could be excepted from section 102 of the Administration of Justice Act, 48 Vic. c. 17, which enacts that "a judgment creditor may, at one and the same time, have execution both against the goods and lands of the judgment debtor in *every case* of a judgment." The same was held by my brother Killam in *McArthur* v. *Dewar*, 3 Man. L. R. 81.

The Mechanics' Lien Act declares that every mechanic shall have for his work upon or in connection with any building, a lien or charge upon said building. It does not make any exception for school houses or other public buildings.

In order to decide that executions could not issue against the school house in this case, I would have to hold that the Mechanics' Lien Act does not apply to public buildings, and that school houses are excepted from the operation of section 102 of the Administration of Justice Act. I do not see my way clear to such a conclusion.

I think an order should go allowing the amendments prayed for in the petition.

But the mistake was made by the plaintiffs, and notwitstanding the letter of the 18th June, 1887, written to the secretary-treasurer of the defendants, I think the defendants who were only trustees for the people had some grounds for not consenting to have the proceedings thus amended, and they should have the costs of this application.

Amendment allowed as prayed for in petition.

TOUSSAINT v. THOMPSON.

(IN APPEAL.)

Demurrer overruled.—Costs, payment of, before pleading.

Demurrer to the declaration was overruled. Defendants appealed and again failed. They then applied for leave to plead, which was granted, but only upon condition of first paying the costs of the demurrer and appeal.

After judgment had been given as reported (4 Man. L. R., 499), counsel asked that defendants might have leave to plead to the declaration. Counsel for plaintiffs insisted that payment of costs of the demurrer and appeal should be made a condition precedent to their doing so.

J. S. Ewart, Q.C., and *C. P. Wilson*, for the plaintiffs.

J. B. McArthur, Q.C., and *N. F. Hagel, Q.C.*, for the defendants.

TAYLOR, C.J.—The English books of practice are silent as to the terms upon which a party will, after his demurrer has been overruled, be allowed to plead. In *Arch. Prac.*, 927, it is said, a party demurring, may in general, before argument, obtain leave of a judge to withdraw his demurrer on payment of costs. He certainly should not be in a better position, where he does not withdraw his demurrer before argument, but goes on to argue it, with the result of a decision against him. In *Underhill* v. *Hurney*, 3 Dowl. 495, where a defendant pleaded a frivolous demurrer so late in the term that there was not sufficient time to set it down for argument, and a motion was made to set it aside, the Court were about to make the rule absolute, but, upon an affidavit of merits, granted leave to withdraw the demurrer, pleading instanter, and paying the costs of the application and the demurrer. In *Griffith* v. *Ward*, 20 U. C. Q. B. 33, a new trial had been granted, and the defendant obtained an order to add a plea, which upon demurrer was held good. Next term, the plaintiff obtained a rule calling upon the defendant to show cause why the order under which the plea had been added should not be rescinded, or why he should not have leave to withdraw the demurrer and reply. The Court refused to rescind the order, but allowed the plaintiff to withdraw his demurrer, and reply to the plea on condition of paying costs.

Miller v. *Heath*, 7 Cow. 101, was a case in which a demurrer to a declaration had been overruled. A motion was made the following term, for leave to withdraw the demurrer, and plead on payment of costs. The motion was supported, by an affidavit of the attorney, that he had demurred in good faith, believing the declaration to be defective, and by the affidavit of one of the defendants, that they had as he was advised by counsel and believed, a good and substantial defence on the merits. The motion was granted on paying the costs of the demurrer and of the motion.

Counsel did not insist here, upon any affidavit of merits being made in support of the leave asked, but seemed willing that it should be granted on terms. We grant the defendants leave to plead to the declaration, upon the condition of paying costs.

DALY v. WHITE.

(In Chambers.)

Statutes.—Security for Costs.—Libel in Newspaper.—Action commenced before statute complied with.

A statute provided that defendants in actions of libel, might, under certain circumstances, obtain security for costs. Another clause provided that no person who had not complied with the provisions of this statute (as to registration, etc.,) should be entitled to the benefit of it.

Held. That compliance with the provision of the statute after action brought did not entitle the defendant to the benefit of the Act.

This was an action of libel based upon an article in a newspaper. At the date of the issue of the writ the defendants had not complied with the provisions of 50 Vic. (Man.) c. 23, ss. 1 and 10. After service of the writ the defendants having complied with these sections, obtained a summons for security for costs.

J. W. E. Darby, for plaintiff.

T. D. Cumberland, for defendant.

(*22nd November, 1887*.)

Dubuc, J.—The question is whether the defendants, who, by not having complied with the provisions of the Act respecting newspapers, when the action was commenced, were not then entitled to the benefit of the Act respecting the law of libel, can now claim said benefit by a later compliance with the requirements of the Act respecting newspapers.

The plaintiff commenced his action under certain circumstances and certain law regulating the matter. He knew that the Acts respecting the law of libel and respecting newspapers were in force. By making search he became aware that the defendants, through their neglecting to comply with the said Acts, were not in a position to claim the benefit thereof. Then the only law which could regul[illegible] his intended action of libel against the defendants was the law of libel as it existed before these Acts were passed, as if the said Acts had not been passed. The cause of action had arisen under said law, and it was the only law applicable to the case when he brought his action.

The defendants tried to alter their circumstances and their legal positions towards the plaintiff by a subsequent compliance with the Acts and they now claim the benefit thereof. Are they entitled to do so?

I have not been able to find any authority exactly in point. I must therefore apply the principles which may be deduced from analogous cases.

In *Hitchcock* v. *Way*, 6 A. & E. 943, the Court held that an Act passed while an action is pending could not alter the position of the parties, unless it should clearly so express. Lord Denman, C. J., said: "We are of opinion in general that the law, as it existed when the action was commenced, must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relations of the litigant parties to each other."

The same was held in *Chappell* v. *Purday*, 12 M. & W. 330. "I think," said Lord Abinger, C.B., in that case, "that the Legislature never intended, by an *ex post facto* law, to give one party to a suit already commenced, a great advantage over his adversary."

In the present case the Act was passed before the action was brought, but the defendants neglected to put themselves in a position to claim the benefit of its provisions.

I think the summons should be dismissed with costs.

Summons dismissed with costs.

Re SHOAL LAKE ELECTION.

(IN APPEAL.)

Preliminary objections.—Appeal from single judge.—Election petition without prayer.—Amendment.

An appeal will lie against the order of a single judge allowing preliminary objections, and thereupon dismissing a petition.

An election petition set forth certain corrupt practices and concluded as follows: "Your petitioner alleges that by reason of one or more of such acts or practices, the election of said C. E. H. was void."

Held (Overruling Dubuc, J., 4 Man. L. R. 270), 1. That these words constituted a sufficient prayer for relief.

2. That, if necessary, an amendment could be made.

This was an appeal from an order made upon a summons to consider certain preliminary objections. (See 4 Man. L. R. 270.)

The clauses of the statute, Con. Stat. Man. c. 4, principally relied upon by counsel were sections 7, 9, 11, 39, 40 and 93; and several sections in which "the court or a judge," was empowered to do certain things.

W. H. Culver and *G. G. Mills*, for respondent, objected (1) There is no appeal allowed by the Act from a judgment on preliminary objections. (2) Any appeal if there be one should be in the mode pointed out by section 93 of the Controverted Elections Act. See Con. Stat. Man. c. 4, s. 83. also sections 7, 9, 39 and 40. *Brassard* v. *Langevin*, 2 Sup. C. R. 319. The Supreme Court Act, 1875, s. 48, repealed ss. 33, 34 and 35 of Dominion Election Act of 1874 and substituted an appeal to the Supreme Court, the sections are almost *verbatim* with the Manitoba Act.

The right of appeal is not a matter of procedure, *Walterhouse* v. *Gilbert*, 15 Q. B. D. 571; *Attorney General* v. *Sillem*, 10 H. L. C. 704. Under an interpleader where the adjudication was summary there was no appeal, *Dodds* v. *Shepherd*, 1 Ex. D. 75; *Turner* v. *Bridgett*, 9 Q. B. D. 55; *Expte Streeter*, *Re Morris*, 19 Ch. D. 222; *Sandback Charity Trustees* v. *North Stafford Ry. Co.*, 3 Q. B. D. 1.

J. B. McArthur, Q.C., for petitioner. There is a distinction between the Dominion Acts and those in Manitoba. See 49 Vic. c. 29, ss. 7, 9, 12. Rule 46 delegates powers of the court to the judge in Chambers. This puts the proceeding on the same footing as any cause. It is the "judge" who is to grant orders for examination, and other orders, and if there be no appeal on these preliminary objections there is none on any such order. Objection of non-compliance with section 93 of the Controverted Elections Act cannot now be taken, *Steele* v. *Ramsay*, 3 Man. L. R. 305.

W. H. Culver in reply, cited *McLean* v. *Clydesdale Banking Co.*, 9 App. Ca. 95, and *Steele* v. *McKinlay*, 5 App. Ca. 754.

No rule is made allowing appeal, *Wheeler* v. *Gibbs*, 3 Sup. C. R. 374, shows setting down in time a condition precedent.

(*1st June, 1887.*)

WALLBRIDGE, C.J.—This appeal is brought to reverse the order of a judge allowing preliminary objections. It is not made within the eight days allowed by section 93 of c. 4, Con. Stat. Man., which is the Act respecting the trial of controverted elections. The $100 directed by that section to be deposited with the prothonotary has not been so deposited. I am of opinion that no appeal could be had against preliminary objections under that section, because under that section the prothonotary is directed to set the matter of the petition down for hearing, the presiding judge is directed to appoint an early day for the hearing the same, and the party appealing is directed within three days, or such further time as the court upon application may allow to give the parties affected by such appeal or their respective attorneys or agents by whom such parties are represented in the trial of the petition, notice that the matter of the petition has been set down to be heard.

This section amongst other requirements directs that the notice of the appeal shall be given to the attornies or agents of the parties represented at the trial. It appears to me that an appeal is only allowed under this 93rd section, when there has been a trial, besides, no appeal under this section has in fact been made. But, the petitioner now contends that he has the ordinary right to appeal against the decision of the judge, that he would have in any proceeding in a suit in court.

The 7th section of this Act declares that the Court of Queen's Bench shall have jurisdiction over election petitions and over all proceedings to be had in relation thereto, that is in relation to the proceeding, in an election petition.

No appeal is provided for in express words in the Act, against the decision of the judge upon preliminary objections.

No particular form of words are necessary to give the judge a personal jurisdiction, but the whole scope of the Act must be considered in order to ascertain its meaning. The 93rd section does provide for an appeal in certain cases, before either party shall be precluded, if we hold there should be no appeal we conclude the petitioner just as effectually as if his cause had been heard and determined on its merits. I am satisfied this could not be the meaning of the Act. Before a decision is final in the cases provided for in the 93rd section an appeal is allowed and viewing the statute in its general bearing and scope an appeal, I think, was intended and in this as in other cases when a judge, a member of the court hears a preliminary matter, the Court in Banc has a superintending power which, I think can be properly exercised on hearing this appeal. *Sandback Charity Trustees* v. *North Stafford Railway*, 3 Q. B. D. 1.

By section 29, preliminary objections are such as may be urged against the petitioner or against the sureties or against any further proceedings therein.

Section 40, the judge shall then hear the parties upon such objections and grounds, and shall decide the same in a summary way.

Judge, means any one of the judges of the Court of Queen's Bench.

By section 7, the court has a jurisdiction over all proceedings n relation to the petitioner, and this includes proceedings both y petitioner and respondent. Section 5 declares, what an elecion petition is. Section 9 declares, the judge in term or in acation, shall have the same powers, jurisdiction and authority s the Court of Queen's Bench sitting in Term.

TAYLOR, J.—There is in my opinion no appeal on preliminary bjections under the 93rd section of The Controverted Elections ct. Although that section, as it stands in our Act, has not the ords found in the 48th section of The Supreme Court Act, "the decision of the judge who has tried such petition," yet the section requires the prothonotary, upon an appeal, "to set the matter of the said petition down for hearing," and further requires the party appealing to give "to the other parties affected by the appeal, or their respective attorneys or agents by whom such parties are represented, on the trial of the said petition, notice that the matter of the said petition has been so set down to be heard in appeal." The words "are represented," are most probably a misprint for "were represented," as in the 48th section of the Supreme Court Act. These provisions of the statute, and indeed the whole wording of the section, show that an appeal from the decision of a judge at a trial of a petition is what that section was intended to provide for.

Whether an appeal lies under the general powers given the Court to deal with election matters, is a question upon which it is, from the wording of the Act, difficult to come to a quite satisfactory conclusion. No doubt there could not, in the case of a petition respecting an election to the House of Commons, have been, before the passing of the 42nd Vic. c. 39, D., an appeal, upon preliminary objections, to the Supreme Court, but then there could be no appeal in any case to that Court from the decision of an inferior court, unless expressly given by statute.

The present case is quite different, as it is not the case of an appeal from one court to another, but to the full court from a single judge of the same court. The cases collected by my brother Killam, certainly support the view that there may be an appeal, and I agree with the conclusion the Chief Justice and he have arrived at. I do so the more readily because, to hold there can be no appeal, is to leave the decision of questions, often of great importance and difficulty, dependent entirely upon the opinion of a single judge.

The 42nd Vic. c. 39, D., allowing an appeal to the Supreme Court in the case of preliminary objections, the allowance of which shall have been final and conclusive and put an end to the petition, or which would, if allowed, have been final and conclusive, and have put an end to the petition, having been passed the next session after the decision in *Brassard* v. *Langevin*, 2 Sup. C. R. 319, is an indication that, at all events in the opinion of the Dominion Parliament, the allowance of such an appeal is a proper thing.

KILLAM, J., agreed with the view that there could be no appeal under the 93rd section of the Act, but thought that by the 7th, 8th, 9th, and 11th sections the petition was placed in the position of a cause pending before the court, and that the authority given to a judge to hear and determine questions raised on preliminary objections must be deemed to be given subject to the usual jurisdiction of the court to review an interlocutory order in a cause in court. He cited and discussed the remarks of Parke, B., in *Witham* v. *Lynch*, 1 Ex. 399 and *Teggin* v. *Longford*, 2 Dowl. N. S. 468; 10 M. & W. 557, of Alderson, C.B., in *Teggin* v. *Longford*, 10 M. & W. 557, and in *Graham* v. *Connell*, 1 L. M. & P. 438, and of Harrison, C. J., in *Kidd* v. *O'Connor*, 43 U. C. Q. B. 197, 198, and the judgments in *Brown* v. *Bamford*, 9 M. & W. 42; *Morris* v. *Manesty*, 7 Q. B. 674; *Fowler* v. *Churchill*, 11 M. & W. 57; *Robinson* v. *Burbidge*, 1 L. M. & P. 94; *Wearing* v. *Smith*, 10 Jur. 924, 9 Q. B. 1024; and *Clark* v. *Smith*, 3 C. B. 982.

The appeal was subsequently argued, and judgment given.

(*1st June, 1887.*)

KILLAM, J., delivered the judgment of the court (*a*).

Although the word "allege" is not a word of prayer, yet in this case I think it is so. The party calls himself a petitioner; he states facts, which if true are sufficient in law to render the election void, and he then sets out the legal consequence.

As he is bringing this forward as his petition to the court having power to give the relief, it is impossible to understand the last paragraph in any other way than as a demand or request for the relief to which he is entitled. I think that the petition then itself complies, though in a very clumsy way, with the rules of the court, except perhaps the one giving a form which is not imperative.

Then, upon the question of amendment, the statute says nothing as to prayer. It defines the words "election petition." That the word "petition" thus used implies that there must be a prayer, though otherwise it is understood to be a request, does not seem to have been considered by the framers of our rules or those from which they are taken, as they have seen fit to specify that there shall

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(*a*) *Present:* Wallbridge, C. J.; Taylor, Killam, JJ.

be a prayer. If then the objection is under the rules, as those rules are subject to the provision in the 47th, that no proceeding shall be defeated by any formal objection, and as the objection would be clearly one merely of form in this case where the party states what is the relief he considers himself entitled to, the petition should not be dismissed for the informality. To dismiss it would be to allow the proceeding to be defeated by the formal objection. As the statute does not say that the petition is necessarily to be dismissed in case any preliminary objection be found valid, and as the judge in chambers is given the powers of the court, I think that an amendment could have been made. As the learned judge did not exercise any discretion with regard to amendment it could now be done if necessary. The objection is clearly not one going to the root of the petition. If the objection had not been made the parties could have gone on with all proceedings as if under a perfect petition, and none would have been null on account of the want of a prayer.

The amendment does not, however, appear necessary, but a rule should go reversing the order as to the first and second objections, and overruling those objections.

As, however, the petition does not comply with the rules strictly in the form of prayer, and as the clumsy way in which the prayer is attempted to be made is such as to have misled the respondent into making the objection, no costs should be allowed, either of the appeal or of the argument of these preliminary objections.

We do not determine anything with regard to any preliminary objections except the first and second. The others are to be considered again in chambers if brought forward.

Appeal allowed without costs.

REG. v. MORGAN.

Criminal Law.—Conviction.—Statutory exceptions not negatived.

A statute declared certain acts committed by "any person not legally empowered . . . . without the owner's permission," to be unlawful.

A conviction stating the acts done but not negativing power and permission was *Held*, Bad.

J. Rowe, for defendant.

R. R. Sutherland, for the magistrate.

(*24th November, 1887.*)

DUBUC, J.—This is a rule *nisi* to quash a conviction brought by *certiorari*. The defendant was convicted under the C. S. M. c. 18, s. 1, which reads as follows:

"It shall be unlawful for any person, not legally empowered, to catch and use, or detain, or cause to be caught and used, or detained on his premises or elsewhere, any animal being the property of another person, without the owner's permission for so doing, and any person so offending, &c., &c."

In the conviction the offence is stated to be "that the defendant did unlawfully catch, use and detain an animal, to wit: one mare colt, of the property of one Thomas Foulds, contrary to the form of the statute in such case made and provided."

The rule asks that the conviction be quashed on several grounds, the first of which being that "the said conviction discloses no offence, inasmuch as it does not allege that the defendant was not legally empowered to catch, use and detain the animal, nor does it allege that he had not the owner's permission to do so."

Was it necessary in this case to allege those two exemptions or qualifications pointed out by the statutes? The law appears to be very clear on the subject. *Paley on Convictions*, p. 240, says: "One of the most essential points to be carefully attended to in describing the offence charged is, that every exemption, excuse or qualification, which accompanies the description of the offence in the enacting clause, be distinctly and positively negatived."

It does not mean that all exceptions or qualifications contained in a proviso added to the clause, or in a subsequent clause, should be negatived. The rule is that all circumstances of exemption and modification, whether applying to the offence or to the person, that are either originally introduced into or incorporated by reference with the enacting clause, must be distinctly enumerated and negatived. *Paley on Convictions*, 244; *R.* v. *Jukes*, 8 T. R. 542; *R.* v. *Jarvis*, 1 Burr. 148. But such matters of excuse as are given by other distinct clauses or provisoes, need not be specifically set out or negatived. *Paley on Convictions*, 244; *R.* v. *Pratten*, 6 T. R. 559; *Gill* v. *Scrivens*, 7 T. R. 27.

In *R.* v. *Jarvis*, as reported in a note found in 1 East, p. 643, Lord Mansfield says at p. 646: "It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but when exceptions are in the enacting part of a law, it must appear that the defendant does not fall within any of them." At the following page, Denison, J., says: "There is a known distinction between exceptions in a statute by way of proviso, which need not be set forth, and those in the purview of the Act."

In this case the offence is created by statute. The statute does not state that it shall be unlawful to catch, use or detain an animal being the property of another person, but to catch, use or detain it without being legally empowered to do so, and without the owner's permission. And to catch, use and detain an animal, as stated in the conviction, is no offence at all in itself, because the defendant might have been legally empowered to do so, or he might have had the owner's permission. The two exemptions or qualifications are not in a proviso, but within the purview of the Act and in the enacting clause.

The statement that the act was done "contrary to the form of the statute in such case made and provided," is not sufficient, it should have stated that the defendant had not the particular qualifications mentioned in the statute. *R.* v. *Hill*, 2 Ld. Raym., 1415.

Without considering the other grounds, I think the conviction is bad because it discloses no offence, and it should be quashed.

Conviction quashed.

HOOPER v. COOMBS.

(IN APPEAL.)

Illegal contract.—Sale of whiskey to be taken to N. W. T.

Plaintiff agreed to put on board the cars at B. a certain quantity of whiskey and potatoes; he knew that it was the defendant's intention to ship them through the North-West Territories without obtaining a permit, and that to do so was illegal; and he assisted in the transaction by concealing the whiskey among the potatoes. The defendants agreed to pay the price of the articles when placed on the cars.

In an action for the price of the goods—

Held, 1. That even if the plaintiff had agreed to ship the goods, their acceptance by the railway was a performance of the contract, although the railway might have subsequently refused to give a shipping bill.

2. A contract lawful in itself is illegal, if it be entered into with the object that the law should be violated.

3. As a matter of public policy courts should refuse to enforce contracts projected in violation or intended violation of Dominion legislation, although that legislation may not apply to the Province in which the contract is made or is sought to be enforced (*Hooper* v. *Coombs*, 4 Man. L. R. 35 not followed).

4. The fact that the illegal purpose was not carried out is immaterial.

5. The contract for the potatoes and whiskey being an entire contract the plaintiff could not recover for the potatoes, the defendants not having accepted or received them.

After the decision upon the demurrer (4 Man. L. R. 35) the parties went to trial. The plaintiff amended by adding a count to the effect that it was agreed that the plaintiff should deliver upon the cars the goods in question, in consideration whereof the defendants promised to pay, etc. The defendants added a plea similar to the plea before demurred to with the addition of the words "The plaintiff, knowing said illegal purpose, did pack and secure said liquors in and amongst said potatoes, and did conceal the same, and place the same so concealed in said car, and did actually exert himself in such acts for the purpose and with the design of so evading and enabling the defendant to evade the law."

Taylor, C.J., before whom the case was tried found the added count to have been proved. The defendant now moved to set aside the verdict and to enter a non-suit or verdict for the defendant.

N. F. [illegible]*el, Q. C.*, for defendant. The contract is illegal. The plaintiff's evidence showed concealment to evade the law of the N.W.T. *Ritchie* v. *Smith*, 6 C. B. 462; *Benjamin on Sales*, § 506, *et seq.*; *Hodgson* v. *Temple*, 5 Taunt. 181; *Waymell* v. *Reed*, 5 T. R. 599; *Egerton* v. *Earl Brownlow*, 4 H. L. C. 1.

J. S. Ewart, Q.C., for plaintiff, cited *Hart* v. *Bush*, 27 L. J. Q.B. 271; *Smith* v. *Hudson*, 34 L.J.Q.B. 145. Word "ship" does not include getting bill of lading, *Leggett on Bills of Lading*, 13, 14, 17; *Caldwell* v. *Ball*, 1 T. R. 205, 213; *Inglis* v. *Stock*, 10 App. Ca. 271; *Browne* v. *Hare*, 4 H. & N. 821; *Brown on Carriers*, 494; *Sewell* v. *Burdick*, 10 App. Ca. 74. If illegality not carried out, the rights of parties remain as if there was no illegality, *Bone* v. *Ekless*, 5 H. & N. 924; *Hastelow* v. *Jackson*, 8 B. & C. 221; *Taylor* v. *Bowers*, 1 Q. B. D. 291; *Wilson* v. *Strugnell*, 7 Q. B. D. 548. Plaintiff could not be prosecuted for concealing the liquor. Prohibition was only against bringing it into N. W. T. or having it in possession there, *Biggs* v. *Lawrence*, 3 T. R. 456; *Waymell* v. *Reed*, 5 T. R. 599; *Pellecat* v. *Angell*, 2 C. M. & R. 311. The plea is not sufficient, or if so, it is not proved.

N. F. Hagel, Q.C., in reply. It is immoral to conceal a wrong, or to break a statutory law. *Adams* v. *Couillard*, 102 Mass. 167; *Ely* v. *Webster*, 102 Mass. 304; *Webster* v. *Munger*, 74 Mass. 587; *Cannan* v. *Bryce*, 3 B. & A. 179. Property did not pass, and plaintiff was only entitled to damages for breach.

(*9th January, 1888.*)

KILLAM, J.—In my opinion, the findings of the learned chief justice upon the facts, cannot be disturbed. It was quite open to him upon the evidence to find that the plaintiff had only to deliver the goods on board a car at Brandon, and did so deliver them.

If the contract had been that the plaintiff should ship the goods, as he first secured their acceptance by the railway company, though he was afterwards refused a shipping bill, it appears to me that he would have performed it on his part. For this view the case of *Brown* v. *Hare*, 3 H. & N. 483, 4 H. & N. 821, is sufficient authority if any be required.

The only defence, then, which requires much consideration is that of the illegality of the contract.

It is very clear that "a contract lawful in itself is illegal, if it be entered into with the object that the law shall be violated" *Waugh* v. *Morris*, L. R. 8 Q. B. 207; or if it is made for the very object of satisfying an illegal purpose *Pearce* v. *Brooks*, L. R. 1 Ex. 213; or if it is made for the express purpose of a violation of the law, *McKinnell* v. *Robinson*, 3 M. & W. 434. These are only different forms of expression of the same principle which is fully supported also by *Ritchie* v. *Smith*, 6 C. B. 462; *Langton* v. *Hughes*, 1 M. & S. 593; *Clugas* v. *Penaluna*, 4 T.R. 466; *Gas Light and Coke Co.* v. *Turner*, 5 Bing. N. C. 666; *Webb* v. *Brooke*, 3 Taunt. 6; *Jennings* v. *Throgmorton*, Ry. & Moo. 251; *Girardy* v. *Richardson*, 1 Esp. 13; *Smith* v. *White*, L. R. 1 Eq. 626; *Lightfoot* v. *Tenant*, 1 B. & P. 551; *Appleton* v. *Campbell*, 2 C. & P. 346; *Fisher* v. *Bridges*, 3 E. & B. 642; *Cannan* v. *Bryce*, 3 B. & Ald. 179; *Bone* v. *Ekless*, 5 H. & N. 925; *Taylor* v. *Chester*, L. R. 4 Q. B. 309; *Pellecat* v. *Angell*, 2 C. M. & R. 311; *Webster* v. *Munger*, 74 Mass. 574; *DeGroot* v. *VanDuzer*, 20 Wend. 392; *Hamilton* v. *Grainger*, 5 H. & N. 40.

In *Cnnan* v. *Bryce*, 3 B. & H. 179, Abbott, C. J., said: "As the statute has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the making such payment is not an unlawful act; and if it be unlawful for one man to pay how can it be lawful for another man to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied and for the express purpose of accomplishing that object."

In *McKinnell* v. *Robinson*, 3 M. & W. 434, Lord Abinger, C.B., said: "As the plea states that the money for which the action is brought was lent for the purpose of illegally playing and gaming therewith at the illegal game of hazard, this money cannot be recovered back on the principle, not for the first time laid down, but fully stated in *Cannan* v. *Bryce*."

In *Pearce* v. *Brooks*, 1 L. R. Ex. 213, Pollock, C. B., said: "Since the case of *Cannan* v. *Bryce*, cited by Lord Abinger in delivering the judgment of this court in *McKinnell* v. *Robinson*, and followed by the case in which it was so cited, I have always considered it as settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose cannot recover the price of the thing so supplied." And Martin, B., said: "As to the case of *Cannan* v. *Bryce*, I have a strong impression that it has been questioned to this extent that if money is lent, but the lender merely handing it over to the absolute control of the borrower, although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering; but no doubt if it were a part of the contract that the money should be so applied, the contract would be illegal." And Pollock, C. B., then added: "If a person lends money but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied."

In *DeGroot* v. *VanDuzer*, 20 Wend. 392, Walworth, Ch., said: "The illegality of the contract consists in the intention to aid in a violation of the law or of a principle of public policy or to commit a breach of good morals, and not in the actual consummation of the offence. Those cases in which an independent contract has been held void from a mere knowledge of the fact of the illegal end in view proceed upon the ground that the party having such knowledge intended to aid the illegal object at the time he made the contract, and where ever, therefore, that intention is shown no doubt can exist as to the propriety of applying the rule that no action or claim can be sustained in a court of justice founded upon such a contract."

In *Ritchie* v. *Smith*, 6 C. B. 462, Wilde, C. J., said: "It is said that though the agreement was entered into for the purpose of enabling Newman to do this, it did not of necessity follow that he would be guilty of any infraction of the law; but I think it is impossible to look at this agreement without seeing that the parties contemplated the doing of an illegal thing in the infraction of a law enacted for the safety and protection of the public morals."

In *Langton* v. *Hughes*, 1 M. & S. 593, Lord Ellenborough, C. J., said: "It has been truly said that the case does not state that the drugs were in fact mixed, but they were sold with a view to be mixed, and the court would not give sanction to a contract entered into against the policy of the law."

And in *Gas Light and Coke Co.* v. *Turner*, 5 Bing. N.C. 666, Tindal, C. J., said (referring to *Lightfoot* v. *Tenant*, 1 B. & P. 551): "In that case it was argued that after the goods were once delivered to the buyer, he might change his mind and use them in a different manner from that which was originally designed, as here, that the tenant might put the premises to a use different from that for which they were let; but it was answered that the entering into the contract with the illegal intent tainted the contract with illegality and prevented an action from lying thereon."

Thus it clearly appears that if the statute intended to be violated had been one in force in Manitoba, the plaintiff could not recover in Manitoba for the goods so supplied. But such is not the case, and it is just here that all difficulty arises.

By Statute 43 Vic. c. 25, s. 90, D, "Intoxicating liquors and other intoxicants are prohibited to be manufactured, compounded or made in the said North-West Territories, except by special permission of the Governor-in-Council, or to be imported or brought into the same from any province of Canada or elsewhere, or to be sold, exchanged, traded or bartered or had in possession, except by special permission in writing of the Lieutenant-Governor of the said Territories." By the 3rd sub-section a penalty is imposed on any person importing, selling, etc., or in whose possession or on whose premises intoxicating liquors are. And by the 4th sub-section any such liquors so imported, sold, etc., are made liable to seizure.

It has been held that a party selling goods abroad, with the knowledge that the purchaser intends to smuggle them into England may recover their price even in England. *Holman* v. *Johnson*, Cowp. 341; *Pellecat* v. *Angell*, 2 C. M. & R. 311. But if the seller does any act in assisting the buyer to smuggle the goods or participates in any way in the smuggling transaction he is not allowed to recover in England. *Biggs* v. *Lawrence*, 3 T. R. 454; *Clugas* v. *Penaluna*, 4 T. R. 466; *Waymell* v. *Reed*, 5 T. R. 599. So in *Webster* v. *Munger*, 74 Mass. 584, it was held that a party could not recover in Massachusetts for liquors sold and delivered in Connecticut with knowledge that the buyer intended to take them to Massachusetts and sell them there contrary to law and for the purpose of enabling him to carry out that design. Though on the other hand, in *McIntyre* v. *Parks*, 3 Met. 207, the plaintiff recovered for the price of lottery tickets sold in New York to a party who intended, to the knowledge of the plaintiff, to resell them in Massachusetts contrary to law. In *Webster* v. *Munger*, this case was distinguished as being a case of mere knowledge of an illegal intention, without further evidence of intention to assist in the illegal design. The difference is the same as between *Holman* v. *Johnson* and *Waymell* v. *Reid.*

However, it appears from some expressions in *Biggs* v. *Lawrence*, *Clugas* v. *Penaluna*, *Waymell* v. *Reed* and *Pellecat* v. *Angell*, as well as from *Hedley* v. *Lapage*, Holt 392; *Richardson* v. *Maine Ins. Co.*, 6 Mass. 112; *Parker* v. *Jones*, 13 Mass. 176; *Planche* v. *Fletcher*, 1 Doug. 251; *Ludlow* v. *Van Rensselaer*, 1 Johns, 94; *Wharton on the Conflict of Laws*, sec. 486; *Story on the Conflict of Laws*, sec. 257; *Parsons on Contracts*, vol. 2, p. 754; *Westlake on Private International Law*, sec. 202, that one country does not regard the revenue laws of another so far as to consider a contract void because made for the purpose of evading or violating them, and some of these authorities apply the same principle to restrictive trade laws as distinguished from mere revenue laws.

Mr. Parsons, in his work on Contracts, vol. 2, p. 754, says of this rule, "The rule began in England when the courts could not have adopted any other without breaking up the very profitable business which their merchants found in carrying on with different nations a trade prohibited by the laws of those nations. The same rule seems to be extended to such things as making false or depreciated coin or counterfeit paper money for use in a foreign country, although it is, perhaps, not so well settled. But it is obvious that arguments might be used against this extension of the rule which would not apply, at least with equal force, to the rule itself." Besides, the rule in any shape has been disapproved by such high authorities on contracts and international law, as Pothier, Story, Kent, Chitty, Mohl and Bar. *Wharton on* *the Conflict of Laws*, sec. 484; *Story on the Conflict of Laws*, sec. 257.

I can find but one authority for any further extension of such a rule, and that is a decision of the late Chief Justice Harrison, of Ontario, in *The Bank of Toronto* v. *McDougall*, 28 U. C. C. P. 345. The action was brought on a bill of exchange accepted by the defendant, payable to the plaintiff, and it was pleaded that the bill was drawn and accepted for the purpose of carrying on gambling contracts or speculations on the rise and fall of the price of pork in Chicago, which contracts were by the laws of Illinois illegal and void, and that the plaintiff took the bill with notice of the illegal purpose. The plaintiff demurred to the plea and the demurrer was argued before Harrison, C. J., sitting alone in vacation. He then said: "It is not at all clear that mere knowledge that the loan of money or sale of goods in this country to be used for an illegal purpose is void because of the mere knowledge that the money or goods were to be so used. But to hold that the contract is void in this country where the purpose is only illegal by the laws of the foreign country would be to carry the law much further than it has yet been carried so far as I can judge from the investigation of the cases which I have been able to find since the argument of the case." He then referred to two cases, *Quarrier* v. *Colston*, 1 Phil. 147, and *King* v. *Kemp*, 8 L. T. N. S. 255, as the only ones having a direct bearing on the point, and added, "Neither of these cases is a decision on the point now before me. In the absence of authority I hold the plea good." This judgment is open to the suggestion that the chief justice was treating the case as one of an advance of money by the bank upon a bill drawn and accepted by the parties for the purpose of obtaining money from the bank for their illegal design, as distinguished from a case of an advance of money by the drawer to the acceptor upon the bill that the acceptor might so use it, and a transfer to the bank with notice of the facts. Knowledge of an illegal intention is frequently treated only as evidence of a participation in the illegal design. See *Lightfoot* v. *Tenant*, 1 B. & P. 551; *Webster* v. *Munger*, 74 Mass. 584; *Pearce* v. *Brooks*, L. R. 1 Ex. 213. If it is to be treated only as evidence and the original transaction was to be regarded only as one between the bank on the one part and the acceptor and maker of the bill on the other, then there should probably be more than mere knowledge averred in the plea. Or it may have been a distinction such as is found in the smuggling cases between mere knowledge of an intention by the defendant to break the foreign law, and further acts of participation in furthering the design that the chief justice had in view. The meagre report of the reasons for the conclusion make the case a very unsatisfactory authority, even if directly in point.

On the other hand, there is an American authority largely favoring a contrary view. In *Hayden* v. *Davis*, 8 Myers Fed. Decisions, 183, an action was brought upon a bond made in Michigan to indemnify the plaintiff against liability on drafts drawn by him in Michigan on and accepted by a bank in Buffalo, N. Y., and given on account of a portion of the purchase-price of certain shares of stock of a Michigan bank. Under a statute of the State of New York, it was illegal for a bank in that State to accept a bill not payable on demand and without interest, and this bill was payable at a future date. It was held that though the bond was executed in Michigan, as it related to a transaction which was void by the laws of the State of New York, it was illegal and the plaintiff could not recover upon it in Michigan.

The whole question is one of public policy, and it appears to me that it is and should be as much the policy of the courts of this Province to refuse to enforce contracts projected in violation or intended violation of Acts of the Dominion Parliament, as of those of the Provincial Legislature. This court is charged with the enforcement of Dominion laws as much as with that of Provincial laws. If it were illegal to take liquors from one part of Manitoba to another can it be doubted, upon the authorities to which I have referred, that such a contract for the supply of goods where they could lawfully be sold, for the purpose of a violation of the law in taking them to the part where they were prohibited, would be held void? If this were a court having jurisdiction over the whole Dominion, would it not equally be considered against the policy of the law administered by the court to enforce this contract? It so appears to me, and I must confess that I cannot see that it makes any difference that this court is established by the Provincial Legislature and has jurisdiction only within this Province.

The statute in question is clearly, under the authority of *Russell* v. *The Queen*, 7 App. Cas. 829, one which only the Dominion Parliament could enact for any part of Canada. It is enacted on grounds of public policy and for the protection of the public morals. It is not enacted in hostility to other portions of Canada, as the revenue laws and trade laws to which I have referred were with reference to foreign countries. On the contrary, it is a law of Canada that no intoxicating liquors shall be taken into the North-West Territories. That law must be considered to be enacted in the interests of Canada generally, and to it the plaintiff and the defendants owe obedience. It appears to me that no court in Canada should so far countenance disobedience of that law, as to offer its assistance in enforcing a contract made for the purpose of its breach.

Such appears to have been the decision of this court in *Todd* v. *Ripstein*, in Michaelmas Term, 1883, but on account of the want of any full record of the exact nature of that case, I have not taken it as a clear authority.

On the other hand, the late learned chief justice of this court, in giving judgment upon the demurrer in this cause (4 Man. L. R. 35), expressed a different opinion. He then considered the fifth plea to constitute no defence, and on that ground he overruled the demurrer to the replication.

With all respect, I am compelled to differ from the view which he then expressed, and if it were now open to us to do so, I should also think that we should hold the replication to constitute no answer to the plea. The statute is absolute in its prohibition. It is equally a violation to take intoxicating liquors into the North-West, whether the purpose be to carry them through to British Columbia or to leave them in the North-West. It is left for parties desiring to take them through to obtain the permission of the Lieutenant-Governor, when he can impose such conditions as he may see fit to ensure their not being left in the Territories. Here the plea asserts that the arrangement was to take them in without permission of the Lieutenant-Governor, and though this does not appear to have been distinctly mentioned between the parties, a jury would be justified, and I feel bound, to draw the inference that such was the understanding of the parties.

It was urged that, as the illegal purpose had not been carried out, the plaintiff could recover, and for this view were cited several cases. These, however, show that money or property paid or transferred upon an illegal contract may be recovered back before execution of the contract, the party paying or transferring disaffirming the contract, but that nothing can be recovered upon the contract. Here the plaintiff seeks to recover under the contract.

Then it is said that the plaintiff should at least recover for the potatoes. The plea shows that the contract was a single one for delivery of potatoes and liquors, which could only be satisfied by delivering both, and that the delivery was under such a contract. The evidence also shows this clearly, and also that the potatoes were to be delivered, partially at least, for the purpose of concealing the liquors. Indeed, a jury would be warranted, and I feel justified, in drawing from the evidence the inference that the potatoes were purchased for the purpose merely of carrying out the design with reference to the liquors.

Upon this point of the unity of the contract and that the illegal purpose taints the whole, I would refer only to *Brown* v. *Brown*, 34 Barb. 533; *Andrews* v. *Frye*, 104 Mass., 234; and *Bligh* v. *James*, 88 Mass., 570. In the latter case an action was brought to recover for a barrel of gin and several empty barrels. The gin was sold to the defendant in Rhode Island, and the barrels were also shipped there to the defendant filled with liquors sold to him in that State. The plaintiff knew that the defendant sold liquors in Massachusetts contrary to the law. It was his habit to make a separate charge for the barrels and receive them back empty at that price. It was held that under the law of Massachusetts the plaintiff could not recover for either the gin or the barrels. There was a special statute, not in force when the cause of action in *Webster* v. *Munger* arose, under which the seller could not recover for the liquors if he sold with reasonable ground of belief that the buyer intended to sell in Massachusetts against the law, and it was held that the illegality of the transaction made the claim for the barrels also void. The cases cited for the plaintiff on this point are clearly distinguishable.

The new plea does not differ materially from the old one. The new allegations added are only of facts showing that in delivering the goods the plaintiff sought to aid in the illegal design, and thus serve only as evidence to establish more clearly the allegations of the original plea as to the nature of the arrangement and that the delivery was, as the plea impliedly alleged, in pursuance of such arrangement. No objection was, however, made to the adding of the plea except by general demurrer under which the objection to it of the addition of mere matters of evidence would not lie. I understand that these new pleadings come before us upon the demurrers, and in my opinion the demurrer to the added plea should be over-ruled and that to the special replication to that plea allowed. Nothing appears to have been said at the trial about joinders of issue upon the new pleadings, but I presume that the parties intended to join issue both on the plea and replication and to join in demurrer, and to complete the record these joinders should be added. Indeed, it is exceedingly unsatisfactory to have the record brought before the court in this way. If there is not sufficient time at the trial to draw out new pleadings allowed to be added or to amend pleadings, it should be done as soon as possible, especially when the case is to come before the court upon the new pleadings.

In my opinion, besides the judgment for the defendants upon the demurrers, the rule should go for setting aside the verdict for the plaintiff, and the entry of a nonsuit and the plaintiff should pay the costs of the application.

DUBUC, J.—The statute prohibits the importation of intoxicating liquors into any part of the N. W. T., and the shipping the liquors to Dunmore, in the N. W. T., was clearly importing them into the said Territories, and was a violation of the statute. It is sworn that the consignee intended to take them there and reship them to Donald. But as he was to receive them at Canmore, there was no obligation on him to send them further, and nothing to prevent him from disposing of them right there, or at any other place in the N- W. T. Canmore may be near the dividing line between the N. W. T. and British Columbia, but it makes no difference whether it was the first or last station in the N.W. Territories. A person cannot be excused from violating the clear provisions of a positive law by alleging an intention to do afterwards something else which might remove the violation. All offenders against the law would be too glad to avail themselves of such an excuse. The liquors were sold, packed, put on board the cars, and consigned to be directly imported into the N.

W. T. with the manifest intention of having them imported there first. This was a contravention of the law. The ultimate intention to take them afterwards and to export them elsewhere cannot be accepted as sufficient to remove the contravention already incurred. The plaintiff knew all this, and was a party to the illegal transactions.

In *Waymell* v. *Reed*, 5 T. R. 589, a vendor of goods abroad having packed them up by order of the buyer in a particular manner for smuggling them into England, and knowing at the time that they were to be smuggled, although he was not concerned in the risk of importing them, was held not entitled to recover.

In *Cannan* v. *Bryce*, 3 B. & Ald., 179, it was held that money lent for the express purpose of settling losses on illegal stock jobbing transactions, to which the lender was no party, cannot be recovered back.

The court held in *Ritchie* v. *Smith*, 6 C. B., 462, that an agreement, the object of which is to enable the unlicensed person to sell excisable liquors contrary to a statute is on this ground illegal.

It was argued that the importing of liquors into the N. W. T. violates no law of this province. But the N. W. Territories are part of our country; the statute prohibiting the importation of liquors into those territories was passed by the Parliament of our country, having jurisdiction over this Province as well.

Several authorities applicable to cases of this kind are found in the United States reports. The case of *Hayden* v. *Davis*, 8 Myers Fed. Dec. 446, pointed out to me by my brother Killam, is pretty analogous to this one. In that case the circuit court of Michigan held that where a bond is executed in Michigan, but relates to a New York transaction which is void by the law of that State, the bond is void. The law intended to be contravened there was the law of an independent State, while in this case, it is a statute of our own Dominion.

On the above grounds and authorities, I think the verdict should be set aside and a nonsuit entered.

TAYLOR, C.J., concurred.

Verdict for plaintiff set aside and nonsuit entered.

McEDWARDS v. THE OGILVIE MILLING COMPANY.

[In Appeal].

Master and servant.—Dismissal for disobedience.—Construction of orders.—Non-suit.—Scintilla of evidence.

Defendants wrote to their servant, the plaintiff, on 28th November: "You must have your weekly warehouse reports made out on time for the Tuesday morning's mail. No excuse will be accepted for non-fulfillment of this rule." During the following month the reports were not sent regularly, and on the 30th December, instead of sending the report due on that day, the plaintiff wrote saying he would send it by next mail. He was thereupon dismissed. The excuse for non-compliance was that he was too busy; but he was unable satisfactorily to show in what way his time had been employed, and it appeared he was authorized to employ all the assistance he required.

At the trial the judge told the jury that it was for them to say whether the order was intended to be peremptory, and the jury found a verdict for the plaintiff for $90.

Held, That the charge was erroneous; that it was not for the jury to construe the language of the order and to find whether it meant exactly what it literally said; that the order was positive and clear; that no sufficient excuse for non-compliance had been given; and although there might have been some evidence to go to the jury, yet that there was none upon which a verdict could be supported, and a non-suit was entered.

N. F. Hagel, Q.C., for plaintiff.

J. S. Ewart, Q.C., and *C. P. Wilson*, for defendants.

(*9th January, 1888.*)

Dubuc, J.—The action is for wrongful dismissal. The defendants pleaded that they were justified in dismissing the plaintiff on account of misconduct in wilfully disobeying their reasonable orders, in neglecting his duties, and for drunkenness.

The plaintiff was hired to the defendants as grain buyer for nine months, from the 1st September, 1884, at $90 a month, and he was sent to take charge of the defendant's elevator at Manitou. The dismissal took place on the 2nd January, 1885. At the trial before my brother Killam, the jury gave a verdict in favor of the plaintiff for one month's salary, $90.

At a prior trial, the jury had found a verdict for plaintiff for $450, being for the five months' balance of his term. The said verdict was set aside and a new trial ordered (*a*). The new trial was had with the result above stated.

The defendants now move to have this last verdict set aside, and a nonsuit entered on leave reserved, or for a new trial.

The plaintiff was instructed to send to the defendants' office in Winnipeg, weekly statements of the amount of wheat bought, of the amount shipped, and of the flour sold. The plaintiff sent his statement, but not regularly and promptly according to instructions.

(The learned judge then referred to the evidence as to drunkenness of the plaintiff, which is not necessary to this report.)

One of the serious complaints against him was also his failure to send regularly his weekly reports.

The plaintiff tried to excuse himself for not sending his reports promptly on the ground that he was too busy; but the defendants would not accept the excuse. On the 28th November, Hastings wrote him a letter in which he said: "You must have your weekly warehouse reports made out in time for the Tuesday morning's mail. No excuse will be accepted for non-fulfilment of this rule."

It does not appear that he was again intoxicated; but his weekly reports were not sent regularly in December. His last failure was for the week ending on the 27th December. The report should have been sent in on Tuesday, the 30th December, He wrote on that day, saying he had not his statement ready but would send it by next mail.

On the 2nd January, McGaw went again to Manitou and finally dismissed the plaintiff.

The question is whether the defendants were justified in dismissing the plaintiff, or whether the dismissal was wrongful.

As for drunkenness, they seem to have condoned the misconduct by allowing him to remain in their service after the notice of dismissal of the 6th December, and it does not appear that there was after that date any ground of complaint on that account; but as to the plaintiff's negligence and disobedience

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(*a*) See 4 Man. L. R. 1.

in sending the weekly reports, after having been notified on the 28th November that no excuse would be received for not sending them on time, and by his failing to send them on time in December, I think there was justifiable ground for his dismissal.

The plaintiff's excuse that he was too busy, cannot, under the circumstances, be accepted as sufficient. He was authorized to employ help, and he had been made aware how important it was for the defendants to receive said reports promptly.

In *Pearce* v. *Foster*, 17 Q. B. D. 536, the plaintiff had been hired to the defendants as clerk for ten years. Before the ten years were over the defendants discovered that the plaintiff had for many years previously been engaged in speculating in "differences" upon the stock exchange to the extent of many hundreds of thousands of pounds, and they thereupon dismissed him from their service. The court held that the dismissal was justifiable. The same doctrine had been adopted before in *Spain* v. *Arnott*, 2 Stark. 256.

In *Turner* v. *Mason*, 14 M. & W. 112, a housemaid having insisted, contrary to her master's order, upon visiting her sick and dying mother, was dismissed, and the dismissal was held justifiable by the court.

It was contended on the part of the plaintiff that the question of negligence is one to be left to the jury, and the jury having found in favor of the plaintiff there cannot be a nonsuit.

But the doctrine formerly upheld that a scintilla of evidence to go to the jury was sufficient to prevent a judge from granting a nonsuit, has, for a number of years, ceased to be followed.

In *Jewell* v. *Parr*, 13 C.B. 916, Maule, J., said: "It is now settled that the question for the judge is not, whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established."

Erle, J., said in *Wheelton* v. *Hardisty*, 8 E. & B. 232: "The question is whether the proof was such that the jury could reasonably come to the conclusion that the issue was proved."

The same was held by Williams, J., in *Toomey* v. *The London & Brighton Ry. Co.* 3 C. B. N. S. 146, when he said: "It is not enough to say that there was some evidence. A scintilla of evidence clearly would not justify the judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was negligence."

In *Foster* v. *Taylor*, 31 U. C. Q. B. 24, leave having been reserved to move for a nonsuit on the whole case, it was held that though upon the plaintiff's evidence the mere omission, unexplained, might afford some evidence of fraudulent intent, yet this was repelled by the undisputed facts sworn to by the defendant, and the rule was made absolute for a nonsuit.

In *Giblin* v. *McMullen*, 17 W. R. 447, it was held that it is the duty of the court, in matter of nonsuit, to do what the judge ought to have done at the trial. Formerly, it used to be held that if there were what was called a scintilla of evidence in support of the case, the judge was bound to leave it to the jury; but a course of recent decisions has established a more reasonable rule, viz., that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

In this case, the plaintiff's misconduct in disobeying his masters' positive order was clearly established. It was not for the jury to construe the letter of the 28th November, and to find whether it meant what it literally said. I think the order contained in said letter is positive and absolute and it admits of no other construction.

I think the verdict should be set aside, and the motion for a nonsuit allowed with costs.

TAYLOR, C. J.—In my opinion, the learned judge at the trial erred in leaving to the jury the construction to be put upon the letter from the defendants to the plaintiff of 28th November, which contained an order to send the weekly statement on a certain day in each week, and informed him that no excuse would be accepted for the non-fulfilment of this rule. That was a peremptory order, expressed in the most unmistakeable terms. The evidence shows that it was received by the plaintiff, and he offers no excuse for disobedience to it, except one which is no excuse at all, namely, that he was too busy, or in other words, that he chose to employ his time in attending to something else, and disregarded the positive order given him. Even if the having other work to do, which he chose to do in preference to obeying this order, could be supposed an excuse for his disobedience, the evidence shows that when he neglected to send the statement, for the failure of sending which he was discharged, he had not other work which could have occupied his time.

I cannot, after a careful consideration of this case, come to any other conclusion than that the verdict in favor of the plaintiff was not one such as reasonable men might have come to. The learned judge should, in my judgment, have withdrawn the case from the jury and entered a nonsuit. The evidence of the plaintiff himself showed that a good and sufficient ground of dismissal for disobedience existed, and that being so he cannot maintain the present action.

WALLBRIDGE, C.J., who had heard the argument, died before judgment was delivered.

Verdict for plaintiff set aside and nonsuit entered.

ATTORNEY-GENERAL (DOM.) v. RYAN.

Interlocutory injunction.—Dominion lands.—Railway trespasses.—Continuing trespass.—Public convenience.—Ministers of the Crown.—Disallowance.

1. The Sovereign is always to be deemed in possession of the lands of the Crown. There can be no occupant of the Queen's possession.

2. Possession sufficient to enable a plaintiff to maintain an action of trespass, is the possession which is the test of the right to be treated as a plaintiff in possession for the purposes of an injunction suit or motion.

3. An Act of the Province having been disallowed, the Order of the Governor-General-in-Council was published in the *Manitoba Gazette*, and

following it was also published a certificate of the Governor-General of the day upon which the Act was received. *Held*, That such publication was a sufficient signification of the disallowance.

4. "The Public Works Act." 48 Vic. c. 6, furnishes no authority to take compulsorily Dominion lands for the purpose of any Provincial work, for the statute does not expressly relate to the lands of the Crown; and no authority under the words "the *enlargement or improvement* of any public work" to take lands for the purpose of changing ten miles of grade into sixty-three miles of railway.

5. When railway companies or individuals exceed their statutory powers in dealing with other people's property, and an injunction is sought to restrain their actions, no question of damage or public convenience is raised.

6. A continuing trespass amounting to permanent appropriation of the property of another, is, of itself a sufficiently serious injury to warrant interference by injunction.

7. Upon motion for an interlocutory injunction where the right is doubtful, the court will consider on what side is the balance of convenience; to which party is injury more likely to be done by its interference or refusal to interfere; in what way the parties can best, after the final determination of their rights, be kept in, or restored to, their position at the time of the motion.

8. The Court has jurisdiction to grant an injunction, at the instance of the Attorney-General for the Dominion, in respect of trespass upon Crown lands.

9. Persons claiming exemption from the law must show some reason or authority leaving no doubt upon the subject. And where two persons who were Provincial Ministers of the Crown directed a trespass upon lands of the Dominion and showed no such exemption, an injunction issued against them.

This was a motion for an interim injunction to restrain further trespass upon the lands of Her Majesty, represented by the Attorney-General of the Dominion.

The defendants were Ryan and Haney, the contractors for the building of the road, the Hon. John Norquay, the Railway Commissioner, and the Hon D. H. Wilson, the Commissioner of Public Works, both Ministers of the Crown and the Attorney-General for Manitoba. The information was similar to the bill in ***Browning*** v. ***Ryan***, 4 Man. L. R. 486, and was filed under similar circumstances, save that in the present case the grade for the railway had been completed before proceedings were commenced.

The lands in question were acquired by the Dominion upon the transfer of this Province and the North-West Territories. They had been squatted upon by various persons, but none of these had acquired any right of occupation or purchase as against the Crown. They had assumed, however, to convey, for the purposes of the defendants, strips across the lands occupied by them respectively.

It appeared that the construction of the railway was commenced on the 2nd July, 1886; that about ten miles of the road was completed prior to the disallowance of the Red River Valley Railway Act, on 23rd July. The other important facts appear in the judgment and the former case of *Browning* v. *Ryan*, 4 Man. L. R. 486.

J. A. M. Aikins, Q.C., S. C. Biggs, Q.C., John S. Ewart, Q.C., and *W. H. Culver*, for the informant. The present is a proper case for injunction, for although the value of the property is small, the damage is continuing and the trespass under a claim of right. The principle cases are *Lowndes* v. *Bettle*, 10 Jur. N. S. 226; *Deere* v. *Guest*, 1 My. & Cr. 521; *Perks* v. *Wycombe*, 3 Giff. 662; *Carnochan* v. *Norwich Ry.*, 26 Beav. 171; *Wood* v. *Charing Cross Ry.*, 33 Beav. 290; *Goodson* v. *Richardson*, L.R. 9 Ch. 223; *Allgood* v. *Merrybent Ry.*, 33 Ch. Div. 571; *Allen* v. *Martin*, L. R. 20 Eq. 462; *Wright* v. *Turner*, 10 Gr. 567; *Macauley* v. *Roberts*, 13 Gr. 566; *Masson* v. *Grand Junction*, 26 Gr. 286; *Stanford* v. *Hurlstone*, L. R. 9 Ch. App. 118.

The public interest will not be considered as against individual right, *Allgood* v. *Merrybent Ry.*, 33 Ch. Div. 575; *Atty. Gen.* v. *Colney Hatch*, L. R. 4 Ch. 152; *Spokes* v. *Banbury*, L. R. 1 Eq. 47; *Atty. Gen.* v. *Birmingham*, 16 Jur. 113; *Atty. Gen.* v. *Cambridge*, L. R 6 Eq. 297; L. R. 4 Ch. 71; *Broadbent* v. *Imperial Gas Co.*, 7 D. M. & G. 436, 461.

A probability of right sufficient for an interim injunction, *Tonson* v. *Walker*, 3 Sw. 679; *G. W. R.* v. *Birmingham*, 2 Ph. 597; *Bloxam* v. *Metropolitan*, L. R. 3 Ch. App. 337; *Fullwood* v. *Fullwood*, 9 Ch. D. 176.

As to the right to restrain Ministers of the Crown, *Rogers* v. *Dutt*, 13 Moo. P. C. 236; *Feather* v. *The Queen*, 6 B. & S. 294. A governor of a colony enjoys no immunity from the ordinary application of the law, *Cameron* v. *Kyte*, 3 Knapp. P. C. 341; *Hill* v. *Bigge*, 3 Moo. P. C. 476; *Lord Bellemont's Case*, 2 Salk. 625; *Mostyn* v. *Fabrigas*, Cowp. 161; *Rafael* v. *Verelst*, 2 W. Bl. 983; *Cases of Gen. Picton and Gov. Wall* cited. *Broom's Com. Law*, 647; *Sutherland* v. *Murray*, 1 T.

R. 538 (n.); *Mott* v. *Pennsylvania*, 30 Penn. St. 1; nor do Poor Law Commissioners *Frewin* v. *Lewis*, 4 My. & Cr. 249; nor Commissioners of Woods and Forests. *Rankin* v. *Huskisson*, 4 Sim. 14; Government superintendent of slides not exempt, *Baker* v. *Ranney*, 12 Gr. 228; The Lords of the Treasury may be enjoined from paying money improperly, *Ellis* v. *Earl Grey*, 6 Sim. 214, although they cannot be sued for monies in their hands, *Kinloch* v. *Secretary of State*, 7 App. Ca. 619; the messengers of the Crown executing an illegal warrant have no immunity, *Leach* v. *Money*, 3 Burr. 1742; W. Bla. 555. *Broom's Com. L.* 525; *Entick* v. *Carrington*,, 2 Wils. 275, *Broom's Com. L.* 558, 595; nor is an under Secretary, *Wilkes* v. *Wood*, *Broom's Com. L.* 548, 555; nor the Speaker of the House, *Kielly* v. *Carson*, 4 Moo. P. C. 63, 84; *Fenton* v. *Hampton*, 11 Moo. P. C. 347, 396; *Doyle* v. *Falconer*, L. R. 1 P. C. 328; *Barton* v. *Taylor*, 11 App. Ca. 197, nor a Secretary for State and Privy Councillor, *Wilkes* v. *Earl Halifax*, 19 Howells, St. Tr. 1404; *Sayre* v. *Earl Rockford*, *Broom's Com. L.* 614; the Archbishop of Canterbury even in an ecclesiastical matter is amenable to mandamus, *Reg.* v. *Canterbury*, 11 Ad. & E. N. S. 483, 574; under certain circumstances even officers of the army and navy are liable to action, *Madrazo* v. *Willes*, 3 B. & Ald. 353; *Tobin* v. *The Queen*, 16 C. B. N. S. 310; *Sutton* v. *Johnstone*, 1 T. R. 493, 503; *Banister* v. *Bigge*, 34 Beav. 287.

The Commissioner of Public Works and the Railway Commissioner are merely statutory officers, 33 Vic. (D.) c. 3 ss. 7, 10; Con. Stat. Man. c. 5, ss. 2, 7; Con. Stat. Man. c. 6; 48 Vic. (Man.) c. 5; *Lenoir* v. *Ritchie*, 3 Sup. C. R. 623; *Hill* v. *Bigge*, 3 Moo. P. C. 476; *Cameron* v. *Kyte*, 3 Knapp, 344; *Musgrave* v. *Pulido*, 5 App. Ca. 111; *The Queen* v. *McFarlane*, 7 Sup. C. R. 231, 245; *Windsor* v. *The Queen*, 10 Sup. C. R. 379, 387; and may be enjoined, *Hiscox* v. *Lander*, 24 Gr. 250; *Barton* v. *Taylor*, 11 App. Ca. 197; *Kirk* v. *The Queen*, L. R. 14 Eq. 567; *Foster* v. *Hornsby*, 2 Ir. Ch. R. 434, (*arguendo*); *Stubber* v. *Hornsby*, 2 Ir. Ch. R. 452; *Mississippi* v. *Johnson*, 4 Wall. 475; *Re Massey Manufacturing Co.*, 11 Ont. R. 444; 13 Ont. App. 446.

The practice of the Crown is to throw no obstacle in the way of the trial of a right, *Deare* v. *The Attorney-General*, 1 Y. &

C. Ex. 208. At all events Norquay and Wilson claim the right to proceed with the construction, *Attorney-General* v. *The Proprietors of Bradford Canal*, L. R. 2 Eq. 71.

The Crown is in possession although squatters are in occupation, Bac. Ab., vol. 8, p. 89, 91, 95, 101, 2; vol. 9, p. 458; Coke on Lit., 41 b. 57 b.; Plow., 54 b.; 546 b.; Cov. & Hughes Dig., 1412; *Atty.-Gen.* v. *Churchill*, 8 M. & W. 177; Petersdorf Ab., vol. 6, p. 216; Cooley's Blackstone, 257; Com. Dig., vol. 7, p. 80.

H. M. Howell, Q.C., *J. H. D. Munson*, and *G. G. Mills*, for the defendants.

Ministers are never liable for acts of subordinates. Principle of *respondeat superior*, explained in *Weir* v. *Bell*, 3 Ex. Div. 245. When the Crown adopts an act, the agent is not liable, *Buron* v. *Denman*, 2 Ex. 188. Remedy, if any, is by petition of right, *Windsor Ry.* v. *The Queen*, 10 Sup. C. R. 355; 11 App. Ca. 607; *Canterbury* v. *Attorney-General*, 1 Phill. 324. Courts will not interfere with acts done in pursuance of Government policy, *Re Massey Manufacturing Co.*, 11 Ont. R. 465, 13 Ont. App. 453, *Muskoka* v. *The Queen*, 28 Gr. 563; *Gidley* v. *Palmerston*, 3 B. & B. 275; *Reg.* v. *Commissioners, &c.*, 12 Q. B. D. 461; *Reg.* v. *Commissioners, &c.*, L. R. 7 Q. B. 387; *Buron* v. *Denman*, 2 Ex. 188; *Feather* v. *The Queen*, 6 B. & S. 294; *Wilcock* v. *Terrell*, 3 Ex. D. 323; *Unwin* v. *Wolsley*, 1 T. R. 674; *United States* v. *McLemore*, 45 U. S. Sup. C. 286; *Hill* v. *United States*, 50 U. S. Sup. C. 385; *Gaines* v. *Thompson*, 74 U. S. Sup C. 347; *Mississippi* v. *Johnson*, 71 U. S. Sup. C. 475. Conflict with the Legislature will be avoided, *Willcock* v. *Terrell*, 3 Ex. D. 329. Plaintiff's damage not irreparable, *Mogul* v. *McGregor*, 15 Q. B. D. 476; *Cooper* v. *Crabtree*, 20 Ch. D. 589; *Attorney-General* v. *Sheffield*, 3 De G. M. & G. 313; *Attorney-General* v. *Hallett*, 16 M. & W. 569.

An injunction will not be granted, the balance of convenience being in defendant's favor, and the right not being clear, *Masson* v. *Grand Junction Ry.*, 26 Gr. 289; *Deere* v. *Guest*, 1 My. & Cr. 516; *Filder* v. *London Ry.*, 1 H. & M. 489; *Holland* v. *Worley*, 26 Ch. D. 578; *Wood* v. *Charing, &c., Ry.*, 33 Beav. 295; *Mogul* v. *McGregor*, 15 Q. B. D. 476; *Atty.-Gen.* v. *Sheffield*, 3 De G. M. & G. 313; *Atty.-Gen.* v. *Cambridge*, L. R.

6 Eq. 282; 4 Ch. 71; *Kearney* v. *Dickson*, 6 C. L. T. 140; *Joyce on Injunctions*, 468, 497; Taylor & Ewart, 55; *McLaren* v. *Caldwell*, 5 Ont. App. 363; *Aynsley* v. *Glover*, L. R. 18 Eq. 555.

Important facts having been concealed the injunction cannot be continued, *Hynes* v. *Fisher*, 4 Ont. R. 68; *Wimbledon* v. *Croydon*, 32 Ch. D. 421; *Stewart* v. *Turpin*, 1 Man. L. R. 323; Redfield on Railways, 385; *Calvert* v. *Grey*, 2 Coop. 171; *Harbottle* v. *Pooley*, 20 L. T. N. S. 436; *Dalglish* v. *Jarvie*, 2 McN. & G. 231; *Ley* v. *McDonald*, 2 Gr. 398; *McMaster* v. *Callaway*, 6 Gr. 577; *Clifton* v. *Robinson*, 16 Beav. 355; *Hilton* v. *Granville*, 4 Beav. 131; *Hemphill* v. *McKenna*, 3 Dr. & W. 192; *Holden* v. *Waterlow*, 15 W. R. 139.

Damages may be awarded instead of injunction, 48 Vic. (Man.) c. 15, s. 9, ss. 14; *Holland* v. *Worley*, 26 Ch. D. 578; and if so no interim injunction will be granted, *Holland* v. *Worley*, 26 Ch. D. 578; *Greenwood* v. *Hornsby*, 33 Ch. D. 471; *Lloyd on Compensation*, 81.

The informant is not in possession and cannot obtain injunction, citing cases already noted, and *Mulholland* v. *Conklin*, 22 U. C. C. P. 375.

(*12th November, 1887.*)

KILLAM, J.—There was so much discussion upon the argument of these motions respecting the principles upon which injunctions are granted to restrain trespasses upon lands, and so many of the decisions in injunction suits have been cited and exhaustively commented upon, that I have felt that the motions cannot satisfactorily be disposed of without a careful examination of these and other authorities, and the principles to be deduced from them.

The jurisdiction to grant injunctions restraining trespass, as distinguished from waste, is of comparatively modern development. Originally the court was inclined to limit its interference by injunction to cases of strict waste, which properly includes only injuries to real property by tenants or those in privity with the owner. In the attempts to get beyond this narrow limitation much confusion and many seeming inconsistencies are found in the earlier decisions. The principles upon which the jurisdiction is exercised are now, however, so well settled that it is unnecessary to discuss and attempt to reconcile these authorities. Such discussions and attempts have been frequently made, but, probably, in no instance more satisfactorily than in the case of *Lowndes* v. *Bettle*, 33 L. J. Ch. 451, 10 Jur. N. S. 226, by V. C. Sir Richard Kindersley. He there lays down clear principles which may be safely used as the basis of any further adjudications upon the subject. The cases in which such jurisdiction may be invoked he there classifies, his principal division being between cases in which the relief is sought by a party in possession of the estate and those in which such party is out of possession.

It is, then, of importance for us to determine first, within which of these classes the present case comes. Now, here, it must at once be determined that the parties whom the defendants found in occupation of these various lots, and from whom they obtained permission to enter them, had no right or title to them whatever, possessory or otherwise.

(Reference was then made to the Manitoba Act and amending Act of 38 Vic. c. 52, s. 3, to show that the lands became vested in the Dominion, and the rights which the Dominion is bound to recognize.)

A clear *prima facie* case was sufficiently made out for the informant of the title of the Crown, free from any claim under these sections, and no attempt has been made in argument even to suggest that any of these occupants had any right to the lands under the Manitoba Act or the later Act to which I have referred. Indeed, all but one, have shown their entries upon the lands, or those of the parties under whom they claim, to have been long subsequent to 1870, and in respect of that one not only is nothing established to meet the *prima facie* case made for the Crown but he admits the title of the Crown and his own want of title.

In *Farmer* v. *Livingstone*, 5 Sup. C. R. 221, and *Livingstone* v. *Farmer*, 8 Sup. C. R. 140, it was held that occupation, cultivation and improvement of Dominion lands, even with the knowledge of officers of the Crown, gain no such interest in the land as would give a party even a *locus standi* to attack a patent issued by the Crown. The Dominion Lands Act has been much altered since those decisions were rendered. Sections 33 and 35 of the Act, as they stand in the Revised Statutes, c. 54, appear to confer some *right* to obtain homestead entries in respect of lands settled upon and improved; but the lands in question are not shown to be of the class open for homestead entry, and even under those sections it is made discretionary with the Minister of the Interior to entertain, or refuse to entertain, the application for a homestead entry. Indeed, no such right of entry is here claimed. The most that is claimed is that the parties so occupying would have a prior right to purchase the lands of the Crown at such price and upon such terms, however exorbitant and oppressive, which the Crown might see fit to impose. It is difficult to recognize in this any claim whatever to the land; and here, in only one or two instances out of those in question is any foundation in fact even attempted to be laid for the existence of the alleged pre-emptive right, and in those instances the evidence is only of loose conversations with subordinate officials of the Dominion Lands office, whose authority to give any assurances or confer any rights in no way appears. The notice given by the defendant Wilson to Mr. Whitcher, and the tender of the money are, also, an acknowledgment of the title of the Crown.

Some reference has been made to the alleged custom of the Crown to recognize claims to its bounty by those who have settled upon and improved public lands without permission, as giving priority of right to acquire those lands, and to the Ontario cases which establish in that province that such an occupant acquires by virtue merely of that doctrine a *locus standi* to attack letters patent issued in error or inadvertence, through mere ignorance of his position. But, as I understand these cases, they proceed merely upon the principle that the position of such a party is so far a material circumstance to be considered, that the issue of the letters patent for the land in ignorance of it will be an issue in error or inadvertence within the meaning of the statute; none of them establish that the party thus situated acquires an interest or tenancy in the land as against the Crown, but it is consistent with all of them that the Crown, if fully informed of all of the circumstances, could issue perfectly valid letters patent which such a party could not possibly attack with success. But even as thus limited, it is doubtful, after the decisions of the Supreme Court in *Farmer* v. *Livingstone* and *Livingstone* v. *Farmer*, whether such a principle could be invoked here for any purpose, especially in the absence of evidence of a well established custom of the kind relied on in the practice of the Dominion Lands office.

It is clear that where there is evidence of a lawful title accompanied with seisin and possession, it is presumed to continue in the lawful owner and his heirs and assigns until an actual ouster and disseisin shall be proved.

But the Sovereign is always to be deemed in possession of the lands of the crown.

"If a man enter upon the king's demesnes and takes the profits it will be an intrusion, for as the king takes only by matter of record he cannot be ousted of his possession but by matter of record." Com. Dig., Prerogative D., 71; Co. Lit. 277*a*.

"There can be no occupant of any of the king's possessions." Bac. Abr., vol. 8, Prerogative, E 3, p. 98.

"No man can make himself a title to the king's possessions without matter of record; and, therefore, none can claim any of them as occupant, because that is an act *in pais* and no matter of record." *Ib.*, p. 90.

"So there can be no tenant at suffrance against the king, but he who holdeth over is an intruder because no laches can be imputed to the king for not entering. Therefore, if the king be seised in fee of the manor B, and a stranger erect a shop on a vacant plot of it, and take the profit of it without paying any rent to the king, and after the king grant over the manor in fee and the stranger continue in the shop and occupy it as before, yet there is no disseisin but an intrusion on the king's possession" *Ib.*, E. 4, p. 96.

The same principle was asserted by no less eminent a judge than Baron Parke in *Attorney General v. Hallett*, 16 M. & W. 569.

The consequences which the old authorities deduce from this doctrine are peculiar. They lay it down that the Sovereign cannot maintain ejectment for his land, and that an intruder living on and occupying lands of the Sovereign cannot maintain trespass against another in respect of any entry upon the lands so occupied.

"The methods of redressing such injuries as the crown may receive from the subject are: 1. By such usual common law actions as are consistent with the royal prerogative and dignity. As, therefore, the king by reason of his legal ubiquity cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff, such as an assize or an ejectment." Blackstone's Commentaries, Bk. 3, p. 257.

"The general rule is that the king may waive his prerogative remedies and adopt such as are assigned to his subjects. He may maintain the usual common law actions, as trespass *quare clausum fregit* or for taking his goods. The only exception seems to be in the case of actions which suppose an eviction or disseisin, as an assize or, it seems, an action of ejectment." Petersdorf's Abr., vol. 6, p. 215.

"If the king be in possession by title he cannot be put out. But judgment in an information of intrusion is only *quod committantur et capiantur pro fine.* And thereupon goes an injunction for the possession. But there is no judgment *quod recuperet seisinam,* nor does an *habere facias possessionem* issue in such a case." Per Hale, C.B., in *Friend* v. *The Duke of Richmond*, Hardr., 460.

"Where any one intrudes or enters upon the king's possession the king shall not be put to an assize or an ejectment. So an intruder cannot make a lease to maintain ejectment, neither can he maintain trespass, though he be possessed several years." Com. Dig., Prerogative, D. 71.

"An intruder cannot gain such a possession against the king that he may have an action for trespass." Plowd. Com., 546.

"The king is seized of a manor; A enters into an acre parcel of it and builds a house; A continues in possession and dies seised, the question is what remedy the alienee (of the king) has. It seems that by the intrusion and building A has not gained any estate or possession for he is not able to have an action of trespass against a stranger." Plowd. Quaer., § 373.

It is evidently to meet this very principle that by the 32nd and 87th sections of the Dominion Lands Act, Rev. Stat. Can., c. 54, a right of action for trespass is given to those holding homestead entry receipts or certificates of any entries or sales of Dominion lands.

(Reference was further made upon the question of possession to show that "a possession sufficient to enable the plaintiff to maintain an action of trespass is the possession which is the test" of the right to obtain an injunction, as plaintiff in possession, to *Corporation of Hastings* v. *Ivall*, L.R., 19 Eq., 558; *Cooper* v. *Crabtree*, 19 Ch. D. 193, and *Lowndes* v. *Bettle*, *ante*.)

The authorities cited clearly establish, that in such an action by the crown such possession as these alleged occupants had, could not be set up by the wrong-doer as showing *ouster* of the crown, and consequent loss of the right to maintain the action.

It is clear that these alleged occupants were mere trespassers and intruders upon the lands of the crown, and that unless they had other right than that gained by the permission of such occupants these defendants were so also. A possession gained by the very trespass complained of is not such possession as entitles the defendants to consideration. This is rendered plain by the remark of Ld. Ch. Hardwicke in *Hughes* v. *Trustees of Morden Coll.* 1 Ves. Sr. 189, that "repeated trespasses from time to time "did not gain them the possession," and by Lord Selborne, L.C., in *Goodson* v. *Richardson*, L. R. 9 Ch. 223, and by the same learned chancellor in *Stanford* v. *Hurlstone*, L. R. 9 Ch. 118.

The question, then, that next arises is that of the position of the defendants with reference to the lands, and their right to take them without permission of the officers of the crown for the Dominion.

So far as concerns the general purpose of the Act so generally known as the Red River Valley Railway Act, the authorizing of the construction of a line of railway from the City of Winnipeg to a point, within the Province of Manitoba, at or near the Town of West Lynne, no argument against its validity in that respect has been offered, and I will assume that none can be offered.

That Act appears, however, sufficiently wide to authorize the expropriation for the purposes of the railway of ungranted Dominion lands, and a serious question at once arises of the authority of the provincial legislature to confer such a power. In *Booth* v. *McIntyre*, 31 U. C. C. P. 183. Osler J. suggested that the Dominion Government might have the power to confer upon a railway company authority to take, without permission of the officers of the Crown for Ontario, public lands of that Province.

If Parliament has that power, it would seem difficult to deny to the Legislature of Manitoba a similar power in respect of Dominion lands. As in this instance the defendants do not appear to be able to take advantage of such provisions of the Red River Valley Railway Act, even if *intra vires* of the Legislature, I shall not now discuss that question. It is one of too much importance to be disposed of upon a motion for an interlocutory injunction.

On the 6th day of July the Governor-General-in-Council passed an order disallowing the Red River Valley Railway Act, and in the Manitoba Gazette of the 23rd July, 1887, this Order-in-Council is published and following it in the Gazette is a copy of the certificate of the Governor-General that the Act was received by him on the 2nd July.

(His Lordship then read the 56th and 90th sections of the B. N. A. Act.)

It has been objected that the publication of the Order-in-Council and certificate in the way which I have mentioned was not a sufficient signification of the disallowance and of the certificate of the Governor-General to annul the Act. I am clearly of opinion that it was sufficient. The Manitoba Gazette is the official means of communication between the Lieutenant-Governor and the people of the Province. By Con. Stat. Man., c. 7, ss. 73, *et seq.*, it is published by authority of the Lieutenant-Governor-in-Council, by a Queen's Printer, appointed by the Lieutenant-Governor-in-Council, whose duty is to publish, among other things, "such documents and announcements as the Lieutenant-Governor may, from time to time, require to have printed," and "all publications in the Manitaba Gazette shall be authentic and make proof of their contents without other evidence." Of course it is usual for the Lieutenant-Governor to make and publish proclamations in a more formal manner than this, yet the publication in this way does not seem to me to be the less a proclamation of the Lieutenant-Governor.

In Brown's Law Dictionary the word proclamation is defined as "a notice publicly made of anything; or a public declaration of the king's will made to his subjects." In Bouvier's Law Dictionary it is defined as "the act of causing some state matters to be published or made generally known; a written or printed document in which are contained such matters issued by proper authority." In the Imperial dictionary it is, "1. The act of proclaiming or making publicly known; publication; official or general notice given to the public. 2. That which is put forward by way of public notice; an official public announcement or declaration; a published ordinance, as a proclamation of a king."

None of these definitions suggest or require any particular form of notice. Judged by any of them, there was on the 23rd July a sufficient proclamation by the notice in the Manitoba Gazette, both of the fact of disallowance and of the certificate of the Governor-General. I am the more confident of the correctness of this view as it agrees with that expressed in the case of *Browning* v. *Ryan*, 4 Man. L.R. 486 by the late learned Chief Justice of this Court, whose experience in matters of Governmental and Parliamentary procedure has been so much more extensive than mine that I should have had the greatest difficulty in coming to an opposite conclusion, although I could not treat his expression of opinion, as given in that case, as absolutely binding upon me.

There is not even a suggestion made, or any fact alleged, which would seem to show, that before the 23rd July the defendants, or anyone acting for the Commissioner of Railways under the authority of the Red River Valley Railway Act, had taken possession of any of these lands under the 8th or 22nd section of that Act. On the contrary, it appears that none of the work of grading was done on any of these lands before that date. It has not been argued that any right to the lands was acquired under the expropriation powers of that Act.

The defendants, however, rely upon the "Public Works Act of Manitoba," 48 Vic., c. 6, for authority to take these lands, and assuming for the present the power of the Legislature of Manitoba to authorize the taking of Dominion lands for such a public work as the railway in question, it is necessary to consider whether such authority is conferred by that Act.

(His Lordship then referred to the "Public Works Act," 48 Vic., c. 6, ss. 2, 6, 9, 10, 15, 23, 24.)

These are all the provisions of the Act that have been referred to in argument, or that appear to me to have any bearing whatever upon this question. In my opinion it is impossible to find in them anything which can give authority to take compulsorily Dominion lands for the purpose of any Provincial public work.

"Generally the king shall not be restrained of a liberty or right which he had before, by the general words of an Act of Parliament, if the king be not named in the Act." *Com. Dig.*, Parliament, R. 8; *Willion* v. *Berkley*, Plow 239, 244.

"Where a statute is general, and thereby any prerogative, right title or interest is devested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him." Bac. Abr. Prerogative, E. 5; *Case of Magdalen College*, 11 Rep. 66 b.

This principle clearly applies to property held by the sovereign for the public, as well as to the private demesne of the sovereign.

Under this principle it has been held in England that lands held by the Crown cannot be taken under the Lands Clauses Consolidation Act, *Re Cuckfield Burial Board*, 19 Beav. 153; *Re Manor of Lowestoft*, 24 Ch. D. 253.

To take lands held by the Crown for the public use of the Dominion, and to appropriate them for the use of the Province for a particular public work such as a railway, so that they then become useless for another purpose, is certainly to devest or take away both the prerogative and the property of the Crown in respect of the lands, although, as contended, the title still remains in the Crown. It would thenceforth remain vested in the Crown only in a qualified sense, being subject to being disposed of by the Minister of Public Works of the Province under the directions of the Lieutenant-Governor-in-Council or the Provincial Legislature.

In addition to this general principle of interpretation, there is a clause in the Interpretation Act of this Province which governs the construction of the Public Works Act. By the Interpretation Act, Con. Stat. Man. c. 1, s. 7, subs. 30, "no provision or enactment of any Act shall affect *in any manner or way whatsoever* the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby."

The application of this clause and of the general principles mentioned, has hardly been disputed by counsel for the defendants, but their contention is that the exception of Dominion lands expressly made from the operation of the 9th and

24th sections is a sufficient expressson of intention to render them subject to be taken under the 23rd section. I cannot adopt this view. Not only does it seem to me wholly erroneous if attempted to be supported upon reasoning alone, but there appears to me to be an express authority to the contrary which I must treat as binding upon me. That is the case of *Weymouth* v. *Nugent*, 6 B. & S. 22.

I would prefer to dispose of the claim of right to take the land upon this, which I feel to be a perfectly indisputable ground, rather than upon the other objection that the land is not sought to be taken for any of the purposes mentioned in the Public Works Act; but as I have formed upon that question also an opinion adverse to the contention, it may serve to establish more clearly the impossibility of holding the defendants to be entitled to expropriate these lands for the construction of this railway, if I explain the grounds for my opinion. The 23rd section is the one relied on for the authority to expropriate. That provides for the taking of lands for only certain specified purposes which are (1.) the use, construction or maintenance of hydraulic privileges, (2.) draining, (3) *the enlargement or improvement* of any public work, (4) obtaining better access thereto. The defendants say that at the time of the disallowance of the Red River Valley Railway Act, the ten miles of grade completed formed a public work of the Province of Manitoba. which the Government then fonnd itself possessed of. Thus far, as I intimated upon the argument, I can go with them, assuming, as in the absence of dispute I should feel bound to assume, that they had acquired the property in the land over which this work was done. They then say that this was transferred to the control of the Minister of Public Works by the proclamation of the 22nd July, and that what has since been done, and what is intended to be done, is only an "enlargement" and "improvement" of a public work of the Province within the meaning of this 23rd section. However, I cannot agree that the conversion of those ten miles of grade into a railway is an "improvement" of the work, or the addition to the ten miles of fifty-three miles more in length and the formation of those sixty-three miles into a railway is an enlargement of that work, within the meaning of the section. The ten miles of grade was not in any sense a railway or a part of a railway when the Act was disallowed. It was certainly capable of being converted into a railway just as any piece of land may be. Probably many of our highways could as easily be so. It was not even a railway defectively built which might then require improvement. I cannot think that to convert such a work, taking it in its then existing state, into a railway sixty-three miles in length comes within the meaning of the section. What was there intended, was an improvement of a public work for a purpose for which it was before improvement in some sense capable of being used, an addition to it for a similar purpose. The authorities show that statutes which assume to authorize public bodies or companies to infringe upon the ordinary rights of property must be construed most strictly, that the courts will not permit property to be taken under them for purposes not warranted by the spirit of the Acts under the guise of the powers given by them. The real purposes and intentions will be investigated and these bodies strictly confined to them. And instead of construing such an Act less strictly when the property sought to be taken is public property of the Crown, it must, if possible, be interpreted even more strictly.

To show how impossible is the construction for which the defendants contend, I will only refer, without quoting them at length, to the remarks of Lord Chancellor Eldon in *Blakemore* v. *The Glamorganshire Canal Navigation Co.*, 1 M. & K., 165 *et seq.;* of Sir W. M. James, V.C. in *Holt* v. *The Rochdale Canal Co.*, L. R. 10 Eq., 363; and of Lord Chancellor Cottenham in *Webb* v. *The Manchester & Leeds Ry. Co.*, 4 M. & Cr. 116.

The case, then, as it appears to me, must be treated as one in which the plaintiff is in possession and the defendants have attempted to take, and seek to continue in possession under a claim of right which it is perfectly clear they have not. V. C. Kindersley, in *Lowndes* v. *Bettle*, divided the cases where the plaintiff is in possession under two subordinate heads: "First, where the defendant claims under color of right; and secondly, where he is an absolute stranger;" and after considering carefully the various decided cases, he concluded (33 L. J. Ch. 457), "Where the plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under the color of right, then the tendency of the court is not to grant an injunction unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate the court will grant it. But where the party in possession seeks to restrain one who claims by an adverse title, there the tendency will be to grant the injunction, at least where the acts done either do or may tend to the destruction of the estate."

Now, we should observe how careful the learned Vice-Chancellor was not to lay down precise rules limiting the exercise of the jurisdiction. He had to deal with a branch of jurisdiction which had been assumed with hesitation and had been carried out only to so great an extent as the court had up to that period felt absolutely necessary. He evidently felt that he was dealing with a growing jurisdiction which subsequent authorities have settled on a firm basis far beyond the position at which he left it.

In *Davenport* v. *Davenport*, 7 Ha. 217, Wigram, V. C., explained the phrase "under color of right," and classed under that head the cases of railway companies taking lands under the compulsory powers given them by parliament. He said, "Neither party disputes the abstract right of the other to that which he claims. The dispute is as to the practical application of the law to the facts of the case." Here the defendants do not dispute the abstract right of the Crown for the benefit of the Dominion to the lands in Manitoba, ungranted and unoccupied at the time of the transfer to Canada, nor do they seriously dispute the title of the Crown to the lands in question; in fact, they served on the officials of the Dominion Lands Office a notice that they required these lands for the purposes of this railway, and offered to pay to those officers a certain price for them. On the other hand, the informant does not deny the official positions of the defendant Ministers or the claim of the other defendants to have in fact made, or assumed to make, a contract to build this railway for the Provincial Government, but what they do deny is that the Legislature of Manitoba could, or has attempted to, empower them to take the lands in question without authority from the officers of the Crown for the Dominion, while the defendants claim that the Legislature both could and did so empower them.

The contention of the defendants is that the ground upon which the court acts in restraining bodies having these compulsory powers is the necessity of protecting private individuals from such powerful bodies, usually possessed of so much means, but that in the present case the powerful party is seeking protection from the weaker, and that to enable that powerful party to invoke the aid of this court by injunction, a case of irreparable injury or destructive damage to the property must be made.

There is a passage in Kerr's work on Injunctions, the wording of which would seem to bear out such an argument, but in none of the authorities cited by the author to which I have been able to refer is there any principle laid down in precisely the same terms. The real principle, no doubt, is this, that while formerly property could ordinarily be taken only by judicial proceedings, when it became so common to give such powers of taking property without the consent of the owner in a very summary way, the ordinary protection of the courts of law was not sufficient and it was necessary for the Court of Chancery to exercise its jurisdiction to grant injunctions more freely for the protection of property holders. But in none of these cases that I have seen has the relative power or means of the particular suitors been made a ground of decision, apart from the extraordinary power of setting aside the ordinary right of property. On the contrary, in the case of *The Manchester, Sheffield and Lincolnshire Railway Co.* v. *The Great Northern Railway Co.*, 9 Ha. 284, the protection was given to one railway company against another, without any question of irreparable injury arising in any different sense from that in which it would arise in any case of a private individual, and in *The Commonwealth* v. *The Pittsburgh, &c., R. R. Co.*, 24 Penn. St. 159, an injunction was granted in favor of the State of Pennsylvania against the filling up by a railway company of a lock at the outlet of a state canal which was shown to have never been of use and to have been abandoned for years. To allow of a different principle in a case like the present, where the conflict is between the Dominion and the Province, would be to invite the use of force for the protection of the public property, the arbitrament of the sword rather than that of the courts. The genius of our constitution requires that all such disputes, whether between sovereign and subject or subject and subject, must be decided by the courts, which are open for the enforcement of the rights of the sovereign as for those of the subject.

The general principle is evidently that stated by the court in *The Commonwealth* v. *The Pittsburgh, &c., R. R. Co.*:—

"When railway companies or individuals exceed their statutory powers in dealing with other people's property, no question of damage is raised."

In *High on Injunctions*, sec. 1308, it is thus stated: "Where public officers, under color and claim of right, are proceeding to impair either public or private rights, or where their proceedings will result in a serious injury to private citizens without any corresponding benefit to the public, or where the aid of equity is necessary to prevent a multiplicity of suits, an injunction will be allowed. Thus, commissioners acting under color of law and proceeding without any real legal authority to permanently appropriate the land of a private citizen to a purpose connected with a work of internal improvement may be enjoined from proceeding with such appropriation. And in such a case it is no answer to say that the land independent of the use to which it is to be put in making the improvement would be of little value or that the injury to the owner would be trivial by allowing the work to proceed."

In *Wood* v. *The Charing Cross Ry. Co.*, 33 Beav. 203, Lord Romilly, M.R., said: "If a railway company, disregarding the provisions of the Act, thinks fit to take possession of the property, to act with a high hand and set the owner at defiance, this court interferes and restrains the company from taking further steps." Similar opinions are expressed in *Rankin* v. *The East & West India &c. Co.*, 19 L. J. Ch. 153; *Gray* v. *The Liverpool &c. Ry. Co.*, 9 Beav. 398; *Hext* v. *Gill*, L. R., 7 Ch. 699; *Jarden* v. *The Philadelphia &c. Ry. Co.*, 3 Whart., 502; *Fewin* v. *Lewis*, 4 M. & Cr. 254; *Anderson* v. *The Commissioners of Hamilton County*, 12 Oh. St, 642; *Green* v. *Green*, 34 Oh. St. 377; *Mohawk & Hudson River R. R. Co.* v. *Archer*, 6 *Paige* 83; *Belknap* v. *Belknap*, 2 Johns, Ch. 463; *Livingstone* v. *Livingstone*, 6 Johns, Ch. 497; *Lamb* v. *The North London Ry. Co.*, L. R. 4 Ch. 522; *Webster* v. *The South Eastern Ry. Co.* 1 Sim. N. S. 274.

As long ago as the year 1743, in *Coulson* v. *White*, 3 Atk. 21, Lord Chancellor Hardwicke said: "Every common trespass is not a foundation for an injunction in this court, where it is only contingent and temporary, but if it continues so long as to become a nuisance, in such a case the court will interfere and grant an injunction to restrain the person from continuing it."

(The learned judge also referred to *Hughes* v. *The Trustees &c.*, 1 Ves. Sr. 183; *Attorney-General* v. *Cambridge*, L. R. 4 Ch. 80; *Jarden* v. *Philadelphia*, 3 Whart. 502.)

The same principle is laid down in *Hopkins* v. *Caddick*, 18 L. T. 236; *Murdock* v. *The Prospect &c. R. R. Co.*, 73 N. Y. 579; *Jerome* v. *Ross*, 7 Johns, Ch. 331; *People* v. *Law*, 34 Barb., 506; *Williams* v. *N. Y. C. R. R. Co.*, 16 N. Y., 97; *Perks* v. *The Wycombe &c. R. R. Co.*, 3 Giff. 670; *The Commonwealth* v. *Pittsburgh &c. R. R. Co.*, 24 Penn. St., 159; *Wright* v. *Turner*, 10 Gr. 67.

The defendants say that to warrant an injunction irreparable injury must be shown, and they say that their action will not occasion such injury to the Crown as full compensation in money can easily be given for their trespasses and for the land. Upon such an argument the Court remarked in *The Commonwealth* v. *Pittsburgh &c. R. R. Co.*, 24 Penn. St. 59, "The argument that there is no irreparable damage would not be so often used by wrong-doers if they would take the trouble to observe that the word irreparable is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character."

In *Powell* v. *Aiken*, 4 K. & J. 343, the defendants were mortgagees of mines adjoining lands on which the plaintiffs were mining. The mortgagors had secretly made air courses and built roads for their mines through the plaintiff's soil, and the defendants subsequently took possession under their mortgage. An injunction was granted to restrain the defendants from continuing the use of the air courses and roads, Sir W. Page Wood, V.C., saying, "Whether the continuance of that user is any special injury to the plaintiffs, whether it is any special injury to the plaintiffs to have this air course existing through their ground is a question the Court will not stop to inquire into."

Some expressions in this case and the somewhat similar one of *Bowser* v. *McLean*, 2 D. F. & J., 415, may seem to make those cases turn somewhat upon the secret and fraudulent method in which the use of such roads and air courses had been obtained, though the mortgagees in the former case were in no way parties to any fraud, but several other cases in which that element did not exist bear out the same principle where there is a similar arbitrary attempt to use or appropriate the property of another.

(His Lordship then referred to the *Neath Canal Co.* v. *Ynisarwed Resolven C. Co.*, L. R. 10 Ch. 450; *Rochdale* v. *King*, 2 Sim. N.S. 78; *Goodson* v. *Richardson*, L. R. 9 Ch. 224; *Wright* v. *Turner*, 10 Gr. 67.)

But the defendants farther say that under the authority of the statute known as Lord Cairns' Act, 21 & 22 Vic. c. 27, the court may, and that it should, even if the value of the land taken be considerable, grant damages to the owner of the land instead of an injunction.

(His Lordship then referred to *Smith* v. *Smith*, L. R. 20 Eq. 500, and *Holland* v. *Worley*, 26 Ch. D. 578.)

Here, it is true, that the defendants do not seek to take all the lots in question, though they are willing to do even that in order to obtain the portion necessary for their railway, yet they do seek to take wholly from the Dominion the property in the portion over which the railway is proposed to be carried, to render that portion useless for any other purpose.

In *Powell* v. *Aiken*, already referred to, Sir W. Page Wood, V.C., said, "It was argued that as the act was done the court would now set a value upon the privilege thus usurped" (the use of the air courses through plaintiff's land); "but that is not the province of the court; it is the province of the owner. The mine is his property on which he has a perfect right to set his own value, and he is not to have it interfered with without making his own bargain. The court cannot make a bargain for him."

In *Gray* v. *The Liverpool & Bury Ry. Co.*, 9 Beav. 398, the defendant company took possession of the plaintiff's lands, claiming the right to do so. Lord Langdale held that the company had no right to do so under their Act except by agreement with the plaintiff, and that the plaintiff had a right to impose his own price however exorbitant it might be.

Before leaving this part of the subject it is necessary to refer to some cases strongly relied on by the defendants' counsel.

(His Lordship then referred to *Davenport* v. *Davenport*, 7 Ha. 217; *Deere* v. *Guest*, 1 My. & Cr. 521; *Perks* v. *Wycombe*, 3 Giff. 670, and *Carnochan* v. *Norwich*, 26 Beav. 171.)

In *The Attorney-General* v. *Sheffield*, 3 D. M. & G. 319, and *The Attorney-General* v. *Cambridge*, L. R. 4 Ch. 81, the informations were filed to restrain gas companies from excavating streets for the purpose of laying pipes. They were purely cases of nuisances and not of rights of property, and the injunctions were refused on the ground that the nuisances were not shown to be so serious as to require interference by injunction. They were thought to affect only small portions of a street at a time and to cease when the pipes were put down and the holes filled up, not being continuous or permanent but merely temporary. While, then, the judgments in these cases contain many remarks upon the necessity of showing serious injury to entitle to an injunction, they must be considered as referring particularly to cases of nuisances and not of trespass, and nothing is said in either to impugn the doctrine that a continuing trespass amounting to permanent appropriation of the property of another, is of itself a sufficiently serious injury to warrant interference by injunction. Such cases are distinctly distinguished on this ground in *Goodson* v. *Richardson*, *Rochdale Canal Co.* v. *King*, and many other cases.

In *Cooper* v. *Crabtree*, 20 Ch. D. 589, the defendant having land adjoining the plaintiff's had erected a small obstruction at the edge, and even extending somewhat upon the plaintiff's land, with a view to prevent the plaintiff from obtaining by prescription a right to free access of light across defendant's land. The plaintiff complained both of the trespass upon his land and that the structure creaked in the wind to such an extent as to be a nuisance. An injunction was refused, as the plaintiff's land was occupied by a tenant and the structure of only a flimsy, temporary character, and there being no damage either by way of trespass or of nuisance to the plaintiff's reversion, which must be shown to entitle the reversioner to recover at law.

In *Martin* v. *Douglas*, 16 W. R. 268, there was an application for an injunction to restrain the respondent from removing bricks from or inserting joists into the wall of the petitioner's house or using the same for certain buildings in course of erection by the respondent on the adjoining land, and to compel the removal of bricks, etc., so inserted. It appeared that the respondent had desisted from acts such as were complained of, that he had not done them under any claim of right and did not set up the right to continue. It was a pure case of trespass of a most trifling character, with no attempt to deprive the petitioner of the use of any portion of his property.

In *Wood* v. *The Charing Cross Ry. Co.*, 33 Beav. 293, the company acting *bona fide* had made a mistake as to the lands they had valued and taken possession of. It was considered that as the company had the power to take possession of the lands they did take and the question was simply one of value between it and the owner, and as the plaintiff had delayed greatly in seeking his remedy an injunction would not be granted.

In *Holland* v. *Worley*, Pearson, J., laid down the rule with reference to Lord Cairns' Act, which I have already shown, and which directly excludes from the operation of that Act such a case as the present. *Isenberg* v. *The East and West India, &c., Co.*, 3 D.J. & S. 263, was, like *Holland* v. *Worley*, a case of ancient lights, which the plaintiff wished to prevent the defendant from obstructing by a new building. The building had already been raised above the proper height, and it was thought more just to grant damages than a mandatory injunction to compel the tearing down of an expensive building. In *Goodson* v. *Richardson*, these cases of ancient lights where it is a question of allowing or not allowing a party to do something on his own land are clearly distinguished from cases of continuing trespass like the present.

These suits are clearly such that, apart from certain questions which I shall presently discuss, injunctions must be granted at the hearing. Is the informant entitled to interlocutory injunctions? I say *entitled*, because though the granting of these is said to be discretionary, yet the discretion is a judicial discretion to be exercised according to well settled principles, and they cannot be refused if the cases come within the principles upon which these are granted.

The rule is that where the right is doubtful, the court will consider on what side is the balance of convenience; to which party is injury more likely to be done by its interference or refusal to interfere; in what way the parties can best, after the final determination of their rights, be kept in or restored to their position at the time of the motion. *Cory* v. *The Yarmouth and Berwick Ry. Co.*, 3 Ha. 600; *Pinchin* v. *London and Blackwall Railway Co.*, 5 D. M. & G. 861; *Kearney* v. *Dickson*, 6 Can. L. T. 140.

Under the old practice, a plaintiff seeking an injunction against the violation of a legal right, was ordinarily made to establish his right in an action at law, if either the existence of the right or the fact of its violation were denied. Per Lord Kingdown, in *Imp. Gas Light Co.* v. *Broadbent*, 7 H. L. C. 612. In cases of nuisances this was peculiarly the case, because not merely the existence of facts, but also whether that which was complained of constituted a nuisance were questions for a jury to decide upon. This distinction between cases of trespass and cases of nuisance is distinctly taken in *The Attorney-General* v. *Richards*, Austr. 603; *Attorney-General* v. *Cleaver*, 18 Ves. 218. But even cases of nuisances as Lord Cranworth said, in *Broadbent* v. *The Imperial Gas Co.*, 7 D. M. & G. 461, may be "so clear that this court does not wait the assurance of a court of law." In that very case both the Court of Appeal and the House of Lords held the award of an arbitrator to show sufficiently the legal right. Upon the legal right being established at law, the interlocutory injunction went, except in some cases of trifling nuisances, as a matter of course. The practice of sending matters to be tried at law has come to an end, and here the legal rights are adjudicated upon at the hearing of the cause, but on motions for interlocutory injunctions parties are accustomed to present their cases very fully upon affidavit, so that their rights are often made as clear as the verdict of a jury could render them. In *The Attorney-General* v. *Hallett*, 16 M. & W. 573, an interlocutory injunction was refused, because there was a dispute of fact as to title to be tried. Alderson, B., there said, "The question is whether pending a trial of fact as to title we should grant an injunction. We restrain a defendant who has covenanted not to convert meadow land into arable, because there is no question of title."

In *Campbell* v. *Scott*, 11 Sim. 31, the motion being for an interlocutory injunction to restrain the defendants from selling a certain work consisting partly of originally compositions of the plaintiff, Sir L. Shadwell, V.C., said, "In this case the legal right is, *prima facie* quite clear with the plaintiff because it is not denied that the extracts complained of are taken literally, as they stand, from the plaintiff's work. . . . . The only question is whether there has been such a *damnum* as will justify the party in applying to the court; because *injuria* there clearly has been. What has been done is against the right of the plaintiff. Now, in my opinion, he is the person best able to judge of that himself; and if the court does clearly see that there has been anything done which tends to injury, I cannot but think that the safest rule is to follow the legal right and grant the injunction." Similarly in *The Attorney-General* v. *The Cohoes Co.*, 6 Paige, 133, on motion to dissolve an interlocutory injunction to restrain the company from cutting through an embankment of the Erie Canal, with the intention of drawing off water for the use of mills, the company claiming that the canal would not be deprived of the necessary supply of water and that thus no damage would be done, the court refused to consider this question, on the ground that it was for the officers entrusted with the protection of the public interests to say whether the water could properly be withdrawn.

Here there is no question of fact necessary to be tried to establish the title of the Crown. The *onus* is on the defendants to show their authority to take the lands against the will of the owner. *Lamb* v. *N. London. Ry. Co.*, L. R. 4 Ch. 522. The defendants have wholly failed to establish any right, or even any probability that they have any right, to take the lands. The question of probable damage before the suit can be brought on for hearing, is rather one for the consideration of the officers of the Crown than for that of the court. It is not correct, as contended, that these lands are held only for sale. The 90th section of the Dominion Lands Act, Rev. Stat. Can. c. 54, discloses many purposes for which the lands may be used or granted by authority of the Governor in Council, and I do not think that in such a clear case of right the informant can be required to show that the immediate use of the lands is required for any purpose, or what will be the exact damage to be done by adding to the work already performed, the placing of ties and rails on the lands taken and the running of trains over them, or by dividing the remaining lands by a railway in operation through them.

Two further questions are raised which require some attention, one that of the right of the Crown to seek this relief in respect of property held for the Dominion, and the administration of which is in the Government of the Dominion, and the power of legislation respecting which resides only in the Dominion Parliament; the other, that of the right of the court to restrain the defendants, and particularly the Provincial Ministers, even if the case were otherwise a proper one for injunction, from taking or keeping on behalf of and in the name of the Crown for the Province any property, especially when they are, as here they claim to be, acting under the authority of the Lieutenant-Governor in council, in pursuance of the policy of the Provincial Government.

Now, it is not a question here, of administering the land, it is one of preserving its administration in the proper officials and of protecting the rights of property of the Crown.

The Provincial Legislature has under the 14th sub-section of the 92nd section of the British North America Act, authority to make laws in relation to "The Administration of Justice in the province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

The administration of justice in the Province is not limited to the administration of the laws passed by the Provincial Legislature alone. Provincial Courts are evidently not those merely which ordinarily enforce those laws only. This Court is charged with the administration of justice in this Province generally, and of the laws in force within this Province enacted by the Legislature having the proper authority. By the 101st section of the British North America Act, the Parliament of Canada may provide for "the establishment of any additional courts for the better administration of the laws of Canada." This plainly implies that the Provincial courts are to administer the laws of Canada. This subject was very fully discussed by Ritchie, C.J., and Fournier, J., in *Valin* v. *Langlois*, 3 Sup. C. R. p. 14, 15, 19, 50, 51, 52, to whose remarks I need only refer.

I think that I can well apply the words of Sir G. M. Giffard, V.C., in *Attorney-General* v. *Edmunds*, L. R. 6 Eq. 381, "It certainly would be rather an astonishing proposition, if it could be said that this Court had jurisdiction as between subject and subject, but that this Court had not jurisdiction because there happened to be an information at the instance of the Crown and the proceedings were not between subject and subject. I should have been astonished if any authority to that effect could have been produced and certainly none has been produced. . . . . This being a case which, as between subject and subject, would clearly be within the jurisdiction of a Court of Equity, I am perfectly clear that the Crown has a right to come here and file an information."

It seems to me also that the correct view is that which was suggested by Strong, V.C., in *Attorney-General* v. *Niagara Falls Bridge Co.*, 20 Gr. 34, that in suits for the protection of property held by the Crown for the Dominion, the Attorney-General for Canada is the proper officer to represent the Crown. In adopting for this Court the practice and procedure of the Court of Chancery of England, we have adopted that portion of it under which the Crown sues by information of the Attorney-General. That procedure was for the Provincial Legislature to provide. The appointment of the Attorney-General was for the Crown to make. Her Majesty has seen fit to appoint two Attorney-Generals, each with authority which must be gathered from our constitution and statutes. The respective duties of these two Attorney-Generals are defined by Rev. Stat. Can. c. 21, s. 4, and the Act 48 Vic. c. 5, s. 2, and I think that I need only say that these two Acts appear to me to be mutually exclusive, and that the former empowers the present informant to represent the Crown in the present suit.

The necessity for such separate appointment could not be better exemplified than by this very suit, in which the Provincial Attorney-General is asserting a right to these lands for the Province as against the Dominion.

The Minister of the Interior is not empowered to represent the Crown, except in the summary proceedings for obtaining possession of Dominion Lands given by the 58th section of the Dominion Lands Act. Those proceedings appear to have been first authorized by the Dominion Lands Act of 1883, 46 Vic. c. 17, s. 75. Up to the time of that enactment such a suit as the present would in my opinion have been properly brought in this

Court, and it would be contrary to all principle to allow that the ordinary jurisdiction of this Court is taken away by such an enactment, which must be understood as merely giving an additional remedy in cases to which it is applicable. Whether this is one need not now be considered.

I do not consider it necessary to enter into a discussion of the argument that the lands of a subject having been thus taken, though wrongfully, by authority of the Crown, his sole remedy would be by petition of right, that he could have no right of action against the officers thus acting for the Crown. The lands in question are the property of the Crown, held for the benefit of the Dominion, under the control of Dominion officials, and in the possession of the Crown. The defendants Ryan & Haney under the direction and express authority of the defendants Norquay and Wilson, entered upon the lands and have attempted to appropriate them without legal right to the purposes of the Province. The *onus* is upon them to show their right to do so. They set up that they have taken possession for and in the name of the Crown and that Her Majesty now holds them. This is to beg the entire question. Neither the British North America Act nor the Manitoba Act authorized the Lieutenant-Governor in Council or any Provincial Minister to build railways, or to take or hold lands for the purpose. Power was given to the Legislature to make laws in relation to "Local Works and Undertakings," with certain exceptions (or perhaps better, certain explanations of the term), which would imply the right to make laws in relation to certain classes of railways. Apart from the now inoperative Red River Valley Railway Act, the Legislature has not attempted, even if it had the power, to authorize the expropriation, of Dominion Lands for the purposes of such a railway or of any public work. The only authority to represent the Crown in such an expropriation which the defendants set up is that said to have been given by the Lieutenant-Governor in Council, and that which is claimed to be incidental to the official positions of the defendant Ministers. The fact that these are among the lands to be "administered by the Government of Canada, for the purposes of the Dominion," makes it clear that, at any rate without a statute of the proper Legislature authorizing their appropriation to this purpose, no such authority can be incidental to those official positions and no power to confer it can be incidental to the office of the Lieutenant-Governor.

It is clear from the cases of *Musgrave* v. *Pulido*, 5 App. Cas. 102, and *Cameron* v. *Kyte*, 3 Kn. 332, that even a Governor appointed direct by the Crown for a colony in which there is no such federal constitution as we have is "an officer merely with a limited authority from the Crown," and that "his assumption of an act out of the limits of the authority so given him would be purely void." Much more must this principle be applicable to the position of the Lieutenant-Governor of one of our Provinces, appointed by the Governor-General in Council under statutory authority. The office is purely statutory, and its powers must be limited to such as are to be implied from the statute under which he is appointed. In *Musgrave* v. *Pulido*, the Judicial Committee of the Privy Council said, "Let it be granted that for acts of power done by a Governor under and within the limits of his commission he is protected because in doing them he is the servant of the Crown and is executing its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown nor to be in any proper sense acts of State. When questions of this kind arise it must necessarily be within the province of municipal courts to determine the true character of the acts done by a governor."

In *Hill* v. *Bigge*, 3 Moore P. C. 476, Lord Brougham, said, "It may be safely affirmed that they who maintain the exemption of any person from the law by which all the king's subjects are bound or what is the same thing, from the jurisdiction of the courts which administer the law to all besides are bound to show some reason or authority, leaving no doubt upon the point."

Here none such is shown. It is not to be implied from the nature of the offices of the Lieutenant-Governor or his Ministers, nor has any proof whatever of the conferring of any special powers upon the Lieutenant-Governor been offered. If there were any such, the *onus* would in any event be upon the defendants to show them, and especially would it be so in this case in which two of the defendants against whom the injunctions are asked are Provincial Ministers to whom they would naturally be known, and as with them appears the Attorney-General for the Province to support the claim of the Province.

Moreover, except under subsection (b) of the 90th section of the Dominion Lands Act, authorizing the Governor-General in Council to grant lands in aid of the construction of railways in Manitoba, it is difficult to see how the Governor-General could give to the Lieutenant-Governor the necessary powers; and of an Order in Council under that section there is no pretence.

All of the defendants asked to be enjoined are clearly shown to be acting in concert in entering upon these lands and seeking to continue the construction of the railway over them, and they can only be regarded as intruders upon the demesne of the Crown under circumstances which render them liable to be enjoined. I do not deem it necessary to discuss fully the authorities cited by counsel for the defendants Norquay and Wilson to support their claim of exemption from this jurisdiction. All of them I have examined carefully, and none of them in the least impugn the correctness of the principles laid down in the three decisions in the Privy Council to which I have referred.

In my opinion there can be no doubt that the defendants have no authority whatever to appropriate these lands for their proposed railway, that the case is one in which this Court is bound to exercise its jurisdiction by way of injunction, that the Crown is entitled to call upon the Court to do so and comes to ask it by the proper officer, or that all the defendants are subject in respect of this matter to such jurisdiction. It is not to be taken as evidence of any such doubt that judgment was not delivered at once, or that I have felt it incumbent upon me to discuss these questions so fully. In a matter of so much public interest, where the case for the defendants was so warmly urged by able counsel with apparent conviction of their right to succeed in the suits and particularly upon these motions for interlocutory injunctions, and when every point was so fiercely contested, I felt bound to examine carefully all of the very great number of authorities cited and many others, and, having no doubt myself upon the questions, to endeavor to show that no other conclusion can be reached than the one I have to adopt.

With the policy of either Government, as such, the court has nothing to do. Its office is the protection of the rights of the lawful owner of the property. Except in so far as the defendants in following out their policy, infringe upon this right of property the Court can assume no jurisdiction over them, but when they do, they are subject, as others, to its jurisdiction.

Nor can the Court in such a plain case of right consider the inconvenience to the defendants or those whom they claim to represent from the granting of the injunctions. Its proper course, as pointed out by Lord Chancellor Hatherley, in *Attorney-General* v. *Colney Hatch*, L. R. 4 Ch. 147, "is to ascertain the exact state of the law which regulates the relations of parties, and, having done so, to proceed to act upon it without reference to the difficulties of the case on the part of those against whom it is obliged to decide, leaving those parties to relieve themselves as best they can from the positions in which they have placed themselves, and, if there be no other mode of escape, to cease to do the acts which occasion the wrong."

The injunctions must go in terms of the prayers of the informations restraining the defendants Ryan, Haney, Norquay and Wilson until the hearing or further order. Costs to be reserved until the hearing or further order.

Injunction granted, as prayed, until the hearing or further order.

JENKINS v. RYAN.

(In Equity.)

Costs.—Injunction motion.—Dismissing Bill.

Pending a motion for injunction the plaintiff took out a *præcipe* order to dismiss his bill.

Held, That the defendant's costs of the injunction motion were properly taxable under this order.

W. E. Perdue, for plaintiff.

J. H. D. Munson, for defendants Ryan and Haney.

G. G. Mills, for defendants Norquay and Wilson.

(*25th November, 1887.*)

Killam, J.—This was an injunction suit. The plaintiff gave notice of motion for an interlocutory injunction and when the motion came on to be heard it was enlarged, terms being imposed and an undertaking being given that matters should, pending the adjournment, remain in *statu quo*. The motion came up again pursuant to enlargement and was then, at the plaintiff's request, further enlarged. Before the day to which the second enlargement was made, the plaintiff took out the usual *præcipe* order dismissing the bill with costs. Upon taxation of the defendants' costs a question arose respecting the costs of the injunction motion, and the taxation was allowed to stand over. The defendants Norquay and Wilson then moved to vary the order of dismissal so as to have the costs of that motion specifically included, or for a substantive order for payment by the plaintiff of their costs incurred upon that motion.

It appears to me that those costs are included in the costs payable under the order dismissing the bill. The case of *Corcoran* v. *Witt*, 41 L. J. Ch. 67, seems to me to be distinctly analogous. There the suit was for dissolution of a partnership and the taking of the partnership accounts; the plaintiff moved for a receiver and the motion coming on for hearing it was adjourned until the hearing of the cause on the parties mutually undertaking to observe certain terms, but costs of the motion were not disposed of. The suit never came to a hearing, but after it had stood for a considerable time the defendant obtained an order to dismiss the bill for want of prosecution. The defendants sought to have the costs of the motion for a receiver specially included in the order to dismiss, but this was refused. On taxation the master allowed the costs of the motion as part of the costs of the cause, and this decision was upheld by V.C. Bacon.

The fact that the motion was adjourned until the hearing of the cause, and not to a specific day does not appear to me to furnish any ground of distinction.

In *Purdy* v. *Ferris*, 1 Ch. Ch. 303, notice was given by the defendant of an application for a commission to examine witnesses abroad. Before it came on to be heard, the plaintiff procured the bill to be dismissed on *præcipe*, but the defendant sought to bring on the motion for the purpose of procuring an order for the costs. Mowat, V.C., however, held that the costs were included under the order to dismiss as costs in the cause.

The decisions appear to me to be based on a very reasonable principle, and I think that they should be followed in the present instance.

The application must be dismissed with costs.

Application dismissed with costs.

McROBBIE v. TORRANCE.

(IN APPEAL.)

Promissory note or agreement.—Impossibility of presentment.

If the place at which money is payable under a simple contract ceases to exist, it is not necessary that any demand for payment be made to enable the creditor to maintain an action.

Per TAYLOR, C.J.—If the place at which a promissory note is payable ceases to exist, personal presentment must be made.

A promissory note was preceded by the words, "To collaterally secure the payment of the money mentioned in an assignment of mortgage," &c.

Held, That the instrument was an agreement merely and not a promissory note.

This was an appeal from the judgment of Dubuc, J., allowing a demurrer to the third plea. For the pleadings see the former report 4 Man. L. R. 426.

J. Martin, for plaintiff.

C. P. Wilson, for defendant.

(*9th January, 1888.*)

TAYLOR, C.J.—Whether the demurrer to the third plea should be allowed or overruled, seems to me to depend upon the instrument sued on being a promissory note or an agreement. A place at which the money is payable is named in it, The Ontario Bank at Portage la Prairie. The declaration alleges that there was no such bank or place at the said Town of Portage la Prairie as the Ontario Bank, at the time appointed in and by the said agreement for payment or at any time thereafter, wherefore the plaintiff was excused from and did not, nor could present the said agreement for payment at said bank. Now what is the effect of the place at which a promissory note is made payable ceasing to exist? Is it not that the note must be read as if no place for payment was named at all. That seems to have been the view taken by the Court in *Central Bank* v. *Allen*, 16 Maine 41, although it was not necessary there to decide the point for the note had been presented at the place where payable then occupied by another bank than the one named in it and the court held that in addition due diligence had been used in trying to find the maker who had removed to an unknown part of the country. The American authorities as to no further demand being necessary to charge either maker or endorser if the holder on the day of maturity finds the bank or other place of payment closed, cannot be followed here, because the American courts hold that presentment need never be averred, it is for the defendant to set up as a defence that he was present at the place ready to pay. In England and here it is necessary to allege presentment. Presentment is a condition precedent to the plaintiff recovering in the case of promissory notes and bills of exchange, being an incident applicable to them as the creatures of the law merchant, *Fellows* v. *Ottawa Gas Co.*, 19 U. C. C. P. 180.

Here the fact that when the day for payment arrived there was no Ontario Bank in Portage la Prairie, would be a sufficient excuse for not making presentment there, but in that case would it not be necessary that there should be presentment to the maker? His having absconded or gone to parts unknown might excuse such presentment, but here no excuse is offered for non-presentment to him. For anything that appears he may have been in Portage la Prairie on the day of payment, perhaps living in the very building formerly occupied by the Ontario Bank. If this is a promissory note the demurrer should be allowed, for there is no allegation of presentment to the maker, nor any excuse for not making such presentment.

But is it a promissory note? It commences, "To collaterally secure the payment of the money mentioned in an assignment of mortgage of even date herewith and made between the same parties as the parties hereto, $1000." Then follow words which standing alone would, beyond all doubt be a promissory note. Does the preface or preamble change its character?

In *Robins* v. *May*, 11 A. & E. 213, the instrument was, "At twelve months after date I promise to pay Messrs. R. & Co. £500, to be held by them as collateral security for any moneys now owing to them by J. M., which they may be unable to recover on realizing the securities they now hold, and others which may be placed in their hands by him." This was held not a promissory note, Lord Denman, C.J. saying, it gave notice on the face of it, to all the world, that the promise was only a conditional one. The document sued on in *Hall* v. *Merrick*, 40 U. C. Q. B. 566, was in form a note having added immediately before the signature these words, "This note to be held as collateral security." The court held this not a promissory note. So in *Sutherland* v. *Patterson*, 4 Ont. R. 565, a note containing the words, "This note is given as collateral security for a guarantee of $5000 given to J. S. by A. S." was held not a negotiable promissory note, not being payable absolutely and at all events. That the instrument is not one by which money is payable absolutely and at all events is the test. As was said by Morrison, J., in *Hall* v. *Merrick*, "One of the main requisites of a promissory note is, that it contains a promise to pay unconditionally a sum of money, and if the note at the time of its making, whether on its face or by endorsement, is made or rendered payable on certain conditions, that will deprive it of its character as a note." Where the words which thus change its character appear, does not seem material provided they do appear some where in, or on the instrument.

In *Leeds* v. *Lancashire*, 2 Camp. 205, the plaintiffs declared upon a promissory note on the back of which was endorsed, "The within note is taken for security of all such balances as James Marriott may happen to owe to Thomas Leeds & Co. not extending further than the within named sum of £200: but this note to be in force for six months, and no money liable to be called for sooner in any case." It being proved that this had been written before the note was signed, Lord Ellenborough, C.J., nonsuited the plaintiffs saying, the instrument in question was only an agreement and not a promissory note. In *Hartley* v. *Wilkinson*, 4 Camp. 127, the note bore an indorsement that if any dispute arose between certain parties named as to the fir for the purchase money of which it was given "then the note to be void," and the plaintiff was nonsuited. The Court of King's Bench afterwards (4 M. & S. 25,) refused to set aside the nonsuit, Lord Ellenborough, C.J., said, "How can it be said that this note is a negotiable instrument for the payment of money absolutely, when it is apparent that the party taking it must inquire into an extrinsic fact, in order to ascertain if it is payable." In *Cholmeley* v. *Darley*, 14 M. & W. 344, the note sued upon was unobjectionable on its face, but there was endorsed on it a memorandum as to its being given to secure floating advances from a banking company to one of the makers. At the trial the plaintiffs had a verdict but this was set aside and a nonsuit entered, the Court of Exchequer holding that the instrument could not be given in evidence for want of an agreement stamp.

I can see no difference between the instrument here and those set out in the cases just cited. On the face of it, it appears to be given as collateral security for the payment of a certain mortgage, and on the authorities must be held to be only an agreement. If then only an agreement, was it not the duty of the debtor to seek out his creditor and make payment. The nonexistence of the place named for payment would seem to excuse presentment at that place, but even if the place had been in existence a failure to present there would not cancel the debt, though it might, if the defendant showed that he was on the day named at the place ready and willing to pay, perhaps relieve him from liability in damages for detention of the debt.

The decision in *Montreal City Bank* v. *Perth*, 32 U. C. C. P. 18, that after failure to make a due presentation, there could be no recovery until a demand was made for payment, which must be made on the defendants, seems to have turned upon the wording of the instrument under which presentation and surrender of the debenture was a condition precedent. Osler, J., said, p. 26, "I have already said that in my opinion the presentation and surrender of the bonds was a condition precedent. It is not simply the case of a contract to pay at a named place, in an action upon which it may be sufficient for the plaintiff to make the general allegation that the defendant did not pay, meaning thereby that he made default in fact in not paying according to the condition of the contract, thus making it incumbent upon the defendant to raise, by way of plea, any defence as to the plaintiff not being at the place to receive the money or that he was there ready to pay it. In such a case the defendant is the person to move towards payment of the debt; he must seek out his creditor; and if he was not ready to pay the debt it matters not that his creditor was not there to receive it."

The instrument sued upon here is an agreement not a promissory note: nonpresentment at the place named is accounted for: and that being so it seems to me the defendant, the debtor, is bound to seek his creditor and make payment.

The demurrer should be allowed, and the appeal or rehearing must be dismissed with costs.

KILLAM, J—I agree that for the reasons given and upon the authorities cited by the learned Chief Justice, the instrument set out in the declaration is to be taken as a mere simple contract and not as a negotiable promissory note. So considering it, I agree that, the place named for payment having, through no fault of the promissee, ceased to exist when the time for payment arrived, no act on the part of the promissee was necessary to be done to render the promissor liable.

Whether, in such a case, it would be necessary to make any presentment, or to attempt to make any presentment, of a promissory note in order to charge the maker, is a question upon which I would desire at present to reserve my opinion, as I have not fully considered it.

I agree that the judgment allowing the demurrer should be affirmed with costs.

DUBUC, J., concurred.

Demurrer allowed, appeal dismissed with costs.

WADDELL v. THE DOMINION CITY BRICK COMPANY.

[FULL COURT.]

Corporation.—Agreement prior to charter.—Ratification.

Prior to the granting of the defendant's charter, S., who afterwards became its manager, made a verbal agreement with the plaintiff with reference to land of the plaintiff. Subsequently and after the charter a written agreement was prepared. The parties to it were the plaintiff of the one part, and B. and D. (who were shareholders in the company,) of the other part. It was signed "Dominion City Brick Company, Aubrey Smith, manager," but the company's name appeared in no other part of the document.

Held, 1. That the company was not bound by the verbal agreement, because made previous to its charter, and therefore incapable of ratification.

2. That the company was no party to, and was not liable under the written agreement.

GALT v. STACEY.

[TAYLOR, J.]

Examination of judgment debtor.—Conduct money.

A judgment debtor served with an order and appointment under section 52 of The Administration of Justice Act, 1885, is entitled to be paid conduct money and expenses as in the case of an ordinary witness.

F. S. Nugent, for plaintiff.

W. A. Bonnar, (*N. F. Hagel*,) for defendant.

COCHRANE v. McFARLANE.

[TAYLOR, J.]

Interpleader.—Sheriff's costs when claimant abandons.

A person served a notice upon a sheriff claiming as his, goods seized under writ against another. Upon the return of an interpleader summons the claimant appeared, obtained two enlargements and doing nothing to substantiate his claim was barred.

Held, That the claimant should pay the sheriff's costs.

Archibald & Howell, for sheriff.

C. P. Wilson, for execution creditor.

P. A. Macdonald, for claimant.

CRAWFORD v. DUFFIELD.

(IN APPEAL.)

Constitutional Law.—Law stamps.—Provincial Legislature. Construction of Statute.

A provincial statute provided that "All duties and fees of office payable in law stamps on any search, filing, pleading, ... in virtue of any statute, rule or order, now or hereafter in force, are hereby declared to be a direct tax and duty imposed upon the party directed to pay or paying the same, in order to the raising of a revenue for provincial purposes, and shall not be in any way taxable or recoverable as costs by the said party from any other party or person whatsoever."

Held; 1. That the Act was *intra vires* of the Legislature.

2. The words "now or hereafter in force" read as "which now or hereafter have been enacted or made and remain unrepealed."

I. Campbell and *C. P. Wilson*, for defendant.

J. A. M. Aikins, Q.C., for the attorney-general.

(*13th February, 1888.*)

KILLAM, J.—This is an application, originally made on summons in chambers, and referred by the Chief Justice to the court. An order having been made requiring the plaintiff to give security for the defendant's costs of the action, and the security not having been given, the present application is made to have a time limited for giving it. Objection is made that no stamps have been affixed to the summons or the affidavit filed in support of it.

In *Dulmage* v. *Douglas*, 3 M. R. 562, we held the then existing statutes requiring payment of fees by means of law stamps on proceedings in the court to be *ultra vires* of the Legislature. This holding seemed to result necessarily from the decision of the Judicial Committee of the Privy Council in *The Attorney-General of Quebec* v. *Reed*, 10 App. Cas. 141.

Then, in order to take advantage of a possible distinction suggested by the judgment in the latter case, the Provincial Legislature passed the Act 49 Vic. c. 50, M., under which the proceeds of such law stamps were created into a special fund "solely for the maintenance of the administration of justice in the courts of this Province," and also the Act 49 Vic. c. 51, M., which received the assent of the Lieutenant-Governor on the same day as the Act just mentioned, and by which "All duties and fees of office payable in law stamps on any search, filing, pleading or proceeding, or any act or thing done in any of the courts of this Province in virtue of any statute, rule, or order, now or hereafter in force, are hereby declared to be a direct tax and duty imposed upon the party directed to pay or paying the same, in order to the raising of a revenue for provincial purposes, and shall not be in any way taxable or recoverable as costs by the said party from any other party or person whatsoever."

The latter Act was, by its terms, to come into force at a day to be named in a proclamation to be issued by the Lieutenant-Governor.

This Court having, in *The Plummer Wagon Co.* v. *Wilson*, 3 M. R. 68, held that the Act 49 Vic. c. 50, was *ultra vires* of the Legislature, the other Act, 49 Vic. c. 51, was by proclamation declared in force. The principal question is whether the Act imposes a direct or an indirect tax.

In *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, the Judicial Committee of the Privy Council accepted for the purposes of that suit, the following definitions of John Stuart Mill:—"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs."

Upon the basis of this distinction the tax there in question, one upon banks, insurance companies and other corporations carrying on business in the Province of Quebec, payable annually and varying with the paid up capital and with an additional sum for each office or place of business, was declared to be a direct tax.

It was upon the basis of the very same distinction that the law stamp tax in *The Attorney-General* v. *Reed*, was held to be an indirect tax. It appears to be the one which should be used to test the character of the tax now in question.

It appears to me to be shown as distinctly as possible by the Act now in question, that it was the intention of the Legislature, that this tax should be borne by the parties of whom it was demanded.

In the judgment in *Bank of Toronto* v. *Lambe,* it is said, "Now whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec Legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. . . . It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of the tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government."

It is sought to give the tax in question the character of an indirect tax by pointing out that in many cases the suitors on whom it is imposed may occupy such relations to others as to entitle them to indemnity from them to the amount of the costs incurred including the sums so paid for stamps. It is true, too, that in such instances there would be this distinction between the present case and *Bank of Toronto* v. *Lambe,* that the amount of recoupment would be the aggregate amount of the very sums so paid. There, however, that opposite element is mentioned only as one circumstance indicating the intention of the Legislature, while here that intention appears otherwise sufficiently shown. And in *The Attorney General* v. *Reed,* the right to indemnity in certain cases, as well as the right to recover costs of opposing parties, are referred to only for the purpose of showing that, under the statute there in question, the ultimate incidence of the tax was not intended to be upon the parties originally paying it.

If the right to indemnity were to determine the question it would be *ultra vires* of the legislature to make those assessed in respect of lands personally liable for the taxes upon them, as in some isolated instances those assessed as the holders might be trustees for others to whom they could look for indemnity. It appears to me absurd to treat such exceptional cases as determining the character of that tax or of the one now in question; though the

Judicial Committee of the Privy Council might well, taking on the one side, cases of friendly suits in which parties are frequently of the character referred to and, on the other side, cases of hostile suits in which litigants look to be indemnified for their costs by their opponents if successful against them, considering that these together make up so large a proportion of the suits in which such fees as were there imposed would be payable, use all the circumstances referred to together as showing an intention to impose a tax the ultimate incidence of which should be on others than those by whom it should be originally paid.

Besides, it appears to me that, as the tax in question is expressly made a direct tax, if the right to indemnity in respect of it were to involve its having the character of an indirect tax, then the effect must be to take away the right to such indemnity as would otherwise be implied, rather than to give the tax a different character from that assigned to it by the legislature. This would be particularly the case where, as here, the same legislature, by virtue of its power to legislate in respect of civil rights, has full authority to take away any such implied right to indemnity. The justice or injustice of this, as well as of preventing litigants from recovering such costs of those ultimately unsuccessful, is matter for the consideration of the legislature and not for that of the court. For my own part, I feel no apprehension that any such denial of indemnity must result.

That the impost in question is not general, but imposed only on those taking certain proceedings, cannot in my opinion either deprive it of the character of a tax or make it the less a direct tax. The judgment in *Bank of Toronto* v. *Lambe*, expressly disposes of the latter alternative and thus impliedly of the former. Writers on political economy may consider such imposts objectionable, their injustice may be the more apparent where they add to the expense to which the successful suitor is put without right of recourse for it against the party who has wrongfully compelled him to seek legal redress or to defend himself against an unjust demand, but these are considerations for the legislature alone. Fees on legal proceedings have been too long and too generally imposed to enable any court to say that they are exactions of such a character as not to be properly denominated taxes at all. They were evidently considered in *The Attor-*

ney-General v. *Reed*, to be taxes, though, under the statute there in question, indirect taxes.

The language used by Jessel, M.R., in *The Attorney-General of Quebec* v. *The Queen Insurance Co.*, 3 App. Cas. 1090, has been relied on to show that all taxes imposed through the medium of a stamp are indirect taxes, but it is evident that the language is used only with reference to the particular tax then in question and the authorities cited in the Quebec court on which the expressions with respect to stamp duties are based, have reference to taxes of similar character.

That the tax is collected through the medium of a stamp, cannot, it appears to me, make it an indirect tax, if not so otherwise. The stamps are used merely for the purpose of keeping a check on the officers collecting it and ensuring the receipt by the government of all fees paid.

It has also been argued that it is only the duties and fees payable in virtue of any statute, rule or order in force that are referred to by the Act, and that none such are in force as all the statutes under which they were imposed, or rules or orders imposing them made, were *ultra vires* of the legislature.

Such construction appears to me entirely too narrow and one which can be arrived at only by overlooking the history of the legislation upon this subject, and the very purpose of this Act, which is evidently passed in order to avoid the very objections made to the former ones. It seems to me to be quite allowable, where it is so obviously necessary in order to make the statute have any operation, to construe the words "now or hereafter in force," as if they were "which now or hereafter have been enacted or made and remain unrepealed."

In my opinion the summons should be discharged without costs.

Dubuc, J.—The question is to determine whether the law stamps imposed by 49 Vic. c. 51, of the Provincial Legislature, are recoverable or not. They are said to be an indirect tax upon the suitors, and therefore beyond the power of the legislature, which can only impose a direct tax.

In *Attorney-General of Quebec* v. *Reed*, L. R. 10 App. Cas. 143, the Earl of Selborne, L.C., refers to the definition given by *Mills* in his work on *Political Economy*, of what are direct and indirect taxes, as follows:—A direct tax is "one which is demanded from the very person who it is intended or desired should pay it." Indirect taxes are "those which are demanded from one person in the expectation that he shall indemnify himself at the expense of another."

The above statutes imposing the said law stamps enact that "All duties and fees of office payable in law stamps . . . are hereby declared to be a direct tax and duty imposed upon the party directed to pay or paying the same in order to the raising of a revenue for provincial purposes, and shall not be in any way taxable or recoverable as costs by the said party from any other party or person whatsoever."

Does not this enactment and the law stamps imposed by it fall exactly within the meaning and letter of the above definition of a direct tax? In my opinion it does, and I do not see how the most speculative or forced construction can give it any other meaning.

An objection raised was that when this statute was brought into operation by proclamation, the other Act imposing law stamps had been declared *ultra vires*, and there being therefore no duties or fees of office then payable, this Act could not apply to law stamps. But as stated by *Hardcastle on Statutory Law*, p. 27, the words of a statute are to be understood in the sense they bore at the time when the statute was passed.

Here when this statute was passed, the 49 Vic. c. 50, was in full force and operation. It was only some time after that it was declared *ultra vires* by the court. So the objection cannot be maintained.

It was also contended that it was an unequal tax imposed upon those who were forced to come into court, to the exclusion of all other persons. But it cannot be considered to be unequal when it applies to all persons of the same class or category. With the exception of the capitation tax, the same might be said of almost all taxes, such as the land tax, the dog tax, the registration fee; for all persons do not own lands, dogs, or have business requiring them to pay registration fees.

Another objection was that in certain cases the tax would have to come from a person different from the one paying it, such as a trustee, executor, or in case of a mortgage suit.

In the first place, these are only exceptions which should not affect the general rule. In the second place, the tax in those cases is rather considered as coming from the estate, and paid by the person acting for the time being as the agent or representative in whom the estate is then vested. But these are only exceptional cases arising out of the peculiar relations existing between certain parties; and even for those cases, the statute makes no distinction. It states in the most positive terms that the party paying said tax shall not recover it "from any other party or person whatsoever." The enactment of the statute is direct, unequivocal, absolute. If certain persons placed themselves, or are placed by circumstances, in a certain, particular position different from what was contemplated by the provision of the statute, it cannot alter the said statute and render it void or inapplicable.

I think the summons should be dismissed.

Taylor, C.J., concurred.

Summons discharged.

McLELLAN v. THE MUNICIPALITY OF ASSINIBOIA.

Tax sale.—Action for not executing deed.

A statute authorizing the sale of lands for taxes, provided that the deeds "shall be executed by the reeve and treasurer, and under the seals of the said municipalities respectively." In an action for refusal to execute a deed to a purchaser, the declaration alleged a demand upon the municipality.

Held, That the action would not lie, for the deed ought to be executed by the reeve and treasurer, and not by the municipality.

Every count in a declaration must contain in itself, a complete cause of action. And where several counts showed a cause of action in A., and at the foot of the declaration an assignment was alleged to the plaintiff of "all of the aforesaid causes of action, &c,"

Held, That those words formed no part of the counts and could not be looked at upon demurrer to some of them.

N. F. Hagel, Q.C., and *A. Howden*, for plaintiff.

L. G. McPhillips and *A. E. McPhillips*, for defendants.

(*6th February, 1888.*)

TAYLOR, C.J.—At a tax sale held in December, 1884, Dr. Dufresne became the purchaser of several lots of land then offered for sale. The plaintiff as his assignee, now sues for damages, on account of the alleged refusal of the defendants to give deeds for the lands so purchased. The first four counts of the declaration are exactly the same, except that each relates to a different parcel of land. To these four counts the defendants demur.

The sale for taxes at which the lands were purchased was a sale under 47 Vic. c. 60, a private Act, providing for the sale, by the municipalities of Kildonan and Assiniboia, of lands then in the city of Winnipeg, but formerly within these municipalities, and upon which arrears of taxes remained due to them.

I do not think the objections, that the defendants cannot be rendered liable, because the seal of the corporation is not affixed to the certificate, and that they cannot be liable under the Statute of Frauds, because the certificate is not executed by them, have any force. If they are liable, it must be because the treasurer, selling under the Act, is their agent, and they are bound by what he does within the scope of his authority. The statute provides that he is, after selling, to "give a certificate under his hand," to the purchaser, and that seems to exclude the idea of the seal of the corporation being necessary.

But upon other grounds it seems to me the defendants must succeed on this demurrer. The statute does not say that the defendants are to give, or execute, a deed, that is to be done by the reeve and treasurer. The declaration nowhere alleges that a deed has been demanded from them, or that they have refused to execute one. It only alleges that a deed has been demanded from the defendants, and that they have wholly neglected and refused to execute a deed, but under the statute the deed is not to be executed by them.

Under The Municipal Act at one time in force in Ontario, sales for taxes were made by the sheriff, and he was the person to execute the deeds.

In *Spafford* v. *Sherwood*, 3 O. S. 441, the action for not executing the deed to the purchaser, was brought against the sheriff. The late Chief Justice Harrison, an acknowledged authority on municipal law, in *Harrison's Municipal Manual*, when treating of the section of the Act then in force, which provided that the treasurer, with the warden, should prepare, execute, and deliver the deed, says p. 741, note (k), "If he refuse, an action will lie against him, at the suit of the purchaser, for the recovery of damages."

No duty is, by the statute, cast upon the municipality to procure the execution of a deed by the officers who are required to execute it. In *Martin* v. *Mayor of Brooklyn*, 1 Hill. 545, it was said, that no case had been cited in which it had been held that municipal corporations are liable for omissions of duty, specifically imposed by statute on one of their officers. By the Ontario Statute 4 & 5 Vic. c. 10, s. 37, the duty of the district surveyor was to take care of all fixed property belonging to the district, but when that officer omitted to take proper care of the court house, and damage resulted, the district council were, in *Hawkeshaw* v. *Dalhousie District Council*, 7 U. C. Q. B. 590, held not liable for such damages.

The case of *Austin* v. *Simcoe*, 22 U. C. Q. B. 73, seems also an authority against the plaintiff being entitled to maintain such an action as the present, against the corporation.

Upon another ground of demurrer the defendants are also entitled to succeed. That is, that the counts disclose no cause of action which the plaintiff has against the defendants. Each count avers, that Dr. D. Dufresne became the purchaser of the land to which it refers, it sets out a certificate given to him as the purchaser, that the defendants did not upon demand execute a deed to him, whereby he has sustained damage. The plaintiff in the action is Annie McLellan, but nowhere, in any of the counts, is there anything to show how she is entitled to maintain the action. It is true, that at the close of the declaration, after the common counts, there appears the following statement, "All of the aforesaid several causes of action and all moneys arising therefrom, the said Dr. D. Dufresne by instrument in writing under his hand and seal, bearing date the third day of September, A.D. 1887, assigned and set over to the plaintiff." But that is not sufficient.

The Administration of Justice Act, 1885, section 127, requires that the plaintiff in any action or suit for the recovery of the subject of any assignment made in conformity with the two next preceding sections, shall, in his declaration or statement of claim, set forth briefly the chain of assignments, showing how he claims title. That is relied upon as meaning, that if the chain of assignments is set out anywhere in the declaration, that is sufficient. I do not think so, it must mean that the assignment must be alleged wherever in the declaration, it is necessary for the purpose of showing how the plaintiff claims to be entitled to bring the action. As I understand, every count must contain in itself, a complete cause of action. On the argument of a demurrer, only the counts of the declaration which are demurred to, can be looked at. It is not enough, when a count is demurred to as not showing a cause of action, to refer the court to another part of the declaration, as setting out something, which had it been set out in the count objected to, would have disclosed a good cause of action. The counts demurred to here do not, any one of them, show any cause of action which the plaintiff has against the defendants.

The demurrer is allowed.

Demurrer allowed.

BARR v. CLARK.

County Court.—Appeal from order.

No appeal will lie from an order of a county court judge directing the clerk to sign a judgment, which, without such order, he should have signed.

G. A. F. Andrews, for plaintiff.

J. O'Reilly, for defendant.

(*25th November, 1887.*)

KILLAM, J.—This is an application by the defendant in an action in a county court, to compel the judge of that court to stay the proceedings, and fix security for a proposed appeal from a decision given in that cause.

It appears that on the 5th August last, judgment was rendered in favor of the plaintiff for $75 and costs, but proceedings were stayed for fifteen days to enable the defendant to apply for a new trial or hearing or for a reduction of the amount of the verdict, it being ordered that if no affidavit should within that time be filed by the defendant, execution might then issue.

On the 20th August there was filed with the clerk of the court a paper purporting to be a receipt given in settlement of the suit with an affidavit verifying the signature thereto as that of the plaintiff.

The plaintiff afterwards applied to the clerk to enter judgment and issue execution for the amount awarded the plaintiff on the 5th August, but on account of the receipt having been filed with him the clerk refused to do this without an order from the judge. The plaintiff then applied to the judge who made the order that judgment be signed and execution issued. The defendant then applied to the learned judge to rescind or reverse this order and on his refusal to do so gave notice of his intention to appeal from the latter decision and asked for a stay of proceedings to enable him to perfect his appeal, which the learned judge refused. (His Lordship then referred to the County Courts Act, 50 Vic. c. 9, ss. 243 & 244.)

It appears to me that the decision in question is not one from which an appeal can be had. The clerk was bound to go on and enter up judgment and issue execution and should have done so, without reference to the supposed receipt, unless an order were made for a stay of proceedings. It might be reasonable that, on his refusal to do so, the judge should exercise a summary jurisdiction to compel him to do his duty, but the order made for the purpose is a mere interlocutory order and not the judgment in the cause.

In *Carr* v. *Stringer*, E. B. & E. 123, it was held that no appeal lay under the English County Courts Act, 13 & 14 Vic. c. 61, s. 14, from a decision of a judge of a county court in an interlocutory matter, such as an application with reference to the scale of taxation of costs. That section provided, "That if either party in any cause of the amount to which jurisdiction is given to the county courts by this Act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of law at Westminster." This seems quite as wide as our Act. The words "matter" and "proceeding" in our Act do not appear to me to refer to any application or proceeding in a cause or action, but to substantive matters and proceedings not in themselves actions; such, for instance, as proceedings on interpleader summonses.

The rule will be discharged with costs, but not including costs of material filed by the plaintiff upon the merits of the finding of the county judge, that the alleged receipt was not binding on the plaintiff.

Rule discharged with costs.

WISHART v. BONNEAU.

Charging order.—Style of matter.—Notice of reading affidavit.

A solicitor's petition for a charging order should be intituled in the matter of the Act.

The petition or notice must show upon what material it is grounded.

On an application respecting certain land under The Real Property Act, 1885, a caveat was filed by Wishart, and thereafter such proceedings were had, that a certificate of title was issued to him under the Act. His solicitors presented a petition for a charging order for their costs under the Imperial Act, 23 & 24 Vic. c. 127, s. 28. This was opposed on the part of The Commercial Bank of Manitoba, who are mortgagees of the land, the certificate having been granted to Wishart subject to their mortgage.

Two objections were taken by the mortgagees, the first being, that the petition is not intituled in the matter of the Act. This the petitioners contended was not necessary.

The other objection taken was, that the affidavit, the sole evidence, filed in support of the petition could not be read, no notice of such an affidavit having been given to the respondents. The notice served merely said that the petition of the solicitors, naming them, filed herein and hereto attached will be presented to the presiding judge on such a day. The petitioners contended that under the rules and regulations given in the schedule to the 49 Vic. c. 28, the Act amending The Real Property Act, 1885, only the filing of a petition is provided for.

G. G. Mills, for petitioners.

H. Vivian, for Commercial Bank.

(14th December, 1887.)

TAYLOR, C.J., in a written judgment disposed of these objections as follows:—

The first objection, the learned Chief Justice held to be good, but thought an amendment should be allowed. He referred to Dan. Ch. Pr. 1758; *Faithful* v. *Ewen*, 7 Ch. D. 495; *Twynam* v. *Porter*, L. R. 11 Eq. 181; *Morgan & Wurtzburg*, citing *Clover* v. *Adams*, 6 Q. B. D. 622; and *Hamer* v. *Giles*, 11 Ch. D. 942; *Re Law*, 4 Beav. 510.

The second objection was held to be fatal to the application. Reference was made to *Farish* v. *Martyn*, 1 Gr. 300; *Fraser* v. *Fraser*, 13 Gr. 183.

Leave was given to renew the application.

HARDIE v. LAVERY.

(IN EQUITY.)

Breach of injunction.—Costs of motion to commit.

Although there may not have been such a wilful or contemptuous breach of an injunction as may call for punishment by committal, yet where the defendant by his conduct invited the application to commit, he was ordered to pay the costs of the motion.

J. S. Ewart, Q.C., and *J. R. Haney*, for plaintiff.
L. G. McPhillips and *A. E. McPhillips*, for defendants.

(*2nd November, 1887.*)

TAYLOR, J.—At the close of the argument on the motion to commit the defendant Burke for a breach of the interim injunction, I expressed a doubt if such a wilful or contemptuous breach of the injunction had been made out as to require my going to the extreme length of committing him to close custody. After examining the affidavits and the cross-examination of the various parties and witnesses, I continue to be of the same opinion. At the same time the account of his conduct given by the defendant is by no means satisfactory. His admission that he knew his brother had gone to remove some of the grain may have been, that he knew at the time of making the admission, though he did not know at the time the grain was actually removed. It is, however, open to the other construction also.

I cannot help coming to the conclusion that at all events the defendant by his conduct, if not misconduct, invited the motion to commit and therefore I should follow the precedent in numerous cases by ordering him to pay the costs, although refusing the motion. *Bullen* v. *Ovey*, 16 Ves. 141; *Leonard* v. *Attwell*, 17 Ves. 385; *Marsack* v. *Bailey*, 2 S. & S. 577; *Woodley* v. *Boddington*, 9 Sim. 214; *Brooks* v. *Purton*, 1 Y. & C. 277; *Newman* v. *Ring*, 10 Jur. 463; *Campbell* v. *Gorham*, 2 Gr. 403; *Bickford* v. *Welland Rail Co.*, 17 Gr. 484, are all authorities for pursuing such a course.

HARDIE v. LAVERY.

(FULL COURT.)

Court or Chambers.—Motion to commit.

A motion to commit for breach of an injunction must be made in court and not in chambers.

On a motion to commit for breach of an injunction, no order was made, except that the defendant should pay the costs of the motion. The master taxed the costs as of a chamber application, holding that the motion could or should have been made in chambers. Upon an appeal by the plaintiff, Dubuc, J., reversed the master's ruling, and thereupon the defendant appealed to the full court.

A. E. McPhillips, for the defendant, cited 15 & 16 Vic. c. 80, s. 26; *Witt* v. *Corcoran*, 2 Ch. D. 69; *Ashworth* v. *Outram*, 5 Ch. D. 943; *Notter* v. *Smith*, 1 Chan. Cham. R. 21; *Daniel's Prac.* 1042, and the appendices to the 2nd. vol.

J. S. Ewart, Q.C., for the plaintiff was not called upon.

TAYLOR, C.J., delivered the judgment of the court. (*a*)

A motion to commit for breach of an injunction cannot be made before a judge in chambers, and is properly made in court. No case in England, or in Ontario, can be found in which such a motion was made in chambers. In *Notter* v. *Smith*, 1 Ch. Ch. R. 21, I was counsel for the defendants, and the motion in that case was made in court, as indeed, the report, which says that at the same time, the injunction was dissolved, shows. A number of the cases reported in the three volumes of Chancery Chamber reports, are cases in court not in chambers, but which are reported only upon some point affecting practice or costs. Only in the third volume are the cases in court distinguished as being so.

Saxby v. *Saxby*, 7 Sim. 140, is a direct authority to support the statement, in both *Joyce and Kerr on Injunctions*, that the

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(*a*) Present: Taylor, C.J., Dubuc, Killam, JJ.

motion is a court one. A form of the notice of motion given in *Joyce*, at p. 1395, also shows that the motion is one to be made in court. The order of my brother Dubuc was right and this appeal must be dismissed with costs.

Appeal dismissed with costs.

REG. v. COLLINS.

Habeas corpus.—Rule nisi.

[TAYLOR, C.J., 28th Jan. 1888.]

A rule to quash a conviction may in the first instance be to shew cause why a writ of *habeas corpus* should not issue, "and why, in the event of the rule being made absolute, the prisoner should not be discharged out of custody without the issuing of the said writ, and without his being brought before the Court."

The rule may at the same time ask for a writ of *certiorari* as well as of *habeas corpus.*

A warrant of commitment which recites a conviction, must shew upon the face of the recited conviction, that the offence was one over which the committing magistrate had jurisdiction.

Where, therefore, the conviction was for obtaining $12 by false pretences, and by statute the convicting magistrate could only convict and pass sentence in case the prisoner pleaded guilty, and the conviction did not show that the prisoner had so pleaded. *Held*, That the conviction ought to be quashed.

C. H. Campbell, for prisoner.

G. G. Mills, for the Attorney-General.

Re NEVINS, A LUNATIC.

Jurisdiction in lunacy.—Court's administration of estate.—Liability for failure of banker.—Committee's disposition of money.—Interest.—Compensation.—Support of Lunatic's wife.

The death of the lunatic determines the jurisdiction in lunacy except for certain purposes as accounting, delivery of property, &c.

The paramount consideration in dealing with a lunatic's estate is his comfort and benefit, and the court exercises great freedom in dealing with the estate.

Expenditures which have been made on behalf of a lunatic without authority may be allowed by the court, but not by the master. Such expenditures will be less readily sanctioned after the death of a lunatic.

Where a committee deposits money with a banker the mere fact of his suspension is sufficient ground for presumption of negligence; though this presumption may be rebutted. The fact that the banker is a private banker will not of itself render the committee liable as being negligent. The fact that the banker selected by the committee is the one formerly employed by the lunatic is an element in favor of the committee.

It is the duty of the committee to pay into court moneys which will not, within a short time, be required for the purposes of the estate.

A committee is liable for interest upon money received by him from its receipt until payment

The court has power to allow compensation to a committee, but the master has no such power unless the matter is specially referred to him.

The wife of a lunatic has authority to pledge her husband's credit for necessaries for her support.

This was an appeal from the report of the master upon taking the accounts of James Nevins, the committee of the lunatic.

By the order declaring the lunacy, it was referred to the master to appoint a committee, and it was further ordered that the committee should "once in each year and oftener if required make a just and true account before the said master of the estate and the profits thereof."

The points raised upon the appeal appear from the judgment.

J. S. Ewart, Q.C., and *N. D. Beck*, for the committee.

H. M. Howell, Q.C., and *G. Davis*, for the administratrix of the deceased lunatic.

(*25th April, 1888.*)

KILLAM, J.—(The learned judge treated of the jurisdiction of the court in matters of lunacy, referring to the Statute 17 Ed. 2, c. 10; *Beverley's Case*, 4 Co. 127; *Re Fitzgerald*, 2 Sch. & Lef. 432; *Lysaght* v. *Royse*, 2 Sch. & Lef. 153; Con. Stat. Man. c. 43, s. 1; *Re Barry*, 1 Moll. 414. The learned judge then referred to the following cases to establish that on the death of lunatic, the jurisdiction in lunacy continues to a certain extent. "Thus the control which the court has over the committee of the lunatic does not determine by the lunatic's death, but the committee continues liable to account, and to all the consequences of mis-conduct on his part and bound to act in delivering up possession to the estate as the court shall direct." *Re Brillinger*, 3 Ch. Ch. 292; *Re Ferrior*, L. R. 3 Ch. 178; *Re Butler*, L. R. 1 Ch. 607; *Ex parte Grimstone* Ambl., 706; *Ex parte Clark*, Jac. 589; *Tayler* v. *Tayler*, 3 Mac. & G. 426. The learned Judge then proceeded.)

The first and paramount consideration of the court in dealing with the property of a lunatic is his comfort and benefit. *Exparte Grimstone*, Ambl. 706; *Earl of Leitrim* v. *Enery*, Dru. 345; *Weld* v. *Tew*, 1 Beat. 268; *Exparte Whitbread*, 2 Mer. 99; *In re Pink*, 23 Ch. D. 577; *Davenport* v. *Davenport*, 5 Allen 464.

The court does not necessarily apply the property of the lunatic in payment of his debts, but only in so far as is consistent with his comfort and benefit. His interests, and not those of his creditors, are principally considered. *Exparte Hastings*, 14 Ves. 182; *Exparte Dikes*, 8 Ves. 80; *In re Pink*, 23 Ch. D. 577; *In re Price*, 34 Ch. D. 603; *Re Buckley's Trusts*, Johns. 700.

Upon a party being found lunatic, an inquiry should be instituted to ascertain who would be his heir and who his next of kin, in case he should die at once. They are given notice of and have the right to attend upon all proceedings in lunacy. But, notwithstanding this, neither the heir presumptive nor the next of kin, are recognized as having any right whatever to or interest in the lunatic's property during his lifetime. They are merely called upon to assist the court, as parties having a probable interest in the proper management of the estate, for the better protection of the court in its dealing with the estate and the committee. *Exparte Clarke*, Jac. 589; *Earl of Leitrim* v. *Enery*, 1 Dru. 345, 348; *Exparte Wright*, 2 Ves. Sr. 25; *Exparte Whitbread*, 2 Mer. 99; *Tharp* v. *Tharp*, 3 Mer. 512.

The court, therefore, exercises great freedom in dealing with a lunatic's estate, not limiting itself to the satisfaction of legal claims upon the lunatic or his estate, but acting as it appears that a reasonable and prudent owner would act and as, so far as the court can judge, the lunatic himself would act under the circumstances arising from time to time. *Earl of Leitrim* v. *Enery*, 1 Dru. 348; *Re Browne*, 1 Moll. 5; *Exparte Whitbread*, 2 Mer. 99; *In re Wynne*, L. R. 7 Ch. 229; *Marman's Trusts*, 8 Ch. D. 256; *Davenport* v. *Davenport*, 5 Allen 464; *Beall* v. *Smith*, L. R. 9 Ch. 85; *Edwards* v. *Abrey*, 2 Coop. t. Cott. 177; *In re Law*, 7 Jur. N. S. 410; *Selby* v. *Jackson*, 6 Beav. 202; *Re Willoughby*, 11 Paige 257.

Thus, the court will allow out of the estate sums for maintenance of members of the family of a lunatic. *Foster* v. *Marchant*, 1 Vern. 262; *In re Pink*, 23 Ch. D. 577; *Edwards* v. *Abrey*, 2 Coop. t. Cott. 177; *Re Willoughby*, 11 Paige, 257. It will even make allowances to collateral relatives for whom it was reasonable to suppose that the lunatic would to some extent have provided. *In re Blair*, 1 My. & Cr. 300; *Re Willoughby*, 11 Paige 257. In one case, *In re Earl of Carysfort*, Cr. & Ph. 76, an annuity was allowed out of a lunatic's estate as a retiring pension to an old personal servant of the lunatic.

In many cases in which a committee has made expenditures out of the estate of a lunatic without previous authority of the court, such expenditures, on their appearing to have been for the benefit of the lunatic and of a class and made under circumstances which would have warranted their being authorized if application had been previously made, have been allowed to the committee out of the estate. *Foster* v. *Marchant*, 1 Vern. 262; *Newcombe* v. *Newcombe*, 1 Dru. 358; *Re Browne*, 1 Moll. 5; *Tempest* v. *Ord*, 2 Mer. 56; *Re French*, L. R. 3 Ch. 317; *Re Marman's Trusts*, 8 Ch. D. 256; *Re Shaw*, 15 Gr. 619; *Nelson* v. *Duncombe*, 9 Beav. 211; *Re Brown*, 1 Mac. & G. 206.

But it is by no means a matter of course that such unauthorized expenditures will be allowed, although for the benefit of the lunatic. *Re Langham*, 2 Ph. 299; *Anon*, 10 Ves 104; *Exparte Marton*, 11 Ves. 397; *Exparte Hilbert*, 11 Ves. 397; *Attorney-General* v. *Vigor*, 11 Ves. 563. And the discretion of the court in making such allowances is much more limited after the death of the lunatic, as then other parties have interests in the property. *Re Marman's Trusts*, 8 Ch. D. 256; *Re Patrick*, 2 Ph. 394; *Exparte McDougal*, 12 Ves. 384.

Having thus stated the leading principles upon which the court acts in dealing with the estate of a lunatic, I will proceed to the consideration of the different grounds of appeal.

The first ground of appeal relates to Item No. 17 of the committee's account, in which he charges the estate with a sum of $2000 "paid Sinclair in settlement of claims against John Nevins." It appears that the lunatic while of sane mind and one Bryant became joint lessees of one Sinclair, in respect of a certain hotel property under a written lease by which they covenanted for payment of the rents as they accrued. The lease was for a period of three years from the 1st October, 1882, at a rental of $175.00 per month, payable on the first day of each month in advance. It contained a covenant by the lessor to grant to the lessees a further lease of the premises for two years from the expiration of the first term at the same rental, but no express covenant or agreement by the lessees to accept such further lease or to pay rental beyond the three years. On the 29th January, 1884, Sinclair recovered judgment against Bryant and the lunatic for the rent for January, 1884, and on the 8th March, 1884, Sinclair recovered judgment against them for the February rent.

Previously to the recovery of the judgments, by deed dated 18th December, 1883, John Nevins conveyed to his father, subsequently appointed the committee of his estate, a quantity of valuable lands, without any consideration being given for them. The committee says that he first learned of the conveyance early in January, 1884, on coming to Winnipeg. He had arrived here in December, 1883, having come to look after his son, of whose peculiar actions such accounts had reached him that he thought it necessary to inquire into his condition. He found the condition of the son such that he took him to Chicago for medical advice, under which he then placed him in an asylmn for the insane, at Detroit. After recovery of the judgments against Bryant and John Nevins, Sinclair filed a bill in equity to have the conveyance to the father, of the lands mentioned, declared void as made with intent to defraud creditors, and on being served with the bill, the father came to Winnipeg to attend to that suit. After negotiations with Sinclair he settled the matter by paying to him $2000, in full discharge of all claims for rent under the lease then due, and up to the 1st November, 1885, and of the costs of the suit in equity.

This settlement was made on the 6th May, 1884, on which day the father paid Sinclair $1500 and gave a note for the remaining $500. A receipt for the full $2000 was on that day given by Sinclair, in which it was stated to have been received from John and James Nevins. The master allowed to the committee the amounts for which Sinclair recovered the judgments. While the committee claimed in his account the whole $2000, he seeks upon this appeal to have a further allowance of only $350, being for the rent for the months of March and April, 1884.

It does not appear to me that the master should have allowed any portion of the $2000 to the committee. As I have already stated, it is a matter for the discretion of the court whether the debts of a lunatic shall be paid out of his estate, or, if paid by the committee, whether he shall receive credit for such payments. The master has no authority whatever to determine this. In taking the accounts, it would be very reasonable that he should report any expenditures made for the estate without an order authorizing them and any circumstances relating to them and how far they should be considered as made for the benefit of the lunatic or his estate, but the discretion to determine whether such payments should be allowed to the committee is in the court only.

In *Fielder* v. *O'Hara*, 2 Ch. Ch. 255, where, by a decree for administration of an estate the master was directed to make an allowance to the administratrix for past maintenance of infant children, she made no claim, but her husband did and was allowed it by the master. Vankoughnet, C., held that the master had no authority to do so, it being in the power of the court only, though the master might have reported the circumstances specially.

In *Re Brown*, 1 Mac. & G. 206, under a General Order in Lunacy authorizing the commissioner "without special order to receive any proposition or conduct any inquiry as to the mining, settling, or letting the estate, or otherwise respecting the person or property of any lunatic," and to "report thereon as he shall see fit," but with the restriction that "such report shall be submitted for confirmation as is now done with respect to such reports when made upon special reference," the committee having from time to time made expenditures with the sanction of the commissioner, these were held to be unauthorized, but the fact that the master had approved them as made was taken into consideration as a circumstance affecting the discretion of the court.

In the present case the master was acting only under an order which directed the committee to "make a just and true account before the said master of the estate and the profits thereof as are now or shall hereafter come to his hands, custody or possession." The most that it appears that he could have done with reference to expenditures in paying debts or otherwise, which the court might or might not see fit to allow credit for, would be to report specially the circumstances that the facts might be brought before the court on any subsequent application in reference to them. Strictly even this would not be obligatory upon the master, but the regular course would be that the committee should petition the court for the allowance of such payments, making a *prima facie* case, and a special order of reference to the master would be made. It is true that in *Re Shaw*, 15 Gr. 619, where the master had disallowed an item for a sum expended by the committee without authority, on appeal it was held to be a payment which the court should allow, and the master, on reference back, was directed to do so. But I apprehend that this case shows no more than this, that the court may, on an appeal from the master's report, exercise its discretion and allow an expenditure which the master had no right to definitely allow. The amount in that case was a very small one; there was another point on which the account had to be referred back to the master, and it was very reasonable that the court should determine the question without any separate application being required. Besides, the form or nature of the order of reference in that case does not appear from the report. However, whatever doubt as to the practice this case may have raised, has been entirely dispelled in my mind by my finding that the learned Chief Justice of this Court, whose former position as Master in Chancery of Ontario, gave him so well recognized an acquaintance with such questions of practice, agrees fully with my opinion upon this point.

In the present case, my opinion is that it would be much better that this and some other items which are now the subject of appeal, should be brought before the court in some other way, if the committee should still desire to press for their allowance. If I were to consider them now, I should desire further argument of the propriety of exercising a discretion to allow them, and of the extent of that discretion, since the death of the lunatic. There is one other ground of appeal at least on which the committee might desire to adduce further evidence, and I think that it would be better not to delay the final confirmation of the present report or action upon it, by referring these items back to the master with instructions for a special report.

There may be a ground for allowing to the committee as of right, by way of set-off, any debts due by the estate of the lunatic to him, but whether this should be done, I will not now consider. It does not appear to me that the payment of this sum of $2000, created any debt from the lunatic to the committee. When the $1500 was paid, the appointment of the committee had not been made. If the note was paid after his appointment, the payment was in discharge of a liability which the committee had previously voluntarily assumed. So far as any claim could arise from an assertion of the creditor's claim against the lands conveyed to the committee, I think that the latter would be obliged to rely on the covenants in his conveyance and whether there where any, or such as would cover such a claim upon the land in his hands, there is no evidence to show.

It appears to me that the whole payment must be considered to be a voluntary one, just as any payment of another's debt without request or liability for it is so, and in this way creates no right to enforce repayment. Even if the payment had been made by the committee after his appointment he would have no claim except to call upon the court acting for the lunatic, to determine in the exercise of its discretion whether he should be repaid the amount out of the lunatic's estate. The matter would then be regulated by the principle involved in the words of L.C. Hart, in *Re Browne*, 1 Moll. 5, "Upon the facts properly stated in the petition, I would deal as I would with the disposal of my own property without any reference to a master, just as if a fair debt had been paid for myself."

The fifth ground of appeal relates to an item of $3000 in the committee's account. (The learned Judge referred to the evidence for the purpose of showing that in his opinion, the committee must be considered to have received the sum of $3000, and to have deposited it to his own credit with Manning & Co., private bankers in the City of Winnipeg. The learned Judge then continued.)

As between the bankers and the committee it became thenceforth the money of the committee, though a trust fund. In this case the *onus* is upon the committee to excuse himself from paying it over. But, even if this be not so, and the money be deemed to have still remained the money of the lunatic in the hands of his bankers, as he had left it, the committee would be equally bound to protect the fund, and if it has been lost by his negligence he is answerable for it. In this view, the *onus* is equally upon him, for his negligence must be presumed from the mere fact of the bank having suspended and the amount not being forthcoming, unless he excuses himself, *Salway* v. *Salway*, 2 Russ. & M. 217; *Mendes* v. *Guedella*, 2 J. & H. 279; *Tebbs* v. *Carpenter*, 1 Mad. 290; *Grove* v. *Price*, 26 Beav. 103.

The principle upon which a trustee depositing trust funds with a banker is held not to be liable for its loss by failure of the banker, is shortly and clearly stated by Lord Fitzgerald, in *Speight* v. *Gaunt*, 9 App. Cas. 29, "Although a trustee cannot delegate to others the confidence reposed in himself, nevertheless, he may in the administration of the trust fund, avail himself of the agency of third parties, such as bankers, brokers and others, if he does so from a moral necessity or in the regular course of business." But, as said by Lord Blackburn in the same case, (p. 19), "A trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money."

Passing over the contention that by the mere deposit of the money to his own credit at interest, without any designation of the account as that of the lunatic's estate, the committee became personally liable for it, and the other evidence relied on to show a conversion by the committee, it appears to me that two questions arise. Was it proper for the committee to retain in his hands this sum of money, from the 21st June, to the 31st August? In choosing the bank of Manning & Co. for its deposit, did he act as an ordinary prudent man of business would act in reference to his own money?

The committee would not be entitled to invest the money on the personal security of bankers. He could only be allowed, in respect of moneys proper to be retained in hand, to place them on deposit with a banker. The rule is not to allow an investment of a lunatic's moneys even on mortgage of real estate. On an application for authority to lend such on the security of real estate, in *Exparte Ellice*, Jac. 234, Lord Eldon said, "The general rule is not to lay out the lunatic's money on anything but government securities, except in very peculiar cases." The same rule is laid down in *Exparte Cathorpe*, 1 Cox. 182.

In *Shaw* v. *Rhodes*, 2 Russ. 539, Lord Eldon said, "The receiver's recognizance, it is true, binds him only to pass his accounts yearly, but he may at any time apply to the court to pay in moneys in his hands and if, in the intervals between passing his accounts, he receives any sums of such an amount as to make it worth while to lay them out, he ought to have paid them into court that they may be there made productive for the benefit of the estate." Similar views were expressed by Lord Brougham in *Salway* v. *Salway*, 2 Russ. & M. 212.

It appears to me that such was the duty of this committee with respect to moneys not required to be within a short time expended for the purposes of his office. *Lord Dorchester* v. *Earl of Effingham*, Taml. 279; *Fenwick* v. *Clarke*, 4 D. F. & J. 240, and *In re Marcon's Estate*, 40 L. J. Ch. 537, relied on by counsel for the committee, are cases of executors and administrators, who are not officers of a court into which moneys can be paid, as the committee is, but more in the position of trustees appointed by a party, who have no duty to pay money into court, and who are given by law a year in which to collect in and divide the estate, during which period they are usually entitled to keep the moneys in hand.

It seems to me rather that the language of Lord Langdale, M.R., in *Darke* v. *Martyn*, 1 Beav. 525, is applicable:—"If the executors had stated in their answers that it was necessary for the purposes of the will to have a balance in hand and that they had kept these sums in the hands of the bankers, it would be a subject of excuse, but as I understand the facts they are inconsistent with such a statement; for the debts and all the legacies seem to have been paid very shortly after the death of the testator . . . . These sums were improperly lent on the personal security of the bankers; the trustees, therefore, became liable."

The importance of the consideration whether the money was properly retained in hand or invested, appears also from *Swinfen* v. *Swinfen*, (No. 5), 29 Beav. 211, and *Johnson* v. *Newton*, 11 Ha. 160.

I am also of opinion that, upon the other question, the propriety of selecting the bank of Manning & Co. for the deposit, my decision must be adverse to the committee. With this question may also conveniently be considered that of the liability of the committee upon the hypothesis that he did not deposit moneys received by him, but merely failed to collect and draw out moneys of the lunatic found by him in the hands of the bankers. In either view it appears to me that the committee was guilty of negligence and want of prudence.

The mere fact that the banking house of Manning & Co. was a private or unincorporated bank, cannot, as it appears to me, of itself render the committee liable as being negligent in leaving the money there on deposit. It is, I admit, a strong circumstance in favor of the committee that it was the bank of the lunatic, one in which the latter had been accustomed, as the accounts show, to have considerable sums on deposit at various times, from January, 1882. That this can be considered is shown by the cases of *Speight* v. *Gaunt* 9 App. Cas. 18; *Orr* v. *Newton*, 2 Cox. 276; *Lord Dorchester* v. *Earl of Effingham*, Taml. 279; *Bacon* v. *Bacon*, 5 Ves. 331; *Johnson* v. *Newton*, 11 Ha. 160; *Rowth* v. *Howell*, 3 Ves. 565. I fully agree, also, that only ordinary prudence is to be required of this committee and that one must be careful not to be too much influenced by the result. But the direct evidence shows, as it seems to me, that there was ground for apprehension when the committee agreed to leave the money with these bankers. The committee's own evidence is sufficient to show that the bankers could not well spare the amount in May or in June. The arrangement which the bankers made, agreeing to pay interest at 5 per cent. and even to pay up interest which they were not bound to pay, and that without securing any agreement to leave them the money for any specific period, and again the refusal in July to pay out any of the money, should have awakened the suspicion of any business man. More, the suspicion of the committee was awakened, and this is important not only for the fact itself and as showing that he is not unjustly treated in being (as he should be) held bound by circumstances which were calculated to awaken suspicion in a business man, but also as additional evidence that the circumstances, all of which may not be clearly shown to the utmost detail, were such as naturally to awaken suspicion.

The sixth ground of appeal relates to certain goods and chattels of the lunatic, with which the master has charged the committee as having been converted by him to his own use.

(The learned Judge then referred to a number of articles of more or less value inquiring as to each whether there was sufficient evidence of conversion to the committee's own use. The master had charged the committee with the value of all the articles, but the learned Judge thought that the committee should have the right to return those as to which there was not direct evidence of conversion.)

The next two grounds of appeal relate to sums claimed in the surcharge for interest.

(It had been contended on the part of the committee that interest should be charged only from the date that the committee should have passed his accounts, and that it should be charged up to the date of the lunatic's decease only. The learned Judge thought otherwise and allowed interest from the receipt of the money until payment. The learned Judge then continued.)

That he is liable for interest upon sums received and retained in his hands from the dates of receiving them is shown by the following cases:—*Exparte Catton*, 1 Ves. Jr. 156; *Exparte Chumley*, Ib. 156; *Exparte Hall*, Jac. 160; *Shaw* v. *Rhodes*, 2 Russ. 539.

The tenth ground of appeal is that the master refused to make any allowance to the committee for his trouble and loss of time in connection with the estate, or for the maintenance of the lunatic's wife. In England, the general rule has been that no allowance should be made to the committee of the estate for loss of time and trouble in managing the affairs of the estate, *Progers* v. *Frasier*, 2 Show. 172; *Re Annesley*, Ambl. 78; *Anon*, 10 Ves. 104; *Re Livingston*, 9 Paige 440, 2 Den. 576; *Re Walker*, 2 Ph. 631; *Re Earl of Lanesborough*, Ll. & G. t. Plunkett, 503. But in exceptional cases, such an allowance might be made, *Exparte Fermor*, Jac. 404; *Exparte Warren*, 10 Ves. 622; *Exparte Radcliffe*, 1 J. & W. 639; *Brochsopp* v. *Barnes*, 5 Mad. 90; *Re Walker*, 2 Ph. 630; *Re Laugham*, 1 Jur. 281.

This again, however, would be plainly a matter for the discretion of the court. Without an order directing it, the master would have no authority to make such an allowance.

The committee relies chiefly, in support of his claim for such an allowance, upon the 29th section of the Act 49 Vic. c. 13 M., which provides that, "A trustee shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate as may be allowed by the Court of Queen's Bench, or any judge or master thereof to whom the matter may be referred." Though a committee of a lunatic estate is not strictly within the definition of a trustee given by the 28th section, yet he certainly comes within the spirit of the Act. Under a similar statute of the State of New York not specifically referring to such committees, in *Re Roberts*, 3 Johns. Ch. 42, a committee of a lunatic's estate was allowed a sum for his services. But while our statute may well warrant the court in changing its practice in this respect, and in making it the rule to grant such an allowance and the exception not to do so, yet even the statute leaves the jurisdiction in the court. The master has none over the matter unless it has been referred to him and here this has not been done. *Potts* v. *Leighton*, 15 Ves. 273; *Harrison* v. *Boydell*, 6 Sim. 211; *White* v. *Lady Lincoln*, 8 Ves. 370. (*a*).

(*a*) The learned Judge's attention does not appear to have been called to G. O. 213. Rep.

Assuming that the master could and should allow, by way of set-off any debt due the committee from the lunatic, I do not think that there is any evidence of such debt for the maintenance of the wife. That the wife of a lunatic has implied authority to pledge her husband's credit to obtain necessaries for her support, appears from the cases of *Read* v. *Legard*, 6 Exch. 636; *Davidson* v. *Wood*, 32 L. J. Ch. 400; *Richardson* v. *Dubois*, L. R. 5 Q. B. 51; *Shaw* v. *Thompson*, 16 Pick. 198. Here, however, there is no evidence that she did so. It is not even shown that the committee maintained her. It does appear that she resided for a considerable time at Peterborough, but not that she lived at the house of the committee or was furnished by him with food, clothing or money, except some sums which he has charged specifically in his accounts. Even if it could be assumed that Mrs. Nevins lived for any considerable time at the house of the committee, sufficient is not shown of the circumstances to enable me to determine whether a contract to pay for the maintenance should be inferred or whether it was a mere friendly act of bounty on the part of the committee. If he had intended to make any charge for this he could easily have stipulated for it or have applied to the court for an allowance for maintenance.

BURT v. CLARKE.

(In Equity.)

Registered judgment.—County Court.—Exemptions.—Residence commenced after judgment registered.—Dissolution of partnership.—Registration.—Continuance of liability.—Costs.

A county court judgment for less than $100 registered before the County Court Act of 1887, and re-registered under section 135 of that Act before the 1st November, 1887, is valid, and may be enforced by bill in equity. After a judgment was registered the judgment debtor took up his residence in a house which he owned, and claimed its exemption.

Held, That it was not exempt.

A partnership was dissolved, but the dissolution was not registered. One of the partners continued the business under the partnership name and committed a tort.

Held, That the retiring partner was not liable, there being no evidence that he consented to, or knew of the continuance of the firm name.

Plaintiff's claim being small, his costs were fixed at $50.

G. A. F. Andrews and *A. J. Andrews*, for plaintiff.

J. O'Reilly and *A. Howden*, for defendant.

(*31st January, 1888.*)

Bain, J.—I dispose of this case as follows:—

I overrule the demurrer of the defendant on both grounds.

Subject to the necessity of re-registration as required by section 135 of the County Court Act of 1887, I do not think the effect of this Act has been to take away the lien acquired by judgments for less than $100, registered under the previous Act. Here the bill to realize the lien was filed before the County Court Act of 1887 came into force, and the judgment was re-registered before the 1st day of November last, and I think the plaintiff's rights remain unaffected by the Act of 1887.

I think a party who has a registered judgment has the right to proceed in Equity to enforce the lien, notwithstanding that there are no provisions in the County Court Acts expressly authorizing him to do so. See *McLean* v. *Gillis*, 2 Man. L. R. 113.

The defendant claims that the house on McWilliam Street forming part of the property against which the plaintiff's judgment is registered, is exempt from its operation as his actual residence or home. The certificate was registered on the 20th of July, 1887, and it is clear that at that date neither the defendant nor his family was living in the house and that neither he nor they actually began to live in it till the month of October following, when they returned to Winnipeg from a homestead which the defendant had taken up in the N. W. T. Under these circumstances I must hold that no part of the property is exempt from the lien, *Warne* v. *Housley*, 3 Man. L. R. 547.

As to the set off and counterclaim set up by the defendant for the alleged conversion of a sewing machine; it appears that the partnership between the plaintiff Burt & Haddock was dissolved in August 1885, and the alleged conversion, with which Burt personally had nothing whatever to do, took place in April, 1887. The defendant contends that as proper notice of the dissolution was not given when the partnership was dissolved, and as the business continued to be carried on under the original name, Burt would be liable for the torts of Haddock. There is nothing to shew, however, that it was with Burt's consent or even knowledge, that the old name was continued, and in the absence of such evidence I cannot go the length of holding that Burt would be liable for Haddock's torts. Taking this view, it is not necessary for me to decide whether or not there was a conversion by Haddock.

It appears the lands are subject to a mortgage for $600 to the Manitoba Mortgage and Investment Co.

There will be a decree that the plaintiffs are entitled to a lien against the lands for the sum of $80.75 and interest from the 16th day of July last, with a reference to the master as to incumbrances and to settle amounts and to fix a time for payment, and in default of payment for sale of the lands.

In view of the small amount of the plaintiff's claim, I fix the plaintiff's costs at $50 up to and inclusive of decree.

Affirmed on appeal.

EVANS v. BOYLE.

Security for costs.—Plaintiff suing for benefit of others.

[TAYLOR, C.J., 14th January, 1888.]

Upon an application for security for costs, it appeared that the plaintiff had assigned the cause of action to three persons. After the application had been made, two of these persons re-assigned to the plaintiff.

Held, That no order for security should be made; although had one existed it would not, under such circumstances, have been discharged.

T. O. Townley, for plaintiff.

T. D. Cumberland, for defendant.

McMICKEN v. THE ONTARIO BANK.

Married women.—Next friend.

[TAYLOR, J., 31st October, 1887.]

The modern statutes have not affected the rule that a married woman must sue by a next friend, where the suit relates to her separate property.

T. S. Kennedy, for plaintiff.

J. S. Ewart, Q.C., for defendant.

REG. v. GRANNIS.
REG. v. NEVINS.
REG. v. LYONS.
REG. v. FERGUSON.
REG. v. ADAMS & JACKSON.

Liquor License Act.—Evidence of character of liquor.

Upon a charge of selling liquor without a license, there must be evidence that the liquor was intoxicating.

Where the charge is made against a licensee for some breach of the statute, it must be shewn that he was a licensee, and the production of the license after sentence for the purpose of being indorsed as required by the statute is not sufficient.

The fine imposed by a conviction included a share of the expenses of bringing the prosecutor as a witness from a distance.

Held, That such inclusion vitiated the conviction.

A conviction under section 56 of the Act is not bad because it does not direct distress previous to imprisonment.

Evidence that a certain act was done at, or in Portage la Prairie, will not be taken to apply to the Town, rather than the Municipality or County, of that name.

A conviction will not be quashed upon the weight of evidence merely.

Semble, A joint conviction against two members of a firm for a breach of the statute is bad.

Colin H. Campbell, for the Crown.

H. A. Maclean, for defendants.

(*22nd February, 1888.*)

Taylor, C.J.—These are all convictions under "The Manitoba Liquor License Act 1886," of licensed hotel keepers, for selling liquor during the hours in which such selling is prohibited by the 56th section of the Act. All the records of informations, convictions, evidence and other proceedings, have been brought before the Court by writs of *certiorari*. The prosecutor in each case, was a Provincial policeman, who, in the Grannis case, said he had been sent "to see how the License Act was being carried out. . . . . My instructions were to lay information against any hotel breaking the law." From the evidence of the prosecutor, the visit he paid to Ferguson's hotel was on a Sunday afternoon, and his visits to each of the other hotels, were after ten o'clock on a Saturday evening, so if liquor was sold to him in the bar rooms of these hotels, it was so during prohibited hours.

There are eight objections taken common to all the cases, and in each of the last two, there is an additional objection, specially applicable to it.

In the cases of Grannis, Nevins, Lyons, and Adams & Jackson, the evidence is that the bar rooms were lighted up, and a number of people, other than the household of the hotel keeper, in them, but the cases are not brought within section 122, which provides, that such circumstances, "shall be deemed and taken as *prima facie* evidence, that a sale or other disposal of liquors, by the keeper of such licensed place, has taken place contrary to the provisions of the 56th section." That section 122, applies only to cities and towns, and there is no evidence that the hotels in question, were in a city or town. In two of the cases, the hotel is said to have been "in," and in two others "at," Portage la Prairie. In the Grannis case it is "at Portage la Prairie in the County of Marquette." I cannot, in these cases, apply the general rule that, the court will take judicial notice of the territorial divisions of the Province, *Reg.* v. *Shaw*, 23 U. C. Q. B. 616, these being made by Statute. Under the Municipal Act 1886, there are three municipalities of the same name, the County of Portage la Prairie, the Town of Portage la Prairie, and the Municipality of Portage la Prairie. The evidence does not show that the hotels were in the town of that name, unless they were, the 122nd section is not applicable.

In the cases against Nevins, Lyons, and Ferguson, there is no evidence, that what was supplied to the prosecutor, was an intoxicant. To support a conviction, it is necessary to prove that it was so, *Reg.* v. *Bennett*, 1 O. R. 445; *Reg.* v. *Kennedy*, 10 O. R. 396, and this has been held necessary, notwithstanding the provisions of section 124, that it shall not be necessary that the witness should depose directly to the precise description of the liquor sold, *Reg.* v. *Kennedy*. On this ground alone, therefore, the convictions in these cases must be quashed.

In the *Grannis Case*, the prosecutor, speaking of his first visit to the hotel, says, "I went to the bar and called for liquor, and Grannis gave it to me. I think I drank ale. I have no doubt of it. I presume it was intoxicating. I drank it. I paid for it ten cents. In the Adams & Jackson case, the evidence is, "I asked for a glass of ale and Jackson gave it to me. I paid ten cents for it. It was common ale, and an intoxicant." On cross examination he said, "I won't swear that it was not lager beer." Now, in both these cases, there was evidence from which the magistrate might find that the ale supplied was an intoxicant. It was such evidence, as would have been sufficient to go to a jury, and that being the case, the court will not interfere, for it will not quash a conviction upon the weight of evidence, *Rex.* v. *Davis*, 6 T. R. 178; *Rex* v. *Glossop*, 4 B. & Ald. 616; *Reg.* v. *Justices of Llanfillo*, 15 L. T. N. S. 277; *Exparte Vaughan*, L. R. 2 Q. B. 114; *Cornwell* v. *Sanders*, 3 B. & S. 206; *Reg.* v. *Howarth*, 33 U. C. Q. B. 537.

The special objection is taken, in the case of Adams & Jackson, that it was not in the power of the magistrate to convict them jointly. It is sought to support the conviction on the ground that the licensee is the person liable, and that every member of a firm to which a license is granted, is included, and reference is made to section 2, sub-section 9, which defines the word person, as including every member of a firm. Section 123 is also referred to, which says, "The occupant of any house, shop, room, or other place, in which any sale, barter or traffic of liquors, or any matter or thing in contravention of any of the provisions of this Act has taken place, shall be personally liable to the penalty and punishment prescribed in the 77th section."

The interpretation clause has no reference to the meaning of the word "occupant." The case of *Reg.* v. *Sutton*, 42 U. C. Q. B. 220, is relied on, on the one side, to support the objection, and on the other, to support the conviction. It is relied on as supporting the conviction, because there, it is said, the offence did not arise from the joint act of the defendants, but from the personal and particular defect or omission in each, of not being licensed, and so it was a separate offence in each. In *Hawkins Pleas of the Crown*, Bk. 2, c. 48, s. 18, it is laid down, that where there are several defendants, a joint award of one fine against them all is erroneous, for it ought to be several against each defendant; for otherwise one who hath paid his proportionable part might be confined in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another. In *Burn's Justice*, (30th ed.,) vol. 1, p. 1154, where this passage from *Hawkins* is referred to, it is said, "If several defendants are convicted, whether the offence is in its nature single or joint, a joint award of one penalty against them is bad." There is a statement to the same effect in *Paley on Convictions*, p. 278. And in *Morgan* v. *Brown*, 4 A. & E. 515, Littledale, J., said, at p. 519, "The general result of the authorities cited in *Hawkins*, I think, is that, where a fine is imposed upon several defendants, it should be imposed upon them separately."

In this case the objection is also taken, as in all the others, that there was no evidence that Adams & Jackson are licensees. Selling without a license is dealt with by section 81. The offence charged here is one under section 56, which applies only to licensed dealers. Now, where the proceedings are against a licensed person, it seems necessary that it should be shown that he has a license, or that the place in which the liquor was sold, is a licensed place, *Reg.* v. *Rodwell*, 5 O. R. 186; *Reg.* v. *Duquette*, 9 O. Pr. R. 29. There is nothing in the oral evidence in this case, and the same remark applies to the cases of Nevins, Lyon and Ferguson, to show that the places at which the prosecutor says he got liquor, are licensed places, or that the persons convicted hold licenses. Among the papers returned under the writ of *certiorari*, there is on a sheet of paper, nothing else being written on the same sheet, a memo. signed by the magistrate, as follows, "The license issued under The Manitoba Liquor License Act 1886, to Henry Adams & Robert Jackson of the Rossin House, Portage la Prairie, was produced and the conviction endorsed thereon." In each of the other cases there is a similar memorandum. There is nothing in that to show, whether the license had been produced as part of the evidence for the prosecution, to prove that the parties accused were licensees, or whether it was produced, after the conviction, for the purpose of having the conviction endorsed on it, as required by section 111, sub-section 2. The 1st sub-section of that section provides that the magistrate shall require the accused to produce and deliver to him the license under which such person carries on business, and the summons shall state that such production will be required. There is no doubt in my mind, that such a provision requiring the production of the license, is for the purpose of endorsing upon it the conviction, in the event of the charge being proved, not for the purpose of making the accused supply evidence against himself. None of the summonses in these cases, it may be remarked, require production of the license. If any inference can be drawn, or should be drawn, from the mere wording of the memorandum, and from the position in which it is found among the papers, I should say it is, that after the conviction, the license was produced for the purpose of making the endorsement. The magistrate, however, in an affidavit filed in each case, swears that the license was produced before him on the trial.

In the *Grannis Case*, even this memorandum does not supply the needed evidence. The charge is for selling liquor in the Queen's Hotel, and the memorandum is, that a license was produced "to H. Grannis, of the Congress Hall." There is, however, other evidence in that case, from which the magistrate might find that the Queen's Hotel was a licensed place. The prosecutor says, "I saw the defendant behind the bar at the Queen's Hotel, kept by Grannis, ... I went to the bar, and called for liquor, and Grannis gave it to me, ... I know the Queen's Hotel is a licensed hotel." It is not necessary to prove that the person serving the liquor was a licensee, but it must be proved that he was, or that the place in which the liquor was sold was a licensed place, *Reg.* v. *Rodwell*, 5 O. R. 186. From the evidence here, the magistrate might find that the Queen's Hotel was a licensed place, and that being so, on the authorities already cited, the court will not interfere to quash the conviction.

Another objection however is taken, which applies to the cases of Grannis, and Adams and Jackson, and indeed in all the cases, which is, the sum of $4.15 or $4.13, adjudged to be paid by said convictions as costs are excessive, being more than is allowed in such cases. The sum of $4.15, is the amount of costs as stated in the note of the conviction endorsed in each case upon the information, the $4.13 is the amount of costs stated in each conviction. The amount is made up by including in each case sixty eight cents, one fifth of the prosecutor's railway fare to Portage la Prairie from Winnipeg and return.

It was argued, that the Con. Stat. Man. c. 51. s. 1, and the schedule A therein mentioned, provide what fees can be charged. It seems to me, however, that it is section 2, of that Act and the Schedule B., which must be looked at. Even in that schedule, however, there is no provision for allowing witness fees, or travelling expenses, to a prosecutor. The provision in section 17, that if any officer demands or receives any other or greater fee, than that to which he is entitled under the Act, he shall forfeit and pay the sum of $40, to any person who sues therefor, does not, I think, prevent a party aggrieved from taking the objection taken here. In *Reg.* v. *Elliott*, 12 O. R. 524, a conviction was moved against on the ground, among others, that the costs included an item of $1 for the "use of the hall for hearing the case." There it was urged that the conviction was not invalid by reason of excessive costs being ordered, the remedy being by action against the magistrate under R. S. O. c. 77, s. 4. But Rose, J., held, that in ordering payment of this sum there was a clear excess of authority or jurisdiction, and that he had no power to amend, because by reducing the amount, he would create a variance between the adjudication and the conviction. He therefore quashed the conviction, saying, "The proceeding is not one of form, but of substance, and involves a principle." On this ground therefore these convictions must be quashed also.

Several other grounds of objection were taken, only one of which I have considered, and as my opinion upon it is adverse to the applicants I may state it. That objection is, that there is no provision in said convictions for first levying the fine by distress, before inflicting punishment by imprisonment. Section 77 of the Act, which imposes the penalty for selling during prohibited hours, says nothing as to distress. The form of conviction for a first offence, does contain an order for the sums imposed to be levied by distress, with alternatives in cases where a distress would be ruinous to the defendant and his family, or where the defendant has no goods or chattels whereon to levy. But the form of committment for a first offence, seems clearly to contemplate a conviction such as that made in these cases, for payment forthwith, and on default imprisonment. The 62nd section of The Summary Convictions Act, was referred to as requiring a distress to be issued before imprisonment, but what that section provides for is, a distress where, "by the Act or law in that behalf, no mode of raising or levying the penalty compensation or sum of money, or of enforcing the payment of the same is stated or provided." Here, the mode of enforcing payment is stated and provided, namely, imprisonment. This question has been considered in several cases in Ontario. In *Reg.* v. *Smith*, 46 U. C. Q. B. 442, the defendant had been convicted under 32 & 33 Vic. c. 20, s. 43, D., which provided, that the magistrate might impose a fine, "and if such fine so awarded, &c., are not paid, &c., he may commit the offender." The conviction adjudged payment of a fine and costs, and that if not paid, the defendant should be committed for two months, unless such fine and costs were sooner paid. It was urged, that a distress should first have issued, and that such a distress was required by the Summary Convictions Act, section 57. now, by the Revised Statutes, section 62. But Osler, J., said, "The justice was not bound to order that a distress warrant should be issued before imprisonment. Section 43 expressly provides imprisonment as the mode of enforcing payment of the penalty in this case; and by section 57 of the Summary Convictions Act, it is only, when by the Act authorizing the conviction, the penalty is to be levied by distress, and in cases where, by the Act, no mode of enforcing payment of the penalty is stated or provided, that the justice is required to issue a distress warrant. That is where a fine is to be levied on the goods and chattels of the offender, and nothing more is said, the magistrate is the person who is to issue the distress warrant. The same thing had been previously held in *Arnott* v. *Bradly*, 23 U. C. C. P. 1. Where, as in the present case, there is a discrepancy between the body of the Act and a form in a schedule, I think, the plain words of the Act should be taken as governing. See *Allen* v. *Flicker*, 10 A. & E. 640; *Reg.* v. *Baines*, 12 A. & E. 210; *Reg.* v. *Russell*, 13 Q. B. 237.

The large powers of amendment given by the 107th section were referred to upon the argument, but it would be quite impossible for me, upon the material here, to make such amendments as would render these convictions valid.

The result is, that the convictions of Nevins, Lyons, and Ferguson, are quashed because there is no evidence that the liquor supplied to the prosecutor was an intoxicant; those of Grannis and Adams & Jackson, because excessive costs are ordered. The latter might perhaps be quashed on the ground that being a joint conviction it is bad, but I prefer placing it on the other ground.

The convictions are all quashed without costs.

RE THE QU'APPELLE VALLEY FARMING COMPANY, LIMITED.

Winding up.—Notice of application.—Insolvency.

Notice of an application for a winding up order need not be served upon creditors, contributories or shareholders of the Company. They should be served with notice of the application to appoint a liquidator.

Service by a creditor of a demand for payment, in order to establish insolvency, upon directors of the Company is not sufficient.

A Company does not "acknowledge" insolvency by allowing judgment against it to remain unpaid.

Insolvency held to have arisen from the inability of the Company to meet its liabilities in full, and a conveyance of the main part of its assets to another Company without the consent of the creditors, and without satisfying their claims.

W. H. Culver for petitioners.

H. M. Howell, Q.C., for respondents.

(*26th April, 1888.*)

TAYLOR, C.J.—This is a petition for a winding up order, presented under The Winding Up Act, R. S. C. c. 129, by The Scottish-American Investment Company, Limited, who claim to be creditors of The Qu'Appelle Valley Farming Company, Limited. On the argument, counsel for the respondents admitted that they are a trading company subject to the provisions of The Winding Up Act. No affidavit has been filed denying that the petitioners are, as they claim to be, creditors, but the making of an order is opposed on a number of technical grounds. By their charter the town of Chatham, in Ontario, is named as the chief place of business of the respondents, but it was admitted that this has since been changed to the city of Winnipeg, in this Province. The petition for a winding up order is therefore, under sec. 8, properly made to this court. The actual business operations of the respondents, while carried on, were mainly carried on in the North-West Territories, in the Western District of Assiniboia. No business, it is alleged, has actually been carried on by the respondents since sometime in the summer of 1886.

The petitioners are the holders of debentures issued by the respondents to the amount of $150,000, and the interest upon these falling due and payable on the 26th of February, 1887, amounting to $4,500, not being paid, the petitioners sued upon the coupons in this court, and on the 21st of March, 1887, recovered judgment for $4,545.56. Afterwards an action for the same indebtedness was brought in the proper court in the North-West Territories, and a judgment was recovered there on the 18th of May, 1887. Writs of execution against the goods and lands of the respondents were issued on these judgments to the sheriff of the Eastern Judicial District in Manitoba and to the sheriff of the Judicial District of Western Assiniboia in the North-West Territories, and in both cases these officers have returned the writs *nulla bona* and *nullæ terræ.* The petitioners having failed to realize the amount due them by process issued on these judgments, now apply for a winding up order.

At the outset the objection is taken that no order can be made, or at all events, that no order should be made without notice being first given to the creditors, contributories, shareholders or members. It is urged that as the effect of a winding up order is under sections 16 and 66 to render void executions obtained against the company to be wound up, the Court should know whether there are any such before making an order, which will have the effect of destroying vested rights acquired by creditors under such executions. That section 66 corresponds with section 83 of The Insolvent Act, 1875, but it was sought to distinguish it, and it was argued that the two cases were different: for under the Insolvent Act a creditor could apply to have the insolvency proceedings set aside, while he can make no application to set aside a winding up order. Now that is scarcely correct. There may be such a provision in the Insolvent Act, though I have been unable to find it, but section 18 of the Winding Up Act does provide that the Court may, at any time after a winding up order is made, upon the application of a creditor or contributory, make an order staying the winding up, either altogether or for a limited time. The proceedings in *Clarke* v. *Union Fire Insurance Company*, 10 O. R. 489, were on the application of a shareholder to discharge the winding up order. The proceedings may, under section 8, be taken upon notice to the company, although under section 20 a liquidator cannot be appointed unless notice is given to the creditors, contributories, shareholders or members. In *Clarke* v. *Union Fire Insurance Co.*, 10 O. R. 489, Proudfoot, J., said, notice need be given to the company only, and perhaps also to creditors who have brought actions against the company and whose actions would be stayed by the winding up order. Burton, J.A., in *Re Union Fire Insurance Company*, 13 O. A. R. at p. 272, thought it reasonably clear that it was not the intention of the Legislature that any winding up order should be made until notice had been given to the creditors, contributories, members and shareholders. Paterson, J.A., was, however, in the same case of a different opinion. "It is," he said, at p. 282, "worth while to note particularly that the notice required by section 24 (now section 20) is notice of the intention to appoint a liquidator, not notice that a winding up order is to be applied for. The only notice prescribed for that proceeding is the four-day notice to the company under section 13 (now section 8). It may, therefore, be questionable whether it is contemplated by the statute that a creditor or contributory attending on a notice under section 24 (now section 20) shall be heard to object to a winding up order being made, even if that proceeding stood by adjournment for the same day. He certainly could not appeal to the language of the statute in support of such a claim. . . . It should also be borne in mind that the notice to the company required by section 13 (now section 8) is notice to the directors or others who represent the joint interests of the members of the corporate body, and may reasonably be taken to be, as the Legislature in section 13 treats it, as sufficient notice of the application for the winding up order; while, when the separate interests of individuals or classes are involved, as they may be in the choice of a liquidator, notice of a different kind, such as that required by section 24 (now section 20) becomes necessary." Mr. Justice Osler agreed with the view taken by Paterson, J.A. It seems to me that the plain words of the statute are against the objection.

In dealing with the question of whether an order should or should not be made, it does not seem to me that assistance can be derived from the English cases cited, which lay down that where the creditor cannot obtain payment without a winding up, then the order is to be made *ex debito justitæ*. The English Act contains words not found in the Canadian Act, and in England an order may be made "Whenever the Court is of opinion that it is just and equitable that the company should be wound up." With us the case must be brought within the terms of the statute.

By section 3 the Act applies to the classes or kinds of companies there mentioned—(*a.*) which are insolvent, or (*b.*) which are in liquidation or in process of being wound up. The respondents have not been doing business for nearly two years, but I do not think they are in liquidation or in process of being wound up within the meaning of that section. Are they then insolvent? A number of cases were cited as to the meaning of the word insolvent, but it seems to me that, for the purposes of this Act, the word insolvent is defined by section 5, and that only can be looked at. That section 5 says a company is deemed insolvent if any one of eight different things has happened. No effort was made to make out the respondents as insolvent on account of three of these, being clauses (*b.*) (*c.*) and (*f.*) It was sought to make all the others applicable.

By section 5, clause (*a*,) a company is deemed insolvent "If it is unable to pay its debts as they become due." Section 6 then declares when it is that a company is to be deemed unable to pay its debts as they become due. It is to be so whenever a creditor for a sum exceeding $200 then due serves on the company in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum due and the company has for sixty days neglected to pay such sum or to secure or compound for the same to the satisfaction of the creditor. In the present case a demand in writing was served upon two directors of the company and the debt claimed has neither been paid, secured or compounded But such service was not service, in the manner in which process might legally be served on the company in the place where service was made. The service of process in this Province upon corporations is provided for by section 41 of The Queen's Bench Act, 1885, and it may be served "on the mayor, warden, chairman, reeve, president, or other head or chief officer . . . or on the cashier, treasurer, manager, secretary, clerk or agent of such corporation or of any branch or agency thereof in the Province." Directors are not named among the persons who may be served. Then it appears from an affidavit filed that Mr. Eberts, the Secretary-Treasurer of the Company, who was one of the persons upon whom service of process might legally have been effected, was living in the city and was actually in the city at the time service of the demand was made. It is urged that under section 42 the Court has power to order substitutional service or to homologate previous service, and that an order might and should now be made homologating the service effected upon the directors. I do not see how such an order can be made, for the Court will never make an order for substitutional service or homologating a service effected upon a person other than one who primarily ought to be served when it is not shown that there could be any difficulty in serving him, and here Eberts, the person, could have been served, clearly then the respondents are not brought under clause (*a.*)

It is, however, sought to bring them within clause (*d,*) and it is urged that the company has acknowledged its insolvency, by not paying the debt, allowing itself to be sued, judgment to be recovered and executions to be returned *nulla bona*. I do not think so. These are all circumstances from which perhaps a state of insolvency might be inferred, but that is not what the statute means by acknowledging its insolvency. To bring a company within the clause there must, I think, be something actively done by it as an acknowledgment. This seems plain from the clause, standing as it does immediately after two other clauses saying a company is deemed insolvent, "If it calls a meeting of its creditors for the purpose of compounding with them. If it exhibits a statement showing its inability to meet its liabilities." Then comes the clause, "If it has otherwise acknowledged its insolvency."

Neither has the company been brought within clause (*e.*) It is sworn that an assignment or transfer of the property of the company to the Bell Farm Company was made, to defraud, defeat or delay its creditors; but that is not the way in which to prove a fraudulent transfer. The facts should be stated, and then it is for the Court to say whether, upon these facts, the transfer was, or was not, of that character.

Clause (*g*) provides that the company is to be deemed insolvent "If, being unable to meet its liabilities in full it makes any sale or conveyance of the whole or main part of its stock in trade or assets without the consent of its creditors, or without satisfying their claims." The affidavits here are that the company has never set apart out of profits, the amount which the by-law under which the debentures were issued required to be set apart annually as a sinking fund. Also, that in 1886 the company assigned and transferred to the Bell Farm Company all their property, real and personal, and have never since carried on any business. It is also sworn that at the time of such transfer the company was unable to meet its liabilities in full, and the transfer was made without the consent of its creditors and without satisfying their claims. It is objected that the affidavits do not show sufficiently the means or sources of knowledge of the deponents. The affidavits are made by the solicitors for the petitioners, who swear they have been acting as the agents of the petitioners since March, 1885, in looking after their claim against the respondents under the debentures in question. The sources of their information are stated to be conversations as to the position and affairs of the company with the President, Secretary-Treasurer and General Manager. One of the solicitors says further, that the Bell Farm Company to which the respondents made the transfer in 1886, and which it is said has since carried on the business previously carried on by the respondents, in 1887 obtained from the petitioners a loan to enable it to carry on operations, and he for a time acted as a director of that company for the purpose of looking after the interests of the petitioners, and while so acting he became familiar with the affairs of the Bell Farm Company, and incidentally with the affairs of the respondents also. *Re Fortune Company*, L. R. 10 Eq. 390, was a case in which the petitioners were resident in Australia. The rule of court required an affidavit from the petitioners, to be sworn and filed within four days after the petition was presented, and as this could not be complied with an application was made to have this statutory affidavit dispensed with. The Vice Chancellor thought the proper course would be to apply to the Lord Chancellor, and accordingly an application was made to Lord Hatherley and Lord Justice Giffard. They said, that if an affidavit were filed by some person deposing from his own knowledge and not merely to his belief, as to the facts stated in the petition such affidavit might, under the circumstances be admitted as sufficient. Thereupon the solicitor made an affidavit as to the company having ceased to carry on business, being involved in debt, having no money and having expended their capital, and that he had learned these facts from the secretary of the company. The evidence was considered sufficient. The affidavits here go quite as far, if not further than that, and I think I should hold them sufficient, especially where there is no contradiction of the facts sworn to, indeed no attempt to contradict them, although the secretary-treasurer, one of the persons with whom the conversations are said to have taken place, has filed two affidavits on other points.

That executions have been issued and returned *nulla bona* does not bring the respondents within the letter of clause (*g*,) which speaks only of a company permitting an execution under which a seizure has been made to remain unsatisfied, but certainly it is within the spirit of that clause. In England, under the Companies Act, 1862, s. 80, s.-s. 2, a company cannot be deemed unable to pay its debts unless the judgment creditor petitioning has actually issued execution and such execution has been returned unsatisfied in whole or in part. In *Re Flagstaff, &c. Company*, L. R. 20 Eq. 268, no execution had been issued because the solicitor of the company told the creditor there was no property of the company on which he could levy, and that it was held relieved the creditor from the necessity of actually levying. So, although in England service must be made at the registered office of the company. Where that had been pulled down, service at another place was in *Re Fortune Company*, L. R. 10 Eq. 390, held to be sufficient.

The case is, however, within the terms of clause (*g*,) and I must hold on the evidence, that the company when unable to meet its liabilities in full made a conveyance of the whole or main part of its stock in trade or assets without the consent of its creditors and without satisfying their claims, and is therefore subject to have an order made for winding it up.

As notice has not yet been given to the creditors, contributories, shareholders or members a liquidator cannot be appointed, and that must be done when the winding up order is made. I make no order at present, but adjourn the consideration of the petition for such a time as will admit of notice being given.

WEST v. LYNCH.

(IN EQUITY.)

Specific performance or Rescission.—Demurrer.

There is a distinction between a bill for specific performance, and a bill asking that a time may be fixed for payment, and in default rescission.

The principle upon which the court acts in decreeing cancellation of an agreement for the sale of land, is practically the same as that on which foreclosure of a mortgage is decreed.

Consequently, a bill for rescission may be filed for default in payment of an instalment, although the whole purchase money may not be due.

An agreement for the sale of land, provided that upon default the vendor might re-enter or re-sell.

Held, That without exercising these powers the vendor might file a bill for rescission.

It is not necessary to allege that an assignment from a vendor of his interest in the property was in writing. When it is stated generally in a pleading that there is an agreement, or assignment or other contract, and it does not appear on the face of the pleading that it is invalid, the court will assume that it is valid. Assignments of *choses* in action may in equity be by parol.

Bill for payment of amount due on an agreement for sale of land, and in default for cancellation. Demurrer by defendant Hoare, for want of equity.

W. H. Culver, for defendant Hoare. The bill shows that the agreement has never been rescinded by the parties.

Apart from the agreement, no right to apply for rescission, *Fry on Specific Performance*, 453, 500; *Sweet* v. *Meredith*, 4 Giff. 207; *Foligno* v. *Martin*, 16 Beav. 586; *Watson* v. *Cox*, L. R. 15 Eq. 219; *Morgan* v. *Brisco*, 32 Ch. D. 192; *Tyler* v. *Landes*, 15 Gr. 99; *Warde* v. *Dickson*, 5 Jur. N. S. 698. Plaintiff should have exercised remedies reserved in the agreement, and not having done so, he cannot ask the court to rescind, *McDonald* v. *Garrett*, 7 Gr. 611; *H. B. Co.* v. *Macdonald*, 4 Man. L. R. 237, 480. The plaintiff cannot approbate and reprobate, rescind and not rescind. *Rawlings* v. *Lambert*, 1 J. & H. 458. As to cloud on title, as the bill does not allege vendor in possession, bill will not lie to remove cloud on title, *Gage* v. *Schmidt*, 104 Ill. 106; *Thomas* v. *White*, 2 Ohio St. 540.

W. R. Mulock, for plaintiff. It cannot be necessary to allege possession, for, by the agreement, the vendee is entitled to possession. He cited as to rescission, apart from specific performance, *Lysaght* v. *Edwards*, L. R. 2 Ch. D. 506. Vendee has no right to specific performance, *Towers* v. *Christie*, 6 Gr. 159. Vendee has right to file bill for title to be shown. *O'Keefe* v. *Taylor*, 2 Gr. 305; *Thompson* v. *Brunskill*, 7 Gr. 542; *Wardell* v. *Trenouth*, 26 Gr. 245.

(*15th February, 1888.*)

Bain, J.—The plaintiff's bill alleges that James Spence, being the owner in fee simple of certain lands, by agreement dated the 26th day of May, 1881, agreed to sell, and the defendant Lynch agreed to purchase these lands for $400, $50 of which was to be paid on the execution of the agreement and the balance with interest in seven equal instalments thereafter; that it was provided in the agreement that time was to be of its essence and that unless the payments were punctually made the vendor should be at liberty to re-enter or re-sell, and that on the 28th of April, 1887, $250 and interest were overdue and unpaid on account of the purchase money. It is further alleged that by a conveyance dated the 28th of April, 1887, the vendor sold and conveyed the lands to the plaintiff subject to the terms of the agreement and assigned and set over to him his rights under and interest in the agreement; that through certain conveyances duly registered the defendant Hoare has acquired the interest of the defendant Lynch in the lands and appears by the abstract of title to be entitled to a conveyance of them on performance of the terms of the agreement. It is also alleged that the plaintiff, on the 12th of May last notified Hoare that unless payment of the moneys overdue were made before the 7th of June following, he would treat the agreement as at an end and that payment has not been made. The plaintiff offers to convey the land on payment of the full amount remaining due, and asks that a time should be appointed for the payment of the amount in arrear and in default of payment that the agreement of sale may be cancelled and the registration of the agreement and of the subsequent conveyances under it may be vacated as clouds on the plaintiff's title.

The defendant Hoare demurs for want of equity and urges among other grounds, that as it appears from the bill that all the instalments of purchase money are not due and that the plaintiff has not exercised his power of re-entry or re-sale and has not rescinded the agreement, but treats it as still subsisting, and there being no allegation of fraud, accident or mistake the plaintiff could not file a bill for specific performance, and therefore cannot file a bill for cancellation and vacating the registrations.

I do not agree with this contention. The bill does not ask that the agreement be specifically performed but that a time may be fixed for payment, and if payment be not made within the time fixed that then the agreement may be cancelled; and that there is a distinction between a suit such as this and one for specific performance has been pointed out by Killam, J., in *H. B. Co.* v. *Macdonald*, 4 Man. R. 240. Numerous authorities have been cited to me to establish the position that a suit for specific performance will not be entertained against the purchaser till after the whole of the purchase money is past due, but granting this, is it at all a necessary consequence that a suit like the present cannot be entertained?

The principle on which the court acts in decreeing cancellation of these agreements is, as I understand it, practically the same as that on which foreclosure of a mortgage is decreed, and it is thus clearly expressed by Jessel, M.R., in *Lysaght* v. *Edwards*, 2 Ch. D. p. 506, "It appears to me the effect of a contract of sale has been settled for more than two centuries. It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser, and the estate sold and the beneficial ownership passes to the purchaser." He then points out the analogy there thus is between the position of the vendor and that of a mortgagee, and continues, "the unpaid mortgagee has a right to foreclose, that is to say, he has the right to say to the mortgagor, 'either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So although there has been a valid contract of sale, the vendor has a similar right in equity. He has the right to say to the purchaser, 'either pay me the purchase money or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract, time is given by a decree of the Court of Equity and if the time expires without the money being paid, the contract is cancelled by the decree and the vendor becomes again the owner of the estate." This being the principle on which cancellation is decreed, it would seem to be as applicable when any part of the purchase money is in default as when it all is. A mortgagee whose mortgage is payable in instalments has not to wait for foreclosure till the last instalment is past due; default in the payment of any instalment, either of principal or interest, gives him the right to foreclose independently of the proviso usually inserted in mortgages, that on default of any payment the whole amount secured by the mortgage shall become payable, *Coote on Mortgagees*, p. 1018; *Taylor* v. *Waters*, 1 My. & Cr. 266; *Burrows* v. *Molloy*, 2 J. & Lat. 521; *Cameron* v. *McRae*, 3 Gr. 311. Several suits for the cancellation of agreements such as this have been before this Court, and while the point in question was not perhaps directly raised in any of them, it does not seem to have been questioned that cancellation might be decreed whether the whole or only part of the purchase money was in default, *H. B. Co.* v. *Ruttan*, 1 Man. R. 330; *Wickson* v. *Pearson*, 3 Man. R. 457; *H. B. Co.* v. *Macdonald*, 4 Man. R. 237 & 480.

The absence of reported cases directly in point not only in the Court here, but also in England and Ontario, is urged by the defendant as a reason why the suit should not be entertained, but the absence of cases cannot prevail against a principle if one can be found applicable. In England, I believe, agreements for the sale of land like the one in question are but seldom entered into. In Ontario they are more frequently used, but not nearly to so large an extent as they are, or rather have been, in this Province. Here, as is well known, a large number of these agreements have been entered into, many of which will never be carried out by the purchasers, and having been registered, it is decidedly to the public benefit that, if the court has power to do so, such of them as are not to be carried out should be cancelled and the titles to the lands they affect freed from their registrations.

I cannot agree, either, with the contention that the plaintiff must exercise the power of re-sale or re-entry reserved in the agreement before he can apply to the court for assistance. These are powers to be exercised or not at his option, and if he had exercised them he might still have had to apply to the court to vacate the registrations. On this account, if for no other, the remarks of Kindersley, V.C., in *Warde* v. *Dickson*, 5 Jur. N. S. 700, do not seem to me to be applicable.

Other objections urged by the defendant are, that the plaintiff claims as the assignee of the vendor and the bill does not shew that the assignment was in writing so as to bring the assignment within the enactments relating to the assignment of choses in action, and that it does not shew it was under seal, and further that the enactment relating to the assignment of choses in action contemplates only the positive enforcement of the rights assigned and not their destruction. It is also objected that the assignment from the vendor to the plaintiff is void for champerty.

The reasonable, as well as the grammatical construction of the 7th paragraph of the bill would seem to be that the vendor's rights and interest under the agreement were assigned to the plaintiff by the same conveyance by which the land was conveyed to him subject to the terms of the agreement. But at any rate I do not think it is necessary to allege specially that the assignment was in writing. It is now a settled rule of pleading that when it is stated generally in a pleading that there is an agreement or assignment or other contract, and it does not appear on the face of the pleading that it is invalid, the court will assume that it is valid and leave its validity to be established at the trial or hearing, *Young* v. *Austen*, L. R. 4 C. P. 553; *Davies* v. *Otty*, 12 W. R. 682 & 896; *Corkling* v. *Massey*, L. R. 8 C. P. 395; *Dalgleish* v. *Conboy*, 26 U. C. C. P. 254.

It is also to be remembered on this point that in equity, assignments of choses in action might always be made by parol and the assignee might sue in his own name on making the assignor a party to the suit. I apprehend the effect of the statute to be that if there is an assignment within its provisions, the assignee can sue in his own name without making the assignor a party, but as this right thus to sue is not wholly derived from the statute, the writing, which is a formality imposed by the statute, need not be specifically averred. *Lewis's Equity Drafting*, p. 60.

I understand the effect of the statute to be to give the assignee who comes within its provisions all the rights and remedies that the assignor could have exercised in respect of the contract assigned, and if he could have maintained a suit for cancellation so can his assignee. In *Wickson* v. *Pearson*, above cited, the conveyance of the land from the vendors to the plaintiff subject to the agreement seems to have been considered sufficient to enable him to file a bill in his own name for cancellation.

I find nothing on the face of the bill to shew, or beyond the mere fact that the plaintiff is described as a barrister, even to suggest, that the assignment of the agreement to the plaintiff was given under any arrangement that would make it void for champerty.

I overrule the demurrer with costs. Defendants to have three weeks to answer.

Demurrer overruled with costs.

THE ATTORNEY-GENERAL v. FONSECA.

(In Appeal.)

Patent.—Setting aside in part.—Purchaser for value.—Laches.—Estoppel by former suit.—Cross-relief.—Improvidence without fraud.—Presumption.

1. A patent may be good in part and bad in part, and may be set aside so far as it relates to certain of the property included in it.

2. The plea of purchaser from the patentee for value without notice, is of no avail as against the Crown. In such case the maxim applicable is *Debeo digniori* and not *Potior est conditio defendentis.*

3. The plea of laches is no defence as against the Crown. *The Nullum tempus Act,* 9 Geo. 3, c. 16, is not in force in this Province.

4. In a former suit in which the same portion of the patent was attacked upon the same ground, the relator in this information was plaintiff, and the Attorney-General was defendant. The bill in that case was dismissed, but such dismissal was held to be no estoppel as against the Attorney-General in this information. The Attorney-General in the former case, could not under Gen. Order, have prayed cross-relief against his co-defendants. In any case it was not obligatory upon him to do so.

5. A patent may be set aside upon the ground of improvidence although no fraud is charged against the patentees.

6. The presumption against error in a Crown patent is not so strong as in an ordinary deed between subject and subject.

7. In order that a patent may be set aside it is not necessary to shew that some person is entitled to the land. It is sufficient that there existed claims or material facts, which if present to the mind of the Crown would have influenced it in dealing with the land.

8. It is not an answer to a charge of improvidence and mistake, that the Crown had in its possession, documents which disclosed the claims or material facts, if these are shown not to have been present to the mind of the official when granting the patent.

J. S. Ewart, Q.C., and *George Paterson*, for the informant cited, *Martyn* v. *Kennedy*, 4 Gr. 61; *Attorney-General* v. *Garbutt*, 5 Gr. 186; *Attorney-General* v. *McNulty*, 8 Gr. 324, 11 Gr. 281; *Stevens* v. *Cook*, 10 Gr. 410; *Fricht* v. *Scheck*, 10 Gr. 254; *Cosgrove* v. *Corbett*, 14 Gr. 617; *McIntyre* v. *Attorney-*

General, 14 Gr. 89; *Rees* v. *Attorney-General*, 16 Gr. 467; *Attorney-General* v. *Contois*, 25 Gr. 346.

David Glass and *Chester Glass*, for the defendant Fonseca, and *J. Stewart Tupper*, for the defendant Schultz.

(*7th April, 1888.*)

TAYLOR, C.J., delivered the judgment of the court. (*a*).

This is an information filed by the Attorney-General of Canada, upon the relation of Eliza Mercer, praying that a patent, issued on the 5th of December, 1879, granting to the defendant Fonseca, among other lands, lots C. D. E. & F., part of Point Douglas common in the City of Winnipeg, may be declared, in respect of these four lots, to have issued improvidently and through error, and in ignorance of the rights of the several persons mentioned in the information, and that the patent may be set aside, so far as it affects these lots, and declared absolutely null and void, and of no effect as regards them. The defendants are William Gomez Fonseca, the patentee, and the Hon. John C. Schultz, to whom Fonseca, by an instrument, dated the 12th of November, 1879, agreed to convey one half of any lands, part of the Point Douglas common, which might be granted to him by the Crown.

Both defendants by their answers, deny any fraud or misconduct about the obtaining of the patent. They both set up that Fonseca was entitled to the lands under The Manitoba Act, 33 Vict. c. 3, D., and submit, that parties bringing themselves within the provisions of that Act, are the owners of such lands in fee, and that it is not within the power of the Dominion Government, or the Department of the Interior, to deprive them of such lands, and that patents, granted in such cases by the Dominion Government, do not confer title, but are, [after investigation] only confirmatory of a title theretofore had by the applicant, that no practice of the Department of the Interior, or of the Dominion Government, could, or can, exist of a nature to deprive parties establishing their rights to lands under The Manitoba Act, of such land, or to grant these lands to parties who may have gone into possession since the 15th July, 1870. Both defendants further set up that, by the express terms of an Order in Council of 3rd February, 1879, the rights of the defendant Fonseca were affirmed, but owing to the increased value of the lands, and the

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(*a*) Present: Taylor, C.J., Dubuc, Killam, JJ.

peculiar circumstances of the case, the Dominion Government offered him the lands referred to in the Order in Council, by way of compromise, in settlement and liquidation, of his claim, and he accepted the offer, and in pursuance thereof received the patent, and that it is contrary to the practice of the Court to grant relief in such a case, and the Attorney-General is now estopped from saying that the Government made the conveyance through error or improvidence. The answers further set up that, a former suit was brought by the relator for the purpose of establishing her right to the lands now in question, to which the Attorney-General was a party defendant, that in the suit so brought, a decree was made at the hearing, dismissing the bill, and it is submitted that the Attorney-General could in his answer have set up the facts alleged in this information, and is estopped by the judgment of the Court in that suit, from claiming the relief asked for in this suit. Both defendants claim that, the Attorney-General is estopped by laches and delay, from prosecuting this suit. The defendant Schultz, in addition, sets up that he is a purchaser for value without notice, and claims the benefit of that plea.

At the hearing, a decree was made dismissing the information, and the case is now before the Court by way of a rehearing of that decree, at the instance of the informant.

The plea of the defendant Schultz, that he is a purchaser for value without notice, is clearly not a bar to granting the relief sought by the Attorney-General, if it should otherwise be given. As between subject and subject, such a plea is a good defence, but it has no place against the Crown. In such a case, it is not the maxim, *Potior est conditio defendentis*, but *Debeo digniori*, which is applicable. In *Cummings* v. *Forrester*, 2 J. & W. 234, the Master of the Rolls, speaking of a grant made by the Crown under mistake, held, that the power of calling back its grants, when made under mistake, is not like any right possessed by individuals, for when it has been deceived, the grant may be recalled notwithstanding any derivative title depending upon it. So, in *Atty.-Gen.* v. *McNulty*, 11 Gr. 284, Mowat, V.C., said, "The principle upon which this Court allows the defence of a purchaser for value without notice is, that the defendant in such a case, has an equal equity with the plaintiff; and that between persons having equal equities, this Court will not interfere on either side. But I take this rule to be inapplicable where the Queen is concerned; for among the many respects in which the rules of law, with regard to the Crown, differ from those affecting private persons, is the established principle, that, where the right of the Queen and that of a subject meet at one and the same time, the right of the Queen shall be preserved." The judgment of Van Koughnet, C., in *Stevens* v. *Cook,* 10 Gr. 410; and *Broom's Leg. Max.*, (5 ed.) 55, may also be referred to on this point.

The defence of laches on the part of the Crown, has no more force on behalf of the defendants. That also, is a defence which cannot be set up against the Crown. The *Nullum Tempus* Act, 9 Geo. 3, c. 16, is not in force in this Province, but even if it were so, it would not help the defendants, for by it, sixty years with adverse possession, is the period which bars the Crown. In 2 Inst. 273, it is laid down that, in pursuance of the principle of the sovereign's incapability of doing wrong, the law determines that in the Crown there can be no negligence or laches, and therefore it had been held that no delay in resorting to his remedy would bar the king's right. Or, as it is put in *Bac. Abr.*, vol. 8, p. 95, "From the presumption that the king is daily employed in the weighty and public affairs of government, it hath become an established rule at common law, that no laches shall be attributed to him, nor is he in any way to suffer in his interests, which are certain and permanent. *Vigilantibus non dormientibus jura subveniunt*, is the rule for a subject, but *nullum tempus occurrit regi*, is the king's plea." In the United States, the same rule prevails, founded upon public policy. In *U. S.* v. *Kirkpatrick,* 9 Wheat. 720, Story, J. said, "The general principle is, that laches is not imputed to the government, and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The Government can transact its business only through its agents, and its final operations are so various and its agencies so numerous and scattered, that the utmost vigilance would not save the public from most serious losses if the doctrine of laches can be applied to its transactions." See also *U. S.* v. *Vanzandt,* 11 Wheat. 184; *U. S.* v. *Nicholl,* 12 Wheat. 505; *Dox* v. *Post Master General,* 1 Pet. 325.

I do not see how the Attorney-General can be estopped by the former suit, from instituting the present one.

That was a suit by Eliza Mercer, the relator here, in her own right as plaintiff, against the defendants in this suit, to which the Attorney-General was also a defendant. That the plaintiff in that suit, is the relator here, can be no reason for so holding. Besides the former suit was to have the patent set aside on the ground that it had been issued in ignorance of, and to the injury of the plaintiff's rights, but broader ground is taken now, the allegation being that it was issued in ignorance of the rights of several persons, of whom the relator is only one. The relator suing as a plaintiff in her own right, might fail, under such authorities as *Boulton* v. *Jeffrey*, 1 Gr. E. & A. 111; and *Lawrence* v. *Pomeroy*, 9 Gr. 474, and yet, the patent be set aside in a suit instituted by the Crown. That the Attorney-General was a party to the former suit, could not alone, prevent him from bringing this one. *Martyn* v. *Kennedy*, 4 Gr. 61, was a suit to set aside a patent to a rectory, and the objection was taken that the Attorney-General should have been a party. Dealing with one ground upon which that was urged, that, unless the Crown was a party, it would not be bound, and the defendant might be subjected to a double litigation about the same matter, Esten, V.C., said, "The difficulty would not be surmounted by making the Attorney-General a party on behalf of the Crown, which could not of course be prejudiced by the failure of the plaintiff to establish his case, and could then, as well as now, in case of a decree against the plaintiff, proceed *de novo* against the defendant for the purpose of recalling this patent." The only ground for holding the Attorney-General estopped by the former suit, in support of which even the shadow of an argument could be urged, would be, that he might in it have obtained the relief now prayed for, and was bound to have prayed for such relief in that suit. But how could he have got that. The Gen. Ord. which allows a defendant to pray by his answer cross relief against the plaintiff, does not extend to allowing him to pray cross relief against a co-defendant. Had he, in that suit, prayed to have this patent set aside as issued improvidently and in ignorance, he could have prayed for such relief only against the present defendants, then his co-defendants. Even if he could have prayed for such relief, I do not see how he was under any obligation to have done so. Certainly the Gen. Ord. does not make it imperative upon him to do so, for it only says a defendant "may claim" any relief, &c.

It is further urged for the defence, that Fonseca had a title to the land now in question under the Manitoba Act, which it was not in the power of the Government to deprive him of, the patent being only confirmatory of that title, and the grant made of these lands, was in the nature of a compromise, so that the court, in accordance with well established practice, will not interfere. The land in question forms part of what was known as the Point Douglas common, a large tract of land upon which the holders of lots fronting on the Red River at Point Douglas, had, or claimed they had, the right of pasturing cattle and cutting hay. Fonseca was no doubt on the 15th July, 1870, the holder of a lot or lots on Point Douglas, and being so, was one of the persons entitled to or claiming to be entitled to, these rights and benefits. The persons who claimed to be entitled to an interest in that common, by virtue of their possession of lots on the river, as laid out by Lord Selkirk, by a deed, dated the 14th of October, 1872, after reciting that, it had been agreed that the common so belonging and attached to the possession aforesaid should be laid out in accordance with a map or plan registered in the Registry Office for the County of Selkirk, that the lands so laid out should be sold, and the moneys arising from such sales held in trust, and divided proportionately, in accordance with a resolution passed at a meeting of the shareholders, among the parties entitled to the benefits and profits, that it had been agreed that trustees should be appointed for the purpose of carrying out the trust, that the parties of the second part had been appointed trustees, and had accepted the trust, granted and conveyed unto the parties of the second part, "the lands before mentioned, which may be particularly known as lot 244, or as the reserve in common belonging to the owners, occupiers and possessors of Point Douglas, to have and to hold the same, for the purposes aforesaid, unto, and to the use of, them the said parties of the second part, their successors and assigns for ever." The parties of the second part were, John Sutherland, Edmund L. Barber, Alex. M. Brown, Walter R. Bown, and the defendant Fonseca. These trustees were all also parties of the first part, as was the defendant Schultz. After the execution of this deed, the trustees applied to the Government for a patent to the land, and their claim was dealt with, and disposed of, by an Order in Council, dated the 10th of May, 1877.

The claim made by the trustees having been disposed of, Fonseca on the 26th July, 1877, made a claim on his own behalf.

In his petition he alleged that, prior to, and on, the 15th of July, 1870, he was by himself, and through his servants, tenants, and agents, in actual peaceable possession of a portion of lot 35, in the Parish of St. John, according to Dominion survey of River lots, to wit the southern ten chains of said lot, commencing in the rear of the land on lot No. 11, owned by the late Neil McDonald, and thence running back, the usual distance to the two mile limit, and he prayed that a patent might issue to him for the same. This lot 35 Dominion survey, is, as I understand, the same land as lot 244, spoken of in the deed of 15th October, 1872, from the Point holders to the trustees. Fonseca had possession of several parcels on the river front, one of them being a triangular piece, having a base of ten chains, and it was on the possession of this, that he seems to have based his claim for a grant of an equal width, all the distance to the rear of the common. Now, as to all that part of the land claimed by Fonseca, which was part of the common, he could plainly have no greater right than the trustees, to whom, he, and the other Point holders had conveyed their interests, in the deed of 15th October, 1872, described as an interest in common to the land extending back from their different possessions on the river, and which was by the deed conveyed, as lot 244, or, as the reserve in common belonging to the owners, occupiers, and possessors of Point Douglas. The claim of Fonseca, so far as it extended to land forming part of the common, stood upon precisely the same footing as that of the trustees to the same land, at most, what he had a right to, was, not to have a grant of this particular land, or to have his title to this particular land, confirmed by grant from the Crown, but to have a grant of land, of some piece of land or another, as a commutation for rights of common and cutting hay.

In the Order in Council of 10th May, 1877, the claims in connection with this Point Douglas common, are spoken of as, "certain claims for patent of an exceptional character." It then sets out the allegations made by the claimants in support of their application, as follows:—" 1. That the late Lord Selkirk, at or about the time he founded the Red River settlement, laid out the river lots on Point Douglas, and gave the same to certain of his servants and retainers, marking off the large tract in rear to be held as a common, by and for the benefit of the Point owners. Two of the claimants have stated their belief that Lord Selkirk actually conveyed this land to the settlers, at the same time that he granted them the small lots. 2. That they have always asserted their claim thereto, and have, with a slight interruption, enjoyed the continuous and exclusive right of hay and common over the same, and that the latter right has always been recognized in the surrounding community. 3. That the right so claimed and enjoyed by them, is superior in all respects, to that conceded by the law of the Assiniboia Council to the owners of river lots between the two mile and the four mile lines. 4. That the Government having recognized the hay and common right claimed in the outer two miles, as above, to be of such character as to justify the commutation of the same by an absolute grant of the land therein to the respective owners of lots fronting on the river, they, the applicants should be dealt with not less favorably, that is to say, by an actual grant of the land embraced in the tract lying in rear of the Point lots. 5. They further claim a patent for the land under the provisions of the Act 38 Vic. c. 52, by which was enacted, 'that persons satisfactorily establishing undisturbed occupancy of any lands within the Province prior to and being by themselves or their servants, tenants or agents, or those through whom they claim, in actual peaceable possession thereof, on the 15th day of July, 1870, shall be entitled to receive letters patent therefor, granting the same absolutely to them respectively in fee simple."

The Minister of the Interior then proceeded to deal with these claims, as follows :—" 1. It may be conceded that the claimants had for many years previous to the transfer, enjoyed a right of common and of cutting hay over the land, but the enjoyment of such right can only be regarded as having been exclusive in the same light as the hay and common right in the outer two miles enjoyed by the settlers on farm lots in the old Parishes was exclusive. Respecting the belief expressed by two of the claimants that an actual grant of the land included in the common was made at the time by Lord Selkirk to the Point holders, there is no evidence whatever in support thereof, and the circumstances altogether, connected with the claim render it even more than doubtful that such was the case. 2. As regards the right of the claimants to a patent under the Act 38 Vic. c. 52, it is clear to the undersigned, that the "undisturbed occupancy," and "actual peaceable possession," of the common, either at the time of, or previous to the transfer by the Point holders, was not of the character contemplated by the statute, and therefore not such as would entitle the claimants to a grant of the land. The nature of the right enjoyed in the common by the Point holders, may be considered as somewhat analagous to that claimed in the outer two miles in the old Parishes, although it must be remembered that the latter was provided for by an Ordinance of the Council of Assiniboia, whereas there was not only no such authority to the claim to the common, but the papers show that on the Point holders applying to the council on a certain occasion, for protection against people trespassing by cutting hay thereon, they were referred to the Governor of the Hudson's Bay Company, the natural inference of which is, that the council, which was the highest authority in the settlement, considered the Company as possessing the title to the land. This occurred in the year 1862 The statement that the common as now claimed was set apart by Lord Selkirk, and intended by him for the exclusive use and benefit of the Point holders, is not borne out by the facts: on the contrary, the original plan of survey, embracing the Point lots, shows the land south of lot 249, being the northerly limit of the common, and between it and Fort Garry, to have been embraced in one immense lot or tract, numbered 277, and it was not until many years after Lord Selkirk left the country, that this lot was sub-divided into smaller parcels by the Hudson's Bay Company, which then represented Lord Selkirk in the country. The undersigned is of opinion that the claimants were, at the time of, and previous to the transfer, in the enjoyment of a right of common and of cutting hay over the land in question, and generally in the Province, the ascertaining and adjusting of which is provided for in the Act 33 Vic. c. 3, and that the same should be commuted by a grant of land from the Crown."

By that Order in Council, the rights of the claimants are put in the class of rights dealt with by sub-section 5, of section 32, of the Manitoba Act, and not under any of the first three sub-sections of that section.

The first three sub-sections provide for the title to land occupied by persons being confirmed to them by grants from the

Crown. Sub-section 5 gives no right to any particular land, but merely provides for commutation of rights of common and cutting hay by grants of land, not necessarily the lands, or even part of the particular lands, over which the rights existed. Grants made under that sub-section, both as to the quantity of land, and as to the particular land to be granted, are grants by the grace and favor of the Crown. It was for the Government to say, in each case, what would be the fair and equitable terms of commutation. Accordingly the Minister next dealt with the question of what would be fair and equitable terms. "The question" he says, "now to be considered is, what would be a fair and reasonable commutation of this right on the part of the Point holders, and the conclusion arrived at was, that "the applicants would be fairly, in deed liberally dealt with, were they to receive in commutation of their rights, a grant of acre for acre, out of that part of the common next towards the river, which is the most valuable part of the property."

The claim of Fonseca, presented about two months after this Order in Council was passed, stood upon precisely the same footing as that of the trustees. As to the lands claimed, which formed part of the common, he had been, as the Order in Council expressed it, "in the enjoyment of a right of common and of cutting hay over the land," and this he was entitled to have commuted on fair and equitable terms. What that commutation should be, was dealt with by a report dated 3rd February, 1879, signed by the Surveyor-General, and approved of by the Minister of the Interior. Upon the argument it was urged for the defendants, that this was merely a departmental order, which could not define or limit the rights of Fonseca. The argument used was that under the 42 Vic. c. 31, s. 125, D., certain powers were delegated to the Governor in Council, and he was thereby empowered to make such orders as might be deemed necessary from time to time, to carry out the provisions of The Manitoba Act, according to their true intent, or to meet any cases which might arise, and for which no provision was made in the Act, and that it was only under the Act, or some Order in Council made under the powers so conferred, that this claim of Fonseca could be dealt with. In the answers, this document is always spoken of as the Order in Council under which the patent was issued, but I suppose it was only, as now contended, an order of the Department of the Interior, and not what is known as an Order in Council. The argument could, however, have any force, only in the case of a claim under the Manitoba Act, that is, a claim falling under the first three sub-sections of section 32. It can have no force in the case of such a claim as that of Fonseca.

The Order in Council of 10th May, 1877, settled that, the claim was one for commutation of rights of common and cutting hay, and the Departmental Order of 3rd February, 1879, dealt with what would be the fair and equitable terms upon which it should be commuted. It states that the Deputy Minister of Justice, to whom the claim and the evidence had been referred, "approved of the recognition of the claim," plainly, not to the full extent to which it was made, for it is added, "but gives the opinion that the extent of land to be granted, is a matter for the decision of the Right Hon. The Minister of this Department." The Order in Council had said that, the claimants would be liberally dealt with, were they to receive a grant of acre for acre. The Order of 3rd February, 1879, then proceeded to say that, "in view of the relatively great value of the land in question," that is, of the land a title to which was claimed, "Mr. Fonseca would be most liberally treated were he given such additional area to that which he actually occupied, as would make the whole 25 acres." Subsequently certain lands were designated as those to be granted to him, and the patent issued. The patent so issued embraced lands which the Crown might, or might not, have granted to him, for a grant of any lands, anywhere in the Province, would have satisfied the provisions of sub-section 5. It was only by the terms of the Order in Council of 10th May, 1877, that he can be said to have acquired any right to a grant of land, part of this Point Douglas common, as the commutation of his rights of common and cutting hay. Granting then, for the sake of argument, to the fullest extent, the contention of the defendants, that the rights of parties entitled under the sub-sections of the Manitoba Act which relate to the confirmation of the title to lands occupied on the 15th of July, 1870, are such that it is not in the power of the Government to deprive them of such land, and that patents granted in such cases are only confirmatory of a title theretofore had by the patentee, this is not the case of a patent of that kind. It is one covering land which the Crown might, or might not have granted to Fonseca. I have no doubt this Court can decree it to be void, if issued through fraud, or in error or improvidence.

Where the court is asked to decree that a patent is void, it is not essential to show fraud on the part of the patentee, and in the present case fraud is not charged against the defendants. The patent was set aside in *Martyn* v. *Kennedy*, 4 Gr. 61, although the court expressly exonerated the defendant from any impropriety of conduct in connection with the grant. It is sufficient if it is shown, to have issued in error or improvidence. As Esten, V.C., said in *Martin* v. *Kennedy*, "If the mind of the Crown was indeed misinformed and deceived *eo instanti* that the grant was perfected, it is sufficient, I think, to entitle the plaintiff to relief, although further enquiry might have dispelled the misapprehension which had arisen." No doubt it is not sufficient for the Crown to shew only a *prima facie*, or probable case, but such evidence must be laid before the court in order to the repeal of a patent on the ground of mistake, as will convince the mind of the court to a reasonable certainty, that it was issued in mistake. It was so held in *Atty.-Gen.* v. *Garbutt*, 5 Gr. 181, where Esten, V.C., said, the fact of mistake must be established like other facts by such evidence as excludes all reasonable doubt upon the subject. And in *Saugeen* v. *Church Society*, 6 Gr. 538, the duty of the court was thus stated by Spragge, V.C., "If we find that the Crown made this grant in ignorance of material facts, which if known, would, as far as we can judge, have influenced the Crown to withhold the grant, we must judge it to have been made in error and mistake." At the same time, presumption against error in a Crown patent, does not seem so strong as in the case of an ordinary deed. In *Atty.-Gen.* v. *Garbutt*, counsel for the defendant sought to liken the case to the ordinary one of rectifying a deed between private individuals, but Esten, V.C., said, "A patent prepared *exparte*, by passing through a variety of public offices, without any particular interest in any one to see that it is correct, stands on a different footing in this respect from a solemn deed made *interpartes*, under the personal supervision of the parties concerned, whose vigilance is stimulated by self interest." Or, as Spragge, V.C., put it, "The Crown and the subject certainly do not stand upon precisely the same footing in regard to shewing mistake in their respective deeds, in grants from the Crown and agreements and deeds between individuals, it being open to the Crown to shew itself misinformed, in matters of fact, and mistaken in its law, in cases where it would not be open to a subject to avoid or reform his deed upon the same grounds."

A patent issued in improvidence may be set aside. In *Atty.-Gen.* v. *McNulty*, 11 Gr. 281, Esten, V.C. spoke of patents issued in improvidence, as including, as he understood the expression, patents issued not through fraud nor in mistake, but hastily, incautiously, inadvisedly, to the injury of the rights of the Crown, or the rights of the subject. And in *Atty.-Gen.* v. *Coutois*, 25 Gr. 346, Spragge, C., said he could see no ground in reason why an improvidence should not be relieved against alike, whether it be the result of mistake in law or of fact.

It is not necessary to show positively, that the relator or some person, other than the patentee, is entitled to the land, it is sufficient if there existed claims or material facts which if present to the mind of the Crown would have influenced it in dealing with the land. Where a patent is set aside, it is set aside as was said in *Fricht* v. *Scheck*, 10 Gr. 254, so as to enable the Crown to deal with the case with full knowledge of the facts as in its justice and wisdom it may deem right.

This being so, it seems to me the learned Chief Justice misapprehended the question with which he was called upon to deal, when he in his judgment discussed so largely the question of the rights of Logan. He says he could not hold that the patent issued by improvidence unless Logan had such a possession as would confer a right. He finds that Logan was not in possession on the 15th of July, 1870, and therefore had no rights. He also says the claim of Logan was rejected by the Government. Now, no claim was made by Logan until nearly three years after the patent now in question had been issued. The only evidence produced to show that his claim when made, was not considered a valid one, was a letter of 15th September, 1883, from John R. Hall, acting Secretary to the Minister of the Interior to the solicitors for the defendant Fonseca. The officers of the Department at Ottawa, who have been examined in this case, say, there is nothing in the records of the Department to justify the writing of such a letter. Whether Logan was or was not in possession of part of the land in question on the 15th of July, 1870, may I think on the evidence be fairly considered an open question.

A large number of the witnesses examined say most positively, that he was so.

The claim which had been made before the patent issued, was one made by Belch, claiming part of the land under Logan. This claim was supported by, among other evidence, a statutory declaration made by Fonseca as to the possession of Logan, and in it he said Logan was in possession "in the year of our Lord 1870," though he does not say he was so in the month of July. He said further in the declaration, that he knew of no claim adverse to that of Belch except one of his own, "which I release and forego to the said portions of the lot." Parts of lots C. and F. now in question, were among the lands claimed by Belch. This claim was made in July, 1879, before the patent issued to Fonseca, and was sent by the Department to Winnipeg that it might be enquired into and information obtained respecting it. The papers connected with the claim were in Winnipeg when the patent issued, and were not returned to Ottawa until a considerable time after that. That claim so far as appears, has never to this day been disposed of.

It was urged that the Government had in its possession when the patent issued, abstracts of the title, and that the list of lands to be included in the patent and the fiat describing lands for patent are not produced. From an answer given by Mr. Burgess the Deputy Minister of the Interior, that the adverse claim, called that of Logan, but plainly that of Belch, had been received prior to the fiat being sent to the Department of the Secretary of State, for the preparation of the patent, it must be presumed that the patent was granted while the Belch papers were in Ottawa. But even if abstracts of the title and the claim of Belch were in the hands of officers of the Department, that would not be an answer to a suit by the Crown to rescind a patent as issued improvidently, if adverse claims disclosed by these documents were not present to the mind of the Government or its officers, when granting the patent. That the Government had the means of ascertaining the facts, and could by investigation have ascertained them, would be no bar to such a suit. The contention in *Martyn* v. *Kennedy*, 4 Gr. 61, was that the Crown had the information within its reach, and must be presumed to have been acquainted with all the facts, but Esten, V.C., while he said it might be very just as between contending parties to a litigation to hold that each party knows what with reasonable diligence he might have known, also said that to apply the principle to such a case as he was then dealing with, would be to charge the claimant with the consequences, not of his own neglect but of the misinformation of a third party in no way interested. In *Atty.-Gen.* v. *McNulty*, 8 Gr. 324, it appeared that an award which gave the claimant certain rights, was in the possession of the Crown Land Office, but the same learned Judge said there, "I am satisfied that this award was not present to the mind of the officer of the Government through whose instrumentality these patents were issued; nor do I think the presence of the submission and award in the Crown Lands Office, or the application for their production in 1855, by Jamieson, (one of the claimants), should countervail this fact." In the second case of *Atty.-Gen.* v. *McNulty*, 11 Gr. 281, the same thing is referred to.

Here, Fonseca had no absolute right to the particular land with which the Crown was dealing, it was land which the Crown might or might not, have granted to him, and it is plain from the evidence, that the Crown had no intention of granting any land to which other persons had any right, or to which claims were being made by others. From the Order in Council of 10th May, 1877, it is clear that there was no intention to grant by way of commutation for rights of common, any land for which a right to a patent might be established under the Manitoba Act or the 38 Vic. c. 52. So also, it appears from the evidence, that the Government desired to protect the rights of persons who had purchased from the trustees of Point Douglas common, or whose possession had been recognized by them.

The evidence of Col. Dennis taken in the suit of *Mercer* v. *Fonseca*, was read in this case, and is very important, he having been first Surveyor-General, and afterwards Deputy Minister of the Interior while these claims were before the Government and when the patent issued. This evidence was objected to by the defendants, but I have no doubt it can be read. The parties to the suit in which it was taken were the same as in this suit, except that the Attorney-General was then a defendant, and Eliza Mercer, the now relator, was then plaintiff suing in her own right. The allegations of fact and the case stated in the information, are almost verbatim the same as in the bill in that suit. In every essential particular they are identical. The prayer of the bill and the prayer of the information are exactly the same, except that the prayer of the bill has two additional clauses, one, that it may be declared that Fonseca procured the patent improperly, and the other, that he may be declared a trustee for the plaintiff. The issue raised by the bill, and that raised by the information are exactly the same. Though the defendants now assert that this is not the case, yet, in their answers when setting up the defence that the Attorney-General is by the former suit estopped from filing this information, they both set up that the questions now raised by the information, are those upon which evidence was given, and which were heard and determined in the former suit. Since the evidence was taken in that first suit, Col. Dennis has died. The authorities cited of *Foster* v. *Derby*, 1 A. & E. 791, note, and *Taylor on Evidence*, ss. 467, 468, 469, fully warrant his evidence being now admitted and used.

It seems to me unnecessary to go through the evidence analysing and discussing it minutely. In my judgment, no one can read it without coming to the conclusion that the patent issued improvidently, and when the officers of the Government had not present to their minds the existence of adverse claims.

From the evidence of Col. Dennis it appears that so anxious were the Government to know all about any possible claims which might be made, that an officer was sent to Winnipeg for the purpose of ascertaining the facts which would show what lands, part of this Point Douglas common were available for satisfying the claims of the Point holders. Col. Dennis himself visited Winnipeg, where he saw Fonseca, and where he seems to have visited and examined part of the lands at all events. After his return to Ottawa, Fonseca on the 3rd October, 1878, wrote him a letter, in which he professed to give the names "of such persons as to the best of my knowledge are the owners at present." In a schedule or statement annexed to that letter headed "List of lots disposed of out of W. G. Fonseca's claim on the Point Douglas common," and containing a great many names, the name of William Logan is put down opposite lots C. D. & E., and the names Kew Stobart & Co., opposite lot F.

A great part of the judgment of the learned Chief Justice is occupied with discussing the question of Logan's possession, as not having been possession on the 15th of July, 1870, but that seems to me not a matter of much moment. The question is not now, has Logan, or have those who claim under him, a right to this land under the Manitoba Act, as having been in possession on the 15th of July, 1870. Nor is it which of the two, Fonseca or Logan, who was in possession on that day, and so entitled under the Act. As I have already said, the claim of Fonseca was one which gave a right to no particular land, and the Crown, even if this land was open to be granted, having been occupied by no one who could claim it under the Manitoba Act by virtue of a possession on the 15th of July, 1870, might still decline to make a grant of it, which would interfere with possession taken by some one at a much more recent date.

It seems to me that it is not necessary to find that there existed an established custom in the Department of the Interior respecting the rights of squatters, such as prevailed in the Crown Land Department of Ontario, to justify the Crown in so acting. In the Statutory Declaration made by Fonseca, in support of Belch's claim, Logan is said to have been in possession of portions of C. & F. in 1870, though it is not said that he was so on the 15th of July. He may or may not have been so, and a large number of the witnesses examined in this suit say he was. He seems certainly to have had some rights, for in that year he built a small house and his rights, whatever they were, seem to have been recognized by the trustees of Point Douglas common. In the statutory declaration made by Fonseca who was one of the trustees, he says, "The trustees of Point Douglas common do not claim any rights in or to the said lands, but acknowledge the title of those claiming through the said Logan and Barber respectively." Upon the plan prepared for the trustees by Duncan Sinclair, 26th December, 1870, certified as correct by Sutherland, Fonseca and Barber, on 30th September, 1872, and registered on that day, Logan's name appears on lot C. The name of Barber appears on lot D. & E., that of Schultz being on the latter lots also. And on D. the name of Smith has been written, but afterwards struck out.

From the evidence of Col. Dennis, and that of Mr. Burgess it is clear that had all the facts been known or present to the mind of the officers of the Government, when the patent to Fonseca issued, it would not have been issued, at least not until further investigation had been made. Speaking of Fonseca's letter of 3rd October, 1878, and the statement annexed, Col. Dennis says, "No doubt I asked Mr. Fonseca for this, in order to put myself in a position to know really what Crown lands we had available there, of the portion that Mr. Fonseca claimed." He was asked "Did you know at the time you directed that patent to issue, that you were patenting away the lots C. D. & E.? A. Well, I certainly was in ignorance before authorizing the issue of the patent, that that patent was to include any lands that the Government had not the right to grant, because that was the very thing we were trying to steer clear of. . . . . *Q*. If it had been brought under your notice at that time that this list of lots for patent to Fonseca included C. D. & E., would you have authorized the patent to issue? *A*. Certainly not. Not for a moment because it would have been manifestly wrong. *Q*. It was not the intention of the Government to give Mr. Fonseca lands that other persons had a claim to? *A*. Certainly not. And lands that he admitted belonged to other people. *Q*. And you certainly would not have disposed of Logan's claim without investigation? *A*. Most certainly not. . . . . *Q*. So that had you known that Logan claimed this land simply, the patent would not have issued until you had disposed of Logan's claim? *A*. No, it would not. *Q*. Not knowingly? *A*. It would not."

The evidence of Mr. Burgess was severely criticised by counsel for the defendants, as given with a strong bias against the defendants, and as intended to mislead, but I cannot, after a careful perusal of it agree with such criticism.

From the evidence there can be no doubt there were adverse claims made to the land in question. It is abundantly evident that the Government did not intend to include in the patent to Fonseca, lands which the Crown had not a right to grant. Also, that the adverse claims were not present to the mind of the officers of the Government, when the patent issued and that had they been so, the patent would not have issued including these lands until, at all events, further enquiry had been made. No other conclusion can be come to than that there were claims to these lands deserving of being investigated, and requiring to be investigated, and that this patent when it issued without these claims being enquired into, was issued in error and improvidence.

The prayer of the information is that the patent may be set aside so far as it affects the said lands, that is lots C. D. E. & F., and that it may be declared absolutely null and void and of no effect so far as regards the said lands. The only authority cited for setting aside a patent in part was *Atty.-Gen.* v. *McNulty*, 8 Gr. 324, in which Esten, V.C., concludes his judgment by saying, the patents will be declared void either wholly or in part, according to circumstances. A mere casual expression such as that does not carry much weight as an authority and would scarcely warrant the making of such a decree unless other cases can be found to support it. That a patent can be set aside in part seems not to have been doubted in Ontario, for in *Martyn* v. *Kennedy* the prayer of the bill as appears from the report in 2 Gr. 81, was that the letters patent might be declared void either wholly or as to the said lot 25. When judgment was given, 4 Gr. at p. 100, the expression used by Esten, V.C., was, "My opinion is, that the patent should be declared void," the decree however, drawn up and entered, declared the patent void as to lot No. 25 in the 1st Con. of Darlington. In *Mutchmore* v. *Davis*, 14 Gr. 346, the bill sought to set aside a patent as to two lots only, of a much larger number included in it. The case was disposed of on demurrer, it being held that the plaintiff had no *locus standi*, but Spragge, V.C., when giving judgment said, "The Crown, supposing the allegations of this bill to be true, might by *scire facias* or by information, it may be assumed, have impeached Tiffany's Patent in so far as it granted the lands in question." That a patent may be void in part though good as to the rest seems to have been the opinion of Mr. Justice Story, for in *Winn* v. *Paterson*, 9 Pet. 679, when discussing the question he says, "At the common law, in order to made a grant void in *toto*, for fraud or covin, the fraud or covin must infect the whole transaction, or be so mixed up in it as not to be capable of a distinct aud separate consideration." The question being important, and some doubt having been entertained as to the power of the court thus to set aside a patent in part, it has been carefully considered and search made among the older authorities, to find what could have been done upon a proceeding by *scire facias* to repeal a patent. What could be done upon such a proceeding seems the test as to the powers of the court, now for Strong, J., held in *Farmer* v. *Livingstone*, 8 Sup. Ct. 153, the statute merely gives a new remedy for the old common law right.

In *Bassett* v. *Torrington*, 3 Dyer 276, letters patent, which created a corporation, gave it a mayor, aldermen and burgesses, with a grant to hold a market in each week, and two fairs annually, proceedings were taken by *seire facias* to annul the letters patent as to the markets and fairs. So, in the *Prince's Case*, 8 Co. 61, the judgment was, that the letters patent there in question, as to three manors specifically named should be revoked, vacated and annulled and had and held as void and invalid. It is true that Solicitor-General Finch, when arguing in *Sackville College Case*, Raym. at p. 156, pointed out that in the *Prince's Case* it did not appear that there were other lands, but *Sackville College Case* is a direct authority for the proposition that a patent may be repealed in part. Notwithstanding the argument of Finch to the contrary, Twisden, J., said at p. 177, "This grant may be repealed in part, because it consists of things of several natures; and as a patent may be good in part and naught in part, so it may be repealed for part and stand for another part." Chief Baron Hale took a different view of the case as to the propriety of repealing part of the patent then in question, but he agreed with Twisden as to the regularity of such a proceeding, for he said, "A patent may be repealed in part, but this shall be only in clauses independent." Upon these authorities there seems no doubt that a decree may be made as prayed declaring this patent void as to lots C. D. E. and F.

I express no opinion as to who may be entitled to these lands, or whether the claims made to them can be substantiated or not. It is not my place to do so; as my judgment could in no way bind the Crown. Having found that the patent was issued in error and improvidence by reason of the existence of adverse claims and material facts, not present to the mind of the Crown when it issued, and which should have been enquired into, I simply declare it void, so as to enable the Crown to deal with the case, with full knowledge of the facts, as in its justice and wisdom it may deem right.

The present hearing should be allowed, the decree made at the original hearing reversed, and a decree made declaring the patent void as to lots C. D. E. and F., having been issued in error and improvidence. The informant is entitled to the costs of the suit, including those of the rehearing.

Appeal allowed with costs.

McMONAGLE v. ORTON.

(In Appeal.)

Excessive damages.—Jury fee.

In an action for assault, false imprisonment, slander and libel, the assault and imprisonment consisted in the defendant putting his hand upon the plaintiff's shoulder, pushing her into the office and locking the door for a short time. No evidence was given of special damage under the slander and libel counts, and a verdict upon them alone could not therefore be supported. The jury gave a general verdict of $300.

Held, 1. That although the damages were excessive, the court would not interefere with the verdict upon that account.

2. Although a jury fee would have been payable but for the existence of the slander and libel counts, and although no evidence of the special damage was given under these counts, yet the general verdict would not for non-payment of the fee be set aside.

H. M. Howell, Q.C., and *H. Vivian*, for plaintiff.
N. F. Hagel, Q.C., for defendant.

(*13th February, 1888.*)

Taylor, C.J.—The declaration contained four counts, assault, false imprisonment, slander and libel. At the trial, the jury were instructed that no evidence had been given under the third and fourth counts, and the plaintiff had a verdict on the first and second, with $300 damages. The defendant now moves for a new trial.

The damages are large, much larger than I would have given, but can the court interfere? This is an action for assault by a doctor upon a female servant who came to consult him as a patient. In *Edgell* v. *Francis*, 1 M. & G. 222, Tindal, C.J., said, that with respect to damages, the court never interferes unless they are very excessive, or a strong case is made out that the jury have taken a perverted view of the case, and Bosanquet, J., said, it was the province of the jury to estimate them, and unless the court sees that they are extravagant it will not interfere. That was a case of arrest and confinement for one night, the damages given being £200. *Creed* v. *Fisher*, 9 Ex. 472, was a case of assault by a clergyman upon a churchwarden, and the damages were £300. Pollock, C.B., said, "the damages were such as in our private judgment we might think more than the occasion called for, still, in comparing them with what the jury have awarded, there is not so wide a difference between the two as to satisfy us that the jury either were actuated, or that they had proceeded upon some wrong principle. Under these circumstances, bearing in mind that it is the peculiar province of the jury to assess the damages, and that the court ought not to interfere, unless it be very manifest that the jury have so misconducted themselves, we think that we cannot disturb the verdict." In *Robertson* v. *Meyers*, 7 U. C. Q. B. 423, the plaintiff was arrested under a *ca. sa.* and detained from work, the jury gave £1000. This verdict the court would not disturb, although Robinson, C.J., speaking of the damages said they were very large and he should have been better satisfied had the verdict been less. In the same case, Draper, J., said, "I have been unable to find sufficient ground for disturbing this verdict, though in the exercise of my own judgment on all the facts, I should not have concurred in giving such damages. I feel strongly that a verdict of £1000 is, under the circumstances of this country and the general difficulty of raising money, a penalty much heavier than I should have inflicted. . . . . I have felt it to be extremely probable that the jury, in giving such exemplary damages, not only had in view compensation to which the plaintiff was well entitled but punishment, which they thought the defendant justly merited . . . . but even if it were clear that such consideration influenced the verdict, it would still be almost impossible to set it aside on the ground of excessive damages without directly impeaching the authority of numerous cases."

It was also sought to set aside the verdict on the ground that no evidence having been given on the third and fourth counts, the case was not one which could, under the 49 Vic. c. 4, s. 2, have been tried by a jury without payment of the jury fee required by that section. Now, in the first place, there is not, so far as I am aware, any evidence before the Court that the fee was not paid, and in the next, whatever may be the course which the Court should adopt in a case in which counts such as those which would bring the case within the 3rd section of the Act, have been added simply to evade payment of the fee under the 2nd section, I do not think the court, looking at all the evidence given in this case, could say that the plaintiff had not reasonable ground for adding the third count at all events. It is true that having failed to give evidence of special damage, the judge had to instruct the jury that such evidence had not been given as would entitle her to recover under that count, but may she not have had reasonable cause for supposing that such evidence could be given. Witnesses who would have proved the special damage may have failed to attend at the last moment, so that she was driven to rely on her own evidence only, which the judge had to rule, was not admissible for the purpose.

That the verdict has been entered generally upon the first and second counts seems no ground for setting it aside, even if, as the defendant contends there was no evidence to support a verdict for the plaintiff on the second count. In *Rowand* v. *Tyler*, 4 D. S. 257, it was held that where there are several issues raised and the plaintiff has a verdict upon the whole record, it forms no good objection to his recovery, that some of the issues should have been found for the defendant, if there be sufficient without them to support the verdict. Here it was certainly open to the jury to find a verdict for the plaintiff upon the first count at all events.

The motion for a new trial must be refused with costs.

DUBUC, J.—I think the first and second counts of the declaration have been proven.

The assault is established by the defendant putting his hand on the plaintiff. She swears that when she walked out of the parlor to go to the front way, he put his two hands on her and pushed her into the office door and said, "you wont leave this office to-night till you pay the fee," and he locked the door of the office. This proves also the imprisonment. Elsewhere she says, "he was very rude, he put his hands on my shoulder and shoved me out of the parlor." The defendant admits putting his hand on her in the dining room; but says he did so very gently. He does not deny that he put his hands on her in the hall to make her go into the office; he only swears that he does not recollect doing it. The jury found in her favor, and assessed the damages at $300. The amount may be considered a little high. A smaller verdict might have been sufficient. But it cannot be said to be so excessive that the verdict should be disturbed on that ground.

As to the ground taken by the defendant's counsel that the first and second counts on which the verdict was found, could not be tried by a jury without a jury notice being given and the jury fee paid, I do not think it can be urged as sufficient to vitiate the verdict and render it null. The third count was for slander which by statute was properly triable by a jury without a jury notice being given. Evidence of the slander was given. And the plaintiff had the right to join the two causes of action. Supposing the declaration had contained only the first two counts without any jury notice and had been presented to the prothonotary to be entered on the list of cases to be tried by a jury, without paying the jury fee, and the prothonotary had so entered it, and a jury had been sworn, and the case gone into before them, without any objection or protest from the defendant could it be said that the case had been mistried, and that an otherwise proper verdict should be set aside on that account? I do not think so. It could not be considered to be more than an irregularity, of which the defendant could have availed himself by moving before trial to have the case struck off the list of jury cases; but such an irregularity would have been cured by verdict.

Here the case was, on account of the third and fourth counts, properly entered, and properly brought to trial before a jury. If the defendant did not want to have the first two counts to be tried before a jury without a jury notice, he might also have moved before trial, that the different causes of action be divided for that purpose, and that the first two counts be struck out of the declaration unless the jury fee be paid. An order would likely have been made putting the plaintiff on terms to succeed on the counts triable by a jury without a jury notice, or to recover at least a general verdict on the whole declaration. And he would have gone to trial at his own risk. But the defendant allowed the case to go to trial without objecting, and it is too late now to ask that the verdict should be set aside on that ground.

I think the verdict should stand.

Killam, J.—Upon the argument in this cause, I was inclined to think that the verdict must be set aside on the ground that the action should not have been tried before a jury. On further consideration, however, I have come to the conclusion that the application should not succeed.

The statute does not state that such a consequence shall result from a trial by jury where the jury notice has not been given or the jury fees have not been paid. By the addition of the counts in slander and libel, there was sufficient notice to the defendant that the case was to be tried by a jury. The nonpayment of the jury fees cannot affect the defendant. It might be proper, if there were sufficient evidence that the addition of these counts was only colorable to escape payment of the fees, to set aside the verdict on the ground that the party had been perpetrating a fraud on the court and the Province; but mere failure to recover on the count cannot be sufficient, though, perhaps, failure to offer any evidence under it might establish a *prima facie* case of such an attempted fraud. Here, there was evidence of the oral slander, and the plaintiff failed only through not establishing the special damage. Upon this point also, it appears material that the learned Chief Justice before whom the trial was had, is of opinion that there was a *bona fide* attempt to prove the claim for the alleged slander.

Then, upon the other questions, I think it necessary only to say that there was evidence which, if believed by the jury, would warrant a verdict for the alleged assault, and that the learned Chief Justice thinks that the question was a fair one for the jury upon the evidence.

Though the damages allowed seem large, yet, the amount is not so excessive that the court can interfere.

SHAW v. THE CANADIAN PACIFIC RAILWAY CO.

(IN APPEAL.)

Declaration.—Contract or tort.

Plaintiff having sustained personal injury and loss of baggage in a railway accident, obtained leave to proceed in an action provided he declared in contract. His declaration contained the following counts:—

1 & 2. Allegation of contract to carry; breach, that defendants did not safely carry, but owing to negligence goods lost.

3 & 4. Allegation of contract to safely and securely carry; breach, that defendants did not safely and securely carry, but owing to negligence plaintiff was injured.

5 & 6. The same as 1 & 2 without the allegation of negligence.

Held, 1. (Overruling Dubuc, J.) That the first four counts were in contract and not in tort.

2. That counts 1 & 2 were in reality the same as 5 & 6 and should therefore be struck out as encumbering the record.

The defendants pleaded to counts 5 & 6 a condition of the contract by which their liability was restricted to $100, and payment into Court of that amount.

To this plea plaintiff replied negligence within section 24 of the Consolidated Railway Act, 1879.

Held, That this replication should not be struck out, but if objectionable should be demurred to.

In this action the defendants being resident out of the jurisdiction, but having assets in Manitoba, an order was made allowing service of the writ out of the jurisdiction, but directing that the declaration should be either upon contract or upon judgment.

The present motion was by way of appeal from an order of Mr. Justice Dubuc, striking out the first four counts of the declaration because they were not upon contract or judgment. The first two counts were for injury to luggage, the last two for injury to person.

C. P. Wilson, for plaintiff, cited *Tatton* v. *G. W. R.*, 8 W. R. 606; *Fleming* v. *Manchester, Sheffield and Lincolnshire R. Co.*, 4 Q. B. D. 81; *Addison on Torts*, 726; *Baylis* v. *Lintott*, L. R. 8 C. P. 345; *Symonds* v. *Pain*, 6 H. & N. 709; *Readhead*

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v. *Midland Ry.*, L. R. 4 Q. B. 379; *Christy* v. *Griggs*, 2 Camp. 79.

J. A. M. Aikins, Q.C., for the defendants cited, *The Railway Act*, R. S. C. p. 1513; *Brown on Carriers*, 517; *Stephen on Pleading*, 164; *Foulkes* v. *Met. Dist. Ry.*, L. R. 4 C. P D. 267; *Burnett* v. *Lynch*, 5 B. & C. 603; *Bretherton* v. *Wood*, 3 B. & P. 61; *Addison on Torts*, 21; *Underhill on Torts*, 186.

C. P. Wilson, in reply cited, *Vogel* v. *G. T. R.*, 11 Sup. C. 612; *Allan* v. *G. W. R.*, 33 U. C. Q. B. 483; *Phillips* v. *Clark*, 2 C. B. N. S. 156; *Wyld* v. *Pickford*, 8 M. & W. 443; *Pollock on Torts*, 436.

(*15th June, 1888.*)

KILLAM, J., delivered the judgment of the court. (*a*)

The plaintiff filed a declaration containing eight separate counts, all framed in contract. The first alleged a contract to carry the plaintiff and his luggage on the defendants' railway from Trenton, Ont., to Calgary, N.W.T., and to deliver the luggage to him there within a reasonable time, and for breach that the defendants did not safely carry the luggage and deliver it, but owing to the negligence of the defendants and their servants, it was wholly lost. The second count was similar to the first, but alleged the contract to be to carry the plaintiff and his luggage from Central Ontario Junction in Ontario to Calgary. The third count alleged a contract to safely and securely carry the plaintiff from Trenton to Calgary, and for breach that the defendants did not safely and securely carry the plaintiff but owing to the negligence and carelessness of the defendants in carrying the plaintiff upon their railway and in managing the railway and the carriage and train on which the plaintiff was a passenger, the plaintiff was wounded and injured. The fourth count was similar to the third, except that it alleged the contract to be to carry the plaintiff from the Central Ontario Junction to Calgary. The fifth and sixth counts were similar respectively to the first and second, except that the breach alleged in each was merely that the defendants did not safely and securely carry the luggage and deliver it, without any allegation of negligence. The seventh count alleged a contract to carry the plaintiff from Trenton to Calgary, and for breach that although the defendants carried the plaintiff to

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(*a*) Present: Taylor, C.J., Killam, Bain, JJ.

Winnipeg, being a portion of the journey to Calgary, they did not, nor would carry him to Calgary or beyond Winnipeg. The eighth count was similar to the seventh, except that it alleged the contract to be to carry the plaintiff from the Central Ontario Junction to Calgary. The defendant then applied in Chambers to have the first four counts struck out, or so much of them as charged the loss, damage or injury complained of to have been caused by the negligence, carelessness or omission of duty of the defendants, on the ground that they were against the terms imposed by the court in allowing the plaintiff to proceed, and that they were the same as the subsequent counts except in so far as they charged negligence, carelessness and omission of duty. Upon this application my brother Dubuc ordered the counts objected to to be struck out, holding them objectionable on both the grounds taken. The plaintiff now applies to the court to reverse this order.

By our statute, 49 Vic. c. 35, s. 32, "Service out of Manitoba of a writ or summons may be allowed by the court or a judge in the following cases," (after mentioning four classes of cases not applicable) (*e*) "Where the action is upon a contract or judgment, though the same be not within any of the four classes already enumerated, but it appears to the satisfaction of the court or a judge that the defendant has assets in Manitoba of the value of two hundred dollars at least, &c." It was to bring the case strictly within these conditions that the order limited the plaintiff to declaring upon contract or judgment.

It appears to me that both in substance and in form the plaintiff has conformed to the statutory conditions and to the order, in respect at any rate to the third and fourth counts and the matters set up therein.

The counts allege a contract. To succeed upon them, the plaintiff must prove a contract, express or implied, and its breach. An implied contract would be as much within the statute and the order as an express contract. If the circumstances were such that the defendants were carrying the plaintiff without contract between them, and the law imposed a duty upon them to use due care to carry him safely apart from contract, he could not recover for injury through their negligence under these counts, for he claims under an alleged contract. That he could have brought his action in another form and sued for the tort arising from a breach of the duty to use proper care, cannot, in my opinion, alter the plain fact that he is suing upon a contract. A breach of contract is equally a breach of contract if it occur through negligence, as if it arise from no want of care. Indeed, in so far as the third and fourth counts are concerned, if the allegation of the contract had been properly framed, it would be of a promise only to use due and proper care to carry the plaintiff safely, which is evidently the only promise that can be proved, and not of an absolute promise to carry safely as it now is. But in *Baylis* v. *Lintott*, L. R. 8 C. P. 345, the action was for loss of goods delivered to the defendants for carriage, and the declaration alleged the promise to carry safely and for breach that the defendants did not carry them safely, and it went on to allege loss by negligence. This was distinctly stated by Bovill, C.J., to be a declaration in contract, and on that very ground *Tatton* v. *G. W. R. Co.*, 8 W. R. 606, was held not to be a binding authority, as in the latter case the declaration was framed in tort.

The authorities on which my learned brother Dubuc relied in deciding against the counts were *Tatton* v. *G. W. R. Co.*, and *Fleming* v. *The Manchester, &c., Ry. Co.*, 26 W. R. 741. It does not, however, appear to have been brought to his attention that the decision in the latter case was reversed upon appeal.

The cases arose under a clause in the County Courts Act, by which a plaintiff recovering £20 or less in an action founded on contract brought in a superior court, was prevented from recovering costs without the certificate of a judge. In *Tatton* v. *G. W. R. Co.*, the action was framed in tort, and on that ground the costs were held to be recoverable though the amount recovered was less than £20, but the court expressed some dissatisfaction at being forced to so decide. In *Fleming* v. *The Manchester, &c., Ry. Co.*, 26 W. R. 741, the Queen's Bench Division felt itself bound by *Tatton* v. *G. W. R. Co.*, but the Court of Appeal reversed the decision of the Divisional Court, both holding that *Tatton* v. *G. W. R. Co.*, did not apply, and expressing disapproval of it. Bramwell, L.J., said, "Whether we are to decide the question by looking at the form of the pleadings or at the facts, it is clear that the action is founded on contract."

In *Baylis* v. *Lintott*, L. R. 8 C. P. 345, the Court of Common Pleas adopted the same view as that subsequently taken by the Court of Appeal, distinguishing *Tatton* v. *G. W. R. Co.*, by reference to the difference in the form of the declaration.

So far as the first two counts are concerned, it is enough to point out that they are really the same as the fifth and sixth. The addition of the charge of negligence really adds nothing to them except an element calculated to embarrass as I shall directly point out. The allegation of negligence is in no way material to raise a different cause of action, and it cannot affect the damages. The addition of so many counts upon the same cause of action really the same in form, is highly objectionable as incumbering the record unnecessarily, and upon that ground the order should be affirmed as to those two counts, but, in my opinion, the order should be varied so as to affect only the first and second counts, without costs.

There is, however, another application pending in the same cause. The defendants as to the fifth and sixth counts paid into court one hundred dollars, and pleaded that the contract with the plaintiff was subject to the condition that the baggage liability should be limited to wearing apparel not exceeding one hundred dollars in value. The plaintiff then filed a special replication to this plea to the effect that the defendants were incorporated by an Act of the Parliament of and are subject to the legislative authority of the Dominion of Canada, that the loss of luggage occurred on the 3rd October, 1886, and that the defendants ought not to be relieved from liability under the plea, because as the plaintiff alleged the damage arose wholly from the negligence and omission of the defendants and their servants within the meaning of sub-section four of section 24 of the Consolidated Railway Act, 1879, and not otherwise. That subsection provided that "passengers and goods shall be taken, transported to and from and discharged at such places on the due payment of the toll freight or fare lawfully payable therefor. Every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants."

The defendants applied in Chambers to have this replication set aside as involving a breach of the condition on which the plaintiff was allowed to proceed with his action, it being claimed that the statute merely raised a duty for non-performance of which an action of tort alone could be maintained. This application has been referred to the court. If this contention be correct it appears to me that the objection should be raised by demurrer and not in this way. It seems to be wholly a question of pleading. The plaintiff declares in contract; the defendant pleads a special condition. If the statute has the effect of adding another term to the contract, upon the idea that the parties contracted with reference to it, or if it prevents the defendant when sued on its contract from setting up the special condition as part of the contract in the event of the breach occurring through negligence, it would seem equally to be open to the plaintiff to reply the negligence and he would still be proceeding on contract; but if the statute merely creates a special statutory duty from which no contract is to be implied, then the replication is a departure from the declaration and demurrable on that ground. In neither view should the replication be struck out. We are not justified in treating the matter differently from the way in which the judge in chambers could, and such a question could not be determined on an application in Chambers to strike out the replication.

It is to this point that I referred in speaking of the additional embarrassing element that would be raised by the allegation of negligence in the first and second counts. If those counts had alleged the contract as having been expressly subject to the special condition, but claimed that the loss was occasioned by negligence, in order to avoid the condition and as entitling the plaintiff to larger damages, it would then have been necessary to determine whether this constituted a declaration on contract or in tort or whether the allegation of negligence would entitle to greater damages in the action on the contract. Even then, it would affect only the question of damages, or the right to recover for some portion of the goods, and the allegation of negligence would not be necessary to support a cause of action for some amount. On the counts as framed the allegation is in no way material for that purpose even, and it is not proper to insert it unnecessarily in anticipation of a possible plea and thus encumber the record with the same issues raised in two different ways, upon the two sets of counts.

In my opinion, this application to strike out the replication should be dismissed with costs.

ONTARIO BANK v. HAGGART.

(IN APPEAL.)

Garnishee.—Payment into court.—Suggestion of third party.

Garnishees paid the money attached into court, making no suggestion of the existence of any other claimant. Upon plaintiff's motion for payment out, two of the defendants contended that the garnishees were not indebted to the defendants at all, but to another firm of which the defendants and another were members, and of which one M. was assignee. An order was therefore made for the trial of an issue between the plaintiffs and the assignee as to whether the garnishee was indebted to the defendants. The plaintiff appealed.

Held, That inasmuch as the garnishees had not made any suggestion of another claimant the order should have directed payment to the plaintiffs, and the assignee be left to his action against the garnishees.

Roberts v. *Death*, 8 Q. B. D. 319, distinguished.

J. S. Ewart, Q.C., for plaintiff, cited *Wood* v. *Dunn*, L. R. 2 Q. B. 74; *Roberts* v. *Death*, 8 Q. B. D. 319; Com. Law Pro. Act, 1860, ss. 29 & 30; Ad. Jus. Act, 1885, s. 53; Ad. Jus. Act, 1886, s. 10.

A. E. Richards, for the garnishees.

W. R. Mulock, in person as assignee of Ross, Killam, Haggart & Wilkes, and as counsel for two members of the firm, cited *Clark* v. *Clark*, 8 U. C. L. J. 107; *Miller* v. *Minn*, 1 E. & E. 1075; even a nominal partner interested, *Spurr* v. *Cass*, L. R. 5 Q. B. 656; as to collusion between plaintiff and garnishee, *Ferguson* v. *Carman*, 26 U. C. Q. B. 26; *Ward* v. *Vance*, 3 Pr.

R. 210; *Smith* v. *Trust and Loan Co.*, 22 U. C. Q. B. 525; only legal debts from legal debtors can be attached, *Boyd* v. *Haynes*, 6 Pr. R. 15; *Webster* v. *Webster*, 6 L. T. N. S. 11; *Exparte Whitehouse*, 32 Ch. D. 512; *Re General Horticultural Co.*, W. N. 1886, p. 79; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; *Hirsch* v. *Coates*, 18 C. B. 757; money should not have been paid into court and if so will not be paid out, *French* v. *Lewis*, 16 U. C. Q. B. 547, 551 (n); debt owing to two cannot be attached to answer debt of one, *Re Smart & Miller*, 3 Pr. R. 385; *Macdonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535; suggestion of other claim may come from any person *Roberts* v. *Death*, 8 Q. B. D. 319; *Wilson* v. *Wilson*, 2 Pr. R. 374; *Drake on Attachments*, § 567; order discretionary and will not be appealed from, *Spencer* v. *Conley*, 26 U. C. C. P. 274.

(*10th March, 1888.*)

BAIN, J., delivered the judgment of the court. (*a*)

The Manitoba Mortgage & Investment Co., having been garnisheed in this suit, paid the amount they admitted they owed the defendants into court. On an application of the defendants to set aside the garnishee order, it appeared that the assignee of the firm to whose business the defendants had succeeded claimed that the garnishees were indebted for the larger part of the money they had paid into court not to the defendants, but to him as assignee of the former firm, and it was agreed that the moneys should not be paid out without notice to the assignee. He appeared on the summons to pay out and the judge in Chambers ordered that the portion of the money he claimed should remain in court, to abide an issue to decide whether these moneys were, at the time of the service of the attaching order, due to the assignee as representing the former firm or to the defendants.

From this order the plaintiffs appeal on the ground that as the garnishees have admitted their indebtedness to the defendants by paying the money into court, without suggesting that they were claimed by any one else, a third party cannot intervene and claim that the moneys paid in were due not to the defendants, but to him.

The garnishees were represented at the hearing of the appeal by counsel, who stated that the garnishees denied that they were

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(*a*) Present: Taylor, C.J., Dubuc, Bain, JJ.

liable to the claimant and that if they were, they had a set-off for any amount he could establish against them.

The affidavits filed by the claimant on the application in Chambers contain nothing to shew that the payment of these moneys to the plaintiffs will, in any way, prejudice or affect his right to enforce payment of his claim against the garnishees by action in the ordinary way.

The attaching order was made on the 21st of March, 1885, and the money was paid into court three days afterwards. The statutes that then governed garnishee proceedings were cap. 37 of the Con. Stat. Section 44 and the provisions of the English Com. Law Procedure Act and subsequent enactments, as made applicable by that section. As the provisions contained in section 10 of our Administration of Justice Act of 1886, were substantially contained in the English Com. Law Procedure Act of 1860, the garnishees could, if they had seen fit, have suggested that the moneys sought to be attached were claimed by some third person, and the judge in Chambers could have disposed of the matter as provided in the Procedure Act. They made no such suggestion, however, but paid the money into court, thereby admitting in the strongest possible manner that they owed the defendants the moneys attached.

The claimant relies on the case of *Roberts* v. *Death*, 8 Q. B. D. 319, but that case itself shews that, according to common law practice, unless the garnishee himself suggests that the moneys attached are claimed by a third person, the court will not hear the suggestion from anyone else, and the claimant must seek the assistance of a Court of Equity, which, on a proper case being made out, would interfere to prevent the moneys being paid to the wrong person. In *Roberts* v. *Death*, it appeared that the moneys attached did not belong to the judgment debtor personally, but were moneys of which he was a trustee, and the court allowed the *cestui qui trust* to intervene and ordered an issue to decide whether the moneys were trust moneys or not. But the court considered that the facts were such as would have entitled the claimant to the assistance of a Court of Equity, and it was expressly by virtue of the equitable jurisdiction acquired under the Judicature Act that the court decided as it did, and the decision implies that had it not been for this equitable jurisdiction, and the case established for its exercise, the court could not have interfered.

This court having concurrent equitable jurisdiction, would doubtless follow the rule established by the above case, under similar circumstances. But in the present case, there is nothing before us that would seem to bring it within the rule, and I think, therefore, the appeal should be allowed and the order appealed against set aside with costs, and an order made for the payment of the balance of the money in court to the plaintiffs.

Appeal allowed.

FREEHOLD LOAN COMPANY v. McARTHUR.

Duty of solicitor on purchase of mortgage.—Acknowledgement by mortgagor.—Production of title deeds.

S. claimed to be mortgagee of certain lands and agreed to sell the mortgage to the plaintiffs. The plaintiffs employed the defendant to examine the title of S. and prepare the necessary assignment. Defendant passed the title, and took an assignment of the mortgage, and upon his report the plaintiffs made the purchase. It afterwards transpired that the mortgage was a forgery.

In an action for negligence, it appeared that the defendant had not, before passing the title, obtained an acknowledgement from the mortgagor, of the amount due upon the mortgage; and had not required the production of the title deeds of the property. The mortgage was dated but a short time before the assignment and was not due.

Held, 1. That acceptance of the title without the mortgagor's certificate, did not constitute such negligence as to render the defendant liable.

2. That, notwithstanding the Registry Act, it is as much as ever the duty of a solicitor to inquire for the title deeds; and to insist upon their production, unless their non-production is satisfactorily accounted for; and that upon this ground the defendant was liable for the amount paid by the plaintiffs and interest.

J. S. Ewart, Q.C., and *C. P. Wilson*, for plaintiffs.

W. H. Culver, for defendant.

(*7th March, 1888.*)

KILLAM, J.—It is claimed for the plaintiff that in two respects the defendant was guilty of negligence. (1) In not obtaining or requiring an acknowledgment of the mortgage debt from the mortgagor, and (2) in not requiring production of the title deeds prior to the mortgage to Scott.

Although the evidence is not very strong, I incline to think that upon the evidence it should be found that the advice of the solicitor to obtain an acknowledgment from the supposed mortgagor, was communicated to the company's manager here, and that Scott did supply a forged acknowledgment purporting to be that of the mortgagor.

It appears to me that, under the authority of *Bickerton* v. *Walker*, 31 Ch. D. 152, it must be held that the acceptance of the title without the mortgagor's certificate, would not constitute such negligence as to render the defendant liable. To render a solicitor liable in such a case, there must be *crassa negligentia* or gross negligence, the highest degree of negligence recognized in the law. *Pitt* v. *Yalden*, 4 Burr. 2060; *Blaikie* v. *Chandless*, 3 Camp. 17; *Godefroy* v. *Dalton*, 6 Bing. 467.

This being the case, the difference in the relation of the parties cannot, it seems to me, make a difference in the liability for not obtaining such a certificate.

On the other point raised, however, I have found much more difficulty. It is, undoubtedly, as much as ever the duty of a solicitor to inquire for the title deeds of the property, the title to which he is retained to investigate, and to insist upon their production, unless their nonproduction is satisfactorily accounted for. From *Godefroy* v. *Dalton*, it appears that an attorney retained to prosecute or defend an action on behalf of a client is ordinarily liable for any loss occasioned by his nonobservance, whether through ignorance or negligence, of the rules of practice of the court. Upon the same principle it would seem that a solicitor retained to investigate a title must be liable for nonobservance of the well understood practice of solicitors in such matters.

Now, it appears to me that a solicitor is not justified in assuming that the changes effected by our Registry Act have altered the practice that should be followed with reference to the production of all title deeds. Although I cannot find that the production of the former title deeds is anywhere spoken of as important evidence of the authenticity of any conveyance, yet I think that it is some evidence and the more important where, as here, possession of the property does not go with the conveyance. It appears to me that neglect to inquire for the former title deeds constituted negligence occasioning the loss and that the defendant must be liable for the loss.

The remarks in *Lee on Abstracts of Title*, p. 26, 211, and the judgment in *Cottrell* v. *Watkins*, 1 Beav 361, do not in any way support the inference that a solicitor is justified in neglecting to obtain production of title deeds upon which the title depends. They refer to the question whether a title which is not supported by conveyance, but is claimed to exist wholly without such for the period to which inquiry is usually limited, as a title by descent or possession, is one which an unwilling purchaser can be compelled to accept.

It has been laid down by Sir John Leach, in *Emery* v. *Grocock*, 6 Mad. 54, that, "If the case be such that sitting before a jury it would be the duty of a judge to give a clear direction in favor of the fact, then it is to be considered as without reasonable doubt, but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser." This view is supported also by *Hillary* v. *Waller*, 12 Ves. 270, and *Baldwin* v. *Peach*, 1 Y. & C. Ex. 453.

It appears to me, however, that this principle can be supplied to protect the solicitor only when he has adopted the usual precautions, and obtained the usual evidence required by the practice of solicitors in such a matter.

It is true that the solicitor had the evidence of the registrar's certificate and the apparent affidavit of the supposed witness to the execution of the mortgage, and that by the statute the former is made even in the courts *prima facie* evidence of the execution of the instrument, but in case of the trial of an action, there is a party interested in rebutting the evidence furnished by such certificate. Of course there is not ordinarily that protection to a solicitor or a purchaser in reference to an investigation of title, but the safeguards adopted in the usual practice of solicitors are considered sufficient, and one of these the defendant here neglected to secure.

It appears to me that, under the rules adopted by this company for observance of the officers here in connection with the effecting of loans, and the fact of the defendant having certified to the title and been a party to the advance of the money, there is sufficient evidence of his having been retained to investigate the title of Scott to the land as mortgagee.

Under the authority of *Whiteman* v. *Hawkins*, 4 C. P. D. 13, the verdict must be for the full amount secured by the mortgage to the company $800, with interest at 9 per cent. from 8th February, 1884, $1034. Leave reserved to court to enter nonsuit or verdict for defendant or to decrease the damages to 25c. If application against verdict be entered within two weeks proceedings to be stayed until it shall be disposed of.

Verdict for plaintiff.

BATHGATE v. THE MERCHANTS BANK.

(IN APPEAL.)

Bill of sale.—Statement of consideration.

The full and true consideration for which a bill of sale is given must be set out in it, with substantial accuracy, otherwise the bill is void.

G. being indebted to B., gave his note for the amount, which B. discounted at a chartered bank. As security for the discount, G. executed a chattel mortgage to the bank. At maturity B. took up the note. Afterwards he procured from G. a bill of sale of the goods. The bill recited the mortgage and an agreement to sell the goods for $100 over the mortgage. The expressed consideration was the premises and $100. The $100 was not paid or intended to be paid.

Held, 1. That the mortgage was void under the Banking Act.

2. That although the debt upon the notes might have been a sufficient consideration for the bill of sale, yet as that was not the consideration stated, the bill was void.

Appeal from a verdict entered for the plaintiff on an interpleader issue. The facts are fully set out in the judgment.

J. Stewart Tupper and *F. H. Phippen*, for defendants. The chattel mortgage was void under the Banking Act. *Bank of Toronto* v. *Perkins*, 8 Sup. C. R. 603. See also *McDonell* v. *Bank of U. C.*, 8 U. C. Q. B. 252; *Commercial Bank* v. *Bank of U. C.*, 7 Gr. 250, 430. There was no consideration for the bill of sale, *Smith* v. *Monteith*, 13 M. & W. 427; *Herring* v. *Dorell*, 8 Dowl. 604; *Jones* v. *Ashburnham*, 4 East. 465; *Longridge* v. *Dorville*, 5 B. & Ald. 117. They also cited *Hamilton* v. *Harrison*, 46 U. C. Q. B. 127; *Parkes* v. *St. George*, 10 Ont. App. R. 497; *Arnold* v. *Robertson*, 8 U. C. C. P. 147; *Beecher* v. *Austin*, 21 U. C. C. P. 334, 346; *Walker* v. *Niles*, 18 Gr. 210; *Re Parker*, 44 L. T. N. S. 114.

N. F. Hagel, Q. C., and *H. E. Crawford*, for plaintiff. The bill of sale here is good and complies with the requirements of the Act, *Furlong* v. *Reid*, 12 Ont. R. 612. Granting that the Act has been complied with, plaintiff has the right to show any additional consideration which is not inconsistent with the Bills of Sale Act. *Nixon* v. *Hamilton*, 2 Dr. & W. 385; *May on Fraudulent Conveyances*, 272, 273; *Credit Co.* v. *Pott*, 6 Q. B. D. 299; *Re Johnson*, 26 Ch. D. 338.

(*10th March, 1888.*)

Bain, J., delivered the judgment of the court. (*a*)

This is an interpleader issue which was tried by a judge without a jury at the last Winnipeg assizes, and a verdict was entered for the plaintiff. The defendants move to set aside the verdict and to enter a verdict for the defendants, or for a new trial, on the grounds that the verdict is against law and evidence, and that the bill of sale of the goods and chattels in question from Galbraith to the plaintiff, by which she claims is void because the consideration expressed therein was never paid, and because it was given without consideration.

The evidence was conflicting and contradictory, but I see no reason to differ from the conclusions of fact arrived at by the learned judge who tried the case. But the plaintiff's title depends on the validity of the bill of sale from Galbraith to her, dated

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(*a*) Present: Dubuc, Killam, Bain, JJ.

the 26th of November, 1885, and if, as the defendants now contend, though they do not seem to have raised the question at the trial, this bill of sale is invalid under the Chattel Mortgage Act, the plaintiff was not entitled to a verdict.

The facts that are material in deciding this question seem to me to be as follows: In January, 1882, R. D. Bathgate, the plaintiff's husband, who was a member of the firm of R. Gerrie & Co., made an agreement with one James Galbraith, that the latter should work and farm certain lands belonging to Bathgate, but which stood in Gerrie & Co's. name. One of the terms of this agreement, which was in writing and signed by both parties, was that Bathgate should have the privilege of placing his own stock on the farm and that they should be taken charge of by Galbraith. Soon after the agreement was signed, Galbraith went to Ontario and purchased stock to the value of $3400, and paid for them out of the proceeds of drafts drawn by him on R. Gerrie & Co., and the stock, consisting of cattle and horses, was shipped to Winnipeg, to R. Gerrie & Co. These drafts were charged in Gerrie & Co's. books to an account that was opened in the name of "James Galbraith," and Bathgate and Swims, who was the assistant bookeeper, say the account was opened and kept under that heading to shew what Bathgate owed the firm in connection with the farm which Galbraith was in charge of. On their arrival at Winnipeg, some of the stock were sold and the proceeds of the sales paid to Gerrie & Co. and credited to this account, and the balance of them were sent out to the farm where they remained in Galbraith's charge till March, 1887. The freight on this stock and other sums that were from time to time paid on account of this farming transaction, were also charged under this account, and the statement of the account filed as an exhibit, dated the 1st of March, 1885, shews a debit balance of $4000.

It further appears that during a period extending from May, 1882, until sometime in 1885, Galbraith gave to Gerrie & Co. a number of promissory notes which were discounted by Gerrie & Co., for their own benefit in the Merchants and other banks. An account of these notes was kept in Gerrie & Co's. books in an account under the heading of "James Galbraith. Accommodation account." When notes were given they were credited to Galbraith and when any of them were returned by Gerrie & Co. the account was charged with them. The account filed, shews that $3277 of these notes are still outstanding, and it is on some of them that the judgment against Galbraith under which the Merchants Bank made the seizure of the stock in question, was recovered.

In July, 1884, the lands which Galbraith was farming were conveyed to a trustee for Mrs. Bathgate, the plaintiff and the books of Gerrie & Co., shew that on 1st March, 1885, Mrs. Bathgate was a creditor of the firm for $8230.07, but no evidence was given to shew how this indebtedness arose or what it was for. In November, 1884, Gerrie & Co., being in difficulties obtained a year's extension from the Merchants and other banks to whom they were indebted.

In August, 1885, Galbraith, at the request of R. D. Bathgate, gave him his promissory note for $4500, payable two months after date, and at the same time or on the following day, he executed a chattel mortgage on all the stock in question, to the Commercial Bank, to secure this note, which, the mortgage recited, the Bank then held. The note is dated the 4th of August, and the chattel mortgage on the 5th. The evidence of Bathgate and Mr. Macarthur the manager of the Commercial Bank shews that on the 4th of August Bathgate brought the note to the bank and asked to have it discounted for his wife, the plaintiff, and told Macarthur a chattel mortgage on the stock would also be given to secure the note. The Bank agreed to give the discount, but as Mr. Macarthur says the security on which the money was actually advanced was "the stock in the chattel mortgage." And to still further secure the Bank, it was agreed between Bathgate and Macarthur that the proceeds of the discount should be put into a deposit receipt in favor of the plaintiff, which was to be indorsed by her, left in the hands of the Bank, along with the note and the chattel mortgage. A deposit receipt for $4400, dated the 4th of August, 1884, payable to the plaintiff, and indorsed hy R. D. Bathgate as her attorney is produced and filed, but the evidence of the accountant of the Bank shews that it was not till the 6th of August that the transaction went through the Bank's books. Then the proceeds of the discount $4400 were placed to Galbraith's credit, and his check, dated the 5th of August for that amount payable to his own order and indorsed by him and the plaintiff, is charged against his account. The note was not paid by Galbraith when it fell due and the Bank cashed the deposit receipt and the plaintiff gave a check for the balance and retired the note, and on the 22nd of October, the Bank executed an assignment of the chattel mortgage to the plaintiff. R. D. Bathgate, her husband, had made an assignment for the benefit of his creditors on the 15th of August.

It then appears that on or about the 26th of November following, the plaintiff caused a bailiff to proceed to seize and sell the stock covered by the chattel mortgage, and that on that date Galbraith executed to her a bill of sale of all this stock. The bill of sale recites the chattel mortgage to the Bank and its assignment, and that in default of payment the plaintiff had seized the goods and chattels covered by it, and that, "in order to prevent the sacrifice of such goods and chattels at a sale thereof by public auction," the grantor had agreed to sell the goods and chattels to the plaintiff "for the sum of $100 over and above the said chattel mortgage," and it is expressed to be made in consideration of the premises and of the payment of the sum of $100. The stock remained in Galbraith's possession after the bill of sale was given as they had been before.

Bathgate admits that the $100 was not paid to Galbraith, and says, "it was merely nominal to discharge the rent," but he had previously stated that all the rent then due by Galbraith had been included in the note for $4500.

The plaintiff claims title to the cattle in question in this issue under this bill of sale. The defendants on the other hand claim that they belonged to Galbraith from the time of their purchase by him in Ontario, that the money paid by Gerrie & Co. in retiring his drafts was a personal loan to him and that he gave the notes mentioned in the accommodation account in payment of the money thus lent. They also claim that the chattel mortgage from Galbraith to the Bank, and the bill of sale to the plaintiff, were merely colorable and were given in pursuance of a fraudulent scheme, devised by R. D. Bathgate to protect the cattle from seizure by Galbraith's creditors, and that they were given without consideration and are void. It is also claimed that the chattel mortgage to the Bank is void under the 45th section of the Banking Act, and that the plaintiff took nothing by its assignment to her, that the bill of sale to the plaintiff is also void under the "Chattel Mortgage Act," because the consideration set forth in it was not the true consideration for which it was given.

The principal witness for the plaintiff is R D. Bathgate, her husband, and for the defendants, Galbraith himself. Their evidence is directly conflicting and contradictory, but the learned judge who tried the case came to the conclusion that Galbraith's statement, that the cattle were purchased for himself in the first instance, and that the notes he gave were in payment of the money that Gerrie & Co. had lent him for the purchase, was incredible, and I see no reason to differ from this conclusion. The terms of the agreement between Galbraith and Bathgate before the cattle were purchased, and various circumstances that it is unnecessary to consider in detail, leave no doubt in my mind that Galbraith purchased the cattle for Bathgate, and that up to the transactions in August, 1885, he had no property in them, and that the notes referred to were given as accommodation paper. And if the giving the chattel mortgage to the Bank, and its assignment to the plaintiff, and the bill of sale from Galbraith to her, covered a scheme of Bathgate's to protect the cattle from seizure by creditors, the creditors against whom the scheme was devised were, I think, not Galbraith's, but Bathgate's own. Bathgate assigned on the 13th of August, 1885, and his intention in taking the promissory note and the chattel mortgage to the bank on the 4th or 5th of the month was, I think, that with the assistance of the Bank the title to the cattle might be vested in his wife and saved from his own creditors and she secured to that extent for the amount Gerrie & Co. owed her.

But before he could affect this he had to sell the cattle to Galbraith, and Bathgate's evidence shews that he did in fact sell them to him at the time the note and the chattel mortgage were taken, and it therefore follows that if the chattel mortgage which was assigned to the plaintiff, and the bill of sale from Galbraith to her are invalid as contended, the title to the cattle has not passed to her.

The evidence of Bathgate and of Mr. MacArthur, the president and manager of the Bank, can, I think, leave no doubt but that the Bank made the advance directly on the security of the stock in the chattel mortgage, and the mortgage having been then taken in direct contravention of the provisions of the 45th section of the Banking Act, it was wholly null and void, *Bank of Toronto* v. *Perkins*, 8 Sup. Ct. 603, and its assignment from the Bank to the plaintiff was equally void and inoperative.

The consideration expressed in the bill of sale is the amount due under the chattel mortgage which had been assigned to the plaintiff by the Bank, and the smaller sum of $100 paid by the plaintiff to Galbraith at the time the bill of sale was executed. But though the chattel mortgage was void and no money was in fact paid, still Galbraith owed the amount of the note he had given for the $4500, and this note having been retired by the plaintiff, there was, I think, a consideration for the sale from Galbraith to the plaintiff.

But this is not the consideration that is set out in the bill of sale, and the consideration that is set out is not in fact the real consideration between the parties, and the defendants claim that the bill is therefore null and void under our Chattel Mortgage Act. Adopting the words of Hagarty, C.J., in *Hamilton* v. *Harrison*, 46 U. C. Q. B. 127, the point thus raised is this,—is an erroneous statement of the consideration in the bill of sale *per se* sufficient to avoid it as a matter of law, or is it merely a circumstance to be considered in deciding the issue of fraud or no fraud? Section 3 of the Chattel Mortgage Act, reads as follows:—"Every sale of goods and chattels hereafter made not accompanied by immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit of a subscribing witness thereto of the due execution thereof and an affidavit of the bargainee or his agent, that the sale is *bona fide* and for valuable consideration as set forth in the said conveyance," &c., and a failure to comply with the provisions of the section renders a sale absolutely void as against creditors of the bargainor. The 8th section of the English Bills of Sale Act, 1878, expressly provides "that every bill of sale shall set forth the consideration for which it was given," and numerous decisions on this provision establish that the consideration stated in the bill must be in substance and truth the consideration that has been received by the grantor, though a small inaccuracy will not be sufficient to avoid a bill of sale otherwise valid, *Benj. on Sales*, p. 477; *May on Fraudulent Conveyances*, p. 140; *Ex parte Carter*, 12 Ch. D. 909; *Exparte National Mercantile Bank*, 15 Ch. D. 42; *Hamlyn* v. *Betteley*, 5 C. P. D. 327; *Ex-*

parte Charing Cross Advance and Deposit Co., 16 Ch. D. 35; *Exparte Firth*, 19 Ch. D. 419.

Our Act does not require in so many words that the consideration is to be set out, but it seems to me to imply and require that it shall be set out just as strongly as if it had expressly said so in the words used in the English Act. In the first place it requires that every sale of goods that comes within the Act shall be in writing, and this can only mean that all the essential elements that must combine to constitute a sale, shall be set out in the writing, and one of these elements is certainly the price or consideration. In the next place the bargainee or his agent is required to swear in the affidavit of *bona fides* that the sale is "for valuable consideration as set forth in the said conveyance." Clearly therefore, some consideration must be set forth in the writing of sale, and this being so and remembering the object of the Act, it would appear to me to be impossible to suppose that the Legislature intended that the statement of any but the actual and true consideration between the parties would satisfy its provisions. If I am right in this view, then it follows that the reasons that led to the decisions in the English cases above cited on this point are applicable to cases arising under our own Act, and as the erroneous statement of the consideration in the bill of sale in question is such as would unquestionably render it void under the English Act, I think, therefore, it must be held to be null and void.

I would feel no hesitation in coming to this conclusion, were it not that many of the judges in the Ontario courts have, in the case of chattel mortgages at least, taken the opposite view and have held that the erroneous statement of the consideration will not in itself avoid the instrument but that it is merely a question of fact to be considered in deciding the question of fraud or no fraud. The provisions in our own and the Ontario Chattel Mortgage Acts on which this question turns, both as regards bills of sale and chattel mortgages, are substantially the same, and I must confess it seems to me that the necessity of setting out the true consideration is as strong in the case of a chattel mortgage as it is in a bill of sale. In *Arnold* v. *Robertson*, 8 U. C. C. P. 147, and afterwards in *Fraser* v. *Gladstone*, 11 U. C. C. P. 125, the Court of common Pleas held, that a bill of sale which does not set forth the full and true consideration for which it was given, is null and void, but in *Hamilton* v. *Harrison*, 46 U. C. Q. B. 127, the court took the opposite view in the case of a chattel mortgage. But this case does not overrule *Arnold* v. *Robertson*, and not only does it conflict with previous cases on chattel mortgages, but the judgment was strongly dissented from by one of the judges before whom the case was argued and it has since been questioned by judges whose opinions are entitled to great weight. *Robinson* v. *Patterson*, 18 U. C. Q. B. 55; *Parkes* v. *St. George*, 2 Ont. R. 342 & 10 Ont. App. 496. In our own court, the same question in the case of chattel mortgages gave rise to a conflict of opinion in the case of *Fish* v. *Higgins*, 2 Man. R. 65. There the judgment of the court upheld the validity of the chattel mortgages in question, but the judgment was dissented from by the present learned Chief Justice on the express ground that as the mortgages did not shew the true consideration for which they were given, they were invalid.

After considering the matter carefully, I can come to no other conclusion than that section 3 of our Act requires the full and true consideration for which a bill of sale is given, to be set out in it with substantial accuracy and if it is not so set out the bill of sale is void.

I think the verdict entered for the plaintiff should be set aside and a verdict entered for the defendants.

Verdict for plaintiff set aside and verdict entered for defendants.

MERCHANTS BANK v. McLEAN.

HENDERSON & BULL, GARNISHEES.

(IN APPEAL.)

Garnishing order.—Interpleader.—Garnishee claiming interest in fund.

A garnishing order having been served by plaintiffs, the garnishees paid $667,46 into Court, suggesting the names of several claimants to the fund. One of these, F., had commenced an action against the garnishees, claiming $1000 to be the amount due. Upon a summons taken out by the plaintiffs an order was made barring all the claimants except the plaintiffs and F., (including the assignors of F.,) staying F's. action and directing interpleader between F. and the plaintiffs. Upon appeal,

Held, 1. That the order might properly have barred the other claimants.

2. That the interpleader order could only be made at the instance of the garnishees.

3. There being a dispute as to the amount due by the garnishees, they could not obtain an interpleader order.

Appeal from an interpleader order. The facts sufficiently appear in the head note and judgment.

W. R. Mulock, for claimants Ford, Haggart and Manning. The attaching creditor is not entitled to issue a summons calling upon the claimants to show their claim, that must be done by the garnishee, *Statham* v. *Hall*, Turner & Russ. 30; *Catherall* v. *Davies*, 1 Giff. 326; *Kerr* v. *Fullarton*, 3 Ont. Pr. R. 19; *McPhillips* v. *Wolf*, 4 Man. R. 300; *Ontario Bank* v. *Haggart*, 5 Man. R. 204.

W. E. Perdue, for plaintiffs, cited *Putney* v. *Tring*, 5 M. & W. 425; *Rusden* v. *Pope*, L. R. 3 Ex. 269; *Forth* v. *Simpson*, 13 Q. B. 680; *Canada Permanent* v. *Forest*, 6 Ont. Pr. R. 254.

J. S. Hough, for garnishees, cited *Ferguson* v. *Chambre*, 2 Man. R. 184.

(*15th June, 1888.*)

TAYLOR, C.J., delivered the judgment of the court. (*a*)

The Merchants Bank having recovered a judgment against McLean, obtained an order garnishing in the hands of Henderson & Bull, certain moneys alleged to be due from them to the judgment debtor. Upon the return of the summons to pay over, the garnishees appeared, admitting in their hands the sum of $667.46 which they were ready to pay into court, at the same time setting out the names of a number of other claimants to the fund. One of these, Forde, had just issued a writ against the garnishees. Thereupon an order was made giving the garnishees liberty to pay into Court the amount admitted to be due from them, and a summons was issued calling upon the claimants of the fund to appear and state the nature and particulars of their respective claims and maintain or relinquish the same and abide by such order as might be made. This summons was taken out and served by the attorney for the Merchants Bank, and was afterwards amended, by adding additional claimants. After several adjournments, an order was made staying all further proceedings in the suit of Forde, relieving the garnishees of liability to the extent of the sum paid into Court, barring all the claimants except the Bank and Forde, and directing an issue to be tried between them, the question to be tried being, whether upon the service of the garnishee order upon the garnishees upon the 8th day of March, 1888, the moneys paid into Court were the property of the claimant Forde against The Merchants Bank.

From this order Forde appeals.

As to some of the objections raised, the material before the Court is not such as enables the Court to deal with them. Such for instance is the objection, that Forde was not permitted to examine Bull upon the affidavit filed on behalf of the garnishees, for it does not appear when, if ever, an application for leave to do so was made to the learned judge before whom the summons was heard. Then, as to the barring of Haggart and Manning as assignees of McNab, McLean & Co., and of Haggart as assignee of McLean, whether such a proceeding was strictly proper or not Forde does not seem to be prejudiced thereby. He has assign-

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(*a*) Present: Taylor, C.J., Dubuc, Killam, JJ.

ments from these assignees and it would seem proper that upon the trial of such an issue as has been directed, the parties having the beneficial interest should be the parties to litigate, not those in whom the bare legal title may be. Forde could on the trial of the issue support his claim by proving any title he has derived from them.

The objection that the summons calling upon the claimants to interplead should have been prosecuted not by the Bank, one of the claimants, but by the garnishees, is more important.

The provisions of the C. L. P. Act, 1860, ss. 29 & 30, and of The Administration of Justice Act, 1885, ss. 54, 55, 56 & 57, and s. 53, as amended by 49 Vic. c. 35, s. 10, seems to give a proceeding under these sections as a substitute for the old bill of interpleader in equity. They do not say specifically by whom the summons calling upon the third party to appear and state the nature and particulars of his claim shall be taken, but when the whole of the sections are read together it seems sufficiently plain that it is the garnishee who must move in the matter. The proceeding is one for his protection and benefit, and the claimants are entitled to the benefit of his oath that he claims no interest in the matter and that there is no collusion on his part. He is a party indifferent between the claimants and having once brought them before the court, if they persist in asserting their respective claims, he, having paid the money into court or disposed of the subject matter of the controversy, steps out, leaving them to litigate the matter between themselves. That such was the intention of the framers of the sections in the C. L. P. Act, 1860, is apparent from a passage in the third report of the Common Law Commissioners which preceded the introduction of that Act. After a reference to the hardship in the case of a garnishee, who appearing, admits the debt and is willing to pay it, but has a *bona fide* doubt whether the execution debtor is entitled to it, and whether some other person is not, this passage occurs, "To prevent these inconveniences, the proper remedy is, that the garnishee, on being served with the order, should be at liberty to take out a summons in the nature of an interpleader summons, calling on any person to whom he suggests the debt is really due, to appear."

Another objection is that the right to the money admitted by the garnishees to be in their hands is not the sole question between them and Forde. The Bank has garnished moneys in the hands of the garnishees as moneys due to McLean. Forde is suing them for over $1000 with several years interest and they come forward and admit having $667.46 and they desire that the Bank and Forde should interplead as to that amount. This leaves the question of whether they owe more, still to be determined by some other proceedings. Under such circumstances, a bill of interpleader could not have been maintained.

In *Mitchell* v. *Hayne*, 2 S. & S. 63, an auctioneer had in his hands a deposit for the return of which the purchaser brought an action, the vendor also claimed it and the auctioneer claiming to deduct his commission and the auction duty filed a bill of interpleader as to the balance which he desired to pay into court. The vendor could claim only the deposit less the commission and auction duty but as the purchaser was suing for the whole amount it was held there could be no interpleader, Sir John Leach, V.C. saying, "Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants." *Bignold* v. *Audland*, 11 Sim. 23, decides that where a person represents not merely that he has a sum with respect to which two other persons have adverse rights, but that there is a further question to be litigated, adversely, between himself and one of them, that is not a case of interpleader. In *Diplock* v. *Hammond*, 23 L. J. Ch. 550, the plaintiffs admitted £325 as in their hands, £365 was claimed by one of the claimants. Stuart, V.C., said, "This simple circumstance that there is a question as to the amount of the fund is fatal to the bill."

It may be said that if there can be no interpleader here, there is a hardship on the garnishees, who may have to contest the matter both with the Bank and with Forde. On the other hand if an order be made there will be a hardship in the case of Forde, who making one claim will have to litigate with the Bank as to part of it, and with the garnishees as to the remainder.

The interpleader order should in my judgment be set aside and the summons calling upon the claimants to appear should be discharged without costs, it not appearing that the grounds on which the appellants succeed were taken before the Judge in Chambers.

KILLAM, J , while concurring in the judgment desired to reserve his opinion as to whether, in a case where all the parties were before the court, an order could not be made without a formal application by the garnishees.

Order set aside and summons discharged without costs.

BECHER v. McDONALD.

[KILLAM, J., 19th April, 1888.]

Infant.—Guardian.—County Court.

Although an infant may, perhaps, sue in The County Court and have a transcript of the judgment filed in the Queen's Bench, without a guardian or next friend being appointed; yet he cannot obtain an order to examine the defendant as a judgment debtor in the Queen's Bench without a guardian or next friend.

The following authorities were referred to by the learned Judge, *Campbell* v. *Matthewson*, 5 Ont. Pr. R. 91; *Jones* v. *Lewis*, 1 DeG. & S. 245; *Re Russell*, 15 Jur. 981; *Cox* v. *Wright*, 9 Jur. N. S. 981; *Ferris* v. *Fox*, 11 U. C. Q. B. 612.

GALT v. KELLY.

Real Property Act.—Removal from files of document improperly placed in Registrar General's office.

[TAYLOR, C.J., 14th January, 1888.]

A document drawn up as for registration under the Mechanic's Lien Act was filed in the Registrar General's office. Upon an application to remove it from the files,

Held, That the Court had no power to order its removal. But as it was improperly placed there, the application was refused without costs.

F. S. Nugent, for Galt.

G. Davis, for Kelly.

CANADIAN BANK OF COMMERCE v. NORTHWOOD.

Counter claim.—Cause of, arising out of jurisdiction.

[TAYLOR, C.J., 22nd February, 1888.

A defendant can set up by way of counterclaim only such demands as he could base an action upon. Consequently a cause of action which arose out of the jurisdiction, cannot be set up by way of counter-claim.

C. P. Wilson, for plaintiffs.

Chester Glass, for defendant.

MULLIGAN v. HUBBARD.

(IN APPEAL.)

Illegal transaction.—Recovery of lands conveyed to defeat an agreed purchaser.—Pleading.

A defendant who wishes to rely on the illegality of a transaction "must clearly put forward his own scoundrelism" in his answer. Killam J. dissenting.

Where land has been voluntarily conveyed to the grantee to hold it for some illegal purpose, and that purpose has not been carried out, the grantor is not prevented from taking proceedings to recover back the land. Killam, J., dissenting.

Bill filed to set aside a bill of sale of two houses as having been obtained by fraud. Appeal from decree of Mr. Justice Dubuc, in favor of plaintiff.

W. R. Mulock and *J. R. Haney*, for defendants. The plaintiff must prove the fraud alleged, *Luff* v. *Lord*, 11 Jur. N. S. 50; *Lumley* v. *Desborough*, 22 L. T. N. S. 597; *Parr* v. *Jewell*, 1 K. & J. 673. Plaintiff does not come with clean hands, *Rosenburgher* v. *Thomas*, 3 Gr. 635; *Mundell* v. *Tinkis*, 6 Ont. R. 625. The following cases were also cited, *Cameron* v. *Sutherland*, 17 Gr. 286; *DeMontmorency*, v. *Devereux*, 7 C. & F. 128; *Walton* v. *Simpson*, 6 Ont. R. 213. Court will not presume fraud, *Bentley* v. *McKay*, 31 Beav. 143; *Hunter* v. *Walters*, L. R. 7 Ch. 88. Plaintiff's laches so great he is not entitled to relief, *Kerr on Frauds*, 425, 457.

J. S. Ewart, Q.C., for plaintiff, cited *Taylor* v. *Bowers*, 1 Q. B. D. 291; see also *Fischer* v. *Naicker*, 8 W. R. 655.

W. R. Mulock in reply, cited *Cameron* v. *Cameron*, 14 Ont. R. 561; *McEwan* v. *Milne*, 5 Ont. R. 100.

(*15th June, 1888.*)

TAYLOR, C.J.—The plaintiff files his bill alleging that he employed the husband of the defendant as his agent in this Province, and that while he was so acting, he, assuming to act as the attorney of the plaintiff, executed a bill of sale conveying to his own wife, the defendant, two houses owned by the plaintiff and standing upon land held by him under lease, no consideration being paid therefor. The defendant by her answer set up that the bill of sale, although absolute in form, was really given as security for the repayment of moneys belonging to her which were in her husband's hands for investment on her behalf, and which he lent to the plaintiff. She also set up that to avoid any question as to the validity of the bill of sale, the plaintiff himself duly ratified and confirmed the execution of the bill of sale by his agent. Thereupon the plaintiff amended his bill by alleging that if he executed the confirmation, which he did not admit, the same was executed on the false and fraudulent representation of the said James H. Hubbard, who was then acting on the defendant's behalf, and was also the plaintiff's agent as aforesaid, that the said alleged bill of sale was only given for the purpose of protecting the plaintiff from some claim which had been made to the said buildings by one McLeod, and to prevent the plaintiff from being swindled by said McLeod, and that it was necessary that the plaintiff should confirm the same in order to prevent McLeod from getting the same, and the plaintiff relied upon the said Hubbard and believed it to be necessary to sign such confirmation for such purpose. To this amended bill the defendant put in an answer, in which after denying all fraud on her part personally, and knowledge of any fraud on her behalf or in her interest, and alleging that Hubbard advised the plaintiff fully of her position, and that the bill of sale would only be accepted as security for plaintiff's indebtedness, she proceeds to say that, "the plaintiff did, after being so advised deliberately and absolutely confirm said bill of sale and I submit that if any fraud was committed or intended the plaintiff is solely guilty thereof and that owing to the misconduct laches and acquiesence of the plaintiff in regard to the matters in question he has debarred and disentitled himself to any relief."

From the evidence it appears that the plaintiff, who was then living in Ontario, had entered into an agreement with a person named McLeod, to exchange the houses in question and a mortgage which he held from McLeod for some land in Toronto. This agreement was made in Toronto on the 2nd of June, 1884, and the bill of sale to the defendant is dated on the 3rd of June, the day following. Shortly after, being in Winnipeg, Hubbard represented to the plaintiff that he had been swindled by McLeod, the property in Toronto which he knew, being mortgaged for more than it was worth, and that it was necessary for his protection against any proceedings McLeod might take under the agreement that he should confirm the bill of sale which had been made to the defendant. No other representations seem to have been made to him, but the plaintiff undoubtedly executed the confirmation, so that plainly he was willing to do whatever was considered by his agent necessary to deprive McLeod of any rights he might have under his agreement. The contention of the defendant now, is, that the plaintiff having, when he signed the confirmation, intended to do, and having beyond all doubt done, what is contrary to public policy and immoral, that is sufficient to deprive him of all right to relief against the act so done, and such well known cases as *Rosenburgher* v. *Thomas*, 3 Gr. 635; *Langlois* v. *Baby*, 10 Gr. 358; *Mundell* v. *Tinkis*, 6 Ont. R. 563, and others are cited and relied on.

It is however, argued on the other side that to make such a defence available it must be pleaded. For this *Fischer* v. *Naicker*, 8 W. R. 655, is relied on. It is there said when dealing with the defence of champerty that, although it may be admitted that the court would have the right, perhaps even lay under an obligation, to take cognizance *motu proprio* of any objection manifestly apparent on the face of the proceedings which showed that it was against morality or public policy, yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation, or answer by counter evidence, it is highly inconvenient as well as contrary to the ordinance which regulates the practice of the court, and may lead to the most direct injustice, to enter into the enquiry, if the issue has not been presented by the pleadings, or the points recorded for proof." In *Langlois* v. *Baby*, 10 Gr. 358, though the bar to the suit was not placed upon the correct ground by the answer, still as the facts were set forth and made a ground of defence, Spragge, V.C., thought enough appeared to bring the case within the rule referred to in *Fischer* v. *Naicker*, "The plaintiff" he said, "was informed by the answer what facts would be relied upon, though not that such use would be made of them as they were open to." But in the more recent case of *Haigh* v. *Kaye*, L. R. 7 Chan. 469, it was held that a defendant who wishes to rely on the illegality of a transaction as a defence must plead it in distinct terms. Here the defence is not so pleaded and therefore it cannot be raised.

Besides, it would seem that even where a conveyance has been made voluntarily and without consideration, for the purpose of enabling the grantee to hold property for a purpose against public policy, and the improper purpose has not been carried out, or the illegal trust has failed to take effect, the grantor is not prevented from taking proceedings to recover back the property. It is so laid down in *Lewin on Trusts,* (8th ed.) p. 106, and in *May on Fraudulent Conveyances,* (2nd ed.) p. 472. *Symes* v. *Hughes,* L. R. 9 Eq. 475, was a case in which the plaintiff being in pecuniary difficulties, with at least one execution against him, was urged by Mrs. Maddox to convey to her some part of his property, as a means of securing it against his creditors and he accordingly conveyed to her certain leaseholds for the expressed consideration of £170, none being in fact paid. She afterwards assigned the property to the defendant, and the plaintiff filed a bill for a reconveyance alleging notice, and a decree was made in his favor. Lord Romilly dealing with the objection that the assignment was made for an illegal purpose and that being the case the court would not interfere, said, "I think the correct answer to this was given by Mr. Southgate, namely, that where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it," *Manning* v. *Gill,* L. R. 13 Eq. 485, is to the same effect. This doctrine has the approval of the Court of Appeal in *Taylor* v. *Bowers,* 1 Q. B. D. 291, where Mellish, L.J., stated the true distinction to be that, if money is paid or goods delivered for an illegal purpose, the person who has paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits until the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action. In *Re Great Berlin Steamboat Co.,* 26 Ch. D. 616, it was sought in a winding up matter to recover a sum of money which the applicant had deposited, according to the original intention for a month, to the credit of the company for the purpose of giving it a fictitious credit in case of an expected enquiry as to its financial standing by continental bankers. The court held that the money having been left until after the winding up order was made, in fact, as long as the possibility of carrying out the illegal purpose continued the applicant could not recover it. About eight months after the deposit was made, letters had been received from which it appeared that no enquiries had been made and that none were to be expected. Cotton, L.J., declined to say whether the money could then have been recovered back, but Baggallay, L.J., and Lindley, L.J., thought repayment could then have been enforced as the purpose for which the money was advanced had not been carried into effect. There is no evidence here that McLeod was in any way prejudiced or his rights affected by the bill of sale or its confirmation by the plaintiff, so the alleged illegal purpose was never carried into effect.

Apart from the question which has been dealt with, I have no doubt the decree made by my brother Dubuc was the proper one to make under the circumstances of this case, I do not see how the defendant can ever hold the bill of sale even as security for money advanced. The whole claim of money being advanced, seems to me something trumped up by J. H. Hubbard, who was acting for the defendant as well as for the plaintiff. The decree must be affirmed and the plaintiff is entitled to the costs of the rehearing.

Killam, J.—I agree fully with the finding of my brother Dubuc that the transfer of the houses was wholly voluntary and made for the purpose of evading the performance of the plaintiff's agreement with McLeod and, perhaps, also, for the purpose of placing the property beyond the reach of any execution at McLeod's suit.

The original transfer by the agent was, then, unauthorized and fraudulent, but by confirming it the plaintiff lost the right to attack it as such. Then, the plaintiff attacks the confirmation as having been obtained by fraud and false representation. In this latter contention he wholly fails. His counsel very ingeniously argued that there was a false representation of the law involved in the statement that the execution of the bill of sale was necessary in order to escape performance of the agreement with McLeod, though the plaintiff would in a court of justice have been relieved from that agreement as being fraudulent. I have no doubt that if the agent Hubbard apart from the plaintiff's solicitor, or in collusion with him and with his assistance, represented to the plaintiff that a court of justice would afford no relief from the agreement with McLeod, though it had been obtained by fraudulent misrepresentation or concealment, and by such means the plaintiff was deceived and under a misapprehension upon that point executed the instrument of confirmation, it would be held void. The evidence, however, does not establish such a case. We must suppose that the plaintiff told, at the time, the circumstances of his agreement. The evidence at any rate, is consistent with the view that he did so and that both the agent and the solicitor advised him on the basis of the idea that he could obtain no relief in any court from the agreement which he had executed. He certainly fails now to show that the circumstances were such as to entitle him to have the contract with McLeod declared fraudulent as against him, and in the bill which he filed for rescission he bases his case wholly on McLeod's alleged default and makes no claim of fraud whatever. The plaintiff states that his solicitor concurred in Hubbard's opinion, and there is no ground whatever for supposing that the solicitor was in collusion with Hubbard to defraud the plaintiff and benefit this defendant at his expense.

The instrument of confirmation is shown to have been executed by the plaintiff. It was certainly binding upon him at law. It is very old law that a voluntary transfer of property made with intent to defeat the creditors of the transferor is binding upon himself. *Packman's Case*, 6 Co. 18; *Hawes* v. *Leader*, Cro. Jac. 270. In *Bessey* v. *Windham*, 6 Q. B. 166, the jury found that when the assignment was executed, the parties to it did not intend to pass the property, but the court held it to be binding on the assignor. This case was cited with approval in *Phillpotts* v. *Phillpotts*, 10 C. B. 85.

The only question then, is whether a court of equity raises a trust in favor of the assignor under such circumstances. There is nothing to call for the pleading of such a defence by the defendant. Either the plaintiff has made a complete voluntary transfer of the whole interest legal and beneficial, or he has transferred the legal interest under such circumstances that there is a resulting trust in his favor which a court of equity will enforce. By showing only that he has made a voluntary transfer he shows no title to relief. He must show, as he does, what were the circumstances in order to show his equity. *Haigh* v. *Kaye*, L. R. 7 Ch. 473, was an entirely different case. There the plaintiff's bill alleged an express trust in his favor; the defendant by his answer admitted the trust, but he pleaded that it was verbal and not enforceable by reason of the Statute of Frauds and also, the alleged fraudulent scheme. The court held that the plea of the Statute of Frauds would not avail where the trust was thus admitted, considering that the analogy of a suit to enforce a verbal contract not enforceable under that statute, did not apply to cases of trusts, and the *onus* was thus of course, thrown upon the defendant to relieve himself from the trust he had admitted. Here we have no case of an express trust. We are dealing with the question whether the circumstances raise a resulting trust.

Nor can I regard the case of *Taylor* v. *Bowers*, 1 Q. B. D. 291, except for the apparent acquiesence in *Symes* v. *Hughes*, L. R. 9 Eq. 475, of any importance with reference to the question here involved.

That was an action of detinue for a quantity of goods which had been delivered by the plaintiff to another, with intent to defraud the creditors of the plaintiff. That other party, without the authority of the plaintiff, sold them to the defendant who was aware of the circumstances under which they were held, and gave him a bill of sale of them. The plaintiff had given no written transfer of them, and there was no difficulty in considering the question of his real intention. Even the legal estate had not passed from him, and he was held entitled to maintain his action of detinue for them on that very ground. It was, then, necessary for the defendant to set up any fraud disentitling the plaintiff to recover his own property; and it was considered that as none had ever been perpetrated but the goods had merely been left with another for the purposes of a proposed fraud, the plaintiff was at liberty to change his intention and acquire again the possession of his own goods.

However, I take *Symes* v. *Hughes*, to be a distinct authority in favor of the present plaintiff. Lord Romilly, M.R., clearly in that case, considered that where a debtor made a voluntary transfer of property to another in order to place it beyond the reach of his creditors, the circumstances could be considered in order to determine if the transferee held it, until something further was done to carry out the purpose of the transfer in trust for the transferor, and that the trust was a resulting trust within the exception made by the Statute of Frauds It may be that, if the specific point had been raised before them in *Taylor* v. *Bowers*, the learned judges of the Court of Appeal would not have adopted the view of Lord Romilly, but the fact that they cited the case without any comment upon its main principle certainly lends some slight additional weight to it. And this is increased by some dicta of other judges of the Court of Appeal, in *Re Great Berlin Steamboat Co.*, 26 Ch. D. 616. In *Davies* v. *Otty*, 35 Beav. 208, there was a similar decision of Lord Romilly.

Now certainly. these cases, even with the support thus lent to *Symes* v. *Hughes*, do not constitute authorities binding upon this court upon a rehearing, but I should feel that I had undertaken a very grave task, if I had attempted upon my own unsupported reasoning to justify even a doubt respecting the correctness of the opinion of so eminent a judge as Lord Romilly upon such a question. The question is one, however, upon which authorities appear to me to be both numerous and conflicting.

About the earliest case at all applicable seems to be *Ward* v. *Laut*, Prec. Ch. 182. There the father executed a bond to his daughter to screen himself from taxes, and always kept possession of it though it was payable immediately. This was considered to be an incomplete transaction, though the Lord Keeper intimated an opinion that even if the daughter had got possession of the bond, equity would have relieved.

In *Birch* v. *Blagrave*, Ambl. 264, the plaintiff's testator had conveyed to his daughter certain lands, in order to disqualify himself from being sheriff of London, though he kept it secret from her and always remained in receipt of the rents and profits, but afterwards changed his mind as to taking the necessary oath of want of qualification and paid a fine instead. Lord Chancellor Hardwicke held the daughter to be a trustee for him. He there referred to a case of Col. Pitt, upon a conveyance to qualify for a seat in Parliament, expressing the opinion that if Col. Pitt had never sat in Parliament by virtue of the conveyance, the decision should have been different. In *Platamone* v. *Staple*, Coop. 250, Sir Thomas Plumer, V.C., held that, where lands were conveyed to a party to qualify him for a seat in Parliament, but the grantee never became a candidate, they should be restored to the grantor.

This was a decision upon a motion for an interlocutory injunction and has been referred to in many cases as of little weight on that account, it was so even by Sir Thos. Plumer himself, in *Cecil* v. *Butcher*, 2 Jac. & W. 576, though it was cited with apparent approval by Lord Lyndhurst in *Barnard* v. *Sutton*, 7 Jur. 685, where, however, the point was not determined, the bill being dismissed on other grounds.

In *Childers* v. *Childers*, 1 D. G. & J. 482, the plaintiff in order to give his son a qualification as bailiff, conveyed to him certain lands. His son was then abroad and the father always retained the deed without communicating it to his son who died abroad, and the qualification was never used. The Court of Appeal in Chancery, held the son to be merely a trustee for the father, and that the Statute of Frauds was no bar to the suit, though they held at the same time that there was no illegal purpose as under the statute in question only a bare legal estate was necessary as a qualification.

As a sort of transition to opposing cases, *Cecil* v. *Butcher*, 2 Jac. & W. 565, may be mentioned. The bill was filed to obtain relief on account of the loss of a conveyance made by a father to his son to qualify him to kill game. It was never communicated to the son, who never acted on it. It was retained in the father's possession and he always retained possession of the estate. At his death the deed could not be found. The importance in the earlier cases of the deed never being parted with, as making it in equity an imperfect instrument, is there pointed out. After considering the earlier cases Sir Thos. Plumer, M.R., there stated that it was difficult to extract a principle from them, and expressed a doubt whether he ought not to follow the course taken in *Roberts* v. *Roberts*, Dan. 143, and leave the plaintiff to proceed at law, though he refused him affirmative relief, and in the end he took that course. This seems to me as practically an authority against this plaintiff's claim, as the party would not there have been allowed to proceed at law to recover the land except on the view taken in *Roberts* v. *Roberts*, that he was not to be held to be a trustee for the grantor. This case is the more important as decided by Sir Thos. Plumer, whose earlier expression of opinion in *Platamone* v. *Staple*, has frequently been cited as an authority for the contrary view.

In *Roberts* v. *Roberts*, the plaintiff's testator had conveyed a piece of land to his half brother, solely to qualify him to kill game, and upon the assurance that it would be considered merely nominal, and though the defendant never made use of the qualification it was held that no relief could be given against it. The parties were left to determine their rights at law, and in *Doe d. Roberts* v. *Roberts*, 2 B. & Ald. 367, the deed was held binding at law, which was the decision followed in *Bessey* v. *Windham*, and *Phillpotts* v. *Phillpotts*,. In a similar case, *Brackenbury* v. *Brackenbury*, 2 Jac. & W. 391, Lord Chancellor Eldon expressed opinions similar to those that prevailed in *Roberts* v. *Roberts*, and so also did Sir Wm. Alexander, C.B., in *Groves* v. *Groves*, 3 Yo. & J. 172.

In *Bateman* v. *Ramsay*, Sau. & Sc. 459, some very strong observations were made against the right of a party to ask a court of equity to relieve him from the effect of such transactions upon the plea that they have not been carried into effect, and this case was cited with approval by Lord Chancellor Plunkett in *Hamilton* v. *Ball*, 2 Ir. Eq. 194, some similar observations being added.

In *Mundel* v. *Tinkis*, 6 Ont. R. 625, the plaintiff claimed that a conveyance of lands absolute in form was made by him only as security for a debt due to the grantee. The evidence showed this to be the case and that the principal object of the conveyance was to protect the property from the results of an anticipated action for breach of contract. Boyd, C., after reviewing many of the cases to which I have referred, refused the relief on the ground that the plaintiff was not entitled to call for the interposition of the court in such a case. He expressed disapproval of the principle laid down in *Symes* v. *Hughes*, and tried to show, though I think unsuccessfully, that that case might be supported on another ground. He stated that the cases in the United States were all in the direction of the conclusion at which he arrived. I have not had sufficient time to examine the United States cases closely, but upon his statement and the review of them in *Bump on Fraudulent Conveyances*, 3rd ed. pp. 443, *et seq*, I believe this to be the case. This is also shown in the judgment of Roberts, J., in *Murphy* v. *Hubert*, 16 Penn. St. 58. His remarks are much in the same vein as those used in *Bateman*

v. *Ramsay*, and in his expression "courts of justice do not sit to extricate a rogue from his toils," I feel bound to concur.

One difficulty I see is in ascertaining whether the purpose has been in any respect effected. Creditors may take a sham transfer as a real one and abstain from proceedings in consequence, and this may never become known, while the fraudulent debtor may thus obtain a long delay which may be his principal object, and he may subsequently sue to recover back his property claiming that he has changed his mind and desires to make it available for his creditors.

In his answer to the bill filed against him by this plaintiff, McLeod alleges that the plaintiff refused to carry out his agreement and stated to him that he had sold the lands and premises which he had agreed to exchange with him. How do we know whether McLeod considered it to be a real sale and abstained from proceedings in consequence? Of course, this allegation is not proved, but it may well be correct.

In my opinion the bill should be dismissed, but as my learned brothers differ from my view I would suggest that in any event the bill of sale should not be set aside, but at most the defendant should be declared a trustee for the plaintiff, who should then have his injunction and an account of the rents and perhaps a reconveyance.

Bain, J.—The learned judge before whom this suit was heard came to the conclusion on the evidence that the bill of sale in question was given without consideration, and that the sale of the houses described in it was only a pretended sale and was not intended to be of any effect between the parties. I see no reason to differ from this conclusion, and it only remains to consider the objection urged at the rehearing, that, as the bill of sale was given with the intention, as admitted by the plaintiff, of effecting a fraudulent and illegal purpose,—namely, to enable the plaintiff to evade the performance of an agreement he had entered into with one McLeod for the exchange of these houses for some property in Toronto, he is not entitled to ask the assistance of the court in recovering the property assigned. I do not think the objection can prevail.

In the first place, if this be a ground of defence, the defendant does not set it up in her answer, or at all events, sufficiently so to avail herself of it. In her answer to the amended bill, after denying all fraud on her part, she merely submits "that if any fraud was committed or intended, the plaintiff is solely guilty thereof, and that owing to his misconduct, laches and acquiescence in regard to the matters in question, he has debarred and disentitled himself to any relief." But a general statement or charge like this is not sufficient, and if a defendant to whom property has been given for an illegal purpose means to keep it against the grantor, he must say so in distinct terms. As James, L.J., emphatically puts it in *Haigh* v. *Kaye*, L. R. 7 Ch. App. 469, "he must clearly put forward his own scoundrelism if he means to reap the benefit of it."

In the second place, I do not think that the defendant could have availed herself of this defence even if it had been sufficiently set up. It is not necessary to consider this view of the case at length, but it is to be remarked that the mere fact that an assignment has been executed for an illegal purpose does not of itself, prevent the court from intervening at the instance of the assignor. In the present case it does not appear from the evidence, that beyond the execution of the bill of sale, anything has been done to effect or carry out the fraudulent object for which it was given or that this object has been effected or attained. The plaintiff's case does not rest on this fraudulent agreement, nor is he seeking to enforce it. On the contrary, he is seeking himself to set it aside in order to get the property assigned into his own name again, when, to the same extent as before the assignment was made, it will be liable and available to meet any claims McLeod or other creditors may have against the plaintiff. The case therefore, seems to be clearly within the principle laid down in *Symes* v. *Hughes*, L. R. 9 Eq. 475, and approved of and acted on in *Taylor* v. *Bowers*, 1 Q. B. D. 291. In the former case, the Master of the Rolls says, "when the purpose for which the assignment was given is not carried into execution and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it."

I think the rehearing should be dismissed with costs, and the decree appealed from affirmed.

Appeal dismissed with costs.

OSBORNE v. CAREY.

(In Appeal.)

Fraudulent conveyance.—Onus as to solvency.—Vendee liable for proceeds of property.

C. being indebted to the plaintiffs in an amount exceeding $1,600, part of which was shortly coming due, sold his entire business, receiving $1,000 in cash and $3,500 in notes. He transferred the notes and all his book-debts to his wife the defendant, and shortly afterwards left the country, making no provision for plaintiff's claim.

Upon a bill filed to set aside this transaction, the wife swore that she had lent to C. large sums of money, and that the transfer was in consideration of this indebtedness.

Held (reversing Bain, J.)—

1. That the unsupported and bald statement of a loan by a wife to a husband was not sufficient evidence of a legal indebtedness.
2. The onus is upon the grantee in a voluntary conveyance, when it is attacked by creditors, to show the existence of other property available for creditors.
3. The defendant, having sold the notes after bill and injunction served, was directed to account for the money obtained for them.

The bill was filed by creditors of James Carey to set aside the transfer of certain promissory notes and book-debts from James Carey to his wife Rose Ann Carey. At the hearing the bill was dismissed with costs. Plaintiffs now appealed.

J. D. Cameron, for plaintiff, referred to the Statutes 13 Eliz. c. 5; Ad. of Jus. Act 1885, sections 123 and 124; 49 Vic. c. 45 s. 2. The provision of the latter Act is not retroactive, but applies under the authorities. *Wilberforce on Statutes*, 162; *Freeman* v. *Moyes*, 1 Ad. & E. 338; *Ex parte Dawson*, L. R. 19 Eq. 433; *Ex parte Staner*, 2 D. M. & G. 263; *Queen* v. *Inhabitants of St. Mary*, 12 Q. B. 127. The words of the statute "or which have such effect are only declaratory." *Freeman* v. *Pope*, L. R. 5 Ch. 538; *May on Fraudulent Conveyances*, 37, 38. As to insolvency, see *Warnock* v. *Kleopfer*, 14 Ont. R. 291. *Dominion Bank* v. *Cowan*, 14 Ont. R. 465. As to question of intent, a man must be taken to intend the consequence of his own act. *Bank of Montreal* v. *McTavish*, 13 Gr. 395; *Ivey* v. *Knox*, 8 Ont. R. 635; *Burns* v. *McKay*, 10 Ont. R. 170.

The following cases were also cited:—*Rae* v. *McDonald*, 13 Ont. R. 352; *Exparte Griffith*, 23 Ch. Div. 74; *Re Bird*, 23 Ch. Div. 695; *Re Maddever*, 27 Ch. Div. 529; *Irwin* v. *Young*, 28 Gr. 523; *Macdonald* v. *McCall*, 12 Ont. App. 593.

G. Davis and *T. H. Gilmour*, for defendant, cited *Sutherland* v. *Nixon*, 21 U. C. Q. B. 633; *Hersee* v. *White*, 29 U. C. Q. B. 238; *Clarkson* v. *Sterling*, 14 Ont. R. 460; *Burns* v. *McKay*, 10 Ont. R. 170; *McLean* v. *Garland*, 13 Sup. C. 375.

[*15th June, 1888.*]

TAYLOR, C.J.—The bill alleges that James Carey, carrying on business in the City of Winnipeg, was on the 11th day of August, 1885, indebted to the plaintiffs upon four promissory notes and an open account in an amount exceeding $1,600, that on that day he sold out his entire business, receiving from the purchaser $1,000 in cash and promissory notes for $3,500, that he at once endorsed and transferred to the defendant, who is his wife, the promissory notes so received, and also executed an assignment to her of all the book-debts due and owing to him. It is alleged that at the time he did so he was in insolvent circumstances, unable to pay his debts in full, and the transfer of the notes and book debts was made with the intent and design of hindering defeating and delaying his creditors. Very soon after the making of the transfer Carey left the Province, and the indebtedness to the plaintiffs remains wholly unpaid and unsatisfied. The bill prays that the notes may be delivered up by the defendant, that an account may be taken of the amounts collected by her in respect of the book-debts, and of what she may have received on the notes, that the amount may be paid into Court, and that the persons entitled to share in such moneys may be ascertained.

The defendant by her answer puts the plaintiffs to the proof of the matters alleged in the bill, and denies all charges of fraud and fraudulent conduct made against her.

At the hearing a decree was made dismissing the bill on the ground that, the evidence was not sufficient to establish that the assignment of the book-debts and promissory notes was made by Carey when he was insolvent and unable to pay his debts in full, or that the assignment was made with intent to hinder and defraud creditors. This decree has been reheard at the instance of the plaintiffs.

The depositions of the defendant, taken at her examination on her answer, were put in by the plaintiffs. In these she seeks to establish that she had advanced large sums of money to her husband, in part satisfaction of which the notes were endorsed and the book-debts trsnsferred to her. That she did so rests solely upon her own unsupported testimony. Such uncorroborated evidence of dealings between husband and wife, and between relatives, has in numerous cases been spoken of as not satisfactory. Among these *Harris* v. *Rankin*, 4 Man. L. R. 115; *Douglass* v. *Ward*, 11 Gr. 39; *Ball* v. *Ballantyne*, 11 Gr. 199; and *Merchants Bank* v. *Clarke*, 18 Gr. 594, may be mentioned.

In the evidence of the defendant there is no statement of any promise or undertaking to repay the moneys said to have been advanced at any particular time, or indeed at any time. It is true she says "I lent my husband $10,000 before he went into business," and again, "I lent it to him." The mere saying she lent the money, the using that expression, is not sufficient to prove that it was a loan to be repaid. Whether it was so or not is the whole question, and all the facts and circumstances connected with the transaction should have been given, so that the Court might judge of whether the transaction was one of loan or gift, a mere handing over to her husband of so much of her money.

The use of the expression "lent" was remarked upon in *Dufresne* v. *Dufresne*, 10 Ont. R. 773, where Ferguson, J., referring to a former case of *Hopkins* v. *Hopkins*, said, "I then thought, and I still think, that a contract for repayment must be shown. This is, of course, involved in the contract of loan. The difficulty is, that it is so easy when subsequent events happen, to conceive and say that money, that at the time was simply handed over, was 'lent.'" *In Hopkins* v. *Hopkins*, 7 Ont. R. 224, the same learned judge held, from all the authority he had been able to find, that to enable a wife to recover from her husband for her money which she let him have during the coverture, she must prove a contract for the repayment of it.

Here the evidence given by the defendant proves nothing of that kind, and is not to my mind satisfactory or sufficient to establish a debt, as having been due to her from her husband.

What then is the position of the case? A man in business, having liabilities connected with and arising out of that business maturing on an early day, (one of the notes held by the plaintiffs was due in six days after the sale), sells out his entire business, hands over to his wife the notes received from the purchaser, and transfers to her all that remains unsold, the book-debts, making no provision for meeting the liabilities. Soon after, he leaves the country, and these liabilities remain years after wholly unpaid. Surely, if, as was held in *Freeman* v. *Pope*, L. R. 5 Ch. App. 538, where after deducting the property which is the subject of a voluntary settlement available assets are not left, sufficient for the payment of the settlor's debts, the law infers the intent to defeat creditors, it must under the circumstances of this case be inferred here.

Where it is sought to support a voluntary conveyance the *onus* is upon those doing so to show the existence of other property available for the creditors, *Taylor* v. *Jones*, 2 Atk. 600; *Brown* v. *Davidson*, 9 Gr. 439; *Leacock* v. *Chambers*, 3 Man. L. R. 645. One witness does give some details of other properties owned as he says by the debtor, but as to some of these, he admits that they were held not by the debtor, but by his wife, the defendant. Plainly, he does not distinguish between property owned by the debtor, and property owned by his wife. Then the existence of other property merely, is not sufficient, it must be available for the creditors, *Thompson* v. *Webster*, 7 Jur. N. S. 531.

It was urged that in any event the defendant cannot be made to account for what she may have realized out of the notes and book debts, and for this *Stuart* v. *Tremain*, 3 Ont. R. 190, is cited. But that case differs widely from the present, for there the grantee had transferred the goods for value to a third person before the transaction was impeached. Here the notes were not parted with by the defendant until after the bill had been filed, indeed not until the day after she had been served with an injunction restraining her from parting with them. In *Labatt* v. *Bixel*, 28 Gr. 593, where an assignment of book debts was set aside, the defendant was held accountable for what he had received out of them.

In my opinion, the decree dismissing the bill should be set aside, and a decree made declaring the transfer of the notes and book debts void as against the creditors of James Carey, for an account of the moneys realized by the defendant out of them, for payment of the amount received, for realizing any notes or debts not yet collected, for an enquiry as to the creditors who are entitled to share, and for distribution of the moneys among the parties who may be found entitled, according to the report of the master.

The plaintiffs are entitled to their costs against the defendant.

Dubuc, J.—I concur in the decision of the learned Chief Justice. The unsupported testimony of the defendant, that she had lent money to her husband without even stating that he had agreed or promised to repay the same, is, I think, under the suspicious circumstances connected with the whole transactions, insufficient to make the transfer of the notes and book debts valid as against the creditors of the husband. The defendant contends that the debtor James Carey left other property, more than sufficient to pay his debts, and that it was not clearly proven that he was in insolvent circumstances. But it does not appear that such property was available to satisfy the plaintiff and his other creditors. And the fact that he sold his entire business, transferred the notes received in payment and his book debts to his wife, and immediately left the Province, without making any provision to meet his liabilities, constitutes, in my mind, a very great presumption of insolvency, not repelled by the statement that he had at the time an amount of property larger than required to pay his debts, when the same has not been found available to satisfy his creditors.

Killam, J., concurred.

Appeal allowed with costs.

BALFOUR v. DRUMMOND.

(IN EQUITY.)

Set off of costs.—Severing defendants.

The costs of an interlocutory proceeding were awarded to the defendants. Upon taxation one bill only was allowed to the defendants S. and M. From the taxation S. appealed, but was unsuccessful and was ordered to pay the costs to the plaintiff, but no direction was then made as to set off.

Afterwards the costs under both orders were taxed. The master made no apportionment between S and M. of the costs payable to them. The plaintiff now applied to set off the costs payable by S., against S's. share of the costs payable to S. and M.

Order made without costs.

This was an application to set off costs under the circumstances set forth in the judgment.

(*21st May, 1888.*)

KILLAM, J.—By the order of the 4th May, 1887, costs were ordered to be paid by the plaintiff to "the various answering defendants." On bills of costs being brought in by the defendants Slavin and Molesworth, the master found and certified that "the defendants Slavin and Molesworth should not have severed their defences, and that they are entitled to but one set of costs and no more, although each of them are represented by separate solicitors and were represented at the hearing of the cause and of the petition to re-open the hearing by separate counsel." From this certificate the defendant Slavin appealed and his appeal was dismissed with costs. On rehearing, the order dismissing the appeal was affirmed with costs, but no provision was made in the order on appeal or the order affirming it for any apportionment of costs between these two defendants or for any set-off of the costs awarded the plaintiff. On the 22nd March, 1888, the taxation of the costs of Slavin and Molesworth was completed and a certificate given that they had been taxed at $253.30. On the 27th March, 1888, the plaintiff's costs of the defendant Slavin's appeal and the rehearing were taxed at $129.33. The plaintiff then applied in chambers to set off the costs of the plaintiff on the appeal and rehearing against these costs of the defendants Slavin and Molesworth or one of them, and for an apportionment, if necessary, of the costs of these defendants.

If such an application had been made on the hearing or the rehearing of the appeal or before the completion of the taxation of the defendants' costs, the plaintiff would have been clearly entitled to such apportionment and to a set-off of his costs against Slavin's proportion of costs separately incurred by Slavin.

By the order of the 4th May, 1887, there was no liability created to all the defendants jointly. It is not, then, like the case of an application by A. to set-off a debt due him by B. against one due by him to B. and C. The certificate finding that Slavin and Molesworth were entitled together, to but one set of costs, did not create such a liability to the two defendants jointly; it was directed only to the question of the *quantum* to be allowed; it meant merely that no more than the amount of one set of costs, the amount to which the two defendants would have been entitled if they had employed one solicitor and one counsel should be allowed to them, putting their bills together. The reports in the cases of *Course* v. *Humphrey*, 26 Beav. 402, and *Attorney-General* v. *Wyville*, 28 Beav. 464, show that the expression one set of costs does not necessarily imply that the parties to whom it is allowed are to take it jointly, but that it may be intended to be apportioned between them. Whether, or how, that set of costs should be apportioned, was not dealt with, though the certificate showed that the defendants incurred their costs separately and not jointly. The orders affirming the certificate, of course, went no further.

The rule in equity is to set off costs payable by one party to another, against costs payable by the latter to the former in the same suit, without reference to the solicitor's lien. *Robarts* v. *Buee*, 8 Ch. D. 198; *Taylor* v. *Popham*, 15 Ves. 72; *Bryon* v. *T*[illegible] *Metropolitan Saloon Omnibus Co.*, 4 Drew. 546. This pr[illegible]ciple is not disputed.

The principal authority cited for the defendants is *The Commercial Bank* v. *Elwood*, 1 Ch. Ch. 219. There the bill was filed against Elwood and another. Elwood demurred and his demurrer was overruled with costs. Afterwards two other defendants were added and ultimately the bill was dismissed with costs. All the defendants appeared by the same solicitor. Vankoughnet

C. refused an application by the plaintiff to set-off the costs of the demurrer against Elwood's share of the costs awarded to the defendants. He said, "I can find no practice in equity similar to that established by the rule of court now in force at common law for the set-off of one defendant's costs against those of another for the benefit of the plaintiff. It does not seem to me to be equitable that such a practice should be adopted, and not finding any authority for it in this court, I do not introduce it. . . . . Against this joint bill of costs the plaintiffs seek to set-off the costs awarded to them against the defendant who demurred. If this be done, the other defendant, who had nothing to do with the incurring of these costs will owe his solicitor just so much more, and cannot, in this suit, at all events, recover that amount from his co-defendant, against whom, on the other hand, the plaintiff can proceed in this suit by execution for his costs. In many cases it would be not only most unjust, but might be impossible to apply the rule at law where there are so many diverse interests and rights brought together as is frequently necessary in a suit in this court."

In that case, then, there was merely a refusal to recognize the rule at law as necessarily applicable in equity, as a court of equity recognizes and distinguishes the divers interests of various parties to a suit. The decision clearly turned upon the view that the defendants were jointly liable to the solicitor for the costs, and that to order such a set-off would be to injuriously affect the rights of other defendants. In fact the decision was based on the same principles on which a set-off of a separate against joint liability is refused.

Here, however, the principle there invoked, has no application. The original certificate showed that these defendants incurred their costs separately. No injustice can be done to either by setting off the costs due the plaintiff against Slavin's share of the costs payable by the plaintiff.

In *Wright* v. *Chard*, 4 Drew. 702, the bill was dismissed against the defendants Vernon and his wife with costs, so far as it related to the wife's separate estate, but Vernon was ordered to pay a certain occupation rent. Mr. and Mrs. Vernon had answered and defended jointly. The costs awarded them were at the instance of the plaintiff, ordered to be set-off against the amount payable by Vernon alone, on the ground that the costs belonged to the husband, though ordered to be paid to him and the wife jointly. This shows that the real rights and not the form should be looked at.

In *Jenner* v. *Morris*, 11 W. R. 943, there were different suits mixed together, to which the parties were not the same. It is difficult to understand from the report whether the difference in parties or the difference in the suits was the ground of refusing a set-off, but the case does not appear to be opposed to the view which I take.

In *Wilson* v. *Switzer*, 1 Ch. Ch. 75, 160, the application was to set-off money payable by decree in one suit, against costs of an injunction motion in another and costs of an action at law, which was refused on the ground of the amounts being due in different rights.

Does then, the closing of the taxation of the costs of these defendants and the granting of the certificate to them alter the position of the plaintiff upon this question? It does not appear to me that it should. It is true that the master might, and he probably should, have apportioned these costs on his taxation, but this can still be done. In *Bryon* v. *The Metropolitan &c., Co.*, 4 Drew. 546, a substantive motion by the defendants to set-off costs ordered to be paid to them against costs subsequently ordered to be paid by them was granted, but without costs, on the ground that they might have obtained this order when costs were awarded against them. On interpleader applications a party to an issue directed by order is often, when the facts sufficiently appear, directed by the same order to give security for costs, but a subsequent application may be made for the purpose, though the applicant might just as well have asked it when the original order was made. Many similar instances could no doubt be found.

As these two defendants are really severally and not jointly entitled to these costs, the plaintiff is in justice entitled to the set-off asked, and I cannot consider him estopped by the mode of taxation. That should be treated merely as affecting the costs incidental to this application.

It must be referred to the master to apportion the costs of the defendant Slavin and Molesworth under the order of the 4th May, 1887, to tax and add to the costs of each of them, the costs that shall properly be incurred by them respectively under this reference and of obtaining the money out of court and to set-off the costs thus found due after such apportionment to the defendant Slavin against the costs payable by him to the plaintiff under the certificate of the 27th March, 1888, and to find the balance due from one to the other after such set-off.

The same order may provide for payment to Molesworth, out of the sum paid into court by my direction in this application, of the amount thus to be found due to him with interest from the day of (day of payment into court), and for payment to Slavin of the balance (if any) thus to be found due to him with similar interest, and to the plaintiff of the remainder thus paid in with the remaining interest accrued. No costs of this application except subsequent to this order allowed to either party.

WATERS v. BELLAMY.

(IN APPEAL.)

Breach of promise.—Corroborative evidence.

The corroboration necessary in an action for breach of promise need not go the length of, by itself, proving the promise: it will be sufficient if it supports the plaintiff's evidence in respect of the promise, so as to make it appear reasonably probable that her testimony, that the promise was given, is true.

Circumstances which are as consistent with the non-existence of a promise as they are with the fact of a promise having been given, can scarcely be taken to afford the material corroboration that the Statute requires.

Action for damages for breach of promise of marriage. At the trial a verdict was entered for the plaintiff, damages $500.

Motion to enter nonsuit on ground of want of corroborative evidence.

J. A. M. Aikins, Q.C., for the defendant. There is no corroborative evidence, 32 & 33 Vic. c. 68, s. 2, (Imp.) "some other material evidence in support of such promise." *Costello* v. *Hunter*, 12 Ont. R. 333; *Parker* v. *Parker*, 32 U. C. C. P. 128. The Imperial Act unlike that in Ontario requires corroboration in promise, Ont. Stat. 1882, c. 10; *Bessela* v. *Stern*, 2 C. P. D. 265. The giving of a ring is not corroborative of a promise.

H. A. Maclean, for the plaintiff cited *Sugden* v. *Lord St. Leonards*, 1 P. D. 179; *McDonald* v. *McKinnon*, 26 Gr. 12. The statute does not require direct evidence of the promise apart from the plaintiff's. *Hicky* v. *Campion*, Ir. R. 6 C. L. 557; *Cole* v. *Manning*, 2 Q. B. D. 613; *Wilcox* v. *Godfrey*, 26 L. T. 328, 481, as to what is corroborative evidence.

(*9th January, 1888.*)

BAIN, J.—This is an action for breach of promise of marriage which was tried at the Portage Assizes last spring before the Chief Justice and a jury, when a verdict was found for the plaintiff, with $500 damages. The defendant now moves, pursuant to leave reserved, to set aside the verdict and to enter a nonsuit, on the ground that there was no evidence corroborative of the plaintiff's, as required by the Imperial Statute, 32 & 33 Vic. c. 68, s. 2. The Evidence Amendment Act of 1851, while making parties to actions competent witnesses in their own behalf, excepted actions for breach of promise of marriage. This exception was removed by the above Acts 32 & 33 Vic. c. 68, but with the proviso that no plaintiff in any such action "shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

It is necessary to consider in the first place what is the corroboration the statute requires, and in the second place, if in the case before us there was any such evidence adduced. Into the weight or sufficiency of such evidence, in fact, if there was any in law, we have not to inquire.

A provision similar to the English one has been in force in Ontario since 1882, and was discussed in the case of *Costello* v. *Hunter*, 12 Ont. R. 335. In England, the provision has received judicial construction in two cases, *Wilcox* v. *Godfrey*, 26 L. T. N. S. 328, 481; and *Bessela* v. *Stern*, 2 C. P. Div. 265. It was also before the Irish Courts in *Hickey* v. *Campion*, Ir. R. 6 C. L. 559.

These are the only cases to which we have been referred, or that I have been able to find, directly in point, but cases on analogous provisions in other statutes requiring corroboration assist in arriving at the proper construction to be placed on the provision, *Cole* v. *Manning*, 2 Q. B. D. 611; and *McDonald* v. *McKinnon*, 26 Gr. 12, may be referred to, and especially *Parker* v. *Parker*, 32 U. C. C. P. 113, where a number of cases are cited and considered.

It would not be easy, and it might be dangerous to attempt to lay down a general rule or principle that would be applicable to all cases arising under the enactment in question, for each case will depend very much on its own special circumstances. But from the words of the section and the cases above referred to, this much, I think, may be taken to be clear, that is, that it is not necessary that the corroborative evidence must go the length of, by itself, proving the promise; it will be sufficient if it supports the plaintiff's evidence in respect of the promise, so as to make it appear reasonably probable that his or her testimony, that the promise was given, is true. In all the cases above referred to in the statute, the evidence principally relied on as corroboration consisted of conversations of the defendants with, or statements made by them, to third persons, amounting to admissions, more or less explicit, of a promise having been made. In the majority of cases corroboration will probably be found in such admissions, but circumstances and course of conduct may afford just as strong corroboration as admissions, and may be sufficient to satisfy the requirements of the statute. It is to be remembered however, that what the statute requires is evidence in support of the promise and that such evidence must be material, and therefore, while evidence of circumstances and conduct may be admissible, still such evidence should, I think, be limited to such circumstances and conduct only as are inconsistent with any other reasonable supposition than that the promise has been made. As Cameron, C.J., suggests in *Costello* v. *Hunter*, circumstances which are as consistent with the nonexistence of a promise as they are with the fact of a promise having been given, can scarcely be taken to afford the material corroboration that the statute requires.

In the present case, the plaintiff's statement is that she and the defendant became intimately acquainted in the early part of 1886, and that on the 14th of March of that year he asked her to marry him, and she consented. The defendant admits that on this and on one or two subsequent occasions, marriage was spoken of between them, but, he says, it was the plaintiff who suggested marriage, and that he would not agree to it. Other witnesses prove, and the defendant does not deny, that he shewed the plaintiff marked attentions extending over some months, but in all the evidence it seems to me there are only two circumstances, not depending entirely on the plaintiff's own statement, that can at all be urged as corroboration sufficient to satisfy the statute. One of these is that he gave her a ring, and the other, that a certain conversation took place on a subject that it is hard to believe could have been discussed between them, unless they were engaged. If it had been proved by extrinsic evidence, that, as the plaintiff alleges, the defendant gave her a ring to mark their engagement, that, I think would have been evidence in support of a promise, and so perhaps, would have been extrinsic proof that the conversation she alleges took place. But for corroboration, the plaintiff has to rely on the defendant's statement, and his explanation of the circumstances under which the ring was given take away any corroboration there might be in the fact of its having been given, and while he admits to a certain extent that the conversation above referred to did take place, his explanation of it is quite as consistent with his story that it was she who wanted him to marry her and that he wanted to put her off, as it is with hers that he had promised to marry her.

I do not think there is anything in Woodside's account of the conversation he had with the defendant, which, taking the conversation as a whole, would be admissible as corroboration.

I am of opinion therefore, that the plaintiff's testimony was not corroborated by any other material evidence in support of the promise, and I think the verdict should be set aside.

DUBUC, J., and KILLAM, J., concurred.

Verdict for plaintiff set aside and nonsuit entered.

DAVIDSON v. CAMPBELL.

(In Equity.)

Mechanic's lien.—Amendment of bill after time for filing elapsed.—48 Vic. c. 33, as to filing contracts.

Bill alleged a contract with defendant C. for the performance of certain work in the erection of a building upon land of C. By amendment made after the time for filing the bill had elapsed, the plaintiffs alleged that their contract was with the defendants K. & McD., who had contracted with C. for the erection of the whole building, thus changing their position from contractors to sub-contractors. No new certificate of *lis pendens* was filed.

Held, That the plaintiff could not rely upon the original bill and certificate of *lis pendens*.

It is no defence to an action for work done under a verbal contract that the contract or a statement of it was not filed in accordance with the statute 48 Vic. c. 33, s. 13.

J. S. Ewart, Q.C., and *T. O. Townley*, for plaintiffs.

L. McMeans, for defendants Campbell Brothers.

J. D. Cameron, for defendants Kerr & Macdonald.

The form of the pleadings sufficiently appears from the head note. The bill was *pro confesso* against the defendants Kerr & McDonald, the original contractors with the defendants the Campbells who were the owners of the land.

(*5th May, 1888.*)

Killam, J.—The evidence shows that the defendants Kerr & McDonald were contractors for the erection of the building and that they, with the knowledge and consent of the Campbells, entered into a verbal contract with the plaintiffs for a portion of the work, which was completed, with a few extras ordered by Kerr & McDonald, about the end of May, 1887. The Campbells made no contract with, and were not liable directly to, the plaintiffs who were merely sub-contractors with Kerr & McDonald.

Several objections were taken by the defendants, of which the principal were that the amendment was made after the expiration of the time fixed by the Mechanic's Lien Act for the commencement of the suit and the filing of certificate of *lis pendens*, and that the contract was wholly void and unenforceable under the Workman's and Builders' Act of 1885, 48 Vic. c. 33, s. 16, as not having been filed and registered at the County Court office.

Now, it is clear that the original bill alleged no contract between the plaintiffs and Kerr & McDonald; that was founded only upon an alleged contract between the plaintiffs and the Campbells, which did not exist. It did not allege that the work was done at the request of Kerr & McDonald, or any facts from which could be implied a promise by Kerr & McDonald to pay for the work or that they expressly promised to do so, but, it did allege that the Campbells were indebted to the plaintiffs for the work and materials. The amended bill is founded upon the real contract and it appears to me that it does, though clumsily, set up the contract between the plaintiffs and Kerr & McDonald, in alleging the indebtedness of Kerr and McDonald for the work and materials.

It does not appear to me, that the plaintiffs can thus introduce by amendment an entirely new cause of action, after the expiration of the period for commencing their suit and rely upon the original bill and the original certificate of *lis pendens*. The case might be different if mere formal amendments in support of the case sought to be made by the original bill were made, for by the 9th section of the Mechanic's Lien Act, Con. Stat. Man. c. 53, "the lien may be realized in the Court of Queen's Bench, according to the ordinary procedure of that court on the equity side," which would seem to involve such amendments.

The view which I take appears to be supported by *Crowl* v. *Nagle*, 86 Ill. 437; *Dunphy* v. *Riddle*, Id. 22; *McGraw* v. *Bayard*, 96 Ill. 146.

In *Long* v. *Burton*, 2 Atk. 218, L.C. Hardwicke said, "the pendency of the suit as to those parts which are amended is only from the time of the amendment."

For the plaintiffs, reference was made to the analogy of injunction suits, but it is clear that if an injunction were granted a bill would not be allowed to be amended without prejudice to the injunction, for the purpose of raising an entirely different right in substitution for that originally alleged.

It was contended for the plaintiffs that the objection should have been raised by answer, but, as it appears upon record when the bill was amended, I think that it was unnecessary. Even if it were necessary, I should allow a supplemental answer to be filed for the purpose, just as in *Forrester* v. *Campbell*, 17 Gr. 379, 19 Gr. 143, one was allowed for the purpose of setting up the Registry Act, and in *McIntyre* v. *The Canada Co.*, 18 Gr. 367, to enable the defendant the plead the Statute of Limitations.

The latter statute is regarded at law as giving a defence upon the merits upon which to set aside a judgment by default. *Maddocks* v. *Holmes*, 1 B. & P. 228. If the lien ceased to exist in consequence of the plaintiffs not filing a bill upon their real contract, it could not be revived by a failure to plead properly, and the plaintiffs ought not thereby to acquire rights which they had not when the bill was amended.

The bill, however, seeks a personal order against Kerr & McDonald for payment of the balance due by them. To this, I think the plaintiffs are entitled. The Act 48 Vic. c. 33, s. 13, provides for filing in a county court office a copy of a written contract made by any builder employing workmen, or a statement of the terms of such an unwritten contract. The 15th section imposes a penalty for failure to file such a contract or statement, and the 16th section provides that, "Any builder or contractor, whether principal or sub-contractor, shall be entitled to no right or privilege under or by virtue of any contract required to be filed and registered under the provisions of this Act, unless the same shall be filed and registered in conformity with the provisions of this Act."

In the 13th, 14th and 15th sections, the contract and the statement are distinguished, but the 16th section refers only to the filing of the contract, not to that of the statement. This is a provision which, if interpreted as the defendants claim, is in derogation of the ordinary right of action upon a contract, and it must be construed very strictly. I think that at any rate it does not take away the right of action upon this verbal contract. Besides, the Act refers only to builders employing workmen. Upon the face of the bill, this work might have been done by the plaintiffs themselves. Although the evidence shows that they did the work through workmen employed by them, yet the bill being taken *pro confesso* against Kerr & McDonald, they could not now avail themselves of the objection unless the proceedings were opened up and they were allowed to answer which, in my view of the statute, at any rate, I would not allow.

The bill must be dismissed as against the Campbells without costs, as they should not have allowed the plaintiffs to incur the expense of examining witnesses. I have referred to the evidence only to show clearly that the plaintiffs had no case upon their original bill. When they abandoned that by amendment setting up a claim under a new contract, the defendants should have raised their objection.

As against the defendants Kerr & McDonald there should be a decree for payment of the amount claimed by the bill, $150.40, with interest from the amendment of the bill which the registrar can compute. They will pay such costs as would have been taxable to the plaintiffs upon signing judgment by default on a writ specially endorsed for the amount thus due.

MONKMAN v. BABINGTON.

(IN EQUITY.)

Injunction.—Threatened trespass.

The plaintiff claimed to be tenant of the defendant B. of certain lands upon which he sowed a crop of wheat. Defendants threatened to reap the crop, whereupon the plaintiff filed a bill for an injunction. During the suit the defendants did harvest a portion of the crop, but did not otherwise interfere with plaintiff's occupation. The plaintiff's right was not very clearly established by the evidence.

Held, Injunction refused, but without costs.

The facts sufficiently appear from the head note and judgment.

H. M. Howell, Q.C., and *A. Monkman*, for plaintiff.

J. S. Ewart, Q.C, and *C. P. Wilson*, for defendants.

(*5th May, 1888.*)

KILLAM, J.—This is a suit for an injunction to restrain trespass upon lands occupied by the plaintiff. The evidence in this case is so conflicting that the plaintiff's right is matter of grave doubt

I attach little weight to the evidence of the plaintiff himself or to that of either of the defendants. I am inclined, however, to place considerable reliance on that of Alfred Monkman. As to the evidence of circumstances and conversations given for the defence, it appears to me of very trifling importance, either on account of the unreliability of the witnesses or because so much turns on the exact language used, which I cannot feel sure of having had repeated with absolute correctness, or because the plaintiff may have acted on a false impression respecting the rights the law gave him under his verbal agreement.

Upon the evidence of Alfred Monkman I am inclined to think that there was some arrangement for a holding for a longer period than a year, but upon careful perusal of his evidence, I find the real terms very indistinctly given. For an important instance, it is left completely in doubt whether the whole of the half section or only the ploughed land was leased. At most, I could hold the lease to include only the ploughed land. This would dispose of any right to an injunction in respect of the hay land.

Now, as to the trespass, when the bill was filed only the hay land had been entered upon by either defendant. They are alleged only to have threatened trespass upon the ploughed land. The evidence shows that Babington subsequently, with Follis' assistance removed a portion of the plaintiff's crop and dealt with it as his own. The land had been transferred to Follis by deed, but he appears to have left it to Babington to deal with the plaintiff, looking to Babington for compensation for any loss to himself through not getting possession. While the transfer to Follis is very suspicious, yet I do not think that there is sufficient evidence to warrant the conclusion that it was only colorable. Though Babington took a portion of the crop, he did not prevent the plaintiff from also taking a portion, and he is not shown to have attempted otherwise to interfere with the plaintiff's occupation. Under these circumstances, though Babington did claim to enter as of right on the ground of an alleged determination of the tenancy, and though Follis can claim no better position, I do not think that any injunction should issue. The plaintiff could have had all the relief to which he was entitled by an action for trespass and trover.

There is no analogy to the case of *The Attorney-General* v. *Ryan*, 5 M. R. 81, to which reference has been made. There the title of the crown was perfectly clear and indisputable. The important questions were with the reference to the right of the defendants by statute to appropriate the lands for the purposes of a Provincial railway and the authority to enjoin acts being done by the Provincial Government; a portion of the lands was being permanently appropriated for railway purposes; a permanent structure was being placed upon them; the remaining lands were being divided by ditches, an embankment and a work intended to be operated as a railway for the running of engines and trains.

If this plaintiff had brought an action of trespass and succeeded in it and if the defendants persisted in their trespasses, the plaintiff would be entitled to an injunction. Or, if the defendants had committed a continuous trespass, going on to cultivate the land and deprive the plaintiff wholly of it, and the plaintiff's right were sufficiently clear, the injunction might be granted, but the trespass having been limited to taking off a portion of the crop, and not being continued and there being such a serious question of title, it would be improper to interfere in the way now sought.

The plaintiff having relied for his title upon a specific alleged agreement for a lease, to which alone his rights are referable, he cannot invoke any presumption of a tenancy from year to year as arising from occupation at a yearly rental. Either the agreement was made as he claims, or he held under a lease for a year only. The plaintiff must stand or fall by the case which he set up and attempted to prove.

As, however, the defendants set up a lease for one year only and sought to prove it, and as they succeed on account of the weakness of the plaintiff's case, and not because they have proved their own case, and as, also, they were guilty of a most high handed act in assuming to take possession of the land occupied by the plaintiff and of the crop raised by him, having stood by until it had reached maturity, instead of taking legal proceedings to eject the plaintiff, and as they subsequently resorted to such palpable subterfuges to evade the proceedings taken by the plaintiff, showing throughout an intention to be, if possible, the judges of their own rights, rather than to submit them to the decision of the proper tribunals, the bill should be dismissed without costs.

Bill dismissed without costs.

WOODS v. TEES.

(IN CHAMBERS.)

Striking out embarrassing pleas.

A false plea cannot, merely on the ground of its falsity, be assumed to have been filed for embarrassment or delay if there be other valid pleas upon the record.

The rule as to striking out embarrassing pleas, applies to affirmative pleas. It is not necessarily unreasonable that a defendant should put a plaintiff to the proof of his case.

Upon a motion to strike out a plea, although the plaintiff give *prima facie* evidence of its falsity, the defendant is not bound to swear to its truth in order that it may not be struck out.

Although there be direct Manitoba authority against the validity of a defence, the plea will not merely upon that ground, be struck out.

J. W. E. Darby, for plaintiffs.
C. P. Wilson, for defendants.

(*14th August, 1888.*)

KILLAM, J.—(The learned judge, after citing *McMaster* v. *Beattie*, 6 Pr. R. 162; *Archbold's Practice*, 12th ed., pp. 292 & 295, and cases there cited; *Lush's Practice*, 3rd ed. p. 452; and the Manitoba General Rule No. 5, proceeded as follows:—)

This was an application to strike out pleas. The declaration contains only one count, which is upon a promissory note made by the defendant in favor of the plaintiffs, payable at a particular place. There are 6 pleas, (1) nonfecit, (2) nonpresentment, (3) no consideration, (4) payment, (5) counterclaim on common counts, (6) counterclaim on common counts for an alleged indebtedness of plaintiff to Tees & Co., assigned to the defendant. In these two counterclaims defendant alleges only that the plaintiffs are indebted to him, not that they were so at the commencement of the action.

Both at common law and under this rule, then, the mere falsity of the plea does not seem the ground for setting it aside. Indeed, the rule appears to be merely an expression of the practice at common law, applied to particular kinds of actions. If the only pleas pleaded are clearly false in fact, the inference that they are pleaded for the purpose of embarrassment or delay, is natural. Is it so, if only some are clearly so, while others raise an apparent defence under which the plaintiff is obliged to bring the cause on for trial? It does not appear to me, that in such a case it is necessarily so. Here, for instance, the first plea simply puts the plaintiffs to the production and proof of the note; they must bring the action to trial under the third and fourth pleas. This does not necessarily delay them. Is this to embarrass them? It is a course often taken with the hope of eliciting from the witness to the making of an instrument, some evidence supporting the real defence. It does not appear that such can be said to be embarrassing within the meaning of the rule.

It is noticeable that the practice laid down by Lush refers only to affirmative pleas, not to those merely traversing material allegations of the declaration. It appears to me not unreasonable that a defendant should thus put the plaintiff to proof of his case. I can conceive cases in which it could be shown that the effect would be to embarrass or delay a plaintiff, but it does not appear to be necessarily so, and I think that it must be for the plaintiff making such an application to show this.

Then, as to the second plea, there is no admission of the non-presentment. The notarial certificate is only *prima facie* proof of the presentment. Upon the authorities cited in *McMaster* v. *Beattie*, the defendant should not be put to showing his evidence in Chambers on such an application. He may have evidence to meet such a *prima facie* case. I do not think that he should be even obliged to swear to the truth of his plea.

As to the fifth plea, the *onus* is upon the defendant. It is an affirmative plea, but it cannot delay the plaintiffs. I do not see how it can embarrass them.

It is not complained that either the fifth or sixth plea should be struck out for want of showing that the claim arose before action. It is claimed, that the rule is, that all pleadings should be presumed to relate to matters arising before action, and that both on this account and under the authority of *Sharpe* v. *McBurnie*, 3 Man. R. 161, the sixth plea should be struck out. I do not consider whether it would be ground for striking out the sixth plea under *Sharpe* v. *McBurnie*, as the defendant's counsel was not called on to argue to the contrary, and I think it sufficient to say that, accepting the principle admitted by the plaintiffs' counsel, it should be open to the defendant to carry to the Supreme court, the question in *Sharpe* v. *McBurnie*.

The application must, therefore, be dismissed with costs, to be costs in the cause to the defendant in any event.

GERRIE v. CHESTER.

[FULL COURT. 13th July, 1888.]

Appeal from County Court.—Security by payment into Court.

This was an appeal from the County Court. Upon opening of the appeal it was objected that no bond for security for the costs of the appeal had been given. It appeared, however, that security had been given by payment of money into Court.

The judgment of the court was given by KILLAM, J.—(After an examination of the statutes Con. Stat. c. 34, ss. 226, 227, 228; 47 Vic. c. 22, s. 23; and 50 Vic. c. 9, s. 243, 244, 245). In my opinion, where the necessary sum has been paid into court or other security given with the sanction of the county judge, and he has certified the case to this Court; the giving of a bond is not under the present Act, a condition precedent to the hearing of the appeal, and as it is admitted that the money has been paid into court with such sanction, in this case, the hearing of the appeal should be proceeded with.

R. Cassidy, for plaintiffs.

N. F. Hagel, Q.C., for defendant.

DICK v. HUGHES.

(IN APPEAL.)

Garnishee proceedings.—Jurisdiction of County Judge.—Garnishee out of jurisdiction.

A County Court Judge has power to set aside a garnishing order made in a Queen's Bench action.

A garnishing order was set aside upon it appearing that the garnishee did not reside within the jurisdiction, but was there, when served, only temporarily.

Appeal from a decision of Ryan, Co. J., dismissing a summons to set aside a garnishee order.

H. Nason, for defendant. The affidavit does not state that the garnishee is within the jurisdiction, *Drake on Attachment*, 87; *Keeler* v. *Hazelwood*, 1 Man. R. 28; *Grant* v. *Kelly*, 2 Man. R. 222. To be within the jurisdiction the garnishee must actually reside therein, *McArthur* v. *Macdonell*, 1 Man. R. 354; *Newby* v. *Van Oppen*, L. R. 7 Q. B. 293.

W. H. Culver, for plaintiff. If garnishee has property here, up to $200, he can be sued in this court.

(*15th June, 1888.*)

TAYLOR, C.J., delivered the judgment of the court. (*a*)

This is an appeal against an order of the Judge of the Central Judicial District, discharging a summons obtained by the defendant, to set aside a garnishing order made by himself, under the provisions of The Queen's Bench Act, 1885, s. 32, in an action pending in this court.

An objection was taken on the appeal by the plaintiff, that, although a judge of a county court may, under the Act, make an order in an action pending in this Court, garnishing debts, yet he cannot entertain an application to set it aside, or indeed any further application connected with it. We do not think the objection can prevail. The Act provides, that, "The judge shall

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(*a*) Present: Taylor, C.J., Dubuc, Killam, JJ.

have power and authority to transact the business and exercise all such authority and jurisdiction in respect of the same, as by virtue of any statute or rule, or practice of the said Court, can now be exercised by a judge sitting in Chambers, in respect to the following matters, "namely:— . . . . . (2) garnishee applications." As was said in *Thompson* v. *Wallace*, 3 Man. R. 686, these words seem wide enough to cover making an order to set aside a garnishing order as well as granting one in the first instance. After judgment, it is quite common for a plaintiff to obtain an order attaching a debt and containing also, a summons calling on the garnishee to show cause why he should not pay over the amount. This would plainly be within the power of the judge to grant. It follows, that the judge can entertain an application to pay over. Now, on an application to pay over, there is authority for holding that the judge may not only refuse the order, but, may also discharge the original attaching order, *Wintle* v. *Williams*, 3 H. & N. 288. We, therefore, think the judge having made the order could entertain an application to rescind it.

The summons to rescind the order here, was moved upon new material, there being filed an affidavit that the garnishee does not reside within the jurisdiction, but, was here only temporarily. This is not contradicted, and is, in our opinion, a sufficient ground for rescinding the order. That seems to have been the *ratio decidendi* in *Hamilton* v. *McDonald*, 2 Man. R. 114. It seems only reasonable that it should be so, for a man may owe a debt to another and yet it could not be sued for in this Province, the cause of action not having arisen here, and there being nothing which would make the debtor liable to be sued here. If the garnishee did not pay over on an order for that purpose being made, how could the court in such a case enforce payment.

The appeal should be allowed, and the order of the learned judge reversed and the original attaching order rescinded with costs of the application to rescind the order and of this appeal.

Appeal allowed.

DOUGLAS v. BURNHAM.

(IN CHAMBERS.)

Interpleader issue an action.—Trial of, on Tuesday.

An interpleader issue is within the term action, and may be entered for trial upon a Tuesday, (*Plaxton* v. *Monkman*, 1 Man. R. 371, considered.)

T. D. Cumberland, for plaintiff.

S. C. Biggs, Q. C., for defendant.

(*4th May, 1888.*)

TAYLOR, C.J.—The question argued in this case was, can the plaintiff in an interpleader issue, enter the record and give notice of trial on a Tuesday, under section 24 of The Queen's Bench Act, 1885. The contention is that an interpleader issue is not an action, and *Plaxton* v. *Monkman*, 1 Man. R. 371, is now relied on.

In that case, I held that a defendant in such an issue could not give a notice of trial under Reg. Gen. 31, because an interpleader issue is not a cause, and is never spoken of as such. Further examination has shown me that this is not correct. In *White* v. *Watts*, 12 C. B. N. S. 267, an application was made in an interpleader issue by the defendant, to deliver interrogatories to the claimant, under section 51 of the C. L. P. A. 1854, which provides that, "In all causes," either party may by leave of the court or a judge, deliver to the opposite party interrogatories. The objection being taken, that an interpleader issue is not a cause, Williams, J., referred the parties to the court. In Term the Court held that the rule must be made absolute, the word "cause" being wide enough to embrace an interpleader issue. So, in *Withers* v. *Parker*, 4 H. & N. 810, the Court of Exchequer held there might, in an interpleader issue, be an appeal under section 34 of the C. L. P. A., 1854, because the sections 18 to 35, relate to the trial of causes Erle, J., said, "The language applies upon the trial of any cause, an interpleader cause as well as any other cause. The mischief to be remedied is as great, for most important rights may be decided in an interpleader cause."

In Ontario, it was held in *The Canada Permanent Savings Society* v. *Forrest*, 6 Ont. Pr. R. 254, that the words action at law, include an interpleader proceeding.

The summons here, is to bar the claimant, the plaintiff in this issue, because she has not gone to trial. There has undoubtedly been great delay, which is not accounted for, but, as the issue is now entered for trial, the attorney undertakes to go to trial peremptorily next Tuesday, and to produce the claimant for examination then, I dismiss the summons without costs.

Summons dismissed without costs.

Re CAMPBELL.

[KILLAM, J.—20th July, 1888.]

Conveyances by half-breed children.—Construction of Con. Stat. c. 42, s. 3.

In answer to a question submitted by the Registrar General, for the opinion of the Court as to the construction of Con. Stat. c. 42, s. 3, the following report was returned.

KILLAM, J.—(After discussing the matter at some length), I shall therefore certify to the Registrar General that, in my opinion, the third section does not apply to, a half-breed minor between 18 and 21 years of age, or empower him to convey or otherwise dispose of any portion of the 1,400.000 acres of land that he may be entitled to by inheritance or purchase, but that it empowers such half-breed child merely to convey or dispose of such specific portion of the 1,400.000 acres as may have been allotted to him by the Crown as his own share of those lands.

O'CONNOR v. BROWN.

(In Chambers.)

Taxation.—Appeal.—Counsel fees.

Under the present circumstances of the Province, the Court will exercise a control over the *quantum* of counsel fees taxed by the master.

This was an appeal from the taxation by the master, of certain counsel fees, the complaint being, that they were excessive.

The following is the only part of the judgment having general interest.

(*26th April, 1888.*)

Taylor, C.J.—In *Rankin* v. *McKenzie*, 3 Man. R. 554, I dealt with this question reducing two fees which had been taxed. In that case, a number of English authorities were cited, in which the courts have held, that they will enquire whether the taxing master has exercised his discretion properly or not, and in which his finding has been interfered with. Two more recent cases are, however, cited and relied on. One of these is *Re Harrison*, 33 Ch. D. 52, decided about two months after *Rankin* v. *McKenzie*. In that case, Pearson, J., said, "It has never been the practice of this Court to review his taxation with regard to the *quantum* of a fee which he has allowed," and on appeal, Cotton, L.J., thus expressed himself, "It would be wrong, even in a case like this, to interfere, contrary to our rule, with the discretion, which must be left to the taxing master to determine what amount of fee in the particular case is reasonable." A still more recent case is *Boswell* v. *Coaks*, 36 Ch. D. 444, in which, similar opinions as to the discretion of the taxing master, were expressed, the appeal there being as to costs of defendants defending separately.

Now, I do not think these English cases can be held, in the circumstances of this Province, to apply in their full extent. The taxing masters there, are men of very wide experience. What are the proper fees to be paid counsel, have, in the long course of years become well settled and known. Besides, the fees paid to counsel in England, are just so much money disbursed for the client by the solicitor, not as in so many cases here, merely fees entered by the solicitor and really payable to himself, he being also counsel. While ready to allow a liberal amount of discretion to the taxing master, the court must, I think, in the present circumstances of this Province, exercise a control over even the *quantum* of the fees taxed.

I am prepared to adhere to the views which I expressed in *Rankin* v. *McKenzie*, notwithstanding these more recent decisions in England.

BURBANK v. WEBB.

[KILLAM, J.—10th August, 1888.]

Continuing ex parte injunction.—Misrepresentation of facts.

Upon a motion to continue an *ex parte* injunction, it was objected that the court had been misled when granting the injunction.

KILLAM, J., said: Nothing is of more importance than that a party obtaining an *ex parte* order for an injunction, should deal with the utmost fairness and frankness with the court; and if it were shown that a party did so upon a false statement of information of a material fact, I should not hesitate to refuse to continue it, and to leave him in the position in which he was before geting the order, even though he showed other grounds sufficient to warrant its being continued.

C. P. Wilson, for plaintiff.

J. S. Hough, for defendant.

McLELLAN v. MUNICIPALITY OF ASSINIBOIA.

(In Appeal.)

Tax sale.—Action for not executing deed.

A Statute authorizing the sale of land for taxes, provided that the deeds "shall be executed by the Reeve and Treasurer and under the seals of the municipalities respectively." In an action against a municipality for refusal to execute a deed,

Held, (Killam, J., diss. and affirming Dubuc, J.) That the action would not lie, for the deed ought to be executed by the reeve and treasurer and that, not as agents of the municipality.

The declaration which was the subject of judgment in 5 Man. R. 127, having been amended in several respects, the defendants again demurred. Dubuc, J., allowed the demurrer, and the defendants now appealed.

N. F. Hagel, Q.C., and *A. Howden*, for plaintiff, referred to the statute 47 Vic. c. 60, and cited the following cases, *Martin* v. *Brooklyn*, 1 Hill. 545; *McSorley* v. *St John*, 6 Sup. C. 531; *Barnes* v. *District of Columbia*, 91 U. S. 540; *Canada Central Railway Co.* v. *Murray*, 8 Sup. C. 313; *Farrel* v. *Town of London*, 12 U. C. Q. B. 343; *Smith* v. *Birmingham Gas Light Co.*, 1 A. & E. 526; *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314; *Armstrong* v. *Garafraxa*, 44 U. C. Q. B. 515; *Corporation of Burleigh* v. *Hales*, 27 U. C. Q. B. 72; *Robins* v. *Brockton*, 7 Ont. 481; *McEdwards* v. *Ogilvie*, 4 Man. R. 1; *White* v. *Gosfield*, 2 Ont. 287; *Rowe* v. *Rochester*, 29 U. C. Q. B. 590; *Robertson* v. *Wellington*, 27 U. C. Q. B. 336.

L. G. McPhillips and *A. E. McPhillips*, for defendant cited, *Wallis* v. *Assiniboia*, 4 Man. R. 89; *Ferguson* v. *Freeman*, 27 Gr. 211; *Hedges* v. *Madison*, 1 Gilm. 567, 571; *Grier* v. *St. Vincent*, 13 Gr. 519; *Harrison's Municipal Manual*, 41; *Smith on Master and Servant*, 377, 379; *Atkinson* v. *Newcastle W. W. Co.*, 2 Ex. D. 441; *Silsby* v. *Dunnville*, 8 Ont. App. R. 524; *Shearman & Redfield on Negligence*, § 138, 177; *Smith on Negligence*, 105; *Smith* v. *Newburgh*, 77 N. Y. 130; *Ensign* v. *Supervisors of Livingstone County*, 25 Hun. 20; *Bamber* v.

Rochester, 26 Hun. 587; *Brooklyn Saw Mill Co.* v. *Brooklyn*, 71 N. Y. 580.

(*15th October, 1888.*)

TAYLOR, C. J.—When the demurrer to the declaration as originally framed, was before me, I held that the plaintiff is not entitled to maintain such an action as the present against the defendant corporation. My brother Dubuc, on the argument of the demurrer to the amended declaration, came to the same conclusion. After hearing the argument on the appeal from his judgment and further considering the question, I have seen no reason for altering my opinion. The present appeal should be dismissed, and the judgment of my brother Dubuc affirmed, with costs.

BAIN, J.—This is an appeal from an order of Mr. Justice Dubuc, allowing the defendant's demurrer to the first four counts of the plaintiff's declaration. The defendants are a country municipality, and the plaintiff, as the assignee of a purchaser at a tax sale of certain land sold by the Municipality for arrears of taxes, sues in these counts to recover damages for the refusal of the Municipality and its reeve and treasurer to execute deeds to her of the lands so purchased.

The defendants demurred to these counts and the demurrer was allowed on the ground that, as the statute under which the lands were sold, (Section 7,) casts the duty of executing such deeds upon the reeve and treasurer, the omission or neglect of these officers to comply with their statutory duty gives the plaintiff no right of action against the Municipality.

Certain lands in this Municipality and in Kildonan having been annexed to the City of Winnipeg, a private Act, 47 Vic. c. 60, was passed, authorizing these Municipalities to sell such of these lands as were in arrear for taxes to the Municipalities at the date of their being taken into the City. The Act provided for the notices, &c., to be given of the sales, and in the 6th section declared that such sales "should be subject to the provisions of the Municipal Act of 1884."

The counts of the declaration demurred to allege that in December, 1884, the defendants under the authority of the statute, caused the lands described to be put up for sale by public auction, and that one Dufresne purchased the same and that the defendants sold the same to him upon and subject to the terms of a certain certificate made and executed by the defendants and delivered to the said Dufresne, and the certificate which is alleged to be signed by the then secretary-treasurer of the Municipality is set out in full. The declaration then alleges a demand made by Dufresne for the execution of the deed both on the reeve and treasurer and on the defendants, and their refusal, and sets out an assignment from Dufresne to the plaintiff of all his rights in respect of the sale and the certificate.

The Municipal Act of 1884, section 314, provided that a certificate, in the form given in the 315th section, should be given by a treasurer who has held a sale for taxes to the purchaser and in pursuance of the direction above noted in the 6th section of the private Act, the secretary-treasurer of the defendants gave the certificate which is set out in the declaration certifying that in pursuance of the private Act he had sold the parcel described to Dufresne, "and that on demand a deed will be executed by the reeve and treasurer of the Municipality of Assiniboia, conveying the above described lands to the said Dufresne, his heirs, representatives or assigns, according to the nature of the interest sold, at any time after the expiration of two years from the actual date of sale, if the said lands be not redeemed."

The four counts demurred to are the same, except that a different parcel of land is described in each

A former demurrer to the plaintiff's declaration in this action was allowed by Taylor, C.J., and while the declaration now before us has been amended in several particulars, a reference to his judgment (5 Man. R. p. 128) shews that he, as well as the learned judge whose order is now appealed from, took the view, that the plaintiff is not entitled to maintain this action against the Municipality.

With this view I also agree for the reasons that, as it appears to me, the secretary-treasurer in selling the lands and giving the certificate cannot be taken to have been acting as the agent or servant of the Municipality, but as a public officer discharging his statutory duties, and that as the duty of executing the deeds is expressly cast upon the reeve and treasurer, and no liability is imposed on the Municipality for their neglect or omission, none will be implied by law.

In Ontario, sales of land for taxes were formerly effected by the sheriff and are now effected by the wardens and treasurers of Counties, and cases similar to the present have not therefore arisen there. But *Hawkeshaw* v. *Dalhousie District*, 7 Q. B. 590, referred to in the judgment of the Chief Justice, is an authority against a municipality being held responsible for the neglect of an officer to carry out duties with which he is charged by statute.

In the United States, the weight of authority also supports the same view. Then, there is a marked distinction drawn between purely municipal corporations, such as towns and cities, and what are called involuntary *quasi*—corporations such as counties, townships and school districts. The former, it is said, have been called into existence as corporate bodies, either at the distinct request or with the free consent of the persons comprising them for the promotion of their own local or private advantage; the latter are local sub-divisions of the state created by the legislature for the purpose of assisting in the conduct of civil government, without the particular solicitation or consent of the people who inhabit them. (*Dillon on Corporations*, sections 22 & 23.) It follows from this distinction, that the liabilities of the former class of corporation are much more extensive than the latter, and it seems now, to be a recognized principle in the several states that the latter, as regards the performance of their public duties, are not liable unless such liability has been expressly created by statute. (*Dillon*, section 963.) In *Wallis* v. *Assiniboia*, 4 Man. R. 89, this distinction between the several kinds of municipal organizations was recognized as applicable to this Province, and it was recognized too, that the defendant Municipality fell within the latter class. In the judgment of the Court at p. 102, this Municipality is thus spoken of: "It exists as a corporation, not under any special charter of incorporation, but only by virtue of the general legislative enactment. It exists as a governmental or public agency for the purpose of attending to and performing certain duties, which primarily belong to the government; from the performance of these duties it derives no profit or special advantage and the statute has not imposed on it any civil responsibility for neglect of these duties," and the conclusion the court came to was, that such a Municipality is not civilly responsible unless made so by statute.

If, therefore, such a Municipality is not liable for the neglect of a public duty imposed upon itself by statute, unless the statute provides that it shall be responsible, *a fortiori* it cannot be held responsible for the omission of its officers who personally, and not the Municipality, are charged with the performance of a public duty, as I take the execution of such deeds to be.

Under the Municipal Act, numerous powers are given to these local Municipalities if they choose to assume them, to undertake works for the special benefit and advantage of the Municipality, and as regards these, their responsibilities for the acts and omissions of their officers will be the same as in the case of strictly municipal corporations, and the decision in *Wallis* v. *Assiniboia*, applies to the public duties of municipalities as distinguished from their corporate or private duties. In the case before us, it was argued that the sale of lands under the authority of the private Act was something done by the Municipality for its own private benefit and advantage, and not in the performance of a public duty, and that therefore, the secretary-treasurer was acting as the agent and officer of the Municipality. But the sale of these lands was only a step in the collection of general municipal taxes, and the collection of such taxes by municipalities, even though the amount collected is to be expended within the municipality, is a duty that is not strictly corporate, but public, and in a sense governmental, and the officers of a municipality while engaged in performing such duties, are public officers and not merely the officers or agents of the municipality. *Dillon on Corporations*, s. 739, 740, 741; *Lorillard* v. *Town of Munroe*, 11 N. Y. 393; *People* v. *Supervisors of Chenango*, 11 N. Y. 572; *Wishart* v. *Brandon*, 4 Man. R. 453.

Under the general Municipal Act in force at the time this sale was held, and which was assented to on the same day as the private Act, lands were sold for arrears of taxes by the Judicial District Boards and not directly by the municipalities in which they were situate. The 314th section of the Act required the district or local treasurer who had held a sale to give the purchaser a certificate similar to the one set out in the declaration, and it was in pursuance of this direction, and of the direction in the private Act that the provision of the general Act should apply to sales under the private Act that the certificate was given. Now, the treasurer in giving a certificate in the case of a sale under the general Act, certainly was not in any sense the agent of the municipality in which the land sold was situated, and in passing the private Act to enable the municipalities of Kildonan and Assiniboia to take advantage of the provisions of the general Act, it is not to be supposed that it was intended that the liabilities of these Municipalities should be more extensive than if they had been in a position to have these lands in arrear for taxes sold by the Judicial Board in the ordinary way.

I have no hesitation therefor, in applying the principles above set out to the present case, and I think the learned judge was right in allowing the demurrer, and the appeal against his ruling must be dismissed with costs.

As the case of *McSorley* v. *St. John*, 6 Sup. C. 531, was strongly relied on by the plaintiff at the argument, I may remark that in that case the defendants were a strictly municipal corporation, and their officer for whom the defendants were held liable, was acting in the discharge of corporate and not public duty, and besides, as was pointed out in the judgment in the case of *Wishart* v. *Brandon*, above referred to, there was evidence to shew that the corporation had adopted the illegal act of their officer as their own.

KILLAM, J.—It is not without a great deal of hesitation that I venture to dissent from the view which all my learned brothers have taken upon the question raised on this demurrer.

It is often a matter of great difficulty to determine whether a duty imposed by statute upon an officer of a municipal corporation, is imposed upon him as an agent of the corporation or on its behalf, or as an independant public officer. In deciding such a question the words by which it is imposed and the nature and purposes of the particular statute are chiefly to be looked at.

The particular statute in question is intituled, "An Act to enable the Municipalities of Kildonan and Assiniboia to sell certain lands for taxes." It begins with the recitals that certain portions of those Municipalities were by statute added to the City of Winnipeg, that, at the time of the enactment of the statute, there were taxes in arrear upon those portions, that the Municipality of Assiniboia is entitled to the taxes in arrear at the time of the passing of the recited Act on the portion of that Municipality added to Winnipeg, and similarly with respect to Kildonan, and that it is in the interest of those Municipalities that those arrears be made available to them. Then, by the 1st section, all of such lands formerly in Kildonan, on which taxes are still unpaid "may be sold as hereinafter mentioned by the Municipality of Kildonan." By the 2nd section all of such lands formally in Assiniboia and now included in Winnipeg, on which such taxes remain unpaid, "may be sold as hereinafter mentioned by the Municipality of Assiniboia." By the 3rd section the treasurers are to publish lists of the lands and arrears of taxes and notice of the time and place appointed for the sale. By the fourth section, provision is made for the appointment by the respective municipal councils of the places of sale. By the fifth section, the treasurers of the municipalities are allowed $1 upon each parcel to be sold and to add this to the amount in arrear thereon for taxes. By the sixth section, all such sales are to be subject to the provisions of the Municipal Act of 1884 as far as may be, but except as in the Act in question set out no further formalities shall be required before such sales. By the seventh section, "the deeds for lands to be sold shall be executed by the reeve and treasurer, and under the seals of the said Municipalities respectively, and may be in the form 'A' to this Act." By the eighth and ninth sections the two municipalities are respectively declared entitled to any arrears of taxes on such lands collected by the civic corporation since the union, and authorized to sue for them. The form of deed given, begins "We of the of esquire, reeve, and of the of esquire, treasurer of the municipality of send greeting," and recites that the lands described were sold by the municipality at a certain price, and proceeds, "Now know ye, that we the said and as reeve and treasurer of the said municipality of in pursuance of said sale and for the consideration aforesaid do hereby grant," &c.

The declaration before us contains allegations bringing the case within this Act and showing that the lands were put up for sale under the Act, by the officers of the Municipality of Assiniboia, and purchased by the plaintiff's assignor, and the facts showing the plaintiff's assignor entitled to a conveyance, and a demand upon the Municipality and the reeve and treasurer, by the plaintiff's assignor, for the deed of conveyance and the refusal of it. The question then is, whether the treasurer and reeve are to execute the deed as agents and on behalf of the Municipality, or as independent public officers, whether the duty to do so is one owing by them to the Municipality or to the purchaser direct.

Now, it appears to me, that the natural inference is that in making a sale under this Act the Municipality enters into a contract with the purchaser, as in other cases of sale. The powers are declared to be given in the interest of the municipalities, the purchase money is to go to them, and they must surely be understood, being distinctly named as the vendors, to make some contract for the consideration paid by the purchaser. It may be, and probably is, the case that, under the sixth section, the purchaser should be given a certificate similar to that provided for by the 315th section of the Municipal Act of 1884, but I cannot think that the result is, that the only consideration to be given by the Municipality for the payment made to it, is this certificate and for anything more the purchaser has to look to the reeve and treasurer. By the form of deed, the conveyance is expressed to be made in consideration of the purchase money, which is clearly paid to the municipality. Any officer receiving that money, would, in case of a sale under this Act, be receiving it as agent of the municipality authorized to make the sale.

I quite agree that under the old municipal law of Upper Canada, when tax sales were made by the sheriff, he was in no sense the agent of the municipality, but an independent public officer occupying towards the municipality a position very similar to that in which he stood towards an execution creditor when selling under an execution. Probably, also, it might be found that the treasurer of a county under the later municipal law of that province, or our Municipal Act of 1883, or the treasurer of a judicial district under the Municipal Act of 1884, was named as an independent officer of the law, through whom the taxes were to be levied. I am unable, however, to agree that, even if this be so, it should outweigh the inference to be drawn from the Act in question itself. Such an inference from those other Acts is very much weakened, too, when we examine some of the other statutes of this Province upon municipal matters.

The first on such a subject was the Act of Incorporation of the Mayor and Council of the City of Winnipeg. That made no provision for sales of land for taxes, but by an amendment of the following year, 38 Vic. c. 50, ss. 80 *et seq*, power to make such sales was given, all the steps to be taken by the chamberlain, and conveyances were to be executed by the chamberlain in the name of the corporation. Similarly under the first general Municipal Act, 43 Vic. c. 1, s. 39, C. S. M. c. 64, s. 54, and also under the Act of 1881, 44 Vic. c. 3, s. 64, conveyances after tax sales were to be made by the treasurer "in the name of the municipality." A similar provision was retained in the consolidated city charter of 1882, 45 Vic. c. 36, s. 30, sub-sec. 6, but in the subsequent charter of 1884, 47 Vic. c. 78, s. 81, the corresponding words were omitted. The forms given by those statutes were, however, similar to that provided by the Act now in question; and the duties of the officers of the corporations much the same.

I do not intend now to discuss the position of the treasurer or chamberlain under those statutes. I have referred to them, only to show that there was nothing in them to indicate clearly that those officers were to act as independent public officers rather than as agents of the municipality. There being no such clear indication, I do not think that they furnish by analogy any sufficient argument to meet the inference which appears to me to be the natural one to be drawn from the special Act on which the plaintiff relies.

The case of *McSorley* v. *St. John*. 6 Sup. C. R. 531, appears to me also to show that the officer of a municipality levying taxes on its behalf, is ordinarily to be considered as its agent while acting within the scope of his duties.

In my opinion, the execution of the deed is one of the details in the carrying out of the sale which is by the second section, to be made "as hereinafter mentioned by the Municipality of Assiniboia," and the seventh section merely names the officers who, on behalf of the municipality, are to execute the deeds which, on the necessary conditions being fulfilled, the Municipality is, by its contract of sale, bound to furnish to the purchaser. In my judgment therefore, the demurrer should be overruled.

Appeal dismissed.

RE PATTERSON.

Power of appointment.—General or limited.—Execution against donee of power.

R. G. being the owner of certain lands, and M. G., (his wife,) being the owner of certain other lands, they joined in a conveyance of them to a trustee. The conveyance (22nd July, 1884,) recited that it had been agreed to settle the lands "for the benefit of themselves and their children," as thereinafter appeared. The trusts declared were to hold to such uses as R. G. and M. G. or the survivor of them should by deed or will appoint, and secondly, until and in default of appointment to the use of M. G. for life, and after her decease to the use of R. G. for life, and after the decease of both, to the use of their children in equal shares.

By a subsequent conveyance (18th November, 1885,) R. G. and M. G. appointed and conveyed the lands to R. G. upon the following trusts :—to the use of the children, with power to R. G. to appoint among them; in default of appointment and after the death of R. G. to M. G. for life, with power to her to appoint among the children; and in default of such appointment to the children then living.

By deed (8th February, 1888,) R. G. and M. G. appointed and conveyed to P., one of the children.

Held, 1. That the power of appointment in the first deed was general, and not limited, as to its objects, to the children.

2. That the second deed, therefore, was a good appointment and vested the legal estate in R. G., and the equitable in the children, with power to transfer this latter estate to one or more of the children.

3. That executions against R. G., between the first and second deeds, did not affect the title of P., the grantee under the third deed.

Reference submitted to the Court by the Registrar-General, as to the effect of certain instruments. The questions are set out in the judgment.

H. M. Howell, Q.C., for applicant, referred to the following cases on the first question :—*Lyster* v. *Kirkpatrick*, 26 U. C. Q. B. 228; *Maundrell* v. *Maundrell*, 10 Ves. 254; *Roach* v. *Wadham*, 6 East, 289; *Ray* v. *Pung*, 5 B. & A. 561; *Sugden on Powers*, 94, 97, 98; *Rex* v. *Eatington*, 4 T. R. 177; *Kennerley* v. *Kennerley*, 10 Ha. 160; *Ingram* v. *Ingram*, 2 Atk. 88; *Sugden on Powers*, 179, 181, 191; *Bishop of Oxford* v. *Leighton*, 2

Vern. 375. And on the second question, to *Wigan* v. *Jones*, 10 B. & C. 458; *Tunstall* v. *Trappes*, 3 Sim. 300; 1 & 2 Vic. c. 110, s. 13, amended by 27 & 28 Vic. c. 112, s. 1.

J. S. Hough, for children of Robert Gerrie and for Registrar General, referred to *Sugden on Powers*, 439; *Smith on Real Property*, 936, 172; *Bristow* v. *Ward*, 2 Ves. 336.

(*24th February, 1888.*)

KILLAM, J.—The Registrar-General has submitted, under section 110 of the Real Property Act of 1885, certain questions as to the construction and effect of certain deeds of conveyance upon which depends the title of the applicant to the lands in respect of which application has been made for a certificate of title.

For the purposes of the case, it is assumed that, on the 22nd July, 1884, Robert Gerrie was seized of an estate in fee simple, free from all incumbrances, in the lands.

By instrument bearing that date, made between Robert Gerrie of the first part, Margaret Gerrie, his wife, of the second part, and William Bathgate of the third part, after reciting that Robert Gerrie was the owner of the lands thereinafter by him intended to be conveyed to Bathgate to the uses thereinafter mentioned and that Margaret Gerrie was the owner in her own right of the lands thereinafter by her intended to be conveyed to Bathgate to those uses, and that it had been agreed by and between the parties thereto that they would respectively convey and settle the said lands "for the benefit of themselves and their children," as thereafter appears, Robert Gerrie and Margaret Gerrie each conveyed certain lands to Bathgate and his heirs to and for the uses thereinafter declared. The instrument then went on to declare that Bathgate and his heirs should hold, in the first place, to such uses as Robert and Margaret Gerrie or the survivor of them should by deed or will appoint, and secondly, until and in default of such appointment, to the use of Margaret Gerrie, for, and during the term of her natural life, and after her decease to the use of Robert Gerrie, for, and during the term of his natural life, and after the decease of both Robert and Margaret Gerrie, to the use of their children and their heirs, in equal shares as tenants in common.

Then, by deed dated the 18th November, 1885, Robert and Margaret Gerrie assumed to appoint and convey the lands to

Robert Gerrie, his heirs and assigns, to hold them to the uses and upon the trusts thereinafter mentioned, namely, "To the use and for the benefit of all the children of him, the said Robert Gerrie and Margaret Gerrie, with power to the said Robert Gerrie in his lifetime to appoint the said lands, tenements and hereditaments in the said indenture of settlement or the proceeds thereof to the said children or anyone or more of them in such proportions and at such time or times as he the said Robert Gerrie shall by deed or by his last will and testament direct, limit and appoint, and in default of such appointment by the said Robert Gerrie in his lifetime or by his will, then the said lands, tenements and hereditaments shall, immediately upon the death of the said Robert Gerrie vest in the said Margaret Gerrie for, and during the term of her natural life should she survive the said Robert Gerrie, with power to her, the said Margaret Gerrie, in her lifetime, to appoint the said lands, &c., to the said children or any one or more of them in such proportions and at such time or times as she the said Margaret Gerrie, shall by deed or by her last will and testament direct, limit and appoint, and in default of appointment as hereinbefore provided for by either of them, the said Robert Gerrie or Margaret Gerrie, then the said lands, tenements and hereditaments, or the proceeds thereof, shall, immediately upon the death of the survivor of them, the said Robert Gerrie and Margaret Gerrie, vest in the children then living of the said Robert Gerrie and Margaret Gerrie in equal shares." Then followed a power of sale to Robert Gerrie to enable him to maintain a home for and support, educate and advance the children.

Then, by deed dated the 8th February, 1888, Robert and Margaret Gerrie both assumed to convey and appoint the lands immediately in question to Dora J. Patterson, one of the children of Robert and Margaret Gerrie, the present applicant.

The questions submitted are (1) Whether the applicant gets a good title in fee simple from Robert Gerrie through these three instruments, or whether some other person or persons is, or are entitled to some estate or interest in the lands under those instruments.

(2) Whether executions against the lands of Robert Gerrie placed in the sheriff's hands between the 22nd July, 1884, and 18th November, 1885, and since maintained and now remaining

there in full force and effect, bind the lands named in the application.

I was attended and the questions were argued before me, not only by counsel for the applicant, but also by counsel for the other children of Robert and Margaret Gerrie.

For the latter it was strongly urged that the instrument of the 22nd July, 1884, did not give an absolute and unlimited power of appointment to Robert and Margaret Gerrie, but that it must be construed as giving power only to appoint to and among the children. For this view was cited, *Bristow* v. *Warde*, 2 Ves. Jr. 336. There, marriage articles were entered into, by which it was agreed that the wife's fortune and an equal sum advanced by the husband should be settled on the husband for the joint lives of himself and wife and, in case he should die before his wife leaving issue, on her for life and after her death, as the husband should by deed or will appoint, and in default of appointment on their issue. It was held, that this did not confer a general power of appointment on the husband, but that children only could be the objects of appointment under these articles. Lord Loughborough, L.C., there said, "The articles were made to secure a provision for the intended wife and the issue of the marriage. That is the object of all marriage articles, particularly here, where equal sums were brought in by both parties to be settled for the family: but it was contended that the power here is indefinite as to its objects. It would be a forced construction of articles to hold, that a provision to be made for children in default of appointment, to be equally distributable in the case of an appointment, should be subject to his debts; which would be the necessary consequence of holding that he had an indefinite power of appointing, only providing for the jointure of the wife; for if he had that indefinite power, it would be assets; he might appoint to any one; his creditors could affect it; and if he executed his power for the children, the children must take subject to the debts of their father. It is not the natural frame of such a settlement, nor is it the construction of the words of this."

Now, in the present case, we are not dealing with marriage articles of which the very object is to protect the wife's property from the debts and disposition of the husband, or to secure to her, in consideration of the marriage, a provision out of his estate, but with a special and peculiar instrument. The recital shows that it is not intended as a provision for wife and children alone, but the land was to be settled "for the benefit of themselves (*i.e.*, both Mr. and Mrs. Gerrie) and their children as hereinafter appears." The benefit was intended then, partially at least, for those to whom the power of appointment was reserved, while the ground of decision in *Bristow* v. *Warde* is, that the benefit of the husband in whom was the power of appointment, was not an object of the articles. Here also, the words "as hereinafter appears," served to indicate that the benefit which the parties and the children were to take was to be governed by the declarations afterward set out and to be limited to what those should show. The makers of the settlement might well reserve to themselves a power of disposition over the property, which could be exercised only by themselves jointly, for the benefit of either themselves or their children as circumstances might suggest.

A power of appointment in favor of the owner is to be construed liberally as part of his ancient estate, *Fitzgerald* v. *Fauconberge*, Fitz. 219; *Kibbet* v. *Lee*, Hob. 312.

There being a benefit intended to the grantors, there would be nothing so unreasonable in the property being left so as to be subject to their joint debts, as it would be that the wife's property settled on her on marriage and that given by the husband in consideration of marriage, should be left to be subject to his debts. Indeed when, as the recital to the second deed shows, the parties thought there was danger of Mrs. Gerrie's early decease and that difficulties threatened Mr. Gerrie, they then sought to remove the general power of appointment which would remain to Robert Gerrie alone on his wife's death. Thus, the very execution of the second deed serves to indicate what the parties thought they had effected by the first one. I think that the power of appointment given by the first instrument was general.

The second deed vests the use, and therefore, the legal estate in Robert Gerrie in fee. The other uses and limitations are, I take it, equitable only.

The appointment is made to Robert Gerrie in fee, but as trustee for the children, with power to transfer the equitable estate of the children generally to one or more or, on sale, to strangers.

It is clear, that notwithstanding the trust for the children first expressed, the whole intention of the instrument will be looked at and their equitable estates limited by the powers afterward given to the trustee. This is evident from the consideration of the nature of equitable interests. They are estates in the land only by implication. The principle originally was that the conscience of the trustee was bound by the uses or trusts expressed, but his conscience could not be bound to hold forever to the use of a party where the instrument itself expressly conferred on him a discretionary power to divert the property to another use. But taking together the whole instrument, then a party to whose use he was bound, permanently or temporarily to hold it was implied in equity to have an estate in the land to the extent thus pointed out.

That the whole intention must be looked at and a power may be given in any part of the instrument, whether before or after conveyance of the estate, appears from the following authorities: *Sugden on Powers*, pp. 97, 102, 103; *Kennerley* v. *Kennerley*, 10 Ha. 160; *Bishop of Oxon* v. *Leighton*, 2 Vern. 375; *Bateman* v. *Bateman*, 1 Atk. 421; *Read & Nashe's Case*, 1 Leo. 147; *Fitzgerald* v. *Fauconberge*, Fitz. 207; *Rex* v. *Inhabitants of Eatington*, 4 T. R. 177.

Wright v. *Pearson*, 1 Ed. 119, shows that, while ordinarily, courts of equity follow the common law in determining the characters of equitable estates conferred by deeds or wills, yet even modes of limitations which confer certain estates at law will be considered to be qualified by intention, appearing on the whole instruments to confer equitable estates of other characters.

I accept fully the principles contended for by *Lord St. Leonard* in his work *on Powers*, 8th Ed. pp. 179, 181, 195-6, with reference to delegating powers of appointment. In *Ingram* v. *Ingram*, 2 Atk. 88, and *Hamilton* v. *Royse*, 2 Sch. & Lef. 330, the authority to delegate by appointing to such uses as another should appoint was denied, but those were cases in which the powers were to appoint among certain classes of proposed beneficiaries when there was evidently confidence placed in the discretion of the donees of the powers.

Here, it appears to me that the first power to appoint was wholly unfettered and general and could be exercised directly or indirectly. Under it Mr. and Mrs. Gerrie could have appointed the lands to themselves or to one of themselves absolutely in fee, when the appointees or appointee could at once have proceeded to convey them absolutely or to such uses as any one should appoint, and it would be extremely absurd if such were the case, that they could not appoint at once to Mr. Gerrie in trust for such, among a class of beneficiaries, as he should appoint. The power indeed, resembles the full power of revocation in the instrument in question in ***Fitzgerald*** v. ***Fauconberge***, Fitz. 207.

By the third instrument Robert Gerrie not only appointed to the applicant, the equitable estate in fee, but he also conveyed to her the legal estate vested in him by the second instrument.

In my opinion, the applicant thus became possessed of an absolute estate in fee simple both at law and in equity in the lands comprised in the third deed, and the first question must be answered accordingly.

Then, upon the second question, there can be no doubt. Such a power of appointment is not within the 101st section of The Administration of Justice Act, 1885, which specifies the effect of executions against lands. The Imperial Act, 1 & 2 Vic. c. 110, s. 13, which made judgments affect powers of appointment applied by its terms only to powers which the debtor might, without the assent of any other person, exercise for his own benefit. Such was, evidently, not the power conferred by either the first or the second instrument.

The second question must, therefore, be answered in the negative, though it must be understood that this does not affect the question of the right of creditors to attack these instruments, as void, under the Statute of Elizabeth relating to transfers made to defeat delay or defraud creditors.

CLARKE v. SCOTT.

(IN APPEAL.)

Homestead and pre-emption.—Agreement to convey.—Lien of vendee for purchase money.—Laches.—Issue to try facts.—Costs.

A statute declared that all assignments and transfers of homestead rights before the issue of the patent except, &c., shall be null and void. By another clause the homesteader might acquire a pre-emptive right to other lands, "but the right to claim such pre-emption shall cease and be forfeited upon any forfeiture of the homestead right."

A homesteader before patent agreed to sell both homestead and pre-emption. $50 was paid at once and the balance was to be paid when a deed given with a good title.

The vendor applied for a certificate of title to the pre-emption and the purchaser filed a caveat, and, on it, a petition claiming a lien for the purchase-money.

Held, 1. That the agreement was not illegal as to the pre-emption.

2. That the Crown not having taken advantage of the forfeiture, but issued the patents, the purchaser acquired a lien upon the pre-emption, although probably not on the homestead.
3. The petition was defective in not showing the petitioner's claim of title.
4. Such a petition need not show upon its face that it is filed in time.
5. Lapse of time which would disentitle a purchaser to specific performance may not affect his lien.
6. A disputed question of fact not tried upon affidavit, but an issue directed and form given.
7. No costs of appeal given when point upon which case disposed of was not argued.

One John Scott made application to the Registrar-General to have his title to the NW¼ of section 28, township 2, range 8 west of the principal meridian registered under the provisions of The Real Property Act of 1885 and amendments thereto Thereupon Sarah Ann Clarke filed a caveat, following that up by presenting to the Court a petition as provided for by the rules and regulations in Schedule H. of the amending Act, 50 Vic, c. 11.

The petition alleged that on the 27th of January, 1882, one Joseph Scott entered into an agreement in writing for the sale to her of the west half of section 28 for the sum of $3000, payable $50 at the date of the agreement, and the balance as soon as the said Joseph Scott should have obtained a recommendation for patent and should execute a deed to the petitioner with good title free from encumbrances, which agreement was registered in the Registry Office. The petition further alleged that the $50 was paid at the time of the execution of the agreement and shortly after a further sum of $300 on account of the purchase-money, that Joseph Scott had never made title to the petitioner nor tendered or offered to her a deed of the land, and submitted that by reason of the agreement she had an equitable estate or interest in the land, and was entitled to have it declared that the several payments on account of the purchase money with reasonable interest as damages are a charge or incumbrance thereon. The prayer was that it might be declared that the petitioner had an equitable estate or interest in the land, and that the several payments of purchase money with interest were a charge on the land.

This petition, affidavits having been filed in support of it, and in opposition thereto, came on for hearing before Dubuc, J. who made an order dismissing it with costs. From this order the petitioner appealed.

J. H. D. Munson for the caveatee, offered to make a conveyance to the petitioner upon payment of the balance of the purchase-money.

H. M. Howell, Q.C., for appellant Clarke, cited the following cases:—*Thayer* v. *Street*, 11 U. C. C. P. 243; *Rogers* v. *Lake*, 9 U. C. Q. B. 264; *Baker* v. *Bulstrode*, 1 Mod. 104; *Wythes* v. *Lee*, 3 Drew. 396; Dominion Lands Act, 1879, s. 34, ss. 15, also s. 219; Dominion Lands Act, 1883, s. 36.

J. H. D. Munson for respondent Scott, cited, *Crotty* v. *Vrooman*, 1 Man. R. 149; *Ewing* v. *Obaldiston*, 2 M. & C. 88; *Fry on Specific Performance*, 209; *Harris* v. *Rankin*, 4 Man. R. 115; *Dobie* v. *Temp. Board*, 1 Cart. 351; 7 App. Cas. 136; B. N. A. Act, s. 91, ss. 1; *Hook* v. *McQueen*, 4 Gr. 236; *Rich* v. *Gale*, 24 L. T. 745; *Howe* v. *Smith*, 27 Ch. D. 89.

(*21st December, 1888.*)

TAYLOR, C.J.—The learned Judge seems to have made the order dismissing the petition upon the ground that the agreement set up had been by mutual consent rescinded and abandoned. This is asserted in the affidavit of Joseph Scott and is denied by the agent of the petitioner. It seems to me that, if that is the question upon which the rights of the parties are to be determined, it is one not proper to be disposed of upon the affidavits before the Court, but is rather matter for further enquiry and for a proceeding under rule 6 of schedule H.

The objection is now taken that the petition does not show, as it ought to have done, that it was filed within the proper time. This was not taken upon the argument in chambers. It does not seem necessary that it should show this upon its face. An objection that the proceeding is taken too late, would seem properly to come from and be supported by evidence on the part of the respondent.

Dealing with the case upon the merits, the question must be considered whether the agreement between the petitioner and Scott was, or was not, illegal. If illegal, she could not enforce specific performance of it, and if she could not on that account, enforce it, she can have no lien, *Sugden, V. & P.* (14th ed.,) 672; *Ewing* v. *Osbaldiston*, 2 M. & Cr. 88. If not illegal, even if she could not on account of laches, enforce specific performance, I presume no delay short of what would bar her claim under section 22 of 46 & 47 Vic. c. 26, would prevent her from taking proceedings to enforce a lien.

It appears that the land in question was, at the time of the agreement, Dominion land within the meaning of the "Dominion Lands Act, 1879," Scott acquired any interest he had in the land in 1879, so the rights of the parties and the power of dealing with the land are governed by the terms and provisions of that Act. At the time he entered into the agreement he had resided on his homestead for two years and nine months, and would in three months more have been entitled to receive a recommendation for a patent. He seems, however, to have determined to avail himself of the provisions of sub-section 15 of section 34 of the Act, and to obtain a patent before the expiry of the full three years by paying the Government price therefor at the time of entry. In *Crotty* v. *Vrooman*, 1 Man. R. 149, I held that the payment of the Government price under the provisions of this sub-section 15, did not convert the transaction from one of homestead entry to an ordinary case of purchase. For the reason I then gave, I am still of the same opinion.

The argument of counsel in this case proceeded entirely upon the assumption that the land now in question was land taken up by Scott as a homestead, but such is not the case. From his affidavit it appears that he was entered for the land described in the agreement, the west half of section 28, of which the SW¼ was his homestead and the NW¼ was his pre-emption, and the latter is the land now in dispute.

Had the SW¼ been the land in dispute, I have no doubt the case of *Rankin* v. *Harris*, 4 Man. R. 115, already decided by this Court, settles the question against the petitioner. We there held the assignment of a homestead right previous to recommendation for patent to be void, not only as between the homesteader and the Crown, but also as between the parties to the transaction.

How does the case stand as to land for which the party was entered as a pre-emption. In the case of a homestead the words of The Dominion Lands Act are, "All assignments and transfers of homestead rights before the issue of the patent, except as hereinafter mentioned, shall be null and void, but shall be deemed evidence of the abandonment of the right. . . . Provided that a person whose homestead may have been recommended for patent by the local agent, the conditions in connection therewith having been duly fulfilled, may legally dispose of and convey assign, or transfer his right and title therein." In the case of a pre-emption, what the statute says is, (section 34 sub-section 1,) "But the right to claim such pre-emption shall cease and be forfeited, together with all improvements on such land, upon any forfeiture of the homestead right under this Act."

The first Dominion Lands Act, 35 Vic. c. 23, D., passed in 1872, provided in section 33, sub-section 1, that, "Any person . . . . shall be entitled to be entered for one quarter section or a less quantity of unappropriated Dominion lands for the purpose of securing a homestead right in respect thereof." Subsection 6 provided that "Persons owning and occupying Dominion lands may be entered for other land lying contiguous to their lands, but the whole extent of land including that previously owned and occupied, must not exceed one hundred and sixty acres." Then came sub-section 17, which was the same as subsection 17 of section 34 Dominion Lands Act 1879, except as to the proviso permitting assignment after recommendation for patent. By the Act of 1874, the 37 Vic. c. 19, D., sub-section 1 of the Act of 1872 was repealed and another sub-section substituted for it, providing that the entry of any person for a homestead should entitle him to receive "an interim entry for any adjoining quarter section then unclaimed," and concluding, "but the right to such interim entry shall cease and be forfeited together with all improvements on the land upon any forfeiture of the homestead right under the 14th sub-section of this section; and the provisions of this section applicable to homestead rights shall apply to land for which an interim entry is obtained except as herein varied."

The sub-section 14 referred to was one which provided for a forfeiture of a homestead by the settler voluntarily relinquishing his claim, or being absent from the land for more than six months in any one year. Then, by the Act of 1876, the 39 Vic. c. 19, D., that sub-section of the Act of 1874 was repealed and another very similar to sub-section 1 of section 34 in the Act of 1879 substituted, concluding as the latter does, "But the right to claim such pre-emption shall cease and be forfeited together with all improvements on the land, upon any forfeiture of the homestead right under this Act."

Plainly the case of a homestead and the case of a pre-emption are governed by different rules. In the case of a homestead, an assignment or transfer of the right is void, and works a forfeiture of the right. In the case of the other, any forfeiture of the homestead right will deprive the homesteader of the right to claim the pre-emption. An assignment or transfer of it does not seem to be void. The statute does not say that it shall be so, and the change in language between the Act of 1874, and the Acts of 1876 and 1879, would seem to indicate an intention that there should be this difference. No doubt the doing of anything which will work a forfeiture of the homestead right will prevent the homesteader from claiming the pre-emption, but the provisions of sub-section 1 seem to apply only as between the Government and the homesteader. Where the Government does not take advantage of something which would prevent him from claiming the pre-emption, but as in the present case, issues the patent for it, any agreement before entered into between the homesteader and a third party will become operative and effectual. If that is so, then the agreement between the petitioner and Scott is, as to the land now in question a valid agreement.

There are, however, two matters still in dispute between the parties. The one is, Scott insists that the agreement was rescinded by mutual consent and this the petitioner denies. The other is, the amount for which a lien may be claimed. There is, I suppose, no dispute as to the $50 paid when the agreement was executed, but there is as to a further sum of $300 said to have been advanced or paid afterwards. Both of these are proper questions for enquiry, or for an issue under rule 6 of Schedule H.

In my opinion the order of the 4th of July, 1888, should be reversed, and an order now made directing an issue to be tried before a judge without a jury, for the purpose of determining the matters in dispute between the parties.

As the petitioner has not succeeded upon her contention that the proceedings under the Real Property Act were improper, and in fact only succeeds for reasons not argued, the appeal should be allowed without costs. The costs of the proceedings in chambers should be reserved until the issues are disposed of.

KILLAM, J.—The petition is defective in not showing that Joseph Scott, under whom the petitioner claims ever acquired or had any title to the lands or that John Scott claims or is entitled only through and under Joseph Scott in such a way as to make the alleged claim of the petitioner valid as against John Scott the applicant. No objection, however, has been taken to the petition as deficient upon this ground, but the argument before us has been based wholly on the assumption that Joseph Scott had obtained a homestead entry for the land and had become duly entitled to the land under the Dominion Lands Act and that he had then conveyed it to John Scott.

Upon the argument counsel for John Scott offered to make conveyance to the petitioner upon payment of the balance of the purchase money.

Although it is not clearly shown that the quarter sections were recommended for patent and patents issued for both, I think that we may, in view of the course taken, treat it as still open to the petitioner to establish a title to the alleged lien as against John Scott.

It appears that the agreement mentioned in the petition was made and fifty dollars paid on account of the purchase money, but payment of the three hundred dollars is disputed. Some affidavits are filed to show a verbal rescission or an abandonment of the contract by the petitioner, and other affidavits in contradiction are filed by her.

The Scotts have always remained in possession of the lands, and there is no claim by the petitioner of any demand on her part for the fulfilment of the contract since within a short time after the making of the agreement. The learned judge found that the contract had been abandoned by the petitioner and dismissed the petition on that ground.

It is now claimed that the petition should have alleged and the petitioner should have proved—what is neither alleged nor proved—the date of the filing of the caveat that it might appear that proceedings were taken within sufficient time to prevent the lapsing of the caveat under section 107, sub-section 5 of the Real Property Act, 1885, as amended by 50 Vic. c. 11, s. 37, by which, "After the expiration of one month from the receipt thereof such caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged, shall within that time have taken proceedings under the rules in schedule H. of this Act, to establish his title to the land or his right as set out in such caveat."

It appears to me that the petition goes far enough in alleging the filing of a caveat, and that it is for the party opposing the petition to show that the caveat has lapsed if such be the fact.

Then it is claimed that the agreement was illegal as being in contravention of the provisions of the Dominion Lands Act prohibiting transfers of homestead rights. Now it is to be noticed that this transaction is not affected by the Dominion Lands Act of 1883, as Scott would have completed his term of residence and become entitled to his lands before that Act was passed. The only provisions in the Act of 1879 which can affect the transaction are those contained in sub-sections 1 and 17 of section 34. By the latter sub-section, "All assignments and transfers of homestead rights before the issue of the patent except as hereinafter mentioned shall be null and void, &c."

The exception referred to is found in the provision allowing alienation after recommendation for patent. The 1st sub-section is the one which provides for the pre-emption entry, and it concludes, "But the right to claim such pre-emption shall cease and be forfeited together with all improvements on such land upon any forfeiture of the homestead right under this Act." There is then, no prohibition of a transfer or assignment of the pre-emption right or of an agreement for the transfer of either homestead or pre-emption. It remained for the Act of 1883 to declare agreements void. The case then, is very different from *Harris* v. *Rankin*, 4 Man. R. 115, in which only the homestead was in question and the claim was that the homestead entry was made on behalf of the wife of the homesteader, and that she was beneficially entitled to the land all the time and the husband merely her agent to possess and cultivate it and obtain title to it, which would be a gross fraud upon the Act. Here the agreement was not in itself made illegal and void by the statute, and it was an agreement to do a lawful thing, to transfer after recommendation for patent, when a transfer would be authorized by the statute.

The position then was that, so far as concerned the pre-emption and it is with the pre-emption that we have particularly to deal, Scott's application being only for a certificate of title to the pre-empted quarter section—Scott had a contract with the Crown for its purchase which was subsequently carried out and patent granted to him, and while he was holding under the contract he entered into another contract to sell the quarter section, conveyance to be made on his completing his purchase from the Crown, and upon the latter contract he received a portion of the purchase money. Now, however, the provision against a transfer of the homestead right might operate to prevent the acquiring of a lien upon the homestead, there would, upon the ordinary principles of a court of equity be a lien created upon the pre-emption as between Scott and the petitioner to secure the portion of the purchase money thus paid. *Prima facie* Scott's conveyance of the land to another party would be such a breach of his contract of sale as to entitle the petitioner to rescind the contract and enforce her lien for the amount paid by her.

Undoubtedly it was for Scott on obtaining his title, to notify the petitioner who would not be in a position to learn of it otherwise, and any default would therefore be on the part of Scott. Except the alleged abandonment there was no default on the part of the petitioner so far as appears from the evidence before us. But while this was the case, the petitioner has evidently lost by her laches, the right to enforce specific performance of the contract. It was made in 1882, and the caveat was only filed in March, 1888, and no attempt is made to account for delay. After such unexplained delay a court of equity would refuse to enforce specific performance, leaving the petitioner to her action at law upon the contract. In equity the petitioner would have a right merely to rescind on the ground of the express breach made by the vendor in conveying away the land, and enforce her lien for the moneys paid, or, if there were no such default, to give the vendor a reasonable time within which to complete the contract and on his failure to comply, to rescind and enforce the lien. Both by his default and by his laches the vendor has lost all right to enforce specific performance.

The petition does not set up the breach by alienation. It does not show that time was of the essence of the contract, as it could indeed, hardly be in this case. It does not show that such notice had been given as to make time of the essence of the contract. Therefore, a case of rescission is not made and the court is not asked to enforce the lien claimed. The petition merely asks a declaration that the petitioner has an equitable estate or interest in the lands and that the purchase moneys paid are a charge on the lands. By rule No. 1 in schedule H. of the Act of 1887, 50 Vic. c. 11, the petition is to state specifically what estate, interest or charge the caveator claims, and the only specific claim is that of the lien. The general claim of an equitable estate or interest cannot be considered.

In *Dinn* v. *Grant*, 5 D. G. & S., 4 it was held that by abandonment of the contract the purchaser loses not only the right to specific performance, but also any lien for purchase money paid. I have not, however, been able to find any authority upon the effect of mere laches, and as none has been cited, I feel justified in assuming that the lien would not be lost by mere delay to enforce its performance until barred by the Statute of Limitations unless the position of the parties had been changed in consequence.

The whole claim of the petitioner appears, therefore, to turn upon the question of there having been a rescission by agreement or at any rate, an abandonment of the contract by the petitioner. This question of abandonment is distinct from that of mere laches though the laches is important evidence in support of the claim of abandonment.

It appears to me that the learned judge was in error in deciding the question of abandonment upon these affidavits and that an issue should have been directed to try the question, and I think that this should now be done. Probably the best form of issue to direct would be one whether, at the time of the filing of the caveat, the petitioner was entitled to a lien or charge upon the lands as against John Scott for the purchase money paid by her. There must also be an issue as to whether the additional three hundred dollars were paid as claimed. As in the latter the petitioner should be plaintiff, it will be best that she be so in both, that they may be tried together upon the same record. There is an additional reason for making her plaintiff in the former issue and putting her to proof of her case as against John Scott on account of the looseness of the petition and the very slight evidence, supplied by Scott and not by the petitioner, of the granting of the recommendation and the issue of the patent. This evidence is so vague that if supplied in the same terms by the petitioner it could not be taken as proof, but furnished as it is by the other party, I feel that we are warranted in regarding it so far as to allow the petitioner the issue.

On the part of the petitioner counsel argued strongly against her being compelled to proceed under the Real Property Act to assert her title, but there is a clear discretion given to the Registrar-General by the 17th section of the Act of 1887, to take the course he has pursued, and in this case he appears to have exercised his discretion wisely, whatever might be proper in some of the extreme cases suggested by counsel.

As counsel stated that the application was made to the court largely to test the authority of the Registrar-General in this respect and it fails upon this point, and as the practice under the Act is new, I think that no costs of the application to the court should be allowed, but that the costs of the hearing in chambers and all further questions arising under the petition should be reserved until after the trial of the issues to be then disposed of in chambers.

Bain, J., concurred.

WATTS v. ANDERSON.

(In Appeal.)

Commission.—Interrogatories.—Suppression.—Waiver.

Under an order to take evidence on commission the evidence can only be taken on interrogatories unless otherwise ordered.

Under such an order a commission was issued to take the evidence *viva voce.*

Held, 1. That the commission was irregular and the depositions were suppressed.

2. That the objection had not been waived by cross-examining the witnesses after raising the objection and subject to it; nor, by omitting to object after the commission had been informally returned, upon an application to send it back for a proper return, or upon a further application to extend the time for the return of the commission.

3. *Per* Bain, J.—Waiver as a general rule is doing something after an irregularity committed, when the irregularity might have been corrected before such act was done. It may consist, too, of lying by, and allowing the other party to take a fresh step in the case.

Appeal by defendant against an order of Mr. Justice Killam, refusing to suppress a commission.

C. P. Wilson and *R. W. Dodge* for defendant, referred to the following cases: *Mulligan* v. *White,* 5 Man. R. 40; *Herr* v. *Douglas,* 26 U. C. Q. B. 357; *Hall* v. *De Tastet,* 6 Madd. 269; *Darling* v. *Darling,* 18 Can. L. J. N. S. 424; *Brydges* v. *Branfill,* 12 Sim. 334; Manitoba Statute, 1886, c. 23, s. 2; Imperial Statute, 1 Wm. 4, c. 22, s. 4, s. 7; 15 & 16 Vic. c. 86, s. 23; *Re Earles Trust,* 4 K. & J. 30.

W. R. Mulock for plaintiff, referred to *Hodges* v. *Cobb*, L. R. 2 Q. B. 652; *Hay* v. *Hunt*, 1 Ont. Pr. R. 44; *Hall* v. *De Tastet*, 6 Madd. 269 is overruled by *Shovey* v. *Shebelli*, 1 Tyr. 505 (n); *McIntyre* v. *Canada Company*, 2 Ch. Ch. R. 464; *Clay* v. *Stephenson*, 7 A. & E. 185; *Boelen* v. *Melladew*, 10 C. B. 898; *Passmore* v. *Harris*, 4 U. C. Q. B. 344; *Beard* v. *Steele*, 34 U. C. Q. B. 43; *Liverpool Borough Bank* v. *Turner*, 2 D. F. & J. 508; Con. Stat. Man. c. 7, s. 69 and 70; *Thompson* v. *Cummings*, 6 O. S. 106; *Beard* v. *Steele*, 44 U. C. Q. B. 43; *Bleach* v. *Odell*, 4 O. S. 8; *McLeod* v. *Torrance*, 3 U. C. Q. B. 146; *Frank* v. *Carson*, 15 U. C. C. P. 151; *Harrington* v. *Fall*, 15 U. C. C. P. 546.

(*21st December, 1888.*)

TAYLOR, C.J.—The defendant obtained a summons in Chambers to suppress on several grounds, depositions taken under a foreign commission issued by the plaintiff. On the return of the summons the learned Judge refused to suppress the depositions, but made an order for the commission being returned to the commissioner to have the certificate of the execution thereof signed by him. From this order the defendant now appeals.

The principal objection argued in Chambers seems to have been that the evidence was taken, not on interrogatories, but *viva voce*, while the order for the commission did not provide for its being so taken. In *Mulligan* v. *White*, 5 Man. R. 40, where, as here, the order made no provision for the mode of examination, depositions which had been taken *viva voce* were suppressed. The 1 Wm. 4, c. 22, s. 4, gave the courts power to order the issue of a commission for the examination of witnesses out of the jurisdiction "by interrogatories or otherwise." Archbold says the usual course is to order the examination upon written interrogatories, but a power is sometimes given to put additional questions *viva voce* upon facts arising out of the answers to the interrogatories, and a power is frequently added to enable the opposite party to cross-examine the witnesses *viva voce*. In *Hargrave* v. *Hargrave*, 4 C. B. 648, Wilde, C.J., speaking of a commission to examine on interrogatories, referred to it as a commission with the ordinary powers only. In *Simms* v. *Henderson*, 11 Q. B. 1015, the evidence was taken *viva voce*, but the form of the order which is given, 12 Jur. 775, shows that it was a consent order. So, in *Williamson* v. *Page*, 1 C. B. 464, the commission was a joint one and by consent. That permission to put additional *viva voce* questions even, is not a matter of course, but requires a special order seems apparent from *Pole* v. *Rogers*, 3 Bing. N. C. 780. In Ontario evidence on foreign commissions has usually been taken on interrogatories, and has I believe, always been so unless the order expressly provided that it should be taken otherwise. See *Watson* v. *McDonald*, 8 Ont. Pr. R. 354. Even in Chancery, notwithstanding the terms of the Chancery Act, 1 Wm. 4 c. 22, s. 5, and the 53rd Order of May, 1850. "No written interrogatories for the examination of either witnesses or parties, either before or after decree, shall henceforward be filed, except by direction of the Court," it was decided by *Anon*, 2 Gr. 152, that in the case of foreign commissions the examination was to be as formerly upon interrogatories. Ever since, at all events until the Judicature Act, such commissions have always, except by consent, been for examination by interrogatories, *Gordon* v. *Elliott*, 2 Ont. C. R. 471.

The learned Judge however, held that the defendant had waived the right to object. Now, when did the waiver occur? Not when the examination began to be taken, for his agent then attended and took the objection. But it is said he certainly waived the objection by cross-examining the witness. I do not think so. The authorities are against such a conclusion. In *Ringland* v. *Lowndes*, 17 C. B. N. S. 514, it was held that a party attending before an arbitrator and protesting that he was proceeding without authority was not by cross-examining the witnesses of the opposite party, and himself calling witnesses, precluded from afterwards prosecuting his objection. The same thing seems to have been held in *Davies* v. *Price*, 11 L. T. N. S. 203. In *Holt* v. *Meddowcroft*, 4 M. & S. 467, a rule having been obtained for a special jury, but no special jurymen appearing, the case was tried by a common jury and the plaintiff had a verdict. The defendant's counsel objected to the case being so tried, but the judge determining to try the cause, he appeared and made a defence, and it was held that he was not thereby precluded from moving for a new trial on that ground. Especially should not a strict rule as to waiver in such a matter be applied in the case of an agent with only limited powers and instructions acting in a foreign country. The commissioner having decided, notwithstanding his protest, to proceed, he might well hesitate before determining to withdraw from the examination, and rather make up his mind to continue in attendance and cross-examine subject to his objection. To a person in his position the language of Lord Ellenborough in *Holt* v. *Meddowcroft*, is exceedingly applicable. "I cannot agree that it amounts to a consent on the part of the defendant, because being as it were, tied to the stake, and dragged on to trial, he endeavours to make the best of it."

Neither can it I think, be said that the defendant waived this objection by not taking it when the commission and depositions were first in July returned improperly endorsed, and the plaintiff made on the 10th of July an application for an order to have it returned to the commissioner for correction.

The commission was not then opened, so the time for taking objections to it, and moving to suppress it, had not arrived.

The defendant having, when the evidence began to be taken, objected to the mode of taking it, was, in my opinion, entitled to rely upon that objection as open to him to be urged when the proper time came and I cannot see that he has in any way waived his right to urge the objection.

Numerous other objections were taken as to the examination of witnesses and the taking of evidence generally out of the jurisdiction. With these it is not necessary to deal at present.

The evidence has been taken *viva voce*, when it could only be taken by interrogatories, and the defendant has moved to suppress the depositions within the time allowed him for doing so. He is in my opinion, entitled to succeed. The appeal should be allowed with costs, the order made in Chambers set aside and an order made suppressing the depositions with costs.

Bain, J.—Although the commission itself in this case directed that the examination should be *viva voce*, the order under which it was issued was silent as to the mode of examination, and I agree with the decision of Killam, J., in *Mulligan* v. *White*, 5 Man. R. 40, that the absence of any direction in the order does not authorize the issue of a commission for a *viva voce* examination. There is, therefore, the same irregularity that there was in *Mulligan* v. *White*, and as in it the commission and depositions were suppressed, I think the same practice should be followed here, unless the plaintiff has succeeded in shewing, as he contends, that the defendant must be taken to have waived the irregularity.

There is nothing before us to shew that until his agent attended on the examination he knew, or could have known, that the commission directed a *viva voce* examination. The agent protested before the examination began that the evidence could not be taken *viva voce* as the order did not authorize it, and although he cross-examined the witness, he did so subject to his protest or objection. A protest against a proceeding when the party protesting afterwards goes in and takes part in the proceeding, will not always save a waiver, but in this case it seems to me the agent, who was a foreigner and not acquainted with the practice of our Courts, did all that could reasonably have been expected of him when he expressly took the objection before taking part in the proceedings, and by taking part I do not think he waived the irregularity. See *Holt* v. *Meddowcroft*, 4 M. & S. 467, *Davis* v. *Price*, 11 L. T. N. S. 203.

An irregularity may be waived as much by the party complaining of the irregularity lying by and allowing the other party to take a fresh step in the case, as by taking a fresh step himself, and the plaintiff says that, as the defendant did not point out either to him or to the judge when the order of the 10th July for the return of the commission to be properly endorsed was made, or when the order of the 30th July for the extension of the time for its return was made, that he intended to move against the commission for this irregularity, he was precluded from doing so afterwards.

It appears that an envelope supposed to enclose this commission and examination was received at the Prothonotary's office, and the plaintiff gave notice to the defendant to attend and open it. The defendant objected that the envelope in question was not endorsed with any style of cause, and thereupon the plaintiff's attorney applied to a judge for and obtained an order that this envelope should be sent back to the commissioner to be indorsed. The defendant's solicitor at the request of the plaintiff's solicitor attended before the judge when the application was being made and merely stated he did not consent to anything. Then, on the 30th of July, the order extending the time for the return for a further period of two weeks was made apparently on summons in the usual way. The commission and examination having again been returned to the Prothonotary's office, it was duly opened on the 11st of August, and on the 17th of August the defendant took out a summons to suppress them, on this and the other grounds set out in the summons. On the return of the summons, the learned Judge held that the defendant had waived the irregularities and gave the plaintiff the costs of the application and merely ordered that the commission should be sent back to the commissioner to have his certificate corrected.

I am unable to agree with the learned Judge whose order is appealed from, that the defendant's silence on these occasions amounted to a waiver of this irregularity. The plaintiff, through his agent who attended on the examination, had notice that the defendant had taken this objection to the examination, and he knew too, that by our practice the proper time for the defendant to move to give affect to his objection, was within one week after the commission had been opened. The defendant himself knew that he could not move against the commission till after it had been returned and opened, and I see nothing in the fact of his not repeating his objection on the occasions referred to that would justify the plaintiff in thinking that he would not try to give effect to it at the proper time. In *Archbold's Practice*, p. 1474, it is laid down as a general rule "that waiver is doing something after an irregularity committed, when the irregularity might have been corrected before such act done." Now, in this case, the irregularity had been committed and could not have been remedied, and the objection having once been taken, the plaintiff had either to abandon the examination, or contend as he has done, that the objection was not a good one. There is no reason to doubt but that this latter course was the one he intended to adopt from the first, and there is nothing to lead me to suppose he was in any way misled by the defendant's silence, or that his action was in any way influenced by it. And as far as the judge is concerned, had the objection been made to him, he could only have said that until the papers were before him he could not consider it.

On the whole, therefore, I am of opinion that the defendant did not waive this irregularity, and that on this ground the appeal should be allowed.

DUBUC, J., concurred.

Appeal allowed with costs.

RAJOTTE v. THE CANADIAN PACIFIC RAILWAY CO.

(IN CHAMBERS.)

Jury notice.—Withdrawal of replication in order to add.—Prejudice of jury against defendant.

Where by inadvertence replication is filed without a jury notice, leave may be given to withdraw it in order to refile it with a notice of jury; and the fact that the defendants allege that, owing to excited feeling, a fair trial cannot be had before a jury, will not be an answer to the application.

R. Cassidy, for plaintiffs.

J. A. M. Aikins, Q.C., for defendants.

(*6th March, 1888.*)

TAYLOR, C.J.—This is a summons calling on the defendants to show cause why the plaintiff should not be at liberty to take the replication or joinder off the files, and refile the same with a notice requiring that the issues joined be tried by a jury.

It is argued that the Conrt has no power to order the adding of a jury notice where one has not been given. The statute it is said, has given the Court power to strike out a jury notice, and this being expressly given, shows it was intended there should be no power to do the opposite, to add a jury notice. Even if that objection should be a sound one, I see no reason why the same object cannot be effected in the way sought here The plaintiff has a right to give the notice with his replication, and if he is allowed to take his present replication off the files and file another, he can then give the notice.

The 24 Geo. 2, c. 44, s. 4, gave a magistrate, if he had neglected to tender amends before action brought, power to pay into Court at any time before issue joined such sum of money as he should think fit. In *Devagues* v. *Boys*, 7 Taunt. 33, the defendant pleaded in Hilary Term and in the following vacation the plaintiff delivered the issue with notice of trial. Next Trinity Term the defendant moved for leave to withdraw his plea, and plead *de novo* paying money into Court. The Court held that, though it was not in their power to enable a defendant to pay money into court after issue joined, *i. e.*, not after issue was effectually joined, yet it was in the power of the Court to rescind that which the defendant had hastily and inadvertently done, and to send the parties back to an earlier stage of the cause when they might plead again and pay the money into Court, and made the order accordingly.

Here, there is no doubt from the affidavit filed by the plaintiff's attorney, that filing the joinder without a jury notice, was something hastily and inadvertently done. The Court is always anxious to relieve from the effects of a slip on the part of an attorney where the opposite party is not injured.

But, the filing of a jury notice is opposed further, on the ground that this is not a proper case for trial by a jury, but one which would more properly be tried by a judge. I do not think the grounds stated, that expert evidence must be given as to the construction of railway frogs, and that there are mixed questions of law and fact, are such as would warrant the plaintiff being deprived of trial by jury if he desire it. I venture to say that of every one hundred cases of the same character as the present, ninety-nine at least have been tried by a jury.

Another ground is taken, that owing to excited feeling against the defendants they cannot have a fair and impartial trial if the case is submitted to a jury.

In England, the United States and Ontario, efforts have often been made to have a venue changed on the ground of prejudice against a suitor, but they have rarely succeeded. In *Sally* v. *Ellison*, 8 Dowl. 266, strong political prejudice was held not sufficient. In *Salter* v. *McLeod*, 10 C. L. J. O. S. 76, where the same ground was alleged, the remedy the Court said would appear to be the summoning of a special jury. In *Zobieskie* v. *Bander*, 1 Caines. 487, the venue was changed in an action for slander, though affidavits were filed that the words were spoken during a political contest and that on account of the violent party spirit which prevailed in the city to which venue was proposed to be changed, the plaintiff believed an impartial trial could not be had. So, in *New Windsor Turnpike Road* v. *Wilson*, 3 Caines 127, a motion to change a venue was refused though the plaintiff put in an affidavit that from the prejudices of the city against turnpike roads, an impartial trial could not be had.

The court refused the motion, but said the reason on which it was founded might be a good one for asking a struck jury. In *Bowman* v. *Eley*, 2 Wend. 250, the venue was changed, though opposed on the ground of the excitement which prevailed in the city to which it was sought to change it on the subject of masonry.

Here the defendants can, if they so desire, have the case tried by a special jury.

I think the plaintiff should be given leave to withdraw his joinder on payment of $5 costs.

McLELLAN v. MUNICIPALITY OF ASSINIBOIA.

[DUBUC, J,—November, 1887.]

Particulars of residence, &c., of plaintiff's husband.

Particulars of the residence, &c., of the husband of a plaintiff married woman ordered to be delivered.

Application by defendants for the particulars of the residence &c., of the husband of the plaintiff.

A. Howden shewed cause.

L. G. McPhillips contra, referred to *Johnson* v. *Birley*, 5 B. & Ald. 540; *Glynn* v. *Kirby*, 1 Str. 402; *Marshall* v. *Ruttan*, 8 T. R. 546.

DUBUC, J., after reserving judgment, made the order as asked.

ATTORNEY-GENERAL v. FONSECA.

[KILLAM, J.—10th August, 1888.]

Allowance of bond.—Form of bond.—Style of cause.

On an application for the allowance of a bond for security for the costs of an appeal to the Supreme Court, the *onus* of satisfying the Court of the sufficiency of the security, is upon the appellant.

Such a bond ought to be in favor of the respondent and not of the Registrar of the Court. One surety may under certain circumstances be sufficient.

In an affidavit, one defendant was named "Hon. John C. Schultz." In all other proeeedings it was John Christian Schultz.

Held, That the affidavit could not be read.

G. W. Baker and *C. P. Wilson*, for informant.

Chester Glass, for defendant Fonseca.

J. Stewart Tupper, for defendant Schultz.

HOOPER v. BUSHELL.

[TAYLOR, C.J.—16th May, 1888.]

Costs.—Old affidavit used on new motion.

Upon an interlocutory application, defendant refiled material used by him upon a previous application, which he had made and which had been refused without costs. An order was granted upon the new application with costs. Upon taxation, the master allowed the costs of preparing the old material, but upon appeal,

Held, That such costs were improperly allowed.

R. W. Dodge, for plaintiff.

R. Cassidy, for defendant.

CANADIAN PACIFIC RAILWAY CO. v. NORTHERN PACIFIC AND MANITOBA RAILWAY CO.

Injunction.—Fear of riot.—Construction of statutes.—Railway Crossings.—B. N. A. Act.

The fact that the plaintiff will by force oppose a threatened trespass, and so possibly cause bloodshed is no reason why the Court should grant an interlocutory application, if he is not otherwise entitled to it.

The Act incorporating The Northern Pacific and Manitoba Railway Company, does not, of itself, supersede the power given to the Railway Commissioner by 51 Vic. c. 5, with reference to the building of the extension of the Red River Valley Railway to Portage la Prairie.

An *ex parte* injunction having been dissolved on the ground that the questions involved were of such difficulty that they should be decided at the hearing only, the bill was amended and a new *ex parte* injunction granted. Upon motion to continue it,

Held, That the plaintiffs were entitled to have a full consideration of all the questions involved; and a more deliberate argument having solved the difficulties, the injunction was continued.

The Dominion Parliament has power to provide that no Provincial railway shall cross a Dominion railway without making application to the Railway Committee of the Privy Council for Canada.

A statute provided that a certain thing should not be done "without application to the railway committee for approval of the place and mode," &c.

Held, That the Act required that the approval should be obtained and not merely applied for.

The Railway Commissioner for Manitoba is a "person," and may be enjoined from prosecuting the construction of a railway. (*Attorney-General* v. *Ryan*, 5 Man. R. 81, followed)

J. A. M. Aikins, Q.C., *J. S. Ewart, Q.C.*, and *W. H. Culver*, for plaintiffs. The *onus* being on the defendants to show right, plaintiffs need not allege the contrary, *Barbeau* v. *St. Catherines, &c., Ry. Co.*, 15 Ont. R. 586; *Lamb* v. *North London Ry. Co.*, L. R. 4 Ch. 526. Only title as against defendant must be shown. *Lewis on Equity Drafting*, 29, 30-1 as to being necessary to allege and avoid pretences. *Lewis*, 207-8-9, 216, 218. Office of answer shown in *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Brown* v. *Davidson*, 9 Gr. 441-2. As to danger of violence as a ground for injunction, *Attorney-General* v. *Ryan*, 5 Man. R. 81. As to the powers of the Dominion Parliament, see *Monkhouse* v. *G. T. R. Co.*, 8 Ont. App. 639, 641; *Clegg* v. *G. T. R.*, 10 Ont. R. 708; *Queddy River Driving Boom Co.* v. *Davidson*, 10 Sup. C. R. 229; *Smith* v. *Merchants Bank*, 8 Sup. C. R. 512; *Booth* v. *McIntyre*, 31 U. C. C. P. 192-3; *Credit Valley Ry. Co.* v. *G. W. R.*, 25 Gr. 507; *Maxwell on Statutes*, 450, 477; *G. T. R.* v. *Credit Valley Ry.*, 26 Gr. 572. As to a full re-argument of the case, *Balfour* v. *Drummond*, 4 Man. R. 388; *Tucker* v. *Young*, Man. R. Temp. Wood. 188; *N. W. Nat. Bank* v. *Jarvis*, 2 Man. R. 53; *Smith's Case*, 11 Ch. D. 593; *Talbot* v. *Frere*, 9 Ch. D. 574.

Hon. J. Martin, Attorney-General, in person, *W. E. Perdue* and *H. J. Dexter*, for the N. P. & M. R. Co.

G. Davis for Martin, *R. Cassidy* and *B. E. Chaffey*, for McArthur.

The facts were not stated fairly to the Chief Justice on his granting the injunction. They were stated on information of which deponent had no means of knowledge, and the source of the information was not given, *Joyce on Injunctions*, 1265; *Kerr on Injunctions*, 547, 562-3; *Ley* v. *McDonald*, 2 Gr. 398; *Fisken* v. *Rutherford*, 7 U. C. L. J. 124; *McMaster* v. *Callaway*, 6 Gr. 577. As to "person," including the Government of the Province; "body politic and corporate," does not refer to government. See *Coke's definition* cited in *People* v. *Morris*, 13 Wend. 334. There may be rights in legislature of Province under property and civil rights, *Clegg* v. *G. T. R.* 10 Ont. R. 708, 714. As to dismissal on technical grounds and new motion, see *Fitch* v. *Rochbert*, 18 L. J. Ch. 458.

KILLAM, J.—This is an injunction suit in which the plaintiff company seeks to restrain the defendant company and the Railway Commissioner for Manitoba from entering or trespassing upon the plaintiff's line of railway running in a southerly and westerly direction from Winnipeg, known as the southwestern branch of The Canadian Pacific Railway, and from constructing and operating across that branch the line known as the Portage branch of the Red River Valley Railway, authorized by the Provincial Act, 51 Vic. c. 5, and the later Act incorporating the defendant company.

An *ex parte* injunction in terms of the prayer of the bill was granted by the learned Chief Justice of this Court, who, on motion subsequently made, refused to continue it until the hearing. That occurred so recently and the allegations of the bill were so fully set out by him in the written judgment which was delivered in dismissing the application that I feel it unnecessary to repeat them now. The principal grounds then relied on appear to have been that neither of the defendants had obtained the approval of the place and mode of crossing the plaintiff's railway by the Railway Committee of the Privy Council of Canada under the General Railway Act, 51 Vic. c. 29, ss. 173, *et seq*. D., that by virtue of the 306th section of that Act it was *ultra vires* of the Provincial Legislature to authorize the construction of the line of railway proposed to be built by the defendants, and that in consequence of the coming into force of the Act incorporating the defendant company the power of the Railway Commissioner to construct that line as a provincial public work was at an end, it appearing that it was he, and not the company, who was carrying on the work.

The learned Chief Justice expressed himself as feeling too much doubt upon the first two questions to determine them in favor of the plaintiff, and he seems to have thought that, at any rate in the absence of evidence showing acceptance by the company of the terms, conditions and impositions of the Act as required by the 29th section, the authority of the Railway Commissioner to construct this line of railway had not ceased. Finding the balance of convenience to be against continuing the injunction, he refused the order. Subsequently the plaintiff's bill was amended by the insertion of an allegation that the "agreement" mentioned in the Act incorporating the defendant company was duly accepted by that company in the manner and within the time provided by the Act, and that the agreement is in full force and binding on the parties thereto, that the defendant company in pursuance thereof, has taken possession of the Red River Valley Railway and constructed a continuation thereof into the City of Winnipeg, and erected a passenger platform, and is running trains and carrying passengers, and that the Railway Commissioner has ceased to have any authority whatever under the

Act 51 Vic. c. 5, M. The original bill contained an allegation that the Railway Commissioner had applied to the Railway Committee of the Privy Council of Canada to obtain its approval of the place and mode of crossing the plaintiff's railway. By the amended bill an allegation was introduced that the Railway Committee has decided to have a case stated to the Supreme Court, pursuant to the Railway Act of Canada, as to the authority of the Railway Commissioner to construct the proposed railway to Portage la Prairie and his right to have the mode and place of crossing fixed by the committee.

Upon this amended bill, the affidavits filed on the former application and some additional material the learned Chief Justice granted a further injunction *ex parte*, which the plaintiff now seeks to have continued until the hearing of the cause. The new affidavits showed that the Railway Committee had decided to submit the case as alleged in the amended bill, and that the defendant is operating the Red River Valley Railway, with a number of facts from which it is argued that it must be assumed that the agreement between the defendant company and the Railway Commissioner has been assented to by the company and is binding upon both parties. In addition, the affidavit of Mr. Whyte, General Superintendant of a division of the plaintiff's railway including the branch in question, states that he has received no notice as provided by section 10, subsection 16, of the General Railway Act of Manitoba, and that in his belief no such notice has been sent by mail or otherwise. Hon. Mr. Greenway, the Provincial Premier, Hon. Mr. Martin, the Railway Commissioner, and Mr. Graham, General Superintendent in the employ of the defendant company, have been examined as witnesses on behalf of the plaintiff in support of the motion. The only additional point urged as shown by their depositions is that the defendants are intending to use a large force of men for the purpose of constructing the proposed crossing over the plaintiff's railway and that the plaintiff company proposes to resist by force, any such attempt, and it is urged that in view of this additional circumstance and the danger of serious results from a conflict between such forces the court is bound to interfere. It was suggested that the learned Chief Justice felt in granting the new injunction that this imminent danger was a ground for maintaining matters in *statu quo* by authority of the court until the rights of the parties could be positively determined. On reference to him, I find that this assumption is wholly incorrect, and in view of the fact that the new affidavits before him made no such case, it is difficult to see how this element could have entered into his determination to grant the new order. I find, indeed, that he agrees fully with my own opinion, expressed during the argument, of the impropriety of the contention that the court should interfere, even though it should still consider the question so doubtful, because otherwise the plaintiff company will insist upon a doubtful right with such force as to incur the risk of the fearful consequences suggested.

The fact that such collisions may occur must always be one of the considerations present to the mind of the court in similar applications, but certainly the suggestion that the plaintiff intends to assist in causing one, can afford no argument in support of the interposition of the court in its favor.

In *Kerr on Injunctions*, p. 603, it appears that the practice of granting injunctions, by analogy to the statutes of forcible entry, to quiet the possession until the hearing, has fallen entirely into disuse. This bill is based on the alleged intention of the defendants to enter upon the plaintiff's property for the purpose of a continuing trespass under color of a right claimed to exist by virtue of the Provincial Statutes. The application is for the purpose of having the property preserved in *statu quo* until the rights can be definitely determined. It would seem to be the more fitting course for a plaintiff to whom such injunction has been refused by a judge before whom he has brought his case, on the ground that the inconvenience to the defendants arising from interposition would so far exceed that to the plaintiff from refusal to interpose that there ought to be no interference by the court for the period necessary for a satisfactory determination of the respective rights of the parties, to accept that conclusion gracefully in the meantime, even though he should have the strongest possible opinion that the decision should have been different, and that the court should decide the question as quickly as possible and restrain the defendants in the meantime. Certainly the assertion of an intention not to do so can give no better right to the interference of the court.

The court, however, not having determined the question of right adversely to the plaintiff, the statement of the plaintiff's officers that they will defend the plaintiff's assumed rights by force unless an injunction be granted, cannot, as claimed for the defendants, be any bar to the present application, if otherwise proper. I do not intend to express any disapproval of the plaintiff's course in making this application, and I will, therefore, consider the other questions raised, wholly uninfluenced by the evidence just considered, except in so far as it supports the allegations that, unless restrained, the defendants intend to commit the trespass complained of, and that they claim a right to do so.

I entertain no doubt upon the evidence that the party who is asserting a right to construct the proposed railway across the plaintiff's line is the Railway Commissioner. It was he who made the application that is still pending before the Railway Committee of the Privy Council; it was he who asked the plaintiff's officers to consent to the crossing pending that application. The defendant company has clearly never taken possession of the Portage extension or asserted a right to construct it under the proposed agreement; it has left the Railway Commissioner to continue this work as before its incorporation, though it may, perhaps, have given him some assistance. It is shown that the Red River Valley Railway is being operated by that company under a temporary agreement terminable on three days' notice. So far as the question of the proposed agreement in the statute having been entered into depends upon matters of fact, the evidence is wholly against its having been made if we leave out of consideration the argument based on the delivery of the notice accepting the terms of the statute.

Does the statute itself, with or without that notice, effect a contract between those parties, or in any way determine the previous authority given to the Railway Commissioner to construct the railway in question? By the Act 51 Vic. c. 5, s. 1, the Railway Commissioner was distinctly authorized to construct the railway. By the 73rd section of that Act, he was given power to enter into an agreement or agreements with a company or companies for the completion or operation of that and other lines and for making such become the property of the company or companies. The agreement proposed by the Act incorporating the defendant company contains provisions not authorized by the former Act. The contention of the plaintiff's counsel is that upon the Railway Commissioner entering into an agreement under the former Act for the construction and operation of the railway and for its acquisition by a company, his authority to construct it as a public work of the Province would cease, and that the latter Act, either by itself or by virtue of notice from the company, effected such a contract and thus determined the authority of the Railway Commissioner.

The latter Act begins with the recital that "Whereas an agreement has been formulated for the purpose of acquiring, constructing, aiding, maintaining and operating certain lines of railway described in said agreement, a copy of which is appended hereto marked "Schedule A"—and whereas it is expedient to approve and ratify said agreement and to make provision for carrying the same into effect." Then the first section provides, "The said agreement a copy of which is appended hereto, marked 'Schedule A,' is hereby approved and ratified, and the Government of the Province of Manitoba is hereby authorized to perform and carry out the conditions thereof according to their purport." Then follow provisions incorporating the company, authorizing it to construct, acquire and operate the Red River Valley Railway and an extension thereof from Winnipeg to Portage la Prairie and other lines of railway, and to erect and operate telegraph and telephone lines and carry on an express business, incorporating the Manitoba Railway Act with the new Act, fixing the number, etc., of directors, amount of capital stock, &c. As far as the Railway Commissioner or the Government is concerned, it is wholly an enabling statute, and except in so far as it contains limitations upon the company it is enabling merely as to it also. Then the 29th section provides, "That the acceptance of the terms, conditions and impositions of this Act by the said Northern Pacific and Manitoba Railway Company shall be signified in writing under the corporate seal of the company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within forty days from the date this Act is assented to, and said acceptance shall be served upon and filed with the Railway Commissioner of the Province of Manitoba." Then the copy of agreement appended begins: "This agreement made and executed in duplicate this——day of——, one thousand," etc., "between Her Majesty the Queen, acting through and represented by the Hon. Joseph Martin, Railway Commissioner," etc., "party of the first part, and the Northern Pacific," etc., "Company, party of the second part." The attestation clause is: "In witness whereof the Railway Commissioner has hereunto set his hand and seal, by and under direction of an order-in-council and the Northern," etc., "Company by resolution of its board of directors has caused this agreement to be signed in duplicate originals by its president and secretary and the seal of said corporation to be hereunto affixed and attested by said secretary the day and year first above mentioned."

Now this Act does not assume to say that a contract in the terms set out has been assumed to be made by the Railway Commissioner with any party, and to give effect to that contract. The recital is only that it has been "formulated." To "formulate" is said in the Imperial Dictionary to be "To reduce to or express in a formula; to put into a precise and comprehensive systematic form as a statement." In this statute I can give it no wider meaning.

This was to be a contract with a company not in existence until the statute is put in force. Its date is left blank and it is to be executed by the Railway Commissioner and by the company. It does not purport to have been already executed by the Railway Commissioner. The principal argument in favor of the contention that the statute effected a contract, at any rate on the part of the Province, without subsequent execution of the instrument, is founded on the use of the words "ratify" and "ratified" in the recital and the first section. But those words would be equally inappropriate if used with reference to a contract assumed to be entered into with the promoters of a company before its incorporation and afterwards adopted between the company and the other party. The subsequent adoption in such a case must be such as to constitute a new contract. The term "ratify" is only properly used where a party has assumed without authority to make a contract on behalf of an existing principal who afterwards confirms it. See *Waddell* v. *Dominion City Brick Co.*, 5 Man. R. 119; *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. Div. 156. It appears to me, that there would be no contract between the Railway Commissioner and the company until both parties have executed it.

Nor do I think that the giving of the notice under section 29 is a sufficient execution by the company. It appears that the forty days expired on the 14th of October, and that the resolution was not passed until the 16th. I do not think it necessary to consider the effect of this delay. The acceptance by the section is to be of the terms, conditions and impositions of the "Act," not of the agreement. The Act contains many onerous clauses not in the agreement; it does not, apart from the form of agreement, contain the terms of the agreement. The Act merely authorizes the company to construct, etc., certain railways; it does not say that the company shall construct them. The 24th section gives the company power to acquire by purchase or lease or make running arrangements with any railway line in Manitoba, with certain exceptions. If acceptance of the terms of the Act involves the acceptance of the liability, not merely of the permission to construct the lines, it must equally involve the liability to acquire other lines and to build the telegraph and telephone lines and carry on the express business authorized. The similar mode of dealing with all these matters shows that all these sections were intended to be permissive only, even after acceptance of the terms of the Act, unless the agreement should be entered into. In my opinion, the Government are not yet bound to make that contract with the company, and until the Railway Commissioner and the company execute the agreement, the Railway Commissioner retains his former powers. What may be the effect upon his powers of their executing it I need not consider.

Then, the allegation that the Railway Committee have decided to submit such a case to the Supreme Court does not appear to me to introduce a new element sufficient to warrant a conclusion different from that which should be arrived at upon the material used on the original motion. It then sufficiently appeared that the application to the Railway Committee had not been determined. Indeed, the fact of such a decision having been arrived at is stated in the judgment of the learned Chief Justice. He does not appear to have dismissed the application on the ground of the want of such an allegation in the bill.

The question of a want of notice under section 10, sub-section 16, of the Railway Act of Manitoba, and the objection that the Railway Commissioner can only proceed by contract let after tenders received I pass over for the present, as they are not distinctly raised by the bill.

There remain the questions discussed on the former application. Are they open for my consideration *de novo*, or must I take them as disposed of, for the purpose of this motion, by the former judgment in this cause? And here I must say frankly that I feel very much embarrassed, either in deciding upon them or in determining whether I should attempt to do so. When owing to the Chief Justice being unfortunately unable to be present, I consented to hear this motion, I presumed that his former judgment would be accepted as a starting point and the argument confined to the effect of the introduction of the new matter set up, but the plaintiff's counsel have insisted that they are entitled to have a full consideration of all questions bearing upon their right to this injunction, and I find myself obliged to hold that in this they are strictly correct.

The former decision creates no estoppel.

This new application is made not only upon the amended bill but by the leave of the learned Chief Justice. Upon the making of a second application by leave of the court where the first is refused the whole matter is clearly open. If a new hearing be granted in equity or a new trial at law on the ground of the discovery of fresh evidence or of surprise, the whole matter is open *de novo*, and all questions may be raised that were properly raised originally. The former decision may be considered binding just as the former deliberate decision upon the same point by the same court or by one of co-ordinate jurisdiction may be considered binding, but to no greater extent than if pronounced in a different suit between different parties. Many interlocutory motions determine nothing really binding in this way. In *Abell* v. *Allen*, 3 Man. R. 467, I had to consider an appeal from a report of the master in equity. The late learned Chief Justice of this Court had given leave to appeal after the lapse of the usual time. On the application to him he expressed a very strong opinion upon the merits, allowing the extension of time in consequence of that opinion. I could not feel bound by his view in disposing of the appeal, as it is the rule not to regard such opinions upon the merits expressed in extending the time for appealing as being fully considered, and I decided upon a directly opposite view. So upon motions for interlocutory injunctions usually nothing is positively determined except whether that particular motion should at that time and under the particular circumstances then shown be granted.

The plaintiff's counsel claim that upon the former motion they addressed very little argument to the court in support of their view, feeling their case to be so strong. Upon reference to the learned Chief Justice I find them to be correct in saying that their case was not fully argued. A decision under such circumstances is not usually considered absolutely binding. The Chief Justice states that if the new application were before him he should feel bound to consider all the arguments upon the points formerly raised for the purpose of determining whether the doubts which he then expressed were removed, and he concurs with me in thinking that I am bound to decide upon the whole matter as if it were now before me in the first instance.

Now, upon the question of the proposed Portage branch, whether being constructed as a provincial public work or as the work of the defendant company, being for the purpose of this case within the express provisions of the General Railway Act of Canada, 51 Vic. c. 29, I can entertain no doubt whatever. By the 3rd section that Act is to apply "to all persons, companies and railways within the legislative authority of the Parliament of Canada, except government railways." And by the 4th section, "In addition, all the provisions of this Act relating to any subject or matter within the legislative authority of the Parliament of Canada, and for greater certainty but not so as to restrict the generality of the foregoing terms, all provisions relating to railway crossings and junctions, offences and penalties and statistics apply to all persons, companies and railways whether otherwise within the legislative authority of Parliament or not." Here there is no exception of government railways, about which under the 3rd section so much has been said. Then, the Dominion Parliament has clearly attempted to bring this question of railway crossing, which is that involved in the present suit, whatever the railways affected, within the provisions of this Act. And by the 177th section, "Every railway company incorporated by any Act of the Legislature of any province which crosses, intersects, joins or unites with any railway within the legislative authority of the Parliament of Canada, or which is crossed or intersected by, or joined or united with any such railway, shall, in respect of such crossing, intersection, junction and union and all matters preliminary or incident thereto, be deemed to be, and be within the legislative authority of the Parliament of Canada, and subject in respect thereof to the provisions of this Act." The language of this section is very loose, and there may be some doubt from the use of the word "incorporated," whether, notwithstanding the definition of the word "company," given in the 2nd section, sub-section (a) this can apply to an individual, but it serves to show more fully the intention of the 4th section, which it does not otherwise for the purposes of this case appear to enlarge.

Then by the 173rd section, "No company shall cross, intersect, join or unite its railway with any other railway without application to the railway committee for approval of the place and mode of crossing, intersection, junction or union proposed," (with a provision for notice to the other company). By section 2, sub-section (a) the expression "company," "includes any person having authority to construct or operate a railway." In my opinion the railway commissioner is a person within that provision, even without reference to the definition of person contained in the Interpretation Act. I need not consider then, whether the executive of a province is within the term person, for it is the railway commissioner who is by the Provincial Act authorized to construct this railway.

By the 174th section, "The railway committee may make such orders and give such directions respecting the proposed crossing, intersection, junction or union, and the works to be executed and the measures to be taken by the respective companies as to it appear necessary or expedient to protect the public safety." The 175th section authorizes the committee to require the putting in of an interlocking switch, and the 176th section provides for determining the compensation to be given by the one company to the other. By section 11, "The railway committee shall have power to hear and determine any application, complaint or dispute respecting" (d) "The crossing of the tracks of one company by the tracks of another company." Then, after provision for getting the assistance of experts, the attendance and examination of witnesses, etc , the 17th section provides for the making of a decision or order of the railway committee an order of the Exchequer Court or of any Superior Court of a province, the 19th & 20th sections for the submission of a case to the Supreme Court and its decision by that court, and the 21st section makes the decision of the committee final, subject to a right of the committee to review it, and to a right of appeal to the governor-in-council.

Where the power to hear and determine such application is so clearly given and such careful provision made for enforcing the decisions, I cannot consider that the Act would be satisfied by a mere application without reference to the action taken by the committee.

With reference to the argument that such powers are very great, and that the committee may, under cover of them, nullify any railway act of either the Dominion or a Provincial legislature where the line was to cross a Dominion line, Mr. Ewart has, it appears to me, presented the unanswerable reply that such power must reside somewhere. The great powers given to courts and judges may be used arbitrarily, but they are given with the expectation that they will not be. This railway committee may be considered by some not to be a satisfactory tribunal. If Parliament should so determine, probably another will be substituted, but in the meantime it is the one which must determine such questions, so far as the Dominion Parliament could bestow the jurisdiction. And this brings us to the most important, and in some respects, the most difficult of the questions raised. I lay aside that arising under the 306th section as not necessary to be now considered.

For myself, upon the consideration which I have been able to give this question, and after arguments evidently much more complete than the parties made before the Chief Justice, I am unable to feel such doubt upon it that I can be justified in refusing to determine it for the purposes of this motion. Here it is merely a question whether the Dominion Parliament has authority to make such provisions affecting the proposed crossing by a provincial railway of an existing Dominion railway. If this power be possessed by Parliament, it must be given either as incidental to its powers to authorize the construction of certain railways, or as being within the *residuum* of subjects of legislation neither expressly nor impliedly given to either legislature. If the authority to make provision for such crossing be in the Provincial Legislature exclusively, it must be as incidental to its authority to provide for the construction and operation of local railways. Why should it be in either legislature exclusively, if derived thus incidentally? The Dominion Parliament authorized the construction and operation of the plaintiff's lines of railway, not in the interest of the company alone but for the general benefit of Canada. The company is bound by law to give the public the advantage of them. It is bound to receive and carry the passengers and freight offering upon payment of the usual and proper charges. Parliament is surely bound to insist that all this shall be done with due provision for the safety of the public and of the property entrusted to the company. It should see that the company is not even allowed to agree to the crossing of its line by another railway in such a way as to be dangerous to the public using its line. Parliament should protect both the company and the public using its lines from any action by others which may endanger the property of the company itself, or the life or property of those availing themselves of the advantages offered. The most that the Provincial Legislature can claim is the right to provide for such precautions as will ensure the protection of the railway being constructed under its authority and of the public using it, but it cannot insist that it alone shall determine the precautions to be used to ensure also the safety of the railway authorized by the Dominion Parliament and of the public using that.

Stated in this way, it seems to me very clear that the Dominion Parliament must have power to enact, both for the protection of the company it has created and for the protection of the public in the use of the important work constructed under its authority for the benefit of the public, the legislation affecting the proposed railway crossing now in question.

The necessary result of these opinions is that, notwithstanding the doubts expressed by that learned Chief Justice, and feeling the more impressed in consequence with the necessity for forming distinct opinions of my own before acting, I am obliged to order that the injunction continue until the hearing. I must include the defendant company with the Railway Commissioner, as there is some evidence of its assisting him, though it appears not to be acting on its own account. Upon more full evidence at the hearing there may be found to be no case against the company even in this way.

I entertain no doubt of the authority of the court to enjoin the Railway Commissioner. The authorities to which I referred in

Attorney-General v. *Ryan*, 5 Man. R. 81, appear to me to settle that question clearly. The injunction must be continued with suitable provisions, if the defendants desire, for bringing the case to a speedy hearing. Costs reserved until the hearing or further order.

McNAUGHTON v. DOBSON.

(IN CHAMBERS.)

Staying proceedings.—Second action.—Formal objection.

An application to stay proceedings in a second action for the same cause, cannot be made before appearance.

But such an objection is a "formal" one, and may be cured by enlargement of the application, and the entry of appearance.

T. G. Mathers (*G. H. West*) for plaintiff.

G. G. Mills, for defendant.

(*14th August, 1888.*)

KILLAM, J.—In strictness the objection that the application should not be made until after appearance, must prevail. This is the rule in moving for security for costs, on the ground of plaintiff's absence from the jurisdiction, *Crowe* v. *McGuire*, 3 U. C. L. J. 205; *De La Preuve* v. *Duc de Biron*, 4 T. R. 697; or in moving to stay proceedings on the ground of non-payment of costs of a previous suit for the same cause, *Doe d. Flanders* v. *Roe*, 3 U. C. Q. B. 127.

The subject of staying proceedings on the ground of a prior action for the same cause being pending, is treated of by *Archbold* with that of consolidating actions, and it is there laid down (p. 1360) that the application to consolidate may be made at any time after appearance.

In *De la Preuve* v. *Duc de Biron*, the objection was made that bail had not been put in, and it was held that this should be done before the application should be made for security for costs, but the order was made upon the defendant undertaking to put in bail.

Under the present practice, especially in view of this authority, I think that I may well treat the objection as a formal one under General Rule No. 9 of this Court that, "No proceeding shall be defeated by any formal objection." I will, therefore, allow the application to stand over to enable the defendant to enter an appearance. *Haigh* v. *Paris*, 16 M. & W. 144, and the remarks of Parke, B., in *Chamberlayne* v. *Green*, 9 M. & W. 792, are clear authority that the defendant is not obliged to plead in abatement, but may apply to stay proceedings in the second action.

As the plaintiff claims to have sued in the second action in order to take garnishee proceedings, and the objection is entitled in strictness to prevail, the plaintiff must be allowed to file such further affidavits with reference to the garnishee proceedings or otherwise as may seem proper, and the defendant must pay the costs of the argument of the objection and of this enlargement in any event of the application. The defendant should have twenty-four hours to enter an appearance and give notice thereof to the plaintiff, and if this be done, the summons will come up on Friday next for further answer by the plaintiff, or if not, it will then be dismissed.

MONKMAN v. FOLLIS.

(IN APPEAL.)

Trespass and trover.—Exemplary damages.—Auditâ Querelâ.—Certificate for costs.—Court ascertaining damages.

Plaintiff and the defendant Babington both claimed the ownership of a crop of wheat, the plaintiff as being tenant of Babington, and Babington on the ground that the lease had expired. The question was whether the oral agreement between the parties was for one or five years. The defendant had cut and stacked eight stacks but had not interfered with the rest of the wheat which was cut and put up by the plaintiff in six stacks. The plaintiff had a verdict for $650.

Upon a motion for a new trial,

Held, 1. That the charge was not erroneous because the judge refused to tell the jury that it was for the plaintiff to make out every part of the agreement, and not merely that part of it which he required for this case.

2. That the judge was correct in telling the jury that if they found a verdict for the plaintiff they were not limited in estimating damages to the actual pecuniary loss, but could allow exemplary damages in addition; that it was not necessary, under the circumstances, to point out the distinction between a *bona fide* assertion of right and a wanton trespass.

3. That it was not necessary for the judge to tell the jury that if their verdict was in trespass the damage would be calculated with reference to the whole crop, while, if in trover it would be limited to the part converted. The jury could not well have erred upon that point.

4. Some damage had occurred because of the occurence of a hail storm, while a portion of the wheat was uncut. For this the defendants were not liable, and the damages were reduced by $200, the amount estimated by the Court as attributable to that cause.

Just previous to the hour fixed for rendering judgment in Term affidavits were read by defendant's counsel shewing that since verdict, the plaintiff had threshed seven of the stacks for his own use.

Held, That such a matter could be dealt with by the court.

Affidavits having been filed and a further argument having taken place,

Held, 1. That under the charge the jury might well have given damages in trover for the whole crop, instead only for that part converted; and that the judge's charge was therefore erroneous. (Dubuc, J., diss.)

2. The verdict was, therefore, further reduced to $225, being the value of the stacks converted by the defendants, less the value of one of them re-taken by the plaintiff; the plaintiff to have a certificate for full costs. (Dubuc, J. diss.)

Upon the objection being taken that no certificate could be granted, the court, without deciding the point, ordered the verdict to be entered for $260, the plaintiff to give credit thereon for $35, the value of the stack retaken by him.

J. S. Ewart, Q.C., and *C. P. Wilson*, for defendants. It was not sufficient to prove only one term of the contract, *Ross* v. *Williamson*, 14 Ont. R. 184. As to the judge's charge, the following cases were referred to, *Hilton* v. *Woods*, L. R. 4 Eq. 440; *Emblen* v. *Myers*, 6 H. & N. 54; *Sears* v. *Lyons*, 2 Stark. 318; *Wood* v. *Morewood*, 3 Q. B. 441; *Hawk* v. *Ridgway*, 33 Ill. 473; *Hadley* v. *Baxendale*, 9 Ex. 341; *Knight* v. *Egerton*, 7 Ex. 407.

A. Monkman, for plaintiff referred to *Thomas* v. *Harris*, 27 L. J. Ex. 353; *Williams* v. *Curry*, 1 C. B. 841; *Flint* v. *Bird*, 11 U. C. Q. B. 444; *Throop* v. *Fowler*, 15 U. C. Q. B. 365; *Clissold* v. *Machell*, 26 U. C. Q. B. 422; *Fisher* v. *Grace*, 27 U. C. Q. B. 158; *Smith* v. *Murphy*, 35 U. C. Q. B. 569; *McMahon* v. *Campbell*, 2 U. C. Q. B. 158. Non-direction no ground for a new trial, unless verdict against evidence, *Spence* v. *Hector*, 24 U. C. Q. B. 277; *Spring* v. *Cockburn*, 19 U. C. C. P. 63; *Fitzpatrick* v. *Casselman*, 29 U. C. Q. B. 5.

(*30th November, 1888.*)

KILLAM, J.—This is an action of trespass to land and trover of certain produce thereof, in which the plaintiff has recovered a verdict of $650. The defendants ask for a new trial on several grounds of misdirection and non-direction, and also on the ground of excess of damages and that the verdict is against the weight of evidence. The last two grounds, however, were not pressed by counsel in argument.

The lands in question or some part thereof were leased by the defendant Follis to the plaintiff. The lease was wholly by parol. The plaintiff claims that the lease was one for five years with a right to determine it by certain notice; the defendants claim that it was for one year only. The acts complained of were committed long after the expiration of the first year, the defendant Follis having then entered upon the land with the assistance of his co-defendants, and having taken away a portion of the standing crop of wheat sown by the plaintiff and stacked it off the land.

The evidence respecting the terms of the lease and of circumstances tending to support the claim of the one party or the other was exceedingly conflicting, and the question of the term of the original lease was particularly a question for the jury, with whose finding upon it there is no ground for interfering.

One ground of objection to the charge of the learned judge before whom the action was tried, was that he should have told the jury that it was for the plaintiff to make out every part of the agreement and not merely that part which he required for this case. I am unable to accede to this view. There was, certainly, some confusion in the evidence of the plaintiff and his witnesses respecting the notice to be given in order to determine the lease and the rent to be paid, but there was here no pretence of the giving of such a notice, nor any question of the amount of the rent involved. If the original lease was for five years, whatever the amount of the rent or the length of notice necessary to determine it or the party by whom it could be determined, the the plaintiff was a tenant from year to year and the defendants trespassers upon the land. The plaintiff had continued in possession after the expiration of the first year, ploughing and sowing it again, and he must be deemed lawfully entitled to the possession unless the defendants could show that his right had ceased. I quite agree that in many cases in which a party founds his case upon an agreement, especially upon a complex written one, and can give evidence of only a small portion of it, his evidence should be deemed wholly unreliable in respect of any portion, but here the matter was so simple and the terms about which there might be considered to be unreliable evidence so unconnected with the real question at issue, that I cannot find such a view applicable.

Then the defendants contend that they acted *bona fide* in the assertion of a supposed right to the land, and that the learned judge should have made a distinction between wanton trespass and trespass under claim of right and have told the jury that only in the former case should there be exemplary damages allowed.

The learned judge left it to the jury to allow exemplary damages without making such a distinction. In my opinion, no such distinction could be important here. The defendant Babington must be taken to have known the plaintiff's rights. The other defendants knew that the plaintiff was in possession, that he had ploughed and sown the land, and they chose to assume Babington's contention to be right and to join him in asserting his claim arbitrarily without resort to a court of justice. I think that such a case is one in which exemplary damages, if not excessive, may well be allowed.

Part of the plaintiff's claim was for loss of wheat by hail, in consequence, he alleged, of having been prevented by the defendants from harvesting it. There was evidence that the defendant Babington used some threats to prevent the plaintiff from reaping the crop, but neither of the other defendants was implicated in such conduct. It appears, also, that the plaintiff's father-in-law who was assisting the plaintiff in harvesting crops on other lands of the plaintiff, refused to assist him upon the lands in question on account of the defendants' acts and fearing difficulty with them, but there is no evidence of any threats towards or interference with him by the defendants. There is really no evidence upon which the defendants could be held responsible for the loss by hail. The plaintiff did go on after the defendants had taken some of the crop, and reap and stack a considerable portion of it without interference. The learned judge told the jury that they would be justified in giving damages to the plaintiff for the amount he had proved to them that he had actually lost by the defendants' interference, but that they were not limited to actual pecuniary loss and could allow exemplary damages in addition. He then pointed out to the jury that under the count in trover the damages would be the value of the property converted. The defendants' counsel at the trial objected to the general direction that the jury might allow damages to the amount lost by the defendants' interference, claiming that the learned judge should direct the jury to exclude loss by hail and the wheat stacked by the plaintiff, and certain hay cut by the defendants but taken away by the plaintiff. On the two latter points it does not appear that the jury could well have erred. I can hardly think that there was any such danger of their allowing for these, that I can say that the learned judge committed an error in refusing to specify them, on account of which a new trial should be granted. The other claim, however, of loss by hail was distinctly made upon the record and in the plaintiff's evidence, and to leave it to the jury generally to find the loss by interference was to leave it to their judgment to find whether the loss by hail could be ascribed to the defendants' interference. If they believed the evidence of Babington's threats they might have considered that an interference by all the defendants, which would be erroneous.

With all respect for the opinion of my learned brother Bain before whom the action was tried, I think that the direction thus given as to damages was too general. The only proper measure of damage was the value of the crop taken and a fair allowance, if the jury thought fit, by way of exemplary damages for the trespass. I am of opinion that the direction was in this respect erroneous and that the verdict should not stand for the full amount. Having gone carefully over the evidence respecting the value of the crop and the loss by hail, I formed the opinion that, at the utmost, not more than $200 of the damages allowed could be attributed to the loss by hail. Probably not so much was so allowed. But to give the defendants the full benefit of all doubt on this point and considering that a verdict for $450 would not have been excessive, even taking the damages for conversion as limited to the portion actually taken by the defendants, I was prepared on the day fixed for giving judgment in this cause, to give my judgment in favor of allowing the plaintiff to accept a reduction of the damages to $450, and if he should assent to this, of dismissing the application, but, if he should refuse, of granting a new trial.

Upon that day however, the defendants' counsel filed affidavits showing that since the verdict was rendered, the plaintiff had taken and threshed a considerable quantity of the grain in question, taken partly from that stacked by himself and partly from that removed and stacked by the defendants, and this was urged as an additional ground for a new trial. The plaintiff's counsel expressing himself to be unable at once to reply to the new point raised, the giving of judgment was further postponed to the first day of the present term, when the plaintiff's counsel objected that the defendants only mode of relief was by *auditâ querelâ* or by motion to reduce damages, and urged that the plaintiff should not be obliged to reply to the affidavits filed. In answer it was urged for the defendants that the remedy by *auditâ querelâ* could be had only in respect of matters arising after judgment, and that there was no other mode of granting relief than by allowing a new trial; or that, in any event, the court could now, the plaintiff having had full notice of the objection, grant such relief as the defendants may be entitled to.

So far as the remedy by *auditâ querelâ* is concerned, there is, no doubt, that it applies to grounds for relief arising after verdict and before judgment. In *Colt* v. *Bishop of Coventry*, Hob. 162, it is said, "If a release be made to him (the defendant) between verdict and judgment, he cannot plead it because he hath no day in court, but must help himself by *auditâ querelâ*." The same view is borne out by *Humphreys* v. *Knight*, 6 Bing. 572; *Ouchterlony* v. *Gibson*, 6 Sc. N. R. 577; *Com. Dig.*, vol. 1, p. 781; *Plevin* v. *Henshall*, 10 Bing. 25; *Baker* v. *Taylor*, 1 Cow. 165.

This is a remedy given by the law upon equitable grounds to enable a defendant to obtain relief from execution where he could not previously have raised the defence by pleading strictly the writ of *auditâ querelâ* was founded upon the record of the judgment and could be had only after judgment, but in *Lampiere* v. *Mereday*, 1 Mod. 111, Hale, C.J., said that if *auditâ querelâ* be brought after the day in banc, though the judgment be not entered up, the court will make the plaintiff enter his judgment as of the day in banc so that he shall not plead *nul tiel record*.

The English courts, however, long ago adopted the practice of giving relief on motion where the cause of relief was not matter of fact that need be tried, *Wicket* v. *Creamer*, 1 Salk. 264; *Mitford* v. *Cordwell*, 2 Str. 1198; *Humphreys* v. *Knight*, sup.; *Plevin* v. *Henshall*, sup.; *Ouchterlony* v. *Gibson*, sup.; *Baker* v. *Taylor*, sup.; *Baker* v. *The Judges of Ulster Common Pleas*, 4 John. 191.

Auditâ querelâ itself is an equitable action on which the law does not look with so strict an eye as upon other actions, *Leake* v. *Dawes*, March, 71, Vin. Abr. vol. 3, p. 318. And when we come to deal with the matter upon motion to the court, it would seem that all technicality should be thrown away as far as possible and such relief granted, as the parties may be equitably entitled to. Although I have found no instance of a motion granted before judgment, yet there cannot be any necessity for insisting upon a judgment being first entered up, and the device resorted to in *Lampiere* v. *Humphrey* can thus be easily avoided. In *Vanbrynen* v. *Wilson*, 9 East, 321, a motion was made before judgment but refused apparently on the ground that the objection to the enforcing of the judgment was unmeritorious, the court merely leaving the defendant to any remedy which he was strictly entitled to by *auditâ querelâ*. No question respecting the time of making the motion was raised.

Here the plaintiff has occasioned the difficulty by his own acts, and the matter may well be dealt with by the court in considering how or whether it shall exercise its discretion in allowing a reduction of the damages awarded instead of a new trial. As proposed before these affidavits were read, the court would be merely exercising a discretionary power in order to do justice as nearly as possible without putting the parties to the trouble and expense of another trial. It may well now consider this additional circumstance arising from the plaintiff's own act in determining how it can best deal equitably with the rights of the parties.

The defendants did not show in their affidavits the value of the grain thus taken by the plaintiff, but I think that it would be best to allow both parties now to do so, distinguishing between the grain taken from the stacks put up by the defendants and that from those put up by the plaintiff, and giving the values both as of the date of the conversion by the defendants and of the reconversion by the plaintiff, and of the grain standing uncut and standing in stack.

If then, it be found possible to do justice between the parties without opening up again the contest respecting the term of the lease, and without leaving the defendants to another proceeding after judgment, it should be done.

DUBUC, J.—In the summer of 1885, the plaintiff and the defendant Thomas Babington, entered into an agreement, by which the plaintiff rented Babington's farm in the Rock Lake District, for the following year, or, as claimed by the plaintiff, for five years. The term of five years was though, according to the plaintiff's version of the transaction, to be put an end to at any time by either party giving notice to the other party of his intention to do so. The rent to be paid was to be $1.00 per acre of cultivated ground, or $1.50 if a railway was built in the vicinity.

Pursuant to such agreement, the plaintiff cropped the farm during the season of 1886. And no difficulty arises as to that year. In the fall of 1886, Babington being absent, having been arrested at Brandon, the plaintiff ploughed the cultivated portion of the land. Babington was released from gaol and met with the plaintiff in January and in March, 1887. Some differences arose then between them as to the cropping of the land for the ensuing season. Babington said to the plaintiff that he intended to sell the land, or that he might want it for himself; but that if he rented it, he would give the preference to the plaintiff. When seeding time came, the plaintiff cropped the land. He was not interfered with until harvest time, when the defendants Babington, Follis and Davidson went and cut a portion of the grain, carrying and stacking it on the road allowance. The plaintiff filed a bill in Chancery and obtained an injunction to restrain the defendants. The suit was afterwards decided against him. He also brought this action of trespass and trover, and at the trial, the jury gave a verdict in his favor and assessed the damages at $650.

The defendants now appeal against the said verdict and ask to have it set aside on the grounds of misdirection, excessive damages and that it is against law, evidence and the weight of evidence

In order to succeed, the plaintiff had to prove that he was a lessee of the land, either by a special lease, or by being allowed to crop it with the leave of the defendant Babington, and that the defendants committed the trespass complained of. This last point is not disputed. The defendants admit that they cut and took the grain, but they claim that they had the right to do it, as the plaintiff was not entitled to crop the land.

As to the other point, the evidence is contradictory. The defendant Babington says he told the plaintiff that he would let him crop the land, unless he wanted it for himself, or unless he would sell it. The plaintiff states that Babington spoke of his intention to sell the land; but not in a definite manner. Speaking of the conversation with Babington in March, he says Babington told him that Follis wanted the place, "but he would not let him have it as he would only give him a trifle over the mortgage, some $40 or $50, and he said he would not get it, and I said I will put it in (referring to the crop) and he went away satisfied, knew that I was going to put it in."

Babington then left about the 3rd April, the plaintiff commenced putting in the crop and did not see Babington until June or July.

Now, Babington says he had at that time arranged to sell the land to the defendant Follis, and a deed is produced dated the 4th April, 1887, which, however, was not registered until the 25th July. When asked why he did not let the plaintiff know of his sale to Follis, he said he could have done it, "but he did not see the necessity."

On that evidence the jury have found in favor of the plaintiff, and I think that not only is there some evidence to sustain the verdict, but that the preponderance of evidence is in that direction. Even taking Babington's version that the plaintiff was to have the place unless he would occupy it himself, or sell it; the plaintiff not seeing Babington nor being notified or informed of the sale about seeding time, was perfectly justified in assuming that Babington allowed him to have the land, and in cropping it.

The other objections raised, are the amount of damages and the misdirection.

The evidence shows conclusively that the plaintiff was interfered with in cutting the grain. The defendants Babington and Follis were there with their binder and horses and servants, went around a portion of the field, cut part of the grain, carried it away and stacked it on the road allowance; they also carried away some of the grain cut by the plaintiff. On one ocasion, the plaintiff on going to cut the grain with his binder, was met by Babington who swung a club around and said if he went any further he would knock him off the binder. The plaintiff's father-in-law was also coming with his binder to help him cut the grain; but on account of the dispute he left, as he was not going to have any row with the defendants. Babington denies threatening the plaintiff.

The plaintiff claims damages particularly for the trespass committed by the defendants in cutting and removing his grain, but in his evidence he spoke also of the damages suffered by him by the interference of the defendants, of the delay caused by their action; of the loss of the assistance of his father-in-law, of a portion of the grain injured by hail, of his right to the hay growing on the land, which was taken by Follis, of the trouble and expenses he was put to by the proceedings in the equity side of the court. The jury gave him a general verdict.

The defendants contend that they should know on what particular grounds the damages were assessed, and that the verdict on that account should be set aside. If it was shown that damages were specially given for the hay taken by Follis, or for the trouble and expenses connected with the legal proceedings, it is very doubtful whether such damages could be held justifiable. But the jury had the right to give a general verdict, and unless such verdict could be found justifiable on proper grounds, it would have to be set aside.

The jury having found that a trespass had been committed, I think the evidence shows such circumstances in connection with the trespass as may be sufficient to support exemplary damages. The plaintiff, after ploughing the land in the fall, after his conversation with Babington in January and March, seeing, about seeding time that Babington did not come to take the place for himself and did not inform him of his having sold the land, was perfectly justified in cropping the land. Follis who claims to have purchased the land does not attempt to take possession of the land, and does not even notify the plaintiff of his purchase. The first notification he has, is when Babington saw him in June or July, when the time of harvesting was near. Follis lived only a couple of miles from the plaintiff's place. As I stated on another occasion, the idea of the defendants seems to have been this; we will allow him to crop the land and we will reap the harvest. And then, instead of asserting their right by legal proceedings, they combine three or four to go and take the grain by force, if necessary. Threats are used to attain the purpose. In my opinion, these circumstances are quite sufficient to warrant the jury in awarding exemplary damages. It might be said that Babington alone used threats and intimidation, and that exemplary damages should not be given against Follis and the other defendant. But I think they might be given even without the swinging of the club. The trespass was of a very aggravating character. I consider that these parties came there together, in sufficient number, and with the determined intention to take the grain, by force if necessary. They knew that the plaintiff had had possession of the land without interference, or notice on their part, that he had put in the crop, and that he had, therefore, a primary right to the harvest. Their pretended claim on the grain was of the most flimsy, unfair and unwarrantable character. If they thought they had legal rights they should have tried to assert them by peaceable or legal means. The plaintiff, if he had been animated with the same spirit, might have gathered a few neighbours and protected his property by force, which might have resulted in a serious breach of the peace, and perhaps in fatal consequences. Instead of that, he adopts the mode which a law abiding citizen should do, he takes legal proceedings. Follis, if he was a *bona fide* purchaser of the land, should not have waited until the grain was ripe to assert his right. If a man, acting as he did, could not be made to pay more than the actual pecuniary damages, it would be an invitation to parties who have pretended claims, to take the law in their own hands and try to succeed by force instead of by legal means. Such a party would naturally say: my claim is very doubtful, I may not likely be able to succeed by legal means; I will first go with sufficient force to take the property; the other party will not dare resist or face me; and if he succeeds in the courts, I will only be liable to pay for the grain I have taken. I have, therefore, nothing to lose and everything to gain, as the righteous claimant may not be in a position to run the risk of instituting a law-suit. This would be a most dangerous doctrine.

In this case, whether the defendants combined to take the grain for the benefit of Babington, or for the benefit of Follis, does not appear very clearly, but, I think that when one party stands in one part of the field taking the grain, and the other goes a small distance to work intimidation on the plaintiff, they are equally guilty of the trespass and unwarranted interference.

Then, taking into consideration the grain cut and removed by the defendants, the actual damages thereby sustained by the plaintiff, I think it cannot be said that the amount found by the jury is excessive. Even, if the actual loss of grain sustained by the plaintiff is in reality smaller than the amount awarded by the jury, the exemplary damages cannot be considered to go beyond reasonable limits.

It was contended on the argument that the learned judge who tried the cause, in stating to the jury that they might give exemplary damages, did not sufficiently explain to them the grounds on which such damages could be given. It may be that the explanation might have been more complete. He told them that on account of the unjustifiable and oppressive interference of the defendants, they were not bound to the exact amount of pecuniary loss actually shown, and taking into consideration all the circumstances given in evidence, they were at liberty to give exemplary damages. He also told them that if they gave exemplary damages, they should not be out of proportion to the injury received. This was perfectly proper, and there was certainly no misdirection. The only objection which can be raised would only amount to non-direction. In my view, the direction was sufficient, and I cannot think that the jury did err for want of direction.

In *Connell* v. *Cheney*, 1 U. C. Q. B. 307, it was held that the court will not necessarily grant a new trial for misdirection, if they be satisfied that justice had been done between the parties notwithstanding the misdirection.

Want of direction was held in *Spence* v. *Hector*, 24 U. C. Q. B. 277, to be no ground for a new trial, unless the verdict is against the weight of evidence.

In actions of tort the court will not interfere with the damages found by the jury, unless they appear to be disproportionate to the injury received. *William* v. *Curry*, 1 C. B. 841; *Flint* v. *Bird*, 11 U. C. Q. B. 444; *Clissold* v. *Machell*, 26 U. C. Q. B. 422.

In the present case, I think the weight of evidence is in favor of the plaintiff, there was ample ground for exemplary damages, and, it being so, whether the jury considered or not the weaker grounds on which the plaintiff estimated his damages, the amount found cannot, in my opinion, be considered excessive. The verdict should be affirmed with costs.

(*11th February, 1888.*)

Killam, J.—Affidavits have now been filed by both parties for the purpose of showing the value of the wheat taken by the plaintiff. Six stacks were put up by the plaintiff upon the land in question and eight stacks were put up by the defendants near the lands. The defendants threshed and disposed of the wheat from seven of the stacks put up by them. They admit having obtained from them 432 bushels of wheat and to have realized therefrom, on an average, fifty cents per bushel.

The plaintiff subsequently threshed and took away the wheat from the six stacks put up by him and from the remaining one of the eight stacks. According to affidavits filed on his behalf about 65 bushels of wheat were obtained from the latter stack and 315 from the other six. He files affidavits stating that the wheat from the one stack put up by the defendants was very poor and worth not more than twenty dollars, and placing a very low value on all threshed by him. The defendants on the other hand, file affidavits stating in effect that the grain threshed and taken by the plaintiff was fully equal in quality to that taken by them. They claim also that wheat had risen in price at the time the plaintiff took the wheat, and that there should be a reduction from the amount of the verdict of the full value of all the stacks threshed out by the plaintiff.

Upon the further argument which has ensued the objection to the portion of the charge of the learned judge relating to damages for conversion, appears more important than it did at first. It appears to me now, that the question was left to the jury in such a way that they might well have given damages for the whole crop, including that stacked by the plaintiff. They were told that they might give the value of the crop converted, with no instructions upon the nature of conversion and no distinction between the two portions of the crop. So far, then, as we can judge, the whole amount of the verdict, or the $450 which we proposed to allow the plaintift to hold, may have been given for the conversion and upon the basis of the conversion of the entire crop. I think, then, that it would be improper to assume that the verdict included damages for the conversion of the eight stacks only, and to allow it to stand on that basis with a reduction merely of the value of that one retaken by the plaintiff.

Besides, if judgment were entered upon this record, it appears to me that it would operate as an estoppel against any contention that the conversion was of less than the whole, the quantity claimed for in the count in trover being 2000 bushels, and it does not seem possible to treat the verdict otherwise now upon the question on which the affidavits are filed.

As, then, the charge to the jury appears to have been erroneous in this respect, and the exception a proper one, the plaintiff should not be allowed to retain the reduced amount before suggested, even if the wheat had not since the verdict been taken by the plaintiff.

On the other hand, if no exception had been taken to the charge upon this point, the verdict must have been treated as one for conversion of the whole crop and some method found to compensate the defendants for that retaken by the plaintiff. In this view, it would seem impossible to allow the defendants for a rise in price of the wheat, either upon such an application as the present or upon an *auditâ querelâ*, as this would be to assess damages against the plaintiff as for a reconversion, a course which might, in some instances, leave a balance against a plaintiff. To obtain such relief the defendants would require to bring a cross-action.

They are taking the present course to avoid being obliged to rely on that while the full amount of the verdict would, in the meantime, be enforced against them, and they must accept the alternative of having any reduction made upon the basis of the original value of the wheat.

If there were no circumstances warranting the granting of a new trial, it would seem impossible, on account of the contradictory nature of the evidence before us, on a summary motion to the court to allow the defendants compensation by a reduction in the amount of the verdict, unless they were willing to accept the plaintiff's estimates. Under present circumstances, however, we could well refuse to allow the plaintiff to retain a verdict for the amount which we formerly proposed.

But, if any method can be devised which will avoid the possibility of injustice to the defendants and at the same time the necessity of putting the plaintiff to a fresh assertion of his right of action and the loss of the costs of the former trial, it should be adopted. Now, upon a fresh trial, assuming as we should for this purpose assume, that the plaintiff would have a verdict, he could not fail to recover the amount admitted by the defendants to have been realized from the wheat disposed of by them. On the other hand, their highest estimate of the quantity taken by the plaintiff is 452 bushels. Thus, estimating either on the basis of their receipts or on that of a reduction from the $450 before proposed, of the highest amount which the defendants could reasonably claim for the wheat taken by the plaintiff, very nearly the same amount is reached.

I would think then, that we can properly refuse the new trial if the plaintiff will accept a verdict for $225 without costs of the present application being allowed to either party; but if he is unwilling to do this there should, in my opinion, be a new trial without costs.

TAYLOR, C.J., concurred with KILLAM J.

DUBUC, J.—This is an application made on affidavits by the defendants to reduce the verdict obtained by the plaintiff.

The action was on trespass and trover. The crop had been put in by the plaintiff. At harvest time the defendants went on the land and cut and carried away a portion of the wheat crop, which they stacked on the road allowance. The quantity taken was eight stacks. The balance of the wheat was harvested by the plaintiff and stacked into six stacks on the land in question. On these facts being shown at the trial, which took place at the last spring assizes, the jury gave a general verdict in favor of the plaintiff for $650, which was afterwards, on an application for a new trial, reduced by the court to $450.

The affidavits produced on the present application show the following facts:

The defendants threshed in June last, seven of the eight stacks put up by them, which produced 432 bushels and sold the said wheat at an average of 50 cents per bushel. In October last, the plaintiff threshed his six stacks of wheat, and the one stack left unthreshed by the defendants, the yield being 380 bushels in the six stacks and 70 bushels in the stack put up by the defendants. At the date of the making of the affidavits, in the first days of December, the plaintiff had not sold his wheat.

The defendants claim that the verdict should be reduced by the value of the whole seven stacks of wheat threshed by the plaintiff. To do this we would have to assume that the jury based their verdict principally on the count for trover, and that the defendants should get the whole of the wheat. In my opinion, there is not the least ground or foundation for such contention. The plaintiff claimed damages under two heads, for the value of the wheat wrongfully taken by the defendants, and for the loss and injury done to his crop generally by the wrongful interference of the defendants.

The learned judge in charging the jury explained to them the effect of a verdict in trespass and in trover. He told them that the effect of a verdict in trover would be to transfer the property to the defendants, he told them also, that in trespass, if they found that the interference of the defendants was unjustifiable, they were not bound to the exact amount of pecuniary loss actually shown, that they might give exemplary damages. If the jury had meant that the defendants should get the whole crop, they would have so expressed by finding a special verdict on the count of trover. If they had meant that the defendants were entitled to all the crop, they would have given a verdict in their favor. Why should they have gone out of the natural way, and given to the defendants that portion of the crop harvested by the plaintiff, of which he was considered in possession and made the defendants pay for it! In doing so, they would have allowed to the plaintiff more than he was asking for in his action; for he never claimed that the defendants should be made to pay for the wheat he had harvested himself. And after hearing the evidence and the charge of the judge, if they had so found, they would have expressed it. But they found a general verdict which can be sustained on both counts, or on either. If there was a doubt that the verdict was based on both counts, that is to say, on trover for the wheat taken by the defendants and on trespass for the other damages sustained generally by the plaintiff, I think there would be as good, if not better ground to say that the verdict was based on the trespass only, with exemplary damages, and that the whole crop should go to the plaintiff. This, however, is not now in question. But as to giving to the defendants on this verdict, the portion of the wheat harvested by the plaintiff, it is very likely that the defendants themselves never thought of that until the plaintiff threshed the one stack left by them; and if the plaintiff had not touched the said stack, we can fairly surmise that we would never have heard of this application.

After what precedes, the only point to be determined is the value of the one stack put up by the defendants and threshed by the plaintiff. The affidavits put in by both parties agree that the wheat threshed from the said stack was about 70 bushels. They disagree only as to the quality of the grain. The affidavits filed by the defendants show that the wheat was of the best quality, as the wheat from the other stacks threshed by the defendants, and would command the highest price. From the affidavits put in by the plaintiff one would conclude that the wheat was injured and deteriorated and could not be sold for more than 30 or 35 cents. The defendants did not explain why that stack had been left unthreshed by them. The plaintiff and Louis Monkman say they think it was left because it was not worth threshing. The plaintiff says: "I threshed said wheat because I did not know when this case was going to end, and if I had not done so, it would soon have been worthless."

Whatever valuation may be put upon the said wheat, the difference can only amount to a very few dollars. By giving even the greatest weight and the most favorable construction to the affidavits put in by the defendants, one does not see on what ground he should claim more for this stack than for the seven stacks threshed by him. If he had any reason for leaving the stack standing there all summer, and for expecting more for this wheat than for the seven stacks threshed by him and sold in the spring, he did not state nor show what these reasons might be.

After considering all the circumstances, I think the verdict should be reduced by the value of the said stack according to the average value of the other seven stacks to the defendants. So 70 bushels worth 50 cents per bushel, but deducting 5 cents per bushel for threshing and marketing, would make $31.50, leaving the verdict at $418.50.

As to the costs, I think the defendants have failed in the main part of their application and should get no costs. And, in my view, the plaintiff has not shown such a justification of his taking the said wheat to entitle him to his costs.

A. Monkman for the plaintiff applied for a certificate for full costs.

J. S. Ewart, Q.C., for the defendants, contended that the Court had no jurisdiction to give any direction in the matter. And upon the Court suggesting that the verdict should be for $460, with an abatement for the one stack retaken, argued that the Court had no power to assess the damages, and that there must be a new trial, citing *Mayne on Damages*, 508-510.

Per Curiam.—The verdict will be for $260, the plaintiff undertaking to credit $35 upon it, this appearing to be the value of the converted stack retaken by the plaintiff.

SHAW v. CANADIAN PACIFIC RAILWAY COMPANY.

(IN APPEAL.)

Pleading.—Damages.—Departure.—Objection to appeal.

If a carrier's contract provide that he will not, in case of loss, pay more than a certain sum, this limits the amount of the liability only, and need not be set out in the declaration; but if it provide that he will not pay anything upon goods which exceed a certain value, this limits the liability itself and must be alleged in the declaration.

Therefore, where to a declaration against a carrier in contract, not alleging any limitation, the defendants pleaded a term of the contract, viz., that except as to $100 a special contract, "that the baggage liability of the defendants should be limited to wearing apparel not exceeding $100 in value"; to which the plaintiff replied gross negligence.

Held, That the replication was a departure and bad upon demurrer.

Semble, The Consolidated Railway Act 1879, sec. 25, sub-sec. 4, probably introduces an implied term in contracts to which it is applicable.

This was a demurrer to a replication. The pleadings were as follows:—

Declaration 5.—That the defendants were carriers of passengers and their luggage by Railway from Trenton in the Province of Ontario, to Calgary in the District of Alberta and in consideration that the plaintiff would become and be a passenger to be carried by the defendants on the said Railway from Trenton to Calgary aforesaid, within a reasonable time in that behalf for reward then paid by the plaintiff to the defendants, in that behalf the defendants promised the plaintiff to carry the plaintiff and his said luggage on the said Railway safely and securely from Trenton to Calgary aforesaid and there to deliver to him his said luggage within a reasonable time in that behalf as aforesaid, and the plaintiff paid to the defendants the fare lawfully payable for such carriage and all times elapsed and all things happened and all conditions were fulfilled to entitle the plaintiff to have the said agreement performed. Yet the defendants did not safely and securely carry the said luggage from Trenton to Calgary aforesaid and there deliver the same to the plaintiff within such reasonable time as aforesaid, whereby the same was lost to the plaintiff.

6. That the defendants were carriers of passengers and their luggage by Railway from Central Ontario Junction in the Province of Ontario to Calgary in the District of Alberta, and in consideration that the plaintiff would become and be a passenger to be carried by the defendants on the said Railway from Central Ontario Junction to Calgary aforesaid, within a reasonable time in that behalf for reward then paid by the plaintiff to the defendants, in that behalf the defendants promised the plaintiff to carry the plaintiff and his said luggage on the said Railway safely and securely from Central Ontario Junction to Calgary aforesaid and there to deliver to him his said luggage within a reasonable time in that behalf as aforesaid, and the plaintiff paid to the defendants the fare lawfully payable for such carriage and all times elapsed and all things happened and all conditions were fulfilled to entitle the plaintiff to have the said agreement performed. Yet the defendants did not safely and securely carry the said luggage from Central Ontario Junction to Calgary aforesaid, and there deliver the same to the plaintiff within such reasonable time as aforesaid, whereby the same was lost to the plaintiff.

And for a 9th plea as to counts numbered 5 & 6 of the said declaration the defendants say that the luggage mentioned in the said 5th and 6th counts of the plaintiff's declaration is the same and the defendants, except as to the said sum of $100 parcel of the money claimed say that the plaintiff was to become and did become a passenger with his luggage subject to the terms and conditions of a special contract entered into between the plaintiff and defendants, one of the terms and conditions of which was that the baggage liability of the defendants should be limited to wearing apparel not exceeding $100 in value, and the defendants say that by reason of said contract they are released from liability to the plaintiff for the loss of his said luggage except as to the amount of $100 paid into court.

And for a 2nd replication to the defendants 9th plea, the plaintiff says that the defendants were incorporated by an Act of Parliament of and are subject to the Legislative authority of the Dominion of Canada, and that the loss of the plaintiff's luggage referred to in the said plea occurred on or about the 3rd day of October, 1886, and the plaintiff says that the defendants ought not by reason of anything in the said plea contained to be relieved from the cause of action to which such plea is pleaded, because he says that the damage in respect of which the plaintiff claims under the counts to which such plea is pleaded arose wholly from the negligence and omissions of the defendants and their servants within the true intent and meaning of sub-section 4 of section 25 of "The Consolidated Railway Act 1879," and not otherwise.

J. A. M. Aikins, Q.C., and *W. H. Culver*, for defendants.

The points marked for argument were as follows:—(1) departure; (2) statute does not prevent setting up real contract; (3) confession but no avoidance. Replication not by way of estoppel but *precludi non; Chitty on Pleadings*, 628, 9. As to departure, see *Chitty*, vol. 1, 674; *Stephens on Pleading*, 358, 362; *Com. Dig.*, vol. 6, 151, 153, (F. 8,) 4, 5 also (F. 6,) (F. 10.) Replication asserts only something subsequent to contract and not varying it—deserts contract, and claims by statute, *Bacon's Abr.*, vol. 7, 651, 2, 3, 5; *Brine* v. *G. W. R.*, 2 B. & S. 402; *Saunders on Pleading*, 806; *Hutchinson on Carriers*, 582; Railway Act, 1879, s. 25; *Vogel* v. *G. T. R.*, 11 Sup. C. R. 612.

J. S. Ewart, Q.C., and *C. P. Wilson*, for plaintiff.

Plaintiff required to allege only so much of contract as applicable to case. *Cotterill* v. *Cuff*, 4 Taunt. 285; *Clarke* v. *Gray*, 6 East, 564. Damages not subject of pleading, *Clarke* v. *Gray*, 6 East, 654, shows question one of evidence only, *Brine* v. *G. W. R.*, supports plaintiff's case. *Butt* v. *G. W. R.*, 11 C. B. 139, 145, 152; *Phillips* v. *Clark*, 2 C. B. N. S. 156; *Wyld* v. *Pickford*, 8 M. & W. 443, 459, 461; *Bodenham* v. *Bennett*, 4 Pri. 31.

(*9th October, 1888.*)

KILLAM, J.—I will not now repeat the words of the statute. (The Consolidated Railway Act 1879, sec. 25, sub-sec. 4,) upon which the plaintiff relies. It has already been sufficiently referred to in the former judgment in this cause (5 Man. R. 198.) To support the plaintiff's contention in favor of this replication, it must be construed as introducing another implied term into the contract qualifying the absolute condition set out in the plea, and this, in a case to which it is applicable, would probably be considered to be the true construction of the statute. I do not, however, consider it necessary to determine now this question of construction or the question so much discussed in *Vogel* v. *The Grand Trunk Ry. Co.*, 2 Ont. R. 197; 10 Ont. Ap. R. 163; 11 S. C. R. 612. This demurrer can be determined upon a principle of pleading. The plaintiff relies upon *Clarke* v. *Gray*, 6 East, 564, to show that where the plea sets up a condition limiting only the amount of the liability, the plaintiff may reply a further qualification of the condition under which the limitation of liability does not apply. If, however, the condition be one which would constitute a complete bar to the action, to reply in this way would be a departure from the absolute contract set up in the declaration. On examination of this plea, it is found not to be one setting up a condition limiting the amount to be recovered, but one wholly barring liability for certain goods, viz., the portion in excess of those worth $100, and those not being wearing apparel. While the latter exception may not apply as the goods are not alleged to be other than wearing apparel, yet, as to the former, the condition wholly bars the right of recovery if absolute. To reply then, as in this replication, is to depart from the absolute contract set up in the declaration. This view is supported by the remark of Abbott, C.J., in *Latham* v. *Rutley*, 3 D. & R. 213, "The result of the cases upon this subject is this; if the carrier's notice is that he will not pay more than £5 upon any goods, it limits the amount of the liability only and need not be set out in the declaration; but if it is that he will not pay anything upon goods which exceed £5 in value, there it limits the liability altogether and is such a special exception as must be set out."

The demurrer will, therefore, be allowed.

The plaintiff appealed.

Aikins, Q.C., and *Culver* for the respondent objected that the appeal had not been brought in time and that there was no appeal without leave of a judge citing 48 Vic. c. 15 s. 26.

Ewart, Q.C., aud *C. P. Wilson*, for the appellant cited *Steele* v. *Ramsay*, 3 Man. R. 305.

Per Curiam. No leave is necessary, The appeal is of right. The objection as to time must be taken by a substantive motion to strike the case out of the list.

The argument then proceeded, counsel citing the same cases as before.

(*21st December, 1888.*)

Bain, J., delivered the judgment of the court. (*a*)

I think the learned Judge was right in allowing the demurrer to the plaintiff's second replication, for the reasons stated in his judgment.

The limitation to the contract alleged in the defendant's pleas is one, it seems to me, that materially alters and qualifies the legal nature and effect of the defendant's promise. It does not merely and only limit the amount for which they are to be responsible, but it is a stipulation that absolves them from all liability for any baggage except wearing apparel, and for so much of that as exceeds $100 in value. So they are not liable at all for any baggage except wearing apparel, and not for that beyond the specified amount.

The rule of pleading on this subject is thus concisely stated in *Chitty on Pleading*, vol. 1, p. 324. "If the carrier only limit his responsibility, that need not be stated in pleading, but if a stipulation be made that under certain circumstances he shall not be liable at all, that must be stated."

This express limitation, as well as the implied one, that, if the plaintiff's contention is correct, the statute imports into the contract, should have been stated in the declaration. But the plaintiff has declared on an absolute contract to carry his luggage safely and securely, and he should not be allowed to depart from the case he has thus made and have recourse to the one now set up in the pleadings.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

(*a*) Present: Taylor, C.J., Dubuc, Bain, JJ.

REG. v. HOWES.

Indictment.—Quashing.—Identity with information.

The court can entertain a motion to quash an indictment at any time.

An indictment (within R. S. C. c. 174, s. 140,) need not follow the exact language of the information. That section does not prevent the finding of any indictment founded upon the facts disclosed in the depositions.

G. G. Mills for the Crown.

H. M. Howell, Q.C., for defendant.

(*18th November, 1887.*)

TAYLOR, C.J.—An indictment has been found against the defendant for perjury to which he has not yet pleaded, and a motion is now made under the section of The Criminal Procedure Act relating to vexatious indictments (R. S. C. c. 174, s. 140) to quash this indictment.

There seems to be no doubt that the court can entertain such a motion at any time, *Reg.* v. *Heane*, 4 B. & S. 947; *Knowlden* v. *The Queen*, 5 B. & S. 532; *Reg.* v. *Fuidge*, 9 Cox, 430; *Reg.* v. *Bell*, 12 Cox, 37.

The objections taken by the learned counsel for the defendant are, that the information laid before the magistrate does not allege the fact said to have been sworn to, to be untrue, that the defendant has never been properly charged with perjury before the magistrate, or if he has, he is not now indicted upon the charge made. He contends that the effect or meaning of subsection 2, of section 140, is that a defendant must be charged in the indictment with the same charge as was laid before the magistrate, although there may be added further counts growing out of that charge or which are necessarily corollaries from it. Or where the defendant has been bound over to appear and answer the indictment must contain the same charge as that which is stated in the condition of the recognizance. No doubt this is true in general terms, but can it be said that the indictment must use exactly the same language as the information or recognizance. That cannot be necessary, for so to hold would require every information to be in the strict technical form of an indictment. It would indeed require every nonprofessional man going before a magistrate to make a complaint, to make it in strictly correct technical form, for it has been held that the magistrate should take the information as nearly as possible in the language of the party laying it, *Cohen* v. *Morgan*, 6 D. & R. 8.

So, in *Reg.* v. *Bell*, 12 Cox, 37, Smith, J., speaking of the meaning of the 30 & 31 Vic. c. 35, s. 1, the first part of which is the same as R. S. C. c. 174, s. 140, s-s. 2, said, It means that nothing shall be applicable to prevent the finding of any bill of indictment founded upon the facts disclosed in the depositions. . . . . . The first part requires that the counts must be founded upon the facts in the depositions, otherwise the bill ought not to be preferred. *Archibold* in his work on *Criminal Pleading*, says the 30 & 31 Vic. c. 35, was passed to meet the case where, before the magistrate, the defendant had not been charged with, nor committed, for the precise offence stated in the indictment, although it was evident from the depositions that the charge in the indictment was substantially though not perhaps in form gone into before the magistrate. In *Reg.* v. *Fuidge*, 9 Cox, 430, the prisioner had been committed for obtaining a shawl on the 26th September by false pretences. In the indictment that was made the first count, but there was another count also charging an entirely different offence on another day, and that count was quashed. So, in *Reg.* v. *Bradlaugh*, 47 L. T. N. S. 477, on the proceedings before the magistrate the defendant was charged with a number of libels contained in different issues of a newspaper, and some of these were withdrawn, the defendant being sent up for trial on the others. Before the indictment was sent to the grand jury, leave was asked and obtained from the judge to add a count for another libel and this was quashed by the court because the defendant had not been committed nor had the prosecution been bound over to prosecute in respect of it, and the judge who gave the leave had not been informed that this was one of the libels withdrawn before the magistrate.

In *Knowlden* v. *The Queen*, 5 B. & S. 532, three men were charged before a magistrate with conspiracy. The recognizance recited that they were charged "for that they did unlawfully conspire, confederate and agree together to cheat and defraud against the peace," &c., and the condition was that they should appear and "plead to such indictment as may be found against him by the grand jury in respect of the charge aforesaid," &c. An indictment was found against them but the recognizances and all the proceedings were respited until a future session of the court. Then a fiat was obtained from the solicitor-general for the prosecution of a fourth person and at the next sessions a new indictment was found, which alleged that a certain friendly society had been formed and that the four persons "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to obtain and acquire to themselves of and from divers others of Her Majesty's liege subjects who should become members of the said society, divers sums of money of the respective moneys of the said other liege subjects who should become members of the said society and to cheat and defraud them respectively thereof, against the peace," &c. Having been convicted the three original defendants moved in error on the grounds that the indictment on which they were tried, being for a conspiracy by four was not for the charge upon which they had been committed or bound over and that the fiat of the solicitor-general only related to the prosecution of the fourth or new defendant. After lengthened argument by able counsel, judgment was given for the Crown. Cockburn, C.J., said, "It is said that this is not the same prosecution as that in which the recognizances were entered into, because the three plaintiffs in error were bound over to appear on a charge of conspiracy between themselves, whereas an indictment has been preferred against them for a conspiracy of four; but in substance it is the same, for the *corpus delicti* is the conspiracy. . . . . The condition of the statute is satisfied so long as the offence to which the recognizances refer is the same as that on which the defendants are tried." And Crompton J., said, "I cannot think the statute intends that the offence should be specifically set out in the recognizances. . . . . The prosecutors have been bound over to give evidence of an offence which is conspiracy to cheat and defraud, and the plaintiffs in error have been bound over to meet that charge and the offence charged in this indictment is the same and the prosecution in effect the same." Shee, J., put it thus, "The first objection is, that the plaintiffs in error have been indicted and convicted for an offence in respect of which they had not entered into recognizances. But the question is, not whether the indictment is the same, but whether the offence with which they are charged is the same as that which they entered into recognizances to appear and plead to, the condition of the recognizances being to appear and plead to such indictment as might be found against them, 'for or in respect of the charge aforesaid,' which was a conspiracy to defraud." In that case the charge to which the defendants were to appear was, "that they did unlawfully conspire, confederate and agree together to cheat and defraud," not saying in what manner or what persons. Here the condition is, that the defendant will appear in person "to answer such complaint, charge or charges as shall be on the part of our Sovereign Lady the Queen then and there preferred against him for perjury."

I do not think I should quash the indictment upon the grounds taken. My declining to do so, does not deprive the defendant, should he be convicted, of any relief he may have by writ of error. I therefore refuse the motion, but adjourn, as I have power to do under section 141 of The Criminal Procedure Act, the receiving of the plea and the trial until the next Spring Assizes for the Eastern Judicial District and respite the recognizances entered into by all parties accordingly.

CANADIAN BANK OF COMMERCE v. NORTHWOOD.

[FULL COURT.—9th July 1888.]

Counterclaim or set-off arising out of jurisdiction.

Held, A defendant can only set up by way of counter claim or set-off, a demand for which he can bring an action.

Therefore, a cause of action which arose out of the jurisdiction cannot be set-up by way of counter claim or set-off, unless the circumstances be such as to permit of an action being brought upon it.

The following authorities were referred to by the learned judges, *Birmingham Estates* v. *Smith*, 13 Ch. D. 506; *Stooke* v. *Taylor*, 5 Q. B. D. 576; *McGowan* v. *Middleton*, 11 Q. B. D. 464; *Winterfield* v. *Bradnum*, 3 Q. B. D. 324; *Sykes* v. *Sacerdoti*, 15 Q. B. D. 423; *Chapple* v. *Durston*, 1 C. & J. 1; *Francis* v. *Dodsworth*, 4 C. B. 219; *Rawley* v. *Rawley*, 1 Q. B. D. 460; *Waterman on Set-off*, p. 24; *Leake on Contracts*, p. 1003; *Sharpe* v. *McBurnie*, 3 Man. R. 161; and the *Statutes of Set-off*, 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24.

C. P. Wilson, for plaintiff.

Chester Glass, for defendant.

THE MOLSON'S BANK v. ROBERTSON.

(IN CHAMBERS.)

Special jury.—Order for.—Time for application.

An application for a special jury may be made in Chambers, but is more proper before the Assize Judge.

It is not necessary to give any reason for requiring a special jury.

A plaintiff may obtain an order for a special jury *ex parte*. A defendant should move upon summons, but not necessarily before entry of the recor

G. Davis, for plaintiff.

J. H. D. Munson, for defendant.

(*6th November, 1888.*)

TAYLOR, C.J.—The record in this case having been entered for trial by a jury at the present Assizes, the plaintiff obtained from my Brother Bain, sitting in Chambers, a summons calling on the defendant to show cause why the issues joined should not be tried by a special jury. Cause has been shown before me, and several objections have been taken.

The first of these is that, this summons should not have been taken out in chambers, but should have been obtained from, and have been returnable before the judge of assize, upon whose list the record is standing for trial. Now, the 1 Geo. 4 c. 55, s. 5, does not say that chamber applications in actions entered for trial at the assizes must be made before the judge of assize, but merely that judges of assize may grant summonses and make orders in all actions to be tried before them during their circuits, although they are not judges of the court in which such actions are depending. The reason for such a provision having been made is plain. A judge of assize had, in England, before him records for trial in actions in all the three common law courts, but before that statute was passed the judge had no power to grant a summons or to make an order except in an action pending in the court of which he was a judge. It was only by the 1 & 2 Vic. c. 45, that a judge of one court was given power to deal with matters arising in actions depending in the other courts. Undoubtedly there are applications affecting cases entered for trial at the assizes, which it is more convenient should be disposed of by the judge presiding there, and applications which, as a matter of courtesy, if nothing else, a judge sitting in chambers would leave to be disposed of by him. I would never, sitting in chambers, entertain an application to add a cause to the assize list after the time for entering records has passed, nor without the assent of the judge of assizé, an application which would interfere with the order of business before him. The present application is one which may do that, and I would refer it to my Brother Dubuc, but on speaking to him, he is willing that I should dispose of it.

The objection is further taken that, while the statute 48 Vic. c. 17, s. 206, as amended by 51 Vic. c. 29, s. 15, says either plaintiff or defendant may of right, have issues of fact tried by a special jury, that expression is not to be taken in its wide sense, because it is to be according "to the law and practice in that behalf, being and existing in England on the 15th day of July, 1870," and in England it is said, it was necessary to show grounds for having the cause tried by a special jury. It is then urged that the affidavit filed on behalf of the plaintiffs shows no such ground, while an affidavit of the defendant sets out good reasons why it should not.

I cannot find that in England it was necessary to state any reason for having a special jury. There were two different modes of proceeding to obtain a special jury in England, according as the issues were to be tried at the assizes in the country, or at the sittings in London and Middlesex. In London and Middlesex, the party desiring to have a case tried by a special jury, obtained *ex parte*, a rule for its being so tried, on filing an affidavit, either that no notice of trial has been given, or, if given, stating the day for which given, and in the latter case the rule could not issue unless applied for more than six days before the day named. A judge could, however, on summons, order a rule for a special jury to be drawn up at any time. In a case to be tried at the assizes, all that a plaintiff desiring a special jury had to do was, to serve notice on the opposite party at such time as would be necessary for a notice of trial, of his intention to have it so tried. A defendant could serve a similar notice six days before the day of trial.

That it was in no case necessary to show grounds for having a special jury, is further plain from the 6 Geo. 4, c. 50, s. 34, which provides, that the party applying for a special jury shall pay the costs occasioned thereby, unless the judge shall immediately after the verdict, certify on the back of the record that the cause was a proper one to be tried by a special jury. No such certificate could be necessary, if, before obtaining the special jury, the party applying for it had to prove that the case was a proper one for such a jury.

The court held, in *Robinson* v. *Hutchins*, 1 Man. R. 122, that in this Province as to proceedings connected with the trial of cases at the assizes, the English practice at the assizes should be followed, not the practice in London and Middlesex.

The practice in England as to special juries is, however, by the statute to be followed, "save where altered by the following sub-sections." By sub-section 3, a judge's order is, in all cases required for a special jury. The object of that order is not to give the party a right to a special jury, but is to authorize the summoning of the special jurors by the sheriff. In this Province, an order for a special jury will most conveniently be made on summons, for it must state the day on which the case is to be tried, but where a plaintiff has given a jury notice and desires a special jury, I can see no reason why he might not obtain from the judge who is to take the assizes, an order for a special jury, fixing the day and serve that with his notice of trial.

In a case like the present, the plaintiff could not well obtain the order until after the record had been entered. He did not desire a jury at all, and gave no jury notice. It was only upon the defendant giving the jury notice that the plaintiff desired to have a special jury. Even when that notice was given, the plaintiff had no positive assurance that there would be a jury, for if the defendant failed to pay over to the sheriff the necessary fee, the plaintiff could have had the jury notice struck out, and then the case would have been tried, as he at first intended, by a judge without a jury. It was only when, on the day for entering the record, the fee was paid by the defendant and the case being tried by a jury became a certainty that the plaintiff had to move in the direction of obtaining the special jury he desired. I do not think there has been any unnecessary delay in moving.

To have the case tried by a special jury, if it is to be tried by a jury at all, is the plaintiff's right, and I am prepared to make an order for its being so tried as soon as the parties procure a day for the trial to be named by my Brother Dubuc.

The costs of this application will be costs in the cause.

HOLMES v. THE CANADIAN PACIFIC RAILWAY CO.

[TAYLOR, C.J.—9th May, 1888.]

Order for examination of witness about to leave jurisdiction.—Ex parte.

This was an application to set aside an order, made *ex parte*, for the examination of B. as a witness on behalf of the plaintiff. The affidavit upon which it was granted, stated the cause of action, that appearance had been entered, but no declaration filed, that B. was a material and necessary witness, that he intended to leave the Province on the day upon which the order was made, and would not return for at least six months.

TAYLOR, C.J.—After referring to the statute under which the order was made, 1 Wm. 4, c. 22, s. 4, discussed the following authorities, *Finney* v. *Beesley*, 17 Q. B. 86; *Braun* v. *Mollett*, 16 C. B. 514; *Fischer* v. *Hahn*, 13 C. B. N. S. 659; *Mondel* v. *Steele*, 8 M. & W. 300; *Chutterbuck* v. *Jones*, 6 D. & L. 251; *Saunders* v. *Playter*, Tay. 37; *Dougall* v. *Moodie*, 1 U. C. Q. B. 257; as to the order being made before declaration filed; and *Thomas* v. *Stutterheim*, 5 W. R. 6; *Morgan* v. *Alexander*, L. R. 10 C. P. 184; *Doe* v. *Patterson*, 3 Dowl. 35; *Pirie* v. *Irons*, 1 M. & Sc. 223; 1 Dowl. 252; 8 Bing. 143; and other cases as to the power to make the order *ex parte*, and decided that according to the established practice, the order should not have been made *ex parte*. The order was therefore set aside.

C. P Wilson, for plaintiff.

W. H. Culver, for defendant.

McINTYRE v. WOODS

CANADIAN PACIFIC RAILWAY COMPANY GARNISHEES.

(BEFORE THE FULL COURT.)

Interpleader.—Dispute as to amount due by Garnishees.—Procedure.

Under 49 Vic. c. 35, s. 10, a garnishee may have an interpleader as to the amount he admits to be due, although a larger amount may be alleged by the attaching creditor to be owing. (*Merchants Bank* v. *McLean*, 5 Man. R. 219, overruled.)

The garnishee should, however, upon affidavit, express his readiness to bring into court the amount truly owing, whatever that may be found to be. Such an affidavit was allowed to be supplemented.

An issue may be directed to ascertain what is the true amount due.

Summons by garnishee to interplead, referred from Chambers.

J. A. M. Aikins, Q.C., and *W. H. Culver*, for the garnishees. Indebtedness here arose under separate contracts.

In *Merchants Bank* v. *McLean*, 5 Man. R. 219, some cases were not cited which show that the practice on bills of inter pleader does not necessarily govern proceedings under the Interpleader Act. *Meynell* v. *Angell*, 32 L. J. Q. B. 14; *Best* v. *Hayes*, 1 H. & C. 718; *Tanner* v. *European Bank*, L. R. 1 Ex. 261; *Attenboro* v. *London & St. Katharine Dock Co.*, 3 C. P. D. 450; *Reading* v. *School Board for London*, 16 Q. B. D. 686; *Wilson on Judicature Act*, 481; *Blyth* v. *Whiffin*, 27 L. T. N. S 330.

H. M. Howell, Q.C., for Royal City Planing Mills Co.

J. S. Ewart, Q.C., for plaintiff.

J. W. E. Darby, for defendants.

G. Davis, for Stewart.

A. E. Richards, for the Union Bank.

(*21st December, 1888.*)

TAYLOR, C.J.—The Canadian Pacific Railway Co. are indebted to Woods & Co. the defendants. McIntyre, a judgment creditor, obtained and served an order attaching the indebtedness of the Railway Co., Stewart, another judgment creditor, has done the same. The Royal City Planing Mills Co. have begun two actions against Woods & Co., and they have served attaching orders before judgment. The Union Bank of Canada claim to be entitled to all moneys due from the Railway Co., by virtue of an assignment or assignments from Woods & Co. and have filed a bill on the equity side of the court to enforce their rights.

McIntyre having taken proceedings for payment over of the money, the Railway Co. applied in Chambers, under section 53 of The Administration of Justice Act, 1885, as amended by 49 Vic. c. 35, s. 10, and the summons taken out by them has been referred from Chambers to be disposed of by the Full Court. The Bank claim that the indebtedness to Woods & Co. amounts to $15000, while the Railway Co. admit only $9997.50. The difference arises mainly, as the Railway Co. alleges, on account of a quantity of lumber ordered from Woods & Co., but supplied by the Royal City Planing Mills Co., having been stopped by the latter *in transitu*.

The contention raised against the Railway Co. is, that they are not entitled to relief by way of interpleader where, as here, the right to the money admitted to be owing to them is not the sole question, but there is the further question of whether they owe a larger sum.

For this contention, the case of *Merchants Bank* v. *McLean*, 5 Man. R. 219, and the cases there cited are relied on. No doubt, in that case, the court did hold that, there being a dispute as to the amount due by the garnishees, they could not obtain an interpleader order, but the court so held following the practice which obtained in courts of equity as to bills of interpleader. None of the cases decided in courts of common law were, on that occasion cited. In *Attenborough* v. *St. Katharine's Dock Co.*, 3 C. P. D. 450, Baggallay, L.J., expressed the opinion that since the Common Law Procedure Act, 1860, s. 12, a judge of the Court of Chancery would feel himself no longer bound by the somewhat narrow principle laid down by Lord Cottenham in *Crawshay* v. *Thornton*, 1 Jur. 19, and in *Cababe on Interpleader*, this is spoken of as, "the now exploded doctrine." However this may be, it is certain that the courts of common law never gave in their adhesion to the equity doctrine. In *Best* v. *Hayes*, 1 H.

& C. 718, where the order made in Chambers was moved against as not in accordance with the rules which obtained in equity, Pollock, C.B., said, "This order is in conformity with the practice which has prevailed in this Court (and I believe in every other Court in Westminister Hall) ever since they have had jurisdiction to make interpleader orders." Martin, B., spoke of the order as in accordance with the practice for the last twelve years. In *Tanner* v. *European Bank*, L. R. 1 Ex. 261, Martin, B., referred to *Best* v. *Hayes*, as a case in which the equity rule was entirely disclaimed, and Piggott, B., expressed himself as glad the Courts had not consented to limit the power given them by the Interpleader Acts. In *Attenborough* v. *St. Katharine's Dock Co.*, 3 C. P. D. 450, Brett, L.J., speaking of the English statutes said, "I do not think that the statutes apply merely where the opposing claims are co-extensive; I think that they bear a wider construction."

But the question arises, how is it under the wording of our Acts as to interpleader?

In *Best* v. *Hayes*, and *Tanner* v. *European Bank*, the judges seem to lay stress upon the words of the 1 & 2 Wm. 4, c. 58, and the Common Law Procedure Act, 1860, which give the Court power to make such orders, "as to costs and all other matters as may appear just and reasonable." These words are found in our Administration of Justice Act, 1885, not, as was contended, merely in section 57, and as applicable only between the plaintiff and defendant, where the third party when duly summoned does not appear, but also in section 56. What appears in our Act as sections 54, 55, & 56, stands in the 1 & 2 Wm. 4 c. 58, as one section, the words in question being the concluding words, so no doubt these general words, as found in that Act apply to all the proceedings provided for in the section. It would perhaps have been better and less free from ambiguity had these words, when the provisions of the one section in the English Act were divided up into separate sections, been placed in a distinct section by themselves as has been done in the Rules to the English Judicature Act, Ord. 57, r. 15, *Wilson on Jud. Act*, 485. But section 56, standing as it does in our Act, must be read as conferring two distinct powers upon the court or a judge, first, to determine and dispose of the merits of the various claims in a summary manner, and second, to make such rules and orders as to costs and other matters as shall appear just and reasonable. It must be read, as giving that second power in respect to all or any proceedings under sections 54 and 55, otherwise the court has no power to make orders as to costs in interpleader proceedings. It is, however, further contended that the words used in The Administration of Justice Act, 1885, section 53 as amended by 49 Vic. c. 35, s. 10, "debt, obligation or liability in question" preclude the court from granting any such relief as is asked by the Railway Co. The words in section 54, "subject of the suit," and "subject matter of the action," are also referred to. The contention is, that in the present case the garnishees do not show that they do not claim any interest in the debt, obligation or liability in question, because they dispute part of it, and therefore they do not bring themselves within the Act. That depends entirely upon the meaning of these words. If they are to be read as meaning the debt, obligation or liability which is alleged, or claimed by the assignee or judgment creditor to be due from the garnishees, then the contention is correct. But that cannot be the meaning of the words. That the assignee or judgment creditor alleges or claims that the debt, obligation or liability, is of a certain amount cannot make it so. In my opinion, the section must be read as meaning that the garnishee does not claim any interest in the debt, obligation or liability attached, the amount truly and actually owing to the judgment debtor and that he is ready to bring into court or to pay or dispose of that debt, obligation or liability, whatever the amount of it may be found to be.

That the court may, in a case in which a garnishee disputes that the amount claimed is actually due from him, direct an issue to ascertain what is due, seems evident from section 31 of The Queen's Bench Act, 1885. By that section a judge in Chambers has power and authority if he shall think fit, so to do, "on the return of an interpleader or garnishee summons to hear, determine and finally dispose of any issues that may be thereupon raised; and if he shall find it expedient so to do, in order to enable the parties to such issue or either of them to prepare for the trial thereof, to fix a day at which such trial shall take place, and may from time to time postpone such trial, in whole or in part, as justice may require, and shall finally determine and dispose of the same by his order in that behalf." Now, if on an application for a garnishee to pay over, a certain amount being claimed, he should set up that he does not owe so much because part of the indebtedness has been assigned, although he could not, as under section 53 of The Administration of Justice Act, 1885, as amended, have the assignee brought in to contest the question, yet, taking upon himself the onus of proving the assignment, the judge in chambers could try the issue thus raised.

The affidavit filed here, on the part of the garnishees, seems defective in this, that it does not express their readiness to bring into court, or to pay or dispose of the debt, obligation or liability, the amount truly and actually owing to the judgment debtor, whatever that may be found to be, in such manner as the court or judge may order. The submission is merely as to the amount admitted to be due, the $9,997.50. As this point has not before been considered or disposed of, and as no objection has been taken to the affidavit on this account, the garnishees should have leave to file an amended affidavit. Before however, they do so, or are required to do so, they should have an opportunity of considering what the result may be, and of deciding whether, in view of that, they will proceed further with this application for interpleader.

If the question as to some of the lumber having been stopped *in transitu* did not arise, there would be little difficulty. There could be one issue between the Bank and the other creditors to try the question of the alleged assignment. Then there could be an issue between the assignee and creditors on the one side, and the Railway Co. on the other, to ascertain the true debt, or the assignee or creditors might be directed to join in bringing in the name of Woods & Co., giving a proper indemnity, an action against the Railway Co. for the amount alleged and claimed to be due, and in that way the true indebtedness be arrived at. In that issue or action, the question of the stoppage *in transitu* would necessarily come up, but the difficulty is, that the Royal City Planing Mills Co. seem to have no interest in that. They are apparently, the first in priority of the attaching creditors, and apart from the question of the Bank assignment, the amount which the Railway Co. admit to be due, is more than sufficient to pay what is claimed to be due from Woods & Co. to them. If, however, they have any interest in that, it is one adverse to that of the other creditors, for it is their interest that the amount due in respect of lumber said to have been stopped *in transitu*, should not be found due from the Railway Co. to Woods & Co.

The difficulty in which the Railway Co. are, is that, if they file an affidavit such as is required to give them the benefit of section 53 of the Administration of Justice Act, 1885, as amended, submitting to pay or dispose of the debt, obligation or liability whatever it may be found to be, and their contention as to the stoppage *in transitu*, should be decided adversely to them, then they must pay into court the larger amount for the benefit of the Bank as assignee, or of the other creditors, as the case may be, and still be liable to be sued in respect of that lumber, by the Royal City Planing Mills Co. in British Columbia, or the North West Territories. I see no way in which they can be protected against that risk.

The only disposition which, in my opinion, should be made of this matter at present, is to decide that a garnishee is entitled, although he may dispute his liability for part of the amount claimed as due from him, to call upon the parties to interplead under the statute. *Merchants Bank* v. *McLean*, must be considered as overruled on this point.

So much being decided, the Railway Co. should have an opportunity of considering whether they will file such an affidavit as I have said they should file, and thereby submit to have their entire indebtedness, when ascertained, whatever that may be, dealt with by the court.

The matter must again be mentioned to the court. If they elect to file the affidavit, then the issues to be tried must be settled upon and directed, and if they do not, then I presume, their summons must be dismissed.

KILLAM, J.—Several attaching orders having been issued in this and other actions against the same defendants, attaching all moneys owing by the Canadian Pacific Railway Company to the defendants, and these moneys being also claimed by the Union Bank of Canada as assignees of the defendants, the Company has applied for an interpleader order to settle these conflicting claims.

The application was made upon the affidavit of William Beairsto stating that the Company is indebted to the defendants in the sum of $9,997.50; that a garnishee order at the suit of the

Royal City Planing Mills Co. attaching moneys due from the Railway Co. to the defendants to the extent of $11000, another similar garnishee order at the suit of the same Company attaching such moneys to the extent of $3000, one at the suit of the plaintiff in this action attaching the same moneys to the extent of $17500, and two at the suit of one Stewart attaching the same moneys to the extent of $400 and $443.20 respectively have been served upon the Railway Co., and the respective dates of service; that the Railway Co. claims no interest in "the said moneys so due from them to the said judgment debtors," but, that the right to the same is claimed by the Union Bank of Canada; and that the Railway Co. does not collude in any manner with the Bank, but is ready to bring into court or to pay or dispose of "the said debt," in such manner as the court or a judge may order.

The application is made under the Act 49 Vic. c. 35, s. 10, amending the Administration of Justice Act, 1885, 48 Vic. c. 17, s. 53, by adding thereto the following sub-section:—"In case the garnishee applies to the court or a judge thereof, and shows by affidavit or otherwise that he does not claim any interest in the debt, obligation or liability in question, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, or claims the same; and that such garnishee does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the said debt, obligation or liability in such manner as the court or a judge thereof may order, the court or a judge may grant a rule, order or summons calling upon such third party to appear and state the nature and particulars of his claim, and to maintain or relinquish the same; and thereupon proceedings may be taken and had in the same manner and to the same effect as the similar proceedings under the four subsequent sections in the said amended Act may be had and taken." The four subsequent sections referred to, are those which provide for an interpleader application, by a defendant in an action the subject matter of which is claimed by a third party as well as by the plaintiff in the action, and for the practice upon such an application.

There is filed for the Union Bank an affidavit in which the indebtedness of the Canadian Pacific Railway Company to these defendants is stated to be $15000, and both the Bank and several of the attaching creditors claim that much more is owing than the sum stated in Mr. Beairsto's affidavit. There is also a further affidavit filed on behalf of the Railway Co., which shows that there is ground for believing that a further sum of over $2000 is due by the Railway Co. for goods shipped by these defendants, but subsequently claimed by the Royal City Planing Mills Co., and the other attaching creditors and the Bank claim that this sum must be treated as owing to these defendants.

Under these circumstances the attaching creditors object to the making of the interpleader order, contending that in accordance with the view taken in *Merchants Bank* v. *McLean*, 5 Man. R. 219, no such order can be made where the garnishee does not admit the whole amount claimed of him. As counsel for the Railway Co. disputed the opinion expressed in *Merchants Bank* v. *McLean* upon that point, and desired to have the question reconsidered, the summons has been referred to the court. In view of the further authorities cited, and to which we were not referred in *Merchants Bank* v. *McLean*, I think that we should treat the question as open for further consideration. In that case the opinion was based upon the practice in equity upon a bill of interpleader, which was at first considered in England to be the practice by which interpleader applications at law under the statute 1 & 2 W. 4, c. 58, were to be governed. Subsequently the English courts departed to some extent from the equity practice and made interpleader orders under circumstances under which an interpleader bill would not have been entertained, holding that while the principles involved in interpleader suits in equity could quite properly be looked to for the purpose of determining matters arising upon interpleader applications under the statute, yet the statute was to be construed liberally according to its terms and was not to be given an implied limitation by reference to the practice in equity.

Thus, in *Tanner* v. *The European Bank*, L. R. 1 Ex. 261, and *Attenboro* v. *The London and St. Katharine's Dock Co.*, 3 C. P. D. 450, orders were made staying the actions and for interpleader at the instance of the defendants, although damages were claimed of the defendants which were not claimed by the third parties, and under alleged contracts with which the third parties had nothing to do, while they claimed only the articles which were the subjects of the contracts.

In *Reading* v. *School Board for London*, 16 Q. B. D. 686, it was held that a defendant might have interpleader as to a portion of a sum for which he was sued, while defending as to the balance. This decision, however, was based upon rules under the Judicature Acts and the intention to determine what would have been the practice before those Acts was expressly disclaimed.

The principle which I take from the two first mentioned cases and from *Meynell* v. *Angell*, 32 L. J. Q. B. 14, 8 Jur. N. S. 1211, and *Best* v. *Hayes*, 1 H. & C. 718, is, that the court is to give to the statute its fair construction without an implied limitation by analogy to the practice in equity.

The real question is, What is the meaning of the expression "the debt, obligation or liability in question"? Is it the claim made by the attaching creditor of the garnishee; or is it the debt, obligation or liability which the garnishee sees fit to bring in question by making an application with respect to it?

Now, the enactment by which the application is authorized is in a clause added as a sub-section to the section respecting the making of garnishee attaching orders. This sub-section begins by assuming such an order to have been made, and it appears to me that "the debt, obligation or liability in question" is that which has been attached or attempted to be attached by the order. But the expression is not "the claim in question," and I think that it may fairly be interpreted to be the actually existing debt, obligation or liability which is referred to as that in question. It is assumed that there is such a debt, obligation or liability due or owing by the garnishee. It is in question because assumed to be attached and to be made the subject of a garnishee order. But it is the whole debt, obligation or liability to which the attaching order relates that is the one in question. It may be made up of several distinct causes of action and yet, as respects the attaching order, the whole will constitute together the "debt, obligation or liability in question." It is *the* debt, &c., and not *a* debt, &c., in question that is referred to. Then it is the whole existing debt, obligation or liability, whatever its amount that the garnishee must offer "to bring into court or to pay or dispose of as the court or a judge may order," it is not merely a portion of it which the garnishee may choose to pick out or which he may claim to be the whole. It appears to me, that it matters not that the amount may be undetermined or disputed; the disclaimer of interest should be in the whole, the offer should be as to the whole, though the amount may have to be ascertained. The party seeking this protection from the court must be prepared to submit to have the court or judge decide as to the amount or determine what course shall be taken to ascertain the amount which the garnishee offers to pay into court, or pay or dispose of as he may be ordered.

In this view, then, the affidavit on which the application is based is defective. It is stated that a certain amount is owing. It is not stated that a larger amount is not owing. It is ambiguous at the best whether the disclaimer of interest and statement of the willingness to pay into court, &c., relate to the specific amount stated to be due or to the whole moneys attached or attempted to be attached.

I think, however, that under the circumstances the applicant should if it see fit, be allowed to supplement the affidavit by another made to relate distinctly to all moneys in question under the attaching orders though the amount be found to exceed that contended for by the Railway Co. Unless that Company is prepared to submit the ascertainment of the amount to the court upon the application, no interpleader order can, in my opinion, be made respecting any portion of it.

Now, in ascertaining the amount, the claim of the Mill Co. to certain goods will come up. I do not know whether the Railway Co. desires also that its liability to Woods & Co. for those goods should be a subject of interpleader between the Mill Co. and the other attaching creditors, or whether it is prepared to fight out this question on its own responsibility. There may be some question respecting the right to such interpleader, in this court if, as I understand, the goods were shipped in British Columbia to points in that Province or the North West Territories and were never in this Province. There may also, be a question whether by voluntarily submitting this question to the court for adjudication in interpleader proceedings, either by itself or as part of the question respecting the amount of the liability in question, the Railway Co. can obtain protection from litigation with the Mill Co. respecting it elsewhere or will place itself in any worse position than if it left every one to take what proceedings he pleased to recover what he could from itself.

I agree then, that it would be better to allow the matter to stand until next Term to enable the Railway Co. to elect whether it will make the application relate distinctly to the whole liability whatever it may be, and whether it will also seek a subsidiary interpleader respecting the claim of the Mill Co. The former might be done without the latter, though the Railway Co. would then have to fight that question with the other attaching creditors at its own risk. The difficulty may be that if it brings that in and the Mill Co should refuse to contest the claim here and the amount be thus adjudged to the attaching creditors or the Bank, the order or adjudication may be found to give no protection against a suit by the Mill Co. elsewhere, and the Railway Co. would, perhaps, find itself in a worse position than if it took upon itself the burden of disputing the right of the attaching creditors or the Bank to claim this portion of the moneys.

I think that it would be better that the Railway Co. should make its election and file its affidavit and notify the other parties of it a short time before next Term to be now fixed.

Dubuc, J., concurred.

(*15th February, 1889.*)

Per Curiam.—Upon the new affidavit filed, the Canadian Pacific Railway Company is entitled to an interpleader order as between the Union Bank of Canada and the attaching creditors. We will not now undertake to determine whether there should be one in respect of the now suggested claim of the Royal City Planing Mills Co. other than its claim under its attaching orders. The original application was made only on the basis of the claim made by the Bank adversely to the attaching creditors as such.

We might, perhaps, hold the Planing Mills Co. upon the summons taken out, bound to present all its claims to the debt, obligation or liability in question, but we will not now assume to determine whether we should or not, as the course of the proceedings has not been such that we would think it proper to do so without allowing that Company further time to determine upon its course and as the question of jurisdiction has not been fully argued.

There appears to be no sufficient reason for departing from the usual course of directing an issue between the party claiming to be assignee and the attaching creditors. One objection to adopting the suit in equity for the purpose of deciding in that the question between the parties would be that the Royal City Co. might be thereby indirectly have its right to stop the goods *in transitu* determined, although we do not feel that we ought at present to determine whether it should be placed in that position or not. Still, if the Bank and all the attaching creditors, including that Company, can agree upon having the suit adopted absolutely or upon any conditions in that or other respects it may be done accordingly.

At present, in the absence of such agreement, the order of the court will be that the Railway Co. pay into court the $9997.50 admitted with interest at 4 per cent. per annum from the—— day of——, 1888, to date of payment, that an issue be tried in which the Union Bank of Canada will be plaintiff and the Royal City Planing Mills Co., James McIntyre and Fred J. Stewart will be defendants, and in which the question to be tried will be whether on the 12th July, A.D. 1888, the moneys owing by the Railway Co. under contracts between that Company and the defendants in this cause were the moneys of the Bank as against those attaching creditors. All questions as to the full amount owing by the Railway Co. upon such contracts or otherwise to Woods and Co., and all other questions arising under the summons and all questions of costs not now disposed of, will be adjourned to be determined by a judge in chambers on ——days notice by any party.

We leave it to the judge in chambers to consider whether he will proceed to determine in chambers the full amount owing or direct any other mode of determining it, and whether any order should be made on this or any other application for interpleader respecting this other alleged claim of the Royal City Co. This course will enable the parties to proceed more speedily than would any attempt to determine any of these matters further in court.

On account of the difficulty raised by the former decision in *Merchants Bank* v. *McLean*, no costs of the proceedings in court will be allowed to any party, and costs formerly incurred in chambers as well as those to be hereafter incurred will stand to be disposed of in chambers.

PETTIT v. KERR.

(IN APPEAL.)

Landlord and tenant.—Excessive distress.—Trespass and trover.—Not guilty by statute.—Married woman.—Joinder of husband in tort.

Trespass or trover will not lie upon a distress where there is some rent due. The action should be upon the case for excessive distress, or for not accounting for the surplus moneys realized, or for not returning the balance of goods unsold.

After distress any surplus moneys should be paid to the sheriff, and unsold goods returned or placed in some convenient place, with notice to the tenant.

"Not guilty by statute" puts in issue the tenancy as alleged. If there be a variance as to the landlord alleged, an amendment may be allowed if the verdict be otherwise satisfactory.

Where the principle upon which the jury should proceed in estimating damages was not made clear to them, a new trial was ordered without costs.

Per BAIN, J.—It may still be permissible to join a husband with his wife as plaintiff in an action of tort, for damage to her goods, notwithstanding the Married Womans' Property Act.

Motion by defendants to set aside a verdict for plaintiffs, and for a non-suit or a new trial.

J. A. M. Aikins, Q.C., and *A. Dawson* for defendants. There was no verdict on several of the counts. *Cattle* v. *Andrews*, 3 Salk. 372; *Miller* v. *Trets*, 1 Ld. Raym. 324; *Bentley* v. *Fleming*, 1 C. B. 479. As there was rent due and all the goods were seized for rent, there could be no action of trespass or trover, *Woodfall on Landlord and Tenant*, 497; *Bullen and Leake*, 316, 320; *Whiteworth* v. *Smith*, 5 C. & P. 250. "Not guilty by statute" puts the tenancy as alleged in issue. *Haine* v. *Davey*, 4 A. & E. 892; *Williams* v. *Jones*, 11 A. & E. 643; *Roscoe, N. P.* 825; *Woodfall*, 500. If action were for personal injury, a claim for damages to husband could be joined, but the declaration should show this, *Rischmuller* v. *Uberhaust*, 11 U. C. Q. B. 425; *Shuberg* v. *Cornwall*, 6 O. S. 253; *Breen* v. *MacDonald*, 22 U. C. C. P. 298. Only in cases of personal injury to the wife can husband join actions of his own, *Johnson* v. *Lucas*, 1 E & B. 662; *Bullen and Leake*, 22, 340, 339; *Amer* v. *Rogers*, 31 U. C. C. P. 195, 202. Evidence is that tenancy that of wife only. Agent of landlord not liable for irregular acts of bailiff. *Bennett* v. *Bayes*, 5 H. & N. 391; *Stone* v. *Cartwright*, 6 T. R. 411; *Story on Agency*, § 313; *Smith on Master and Servant*, 415; *Evans on Principal and Agent*, 386.

H. M. Howell, Q.C., and *T. D. Cumberland*, for plaintiffs. Watch chain and ring are paraphernalia, and husband and wife should sue as right of action survives to wife on husband's death. *Ayling* v. *Whicher*, 6 A. & E. 259. As to husband and wife suing on first two counts, *Macqueen on Husband and Wife*, 157-8; *Dunstan* v. *Burnell*, 1 Wils. 224.

J. A. M. Aikins, Q.C., in reply. It is necessary to state wife's interest in the declaration to make her a party. As to wife suing for injury to personal property, *Chambers* v. *Donaldson*, 9 East, 471; *Baggett* v. *Frier*, 11 East, 301; *Shingler* v. *Holt*, 7 H. & N. 65; *Bullen and Leake*, 339; *Chitty on Pleading*, vol. 1, p. 83 and (n.)

(*2nd March, 1889.*)

Killam, J.—The declaration contains several counts, viz.:— 1. Trover. 2. Trespass to goods. 3. Excessive distress. 4. Wrongful distress. 5. Not selling distrained goods for the best price that could be obtained.

The plaintiffs are a husband and wife who resided in premises of which the landlord at the making of the lease was S. C. Biggs. The case for the plaintiffs is that the reversion was assigned to the defendant Kerr and that he personally and by his bailiff, the defendant Hutton, distrained an excessive quantity of goods for rent of the premises, and sold the most of them for a grossly inadequate sum, and that some of the goods seized, a gold watch, a ring and two dresses, all three claimed to have been the property of the female plaintiff, were not sold or accounted for or returned to the plaintiffs. The last three articles are those for which the counts in trover and trespass are inserted.

There is some evidence that some of the goods distrained were the separate property of the wife, but upon the evidence of the plaintiffs it is clear that most of the goods must be treated as the husband's.

As a matter of evidence it is somewhat doubtful whether the husband or his wife was the tenant. The demise was by parol. The wife states that she made the bargain for the rental, but not that she made it for a lease to herself as her separate estate. The natural inference would be that she acted only as agent for the husband and that he was the tenant. The distress warrant directs the distress of the goods of "Pettit, Mr. and Mrs., in the house he now dwells in." The advertisement of sale of the goods states the goods were seized under a warrant at the suit of the Confederation Life Association against the goods of Willis and Maggie Pettit, the plaintiffs; and the notice of seizure is directed to Willis Pettit and Maggie Pettit and states that, "I, as bailiff for your landlord Confederation Life Association have this day seized," &c. This evidence is relied on as showing a joint tenancy by husband and wife. I do not attach much importance to this question as, if necessary to support a verdict, otherwise satisfactory, the wife's name could be struck out. On the other point too, that Kerr was agent only and not landlord, there is practically no evidence for the plaintiffs, the contention of whose counsel really was that there was evidence that the landlord was The Confederation Life Association. But as Kerr personally took the initiatory steps in the distress putting under seizure and in the hands of the defendant Hutton as bailiff, the whole of the goods, he would be liable to the action for an excessive distress, and the action should not be disposed of on this ground.

The plaintiffs obtained a verdict, the jury stating that they found it upon the 1st and 2nd counts, as to the watch, ring and dresses and on the 3rd count as to the other goods.

At the trial the defendants moved for a nonsuit on the ground that there was no evidence under the 1st and 2nd counts, it appearing that some rent was due, and that the two plaintiffs could not recover jointly for the husband's goods. The variance between the record and the evidence as to the real landlord was not made a ground of asking a nonsuit.

Leave was reserved to the court to enter a nonsuit on the grounds on which it was asked at the trial, and the defendants now move to enter a nonsuit or to have a new trial on various grounds.

There being evidence that should be submitted to a jury on the question of excessive distress, and no leave being reserved to enter a nonsuit on the variance mentioned, we cannot now, enter a nonsuit.

The principal objection to the verdict arises out of an exception to the charge of the learned judge at the trial, on the ground that he improperly left it to the jury to find for the plaintiffs upon the counts in trover and trespass.

The case of *Evans* v. *Wright*, 2 H. & N. 527, shows that the duty of the landlord, on selling goods for rent, is to hand over any surplus moneys realized to the sheriff, for the owner, and to return any goods unsold after the rent and expenses are paid to the premises from which they were taken, or perhaps, to put them in some convenient place and notify the owner thereof. *Yates* v. *Eastwood*, 6 Ex. 805, shows that if the landlord do not hand the surplus moneys to the sheriff, an action for money had and received will not lie for the amount, but a special action on the case must be brought.

This view is supported also by the remarks of Lord Ellenborough C.J., in *Winterbourne* v. *Morgan*, 11 East, 401, and by *Kendrick* v. *Lee*, 6 U. C. R. O. S. 29. Upon the reasoning in *Yates* v. *Eastwood*, it would seem that an action of trespass or trover will not lie for nonreturn of surplus goods, but that a special action on the case must be brought.

There is some doubt as to whether the jury returned a general verdict for the whole amount on all the counts, or a verdict separately on the first and second counts for the watch, ring and dresses, and on the third for the other goods, but, if it were necessary to determine the case upon this point, I would take the verdict as entered generally upon all the counts. If then, the verdict was satisfactory, it might be retained by allowing the plaintiffs to strike out the first two counts, or give the defendants a verdict upon them, and by making any other necessary amendments, but the evidence as a whole does not strike me as satisfactory in favor of the plaintiffs, and the amount of the verdict is certainly excessive.

The references by the learned judge in his charge to the jury to the "real value" and the "market value" of the goods seem to me calculated to some extent to mislead the jury, always inclined to favor a plaintiff in an action of this kind. I cannot think that the jury sufficiently appreciated the distinction that in determining whether there was an excessive quantity of goods taken, they must consider what the defendants had a right to expect that the goods would realize at a bailiff's sale.

It certainly appears as if the jury must have proceeded upon some erroneous assumption in finding such a verdict as they did and the learned judge himself considers the amount excessive.

Under these circumstances there must be a new trial without costs.

Bain, J.—If the defendants are responsible for these articles, it is because they took them as a distress for rent, and it is not questioned that at the time they made the distress some rent was due by the plaintiffs, for which these articles might be distrained. The distress, therefore, in itself was lawful, and if the defendants are liable, it must be because they were guilty of irregularities in making the distress, or took an excessive quantity of the plaintiff's goods to satisfy the rent that was due.

The law is very clear, that, as it is thus stated in *Woodfall*, p. 470, when the distress is only excessive or irregular, provided some rent is due, the tenant is not entitled to treat the landlord or other person distraining as a trespasser, but only to sue them for the damages actually sustained, nor can the person in possession of the goods be sued for a conversion of them, *Lynne* v. *Moody*, 2 Str. 851; *Hutchins* v. *Chambers*, 1 Burr. 590; *Whitworth* v. *Smith*, 5 C. & P. 250; *Wallace* v. *King*, 1 H. Blackstone, 13.

The plaintiffs are not, therefore, entitled to recover on the fourth count, and in *Hoare* v. *Lee*, 5 C. B. 754, the court would not allow the plaintiff to declare on a count like this fourth one, and also on one in trespass. The jury do not appear to have assessed any damages on the 5th count, and I see nothing in the evidence that would have justified their verdict had they done so. If, therefore, the plaintiffs are entitled to recover at all, it can only be on the third count, which is for excessive distress.

In this count the plaintiffs allege that they were the tenants of the defendant Kerr, while their own evidence shows that they were in fact tenants not of Kerr but of Mr. Biggs. The defendants' plea of not guilty by statute puts in issue the tenancy and other matters stated in inducement, and the tenancy must be proved as alleged, and a variance in this respect is fatal. *Ireland* v. *Johnson*, 1 Bing. N. C. 162; *Yates* v. *Tearl*, 6 Q. B. 282;

Robinson v. *Shields*, 15 U. C. C. P. 386. In *Ireland* v. *Johnson*, Tindal, C.J., said, "The mode in which the rent becomes due, the party to whom it is due, and by whom the distress is made, are all material allegations, because if the rent be not due, the tenant may sue in trespass."

I do not see that the defendants have been prejudiced by this allegation, and had the verdict been in all respects satisfactory, I would have felt inclined to amend the count so as to make it agree with the evidence. But the verdict here, so far from being satisfactory, is one that I do not think should stand, apart from the question of the variance, and on the merits, I am far from satisfied that the plaintiffs suffered anything like the amount of damage from the defendant's distress and seizure that the jury allowed.

It was entirely for the jury to decide whether the watch and ring and the satin dresses were among the articles that the defendants distrained, and if the defendants are responsible for them, then their value might have been taken into consideration in estimating the value of the goods distrained under the count for excessive distress. But the jury should have been directed that they could not give damages for these articles on the first two counts, and it should have been made clearer to them, than I think it was, that what they had to consider on the third count, was whether the quantity of the goods seized, the value being estimated not at what they were worth to the plaintiffs, but at what they would probably sell for cash at the bailiff's sale, was unreasonably large and out of proportion to the amount of the rent due.

Then again, it appears that among the goods distrained and sold, were the articles that were in the bill of sale given by the plaintiffs to Kerr, to secure the $86 dollars of rent due to the 1st of May. If this be so, then the whole amount of rent up to the date of the distress, if not to the end of August, should have been deducted from the damages, instead of the $37.33 that were deducted.

It appears that the watch and chain and ring were Mrs. Pettit's own property, but I should gather from the whole of the evidence that the property in the other articles distrained was in her husband. Notwithstanding the Married Woman's Property Act, it may still be permissible, although it is not necessary, to join the husband with the wife in an action for tort in respect of the wife's separate property, but if the husband was the tenant, I do not see how the wife can recover jointly with him for torts in respect of his property.

The question whether there was an excessive distress or not, is one for a jury, and if the plaintiffs allegations are true, there would seem to be a case that they should have an opportunity of properly submitting to a jury on this count. I think, therefore, the interests of justice will best be served by setting aside the verdict and granting a new trial without costs, the plaintiffs to be at liberty to amend as they may be advised.

TAYLOR, C.J., concurred.

Verdict set aside and new trial granted without costs.

RAJOTTE v. THE CANADIAN PACIFIC RAILWAY CO.

(IN APPEAL.)

Railways.—Master and servant.—Precautions against accident.—Onus probandi.—Contributory negligence.

Plaintiff was employed by defendants as a switchman in the station yards. In discharging his duties his foot caught in a "frog," and while held fast he was run over and killed. The frog had been "blocked," but the blocking had worn down to some extent.

At the trial of an action by widow and children, the presiding judge at the close of the plaintiff's case held that there was no evidence to go to the jury. Plaintiffs' counsel declined to take a non-suit or to permit leave to be reserved to enter a non-suit in term. The judge then told the jury to bring in a verdict for the defendants, and allowed no addresses by counsel. The jury found a verdict for the plaintiff. Upon a motion in term to set aside the verdict,

Held, 1. That neither the trial judge nor the court could enter a non-suit against the plaintiff's desire.

2. That the verdict would not necessarily be set aside, but would not be allowed to stand if the trial judge was plainly and certainly right in point of law.
3. That in the absence of evidence that the system of blocking was defective or that the blocking of this particular frog was imperfect, and there being evidence that the company employed proper and competent workmen to keep the frogs in repair, there was no case for the jury.
4. The onus of proving the incompetency of the workmen was on the plaintiffs.
5. It was for the plaintiffs to prove that the deceased was ignorant of the dangerous character of the frog and that the defendants were aware of it.

Motion by defendants to set aside verdict for plaintiffs and to enter a nonsuit or verdict for defendant, or for a new trial.

J. A. M. Aikins, Q.C., and *W. H. Culver*, for defendants. The jury were bound to take the law from the court. *Lush's Practice*, 632. The verdict was perverse and must be set aside, even if the judge was wrong in his ruling, *Hodges* v. *Ancrum*, 11 Exch. 214. The judge should direct jury to find for defendant, if no evidence, and the jury is bound to obey. *Deverill* v. *G. T. R.*, 25 U. C. Q. B. 526; *Dublin, &c., Railway Co.* v. *Slattery*, 3 App. Ca. 1168; *Giblin* v. *McMullen*, L. R. 2 P. C. 335; *Ryder* v. *Wombwell*, L. R. 4 Ex. 38; *Cotton* v. *Wood*, 8 C. B. N. S. 573; *Ryan* v. *C. S. R. Co.*, 10 Ont. R. 749; *Wright* v. *Midland Ry. Co.*, 51 L. T. N. S. 539; *Pleasants* v. *Fant*, 22 Wall. 121; *Parks* v. *Ross*, 11 How. 362; *Commissioners of Marion County* v. *Clark*, 4 Otto, 284; *Poleman* v. *Johnson*, 84 Ill. 271; *Heath* v. *Jaquith*, 68 Me. 438; *Fish* v. *Davis*, 62 Barb. 126; *Hyatt* v. *Johnston*, 91 Penn. St. 201. As to course to be taken if jury will not obey, see *Page* v. *Pattee*, 6 Mass. 459; *Sweatman* v. *Prince*, 62 Barb. 256; *Wood* v. *Belding*, 54 N. Y. 658; *Quinlane* v. *Murnane*, 18 L. R. Ir. 53. There was improper reception of evidence, *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 8; *Parker* v. *Portland Publishing Co.*, 69 Me. 173; *Edwards* v. *Ottawa River Nav. Co.*, 39 U. C. Q. B. 274; *Blair* v. *Pelham*, 118 Mass. 422; *Agassiz* v. *London Tramway Co.*, 21 W. R. 199; *Pirie* v. *Wild*, 11 Ont. R. 429. As to influencing jury by remarks of counsel, *Case* v. *Benway*, 18 U. C. Q. B. 476; *Moore* v. *Boyd*, 15 U. C. C. P. 519; *Poole* v. *Whitcomb*, 12 C. B. N. S. 770. As to directing jury to find verdict, *Storey* v. *Veach*, 22 U. C. C. P. 164. As to costs, *Logan* v. *Ryan*, 10 U. C. Q. B. 16; *Saunders* v. *Davies*, 16 Jur. 481; *Harrison* v. *Fane*, 1 M. & Gr. 550. If verdict perverse it should be set aside without costs, *Freeman* v. *Price*, 1 Y. & J. 402. As to notices under *Lord Campbell's Act* not delivered with the declaration, *McCabe* v. *Guinness*, 9 Ir. R. C. L. 510; *The George & Richard*, 24 L. T. N. S. 717; *Pollock on Torts*, 44. As to notice given subsequently on behalf of step children, *Conger* v. *G. T. R.*, 13 Ont. R. 160. Court does not grant amendments to avoid Statute of Limitations, *Weldon* v. *Neal*, 19 Q. B. D. 394. Jury had no guide as to mode of assessing damages, *Penn. Ry. Co.* v. *Vandever*, 36 Penn. St. 302; *Rowley* v. *London & N. W. Ry.* L. R. 8 Ex. 221; *Sedgwick on Damages*, vol. 2, p. 537, n. The following cases were also cited on the argument: *Plant* v. *G. T. R.*, 27 U. C. Q. B. 78; *O'Sullivan* v. *Victoria R. Co.*, 44 U. C. Q. B. 128; *Monkhouse* v. *G. T. R.*, 8 Ont. App. R. 637; *Clegg* v. *G. T. R.*, 10 Ont R. 708; *Ryan* v. *C. S. R.*, 10 Ont. R. 745; *Searle* v. *Lindsay*, 11 C. B. N. S. 429; *Gibson* v. *Erie Ry. Co.*, 63 N. Y. 449; *McFarlane* v. *Gilmour*, 5 Ont. R. 302; *Brunell* v. *C. P. R.*, 15 Ont. R. 375; *Feltham* v. *England*, L. R. 2 Q. B. 33; *Tunney* v. *Midland Ry. Co.*, L. R. 1 C. P. 291; *Howells* v. *Landore Siemens Steel Co.*, L. R. 10 Q. B. 62; *Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205; *Woodley* v. *Metropolitan Dist. Ry. Co.*, 2 Ex. D. 384; *Walsh* v. *Whiteley*, 21 Q. B. D. 371.

H. M. Howell, Q.C., and *R. Cassidy*, for plaintiffs.

As to duty of employer, *Patterson* v. *Wallace*, 1 Macq. 751; *Murphy* v. *Phillips*, 35 L. T. N. S. 479; *Webb* v. *Rennie*, 4 F. & F. 612. As to servant's knowledge of danger, *Osborne* v. *London & N. W. R.*, 21 Q. B. D. 220; *Vicary* v. *Keith*, 34 U. C. Q. B. 224. There might be a perception of danger without comprehension of risk, *Thomas* v. *Quartermaine*, 18 Q. B. D. 696; *Yarmouth* v. *France*, 19 Q. B. D. 656; *Vicary* v. *Keith*, 34 U. C. Q. B. 224. As to defendant's knowledge, *Barton's Hill Coal Co.* v. *Reid*, 4 Jur. N. S. 767; *Farwell* v. *Boston Ry. Co.*, 4 Met. 62; *Meller* v. *Shaw*, 1 B. & S. 437; *Mersey Docks Co.* v. *Gibbs*, L. R. 1 H. L. 101. As to plaintiff's ignorance, *Indermaur* v. *Dames*, L. R. 2 C. P. 311; *McKinney* v. *Irish N. W. Ry. Co.*, Ir. R. 2 C. L. 600; *Thrussell* v. *Handyside*, 84 L. T. 261; *Membury* v. *G. W. R.*, 84 L. T. 208. Where counsel advisedly abstains from submitting question of fact to the jury, there will be no new trial, *Martin* v. *G. N. R.*, 16 C. B. 179. Where counsel do not ask to have a point submitted to jury, cannot have new trial, *Morgan* v. *Couchman*, 14 C. B. 100; *Commissioner for Railways* v. *Brown*, 13 App. Ca. 133.

(*2nd March, 1889.*)

TAYLOR, C. J.—This is an action brought under the Imp. Act 9 & 10 Vic. c. 93, to recover damages from the defendants for the death of Nelson Joseph Rajotte. The plaintiffs named in the declaration are Mary Anne Rajotte and Henry Gordon Nelson Rajotte, the infant son of the deceased, there never having been any executor of the will or administrator of his estate.

The declaration alleges that, the deceased was in his lifetime employed by the defendants as a switchman in a certain railway station yard of the defendants, and in the doing of his work to go and walk to and fro in all directions over, along and upon certain railway tracks or sidings in said railway yard, constructed by and under the management and control of the defendants, certain of which said railway tracks and sidings were by the negligence and default of the defendants constructed unsafely and with defective and improper materials and were in an unsafe condition and unfit for the purpose aforesaid, to wit, the going and walking to and fro in all directions over, along and upon the same by the deceased with reasonable safety in the doing of his said work which the defendants well knew, but of which the deceased was ignorant, and by reason of the premises while the deceased was doing his said work and therein necessarily and properly without any neglect or default on his part walking to and fro over, along and upon the said railway tracks or sidings, one of his feet was caught and firmly held in an angle known as a frog between two of the rails of said railway tracks or sidings and by reason thereof the deceased was struck and run over by a certain engine and train of the defendants running upon one of the said railway tracks or sidings and was thereby wounded and injured and by reason of the wounds and injuries thereby occasioned to him as aforesaid, the deceased afterwards and before this action died. The defendants besides pleading the general issue, have traversed the alleged negligence, the ignorance of the deceased and their knowledge, and have set up the employment by them of competent workmen and the supplying them with proper material for keeping the tracks in repair, that the alleged injury to the deceased was caused by the neglect of his fellow workmen, and several other defences.

On the trial at the close of the plaintiff's case, the defendants moved for a nonsuit, which the learned judge, having ruled that there was no evidence to support a verdict for the plaintiffs, decided to enter. But counsel for the plaintiffs refusing to accept a nonsuit, the case was left to the jury who thereupon rendered a verdict for the plaintiffs. The defendants now move to set this verdict aside and to enter a nonsuit, or for a new trial.

It is urged that a judge has the power to take a case from the jury and to order a nonsuit to be entered. In some of the courts in the United States a judge appears to have the power of nonsuiting a plaintiff without his consent, though in some States this depends upon statute. In the State of New York a judge seems to have this power, *Clements* v. *Benjamin*, 12 Johns. 299; *Elwell* v. *McQueen*, 10 Wend. 519, in which it is said, "A justice at the trial has a right to nonsuit the plaintiff, if, in his judgment, he fails upon his own showing to make out his case." But a Circuit Court of the United States has no authority to order a nonsuit against the will of the plaintiff. *Elmore* v. *Grymes*, 1 Pet. 469; *De Wolf* v. *Rabad*, 1 Pet. 476; *Crane* v. *Morris*, 6 Pet. 598; *Castle* v. *Bullard*, 23 How. 172; *Schuchardt* v. *Allen*, 1 Wall. 359.

This is the practice which has always prevailed in England. As Lord Ellenborough said in *Minchin* v. *Clement*, 1 B. & Ald. 252, "It is in the option of the plaintiff to be nonsuited or not." In Ontario and in this Province the English practice has always been followed and we must continue to adhere to it.

The defendants further urge that the verdict having been rendered for the plaintiffs in direct opposition to the ruling of the learned judge that there was no evidence to support it, it must, of course, be set aside. In *Rex* v. *Poole*, *Lee t. Hardwicke*, the general rule was stated thus at p. 26 by Lord Hardwicke, C.J., "If the judge at *nisi prius* directs the jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial." He then speaks of some limitations to the general rules with which he had been dealing. "To those general rules there are some limitations as clear as the rules themselves, one is, that if the judge should direct the jury plainly and certainly wrong in point of law, and the jury should find contrary to his opinion, and it should appear to the Superior Court, under whose directions all trials at *nisi prius* are, that the judge was undoubtedly mistaken, the court would not grant a new trial because it would be putting the parties to trouble for no purpose." It is therefore, necessary now to consider whether the learned judge at the trial, was plainly and certainly wrong in point of law, undoubtedly mistaken or not. Unless he was, it seems to me the verdict cannot stand.

From the evidence it appears that the deceased had been for some months in the employment of the defendants as a signal man at the Main Street crossing of their railway, but for about a month before his death had been engaged acting as a switchman in the railway yard. There is no doubt that on the evening of the 18th of October, 1887, when employed in coupling cars, his foot caught fast in a frog, and he was run over, being injured so that he died soon after.

The contention of the plaintiffs is, that had the frog been properly blocked the accident could not have happened, and they insist that blocking the frog was part of the proper construction of the road. The want of what they insist was proper blocking is the negligence complained of on the part of the defendants. They also contend that the risk of being caught in a frog was not one of the ordinary risks which the deceased as a switchman undertook. They say all the risk he undertook was that of coupling cars, or as one of the counsel expressed it, of having his fingers nipped. It seems to me he undertook a good deal more risk than that. He undertook all the ordinary risks of doing a switchman's work in a railway yard, in a place where the existence of frogs is a necessary incident to the doing of that work.

What was the defendants duty in relation to frogs which are undoubtedly dangerous? There was no statutory obligation laid upon them to block frogs. Their common law duty may be stated in the language of Lord Cranworth, used in *Barton's Hill Coal Co.* v. *Reid*, 4 Jur. N. S. 767, "Where a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks." Here the defendants did block the frog in question. It is true, the blocking may not, at the time of the accident, have been in so perfect and complete a condition as could have been desired or as some other kinds of blocking would have been, but it was blocking which, when put in would, as to the thickness of the material used, have satified even the requirements of the Act (The Railway Act, s. 262), since passed, which requires frogs to be blocked. The evidence shows that blocking or packing is quickly worn down by the passing of cars over the frog, and at the time of the accident there is no doubt the blocking of the frog in question was somewhat worn away, but the fact remains the defendants did for the purpose of protecting their servants against unnecessary risk block this frog, and I can find no evidence that in the original construction they were guilty of any negligence.

As to the condition of the frog at the time of the accident, without stopping to consider whether after all, negligence in the original construction is the only negligence charged on the record and which the defendants could be called on to meet, the evidence for the plaintiffs shows that the defendants employed proper and competent workmen for the purpose of keeping the tracks in repair. The roadmaster in charge and the men employed under him are spoken of as good competent men. Then the material which they needed was supplied or accessible to them. A great deal was made of the fact that after the accident three inch plank was used, and from this the inference is sought to be drawn that the defendants were guilty of negligence in allowing two inch stuff to be used before, and that they knew of its insufficiency. The evidence is that the workmen used stuff which they found lying round, but also, that on a requisition they got what material they required, and that they had no difficulty in getting it. There is no evidence that before the time of this accident a requisition was ever made for stuff for blocking purposes which was refused. From its being supplied when called for, the inference may very fairly be drawn that three inch plank would have been supplied sooner had it been asked for. That where the master employs competent workmen and supplies them with proper material for the work, he is not liable to a servant who suffers injury from their neglect was settled in *Priestley* v. *Fowler*, 3 M. & W. 1, and has never since, so far as I can see, been questioned, on the contrary, it has again and again been affirmed. As it was put by Lord Cairns in *Wilson* v. *Merry*, 19 L. T. N. S. 30, "What the master is in my opinion bound to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate material and resources for the work. When he has done this, he has in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master." The witnesses for the plaintiffs have proved that the persons employed were competent. Now, before they could hope to succeed it was for them to show that they were incompetent. As Willes, J , said in *Lovegrove* v. *London, Brighton, &c., Ry. Co.*, 16 C. B. N. S. 669, "The only ground upon which the plaintiff could sustain this action was either that there was some evidence that the Company were guilty of negligence in employing an incompetent person to lay the rails, or that the burden of showing his competency rested on the defendants. Now, was there any evidence that the company did employ an incompetent person? . . . . . Then, is the burden of proof of the workman's competency cast upon the master? I apprehend not." Or as Huddleston, B., expressed it in *Allen* v. *New Gas Co.*, 1 Ex. Div. 251, "To establish, therefore, negligence against the defendants, the plaintiff must prove that the defendants undertook personally to superintend and direct the works, or that the persons employed by them were not proper and competent persons, or that the materials were inadequate, or the means and resources were unsuitable to accomplish the work. The *onus* is upon him, and failing to do so he fails to establish negligence."

Then it was essential for the plaintiffs to prove that the deceased was ignorant of the danger and that the defendants knew of it. As Brett, M.R., said in *Griffiths* v. *London & St. Katharines Dock Co.*, 13 Q. B. D. at p. 260, the knowledge of the master and the ignorance of the servant make together a cause of action, and it is necessary that these two things should exist in order to form a *prima facie* cause of action. Or, as Bowen, L.J., said, "Both these allegations are material, because without them there is no cause of action, and unless it was proved at the trial directly, or that there were facts from which it might be inferred that the servant was ignorant of the danger, he would be nonsuited." In *Rudd* v. *Bell*, 13 Ont. R. 47, the language of Bowen, L.J., in the case just cited was adopted, and it was laid down that, there is no cause of action on the part of the injured servant, unless it is alleged and proved that the danger which caused the accident was known to the master and unknown to the servant. Of knowledge on the part of the defendants that the frog in question was defective or not properly protected, there is no evidence whatever. Of the ignorance of the deceased there is no evidence beyond the expression of opinion by one witness that he was a green hand, and from some others that they did not think he was alive to the danger of frogs. He had been for over a month working where this frog was, passing and repassing it many times a day. Besides, even during the months he was acting as a signal man, he must have had some experience of railway tracks and switches.

The danger was an open and palpable one. The deceased had quite as good an opportunity of seeing and knowing the danger as the defendants. And where both parties have equal means of knowledge, it has been said the master is under no obligation to provide for the safety of the servant to a greater extent than the servant is bound to provide for his own safety, *Rudd* v. *Bell*, 13 Ont. R. 47. Even Lord Esher, who seems inclined to go to extreme lengths in holding masters liable, when in *Yarmouth* v. *France*, 19 Q. B. D. 647, dealing with the question whether that case came within the Employer's Liability Act, said, "If it be not, then, according to the old law, if that act had not existed, I have no doubt the plaintiff could not have recovered. He would have been a servant in the employment of the master, a part of whose machinery for carrying on his business was defective, in such a state that it would have been culpable want of care for the safety of his servants, on the part of the employer to permit a necessary part of the machinery for carrying on his business to remain. But that was no concern of the jury. At all events, it was a thing which was patent so that any person in the employ could know and see it. . . . . Under the old law it would have been said, You (the servant) have entered into or continued in this employment, where the thing of which you complain is open and palpable, and therefore it is an implied condition of your contract of service that you take upon yourself the risk of accidents therefore, and consequently you have no remedy against your employer. . . . . Before the Employer's Liability Act, there was this condition in the contract of hiring, that if there was a defect in the premises or machinery, which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk."

The plaintiffs placed great reliance upon the case of *Clark* v. *Holmes*, 6 H. & N. 349; 7 H. & N. 937. In that case the plaintiff was injured owing to the absence of a guard or fence round some dangerous machinery which it was his duty to oil. "The Factory Act, 1856," required such machinery to be fenced and the Court of Exchequer held the plaintiff entitled to recover because there was on the part of the defendant, a breach of his statutory duty to keep the machinery fenced.

The plaintiffs here rely upon the judgment of Cockburn, C.J., in the Exchequer Chamber (7 H. & N. at p. 943) where he held that independently of any statutory duty or obligation there was negligence in the defendant in not fencing the machinery. But what he strongly dwelt on was that when the servant entered upon his employment, the machine was properly fenced. Then the fence got broken and the servant complained, continuing to work about the machine only upon the assurance of the defendant that the defect would be repaired. He says, "The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept. At the time the plaintiff entered on the employment, the machinery was properly fenced; on it ceasing to be so, the manager of the works, on the remonstrance of the plaintiff, promised in the presence of the defendant, the master, that the defect should be made good. It must be taken, therefore, that at the time the contract between the plaintiff and defendant was entered into, it was contemplated by the parties that the machinery should be fenced. It follows that, through the negligence of the master in omitting to keep the machinery fenced, the servant has been exposed to danger to which he ought not to have been subjected; and the injury of which the plaintiff complains having thus arisen, the defendant is justly and properly liable." Now, it is worthy of remark that this case was argued in the Exchequer Chamber before seven judges. The report does not show what the opinion of Keating, J., was. Cockburn, C.J., held, as I have said, that the defendant was liable independently of the statutory obligation, and Byles, J., on the whole agreed with him. Crompton, J., dealt entirely with the questions of whether under the circumstances, the plaintiff's knowledge of the defect would prevent him from recovering, and of alleged contributory negligence on his part. Wightman, J., said, "I concur in the judgment of the Lord Chief Justice, but not in the reasons on which it is founded, and Willes, J., said, "I agree with the opinion of my Brother Wightman." Plainly they considered the plaintiff entitled to recover on the same ground as the Court of Exchequer, that the defendant had been guilty of a breach of statutory duty. That the decision is regarded in England as turning upon that is evident from the language of Bowen, L.J., in *Thomas* v. *Quartermaine*, 18 Q. B. D. at p. 696, where he said, "The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. The case of *Clark* v. *Holmes* is a case of that sort, and has been so explained subsequently by judges of authority."

The *onus* of making out a case for relief rests entirely upon the plaintiffs. "In every case of this kind the plaintiff must show that he is in a condition to recover damages." *Assop* v. *Yates*, 2 H. & N. 768, and see judgments of Erle, C.J., in *Cotton* v. *Wood*, 8 C. B. N. S. at p. 571, and of Willes, J. in *Lovegrove* v. *London, Brighton, &c., Ry. Co.*, 16 C. B. N. S. at p. 692. A careful consideration of the evidence can lead to only one conclusion, that my Brother Dubuc was clearly and unquestionably right when he ruled that there was no evidence to support a verdict for the plaintiffs, and decided to enter a nonsuit.

As the plaintiffs refused to take a nonsuit, the Court cannot enter one now. The learned Judge seems to have reserved leave to move for one so far as he had power to do so. *Avery* v. *Bowden*, 5 E. & B. 714, seems an authority that without consent, leave cannot be reserved. The Court in Term cannot enter a nonsuit against the will of the plaintiffs any more than the judge at *nisi prius* could. As Grose, J., said in *Watkins* v. *Towers*, 2 T. R. 275, "I should think that we could not order a nonsuit to be entered against the consent of the plaintiff." See also, *Elwarthy* v. *Bird*, 13 Price, 222. There must be a new trial, the only question is, upon what terms?

There being beyond all doubt no evidence upon which a jury could properly find a verdict for the plaintiffs and they having been plainly told that by the learned Judge, it does seem to me that the verdict must be regarded as a perverse one. The definition of a perverse verdict was given by Pollock, C.B., in *Saunders* v. *Davies*, 16 Jur. 481, "When a jury choose not to take the law from the judge, but will act on their own erroneous view of the law. In such cases, however honest the intentions of the jury may be, their verdict is perverse."

Where the verdict is perverse the party against whom it was given is entitled to a new trial without costs, *Harrison* v. *Fane*, 1 M. & Gr. 550; *Freeman* v. *Price*, 1 Y. & J. 402; *Saunders* v. *Davies*, 16 Jur. 481. In *Logan* v. *Ryan*, 10 U.C.Q.B. 16, the court held that when the question for trial depends upon established rules of law, and the jury being properly directed, give a verdict in opposition to the charge, the party injured is entitled to a new trial without costs. It was so held because, where a judge fails to lay down the rule correctly to the jury, the party suffering wrong is entitled to a new trial without paying costs for it, so where the judge lays down the law correctly, and the jury choose to act in opposition to it, he should be in no worse position.

There will, therefore, be a new trial without costs.

KILLAM, J.—I agree with the Chief Justice in thinking that the learned Judge was right in directing the jury that there was no evidence upon which a verdict could be entered for the plaintiff.

For this view I will assume, in favor of the plaintiff, that it was the duty of the defendant Company to provide some protection against the danger arising from open, unblocked frogs, and that, apart from the question of the servant's knowledge of their dangerous condition, an action would lie for any injury to the servant arising from their being left in this dangerous condition. But here the defendant recognized this duty and used a system of blocking for the protection of its servants. It also had men employed to examine them from time to time, and to replace any block which should become defective. There is no suggestion that upon this latter point it did not fulfil its duty. The principal objection is that a particular system was adopted by the defendant, for which, it being used so long and so generally, the

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Company itself, and not its employees, must be deemed responsible.

There is another point taken, though not pressed so strongly, that there was not material provided for making a sufficient blocking, but upon this it really comes back to the same question whether, assuming that the Company had adopted this kind of blocking, it was guilty of negligence for which an action would lie.

I will not consider whether the evidence sufficiently shows that the kind of blocking used at the time of the accident was that provided by the Company at first, or whether, even if it were not, and even though the Company provided men to watch for and remedy defects, there could be considered to be evidence of negligence in supervising the men in the fact that this kind of blocking was left so long in use. I base my judgment wholly on the view that it does not appear to me that there was any sufficient evidence that the Company was negligent in adopting the particular system of blocking in use at the time of the accident, assuming it to be directly responsible for choosing that system.

In *Clarke* v. *Holmes*, 7 H. & N. 937, Cockburn, C.J., said, "Where a servant is employed on dangerous machinery from the use of which danger may arise, it is the duty of the master to take due care and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur."

And Byles, J., there said, "The owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. . . . . . To hold that the master is responsible to his workmen for no absence of care, however flagrant, seems to me in the last degree both unjust and inconvenient. On the other hand to hold that the master warrants the safety and proper condition of the machine, is equally unjust to the master, for no degree of care can insure perfect safety. . . . . . It seems to me that the true rule lies midway between these two extremes. . . . . The master is neither on the one hand at liberty to neglect all care, nor on the other hand to insure safety, but he is to use due and reasonable care."

In *Dean* v. *The Ontario Cotton Mills Co.*, 14 Ont. R. 124, Armour, J., said, "It was the duty of the employer to exercise due care that the vats should be in a reasonably safe and proper condition for the servant to go upon in the performance of his work, or to provide a safe and proper covering to be put upon the vats by his servant before going upon them."

In *Wilson* v. *Merry*, L. R. 1 Sc. Ap. 326, Lord Cairns said, "The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that in which he the master has contracted or undertaken with his servant to do."

In *Feltham* v. *England*, L. R. 2 Q. B. 36, Mellor, J., said, "We can find no evidence of personal negligence to fix the master. There was nothing to show that he had employed unskilful or incompetent persons to build the piers, or that he did know or ought to have known that they were insufficient for the use to which they were to be applied."

Similar principles are laid down in *Tarrant* v. *Webb*, 18 C. B. 797, and *Barton's Hill Coal Co.* v. *Reid*, 4 Jur. N. S. 767.

The question, then, is one wholly of negligence. The master does not undertake that any precaution will absolutely protect from danger. He is bound only to exercise due care, and this involves merely the use of fair judgment in devising a means of protection. More than that, the *onus* is on the plaintiff to establish negligence, which must involve, it appears to me, where, as here, the master has adopted a precaution, the showing not merely that it has in one instance proved insufficient, but that it was so palpably insufficient that the master could, by the exercise of no fair judgment believe it to be sufficient. The blocking put in the frog where the accident in question occurred, was placed there for no other purpose than to act as a safeguard against injury to the servants of the Company. It was clearly a device of no possible use to the Company for its own business, except in so far as the protection of its servants could be of use to it. The presumption would then be that it was put there in good faith with an honest desire to guard the servants from injury. I cannot see that there was evidence that it was so obviously an inefficient precaution that the Company was guilty of negligence in adopting it instead of some other kind of blocking. True, the deceased did get caught in it. True, other witnesses did manage to press their feet into it afterward so as to get caught. But it is not clear whether this was due to some extent to the blocking being worn away by traffic, or that such a result was so naturally incident to the construction that a party could not reasonably have adopted the device as sufficient for the purpose which it was intended to serve.

There is no evidence of any accident having previously happened through the use of this description of blocking, although it has been used by this Company for several years in a place where there is evidently a large amount of traffic and where a large number of men are continually walking over just such places as that at which the deceased was killed. There is nothing to show that this device has become obsolete, that it has been generally renounced on railways as insufficient. It is true there is evidence that on one or two railways in the United States, a different system was used, but we do not know the laws under which this was done, and the fact that one or two other parties chose a different device would not show that this Company could not have exercised a fair judgment in adopting the system used by it. The happening of the accident itself is an unsafe criterion, as also is the fact of the subsequent change to other blocking. If that change were not made after such proof of the insufficiency of the former kind, this might furnish some evidence of subsequent negligence, but the making of the change would rather show a desire to remedy defects as they became apparent than that the defects were before apparent. It seems to me that it would be absurd to say that the very kind of blocking which Parliament has since prescribed, as in its opinion sufficient, is so obviously and palpably insufficient that this Company could not have fairly and reasonably expected it to prove sufficient.

These considerations appear to me sufficient to dispose of the case, but I wish to add a few words upon the question of the plaintiff's knowledge of the supposed defect. I confess myself unable to reconcile the cases upon this point. Some judges seem to hold that knowledge is not the determining consideration, that it is merely an element in determining whether the servant was guilty of contributory negligence. There are, however, several cases which distinctly determine that want of knowledge of the defect on the part of the servant must be alleged in the plaintiff's pleadings and proved as a part of his case. I will not delay to cite these, as they have been so fully referred to by the Chief Justice. They appear to me to settle the principle for the state of law existing in England before the Employer's Liability Act. It is true that in some of the later decisions, and especially in *Yarmouth* v. *France*, 19 Q. B. D. 659, this is said to have been merely a question of the application of the maxim *Volenti non fit injuria*, even before that statute, but this seems to me to involve the rejection of the authority of such cases as *Griffiths* v. *The London & St. Katherine's Dock Co.*, 12 Q.B.D. 493, 13 Q.B.D. 259, for it is not a part of pleading to allege mere evidence, which this view makes knowledge to be. And what makes this the more peculiar is that the knowledge is not even to be taken as conclusive.

I think that we must take it as settled upon sufficient authority that the plaintiff should, as part of his original case negative the servant's knowledge of the defect. It is true that there need not be direct, positive oral evidence of his ignorance. As stated by Boyd, C., in *Rudd* v. *Bell*, 13 Ont. R. 47, the evidence may be simply " of facts from which it may be inferred that the servant was ignorant of the existence of the danger. A similar view is expressed in *Allen* v. *New Gas Co.*, 1 Ex. D. 251. But the evidence here does not amount to that. The case for the plaintiffs is that the protection given by the blocking adopted was so obviously insufficient that the defendant was negligent in not adopting a more efficient safeguard. The defect, if any, was not one which it would require scientific knowledge to discern, if, as is the plaintiffs' case, it ought to have been discerned in advance. It was not, as in *Feltham* v. *England*, 4 F. & F. 462, L. R. 2 Q. B. 36, a matter in which engineering knowledge was necessary to determine the amount of strain a certain structure would bear. The very circumstances were present to the eye from which the plaintiffs would wish the jury to infer that the place where the accident happened was so dangerous that its existence in that state showed the negligence of the defendant. I quite grant that, if the *onus* were upon the defendant to show the knowledge of the servant or his having voluntarily incurred the risk, it could not be assumed that he did sufficiently observe the conditions to really appreciate or understand the danger. But, on the other hand, how can we assume that he did not observe the circumstances and recognize that there was danger? And, more particularly, how could a jury be warranted in assuming it, while finding the defect to be so apparent that its mere existence showed the master to have been guilty of negligence in not adopting a better safeguard?

I agree that the verdict should be set aside and a new trial granted without costs.

Bain, J., concurred.

Verdict set aside and a new trial granted without costs.

ONTARIO BANK v. McARTHUR.

(In Appeal.)

Bill of exchange.—Acceptance payable when debentures sold.—Evidence.—Identity of debentures.

The defendants accepted a bill of exchange drawn by the Town of P. payable "when the balance of debentures ($37,000) in our hands are sold by us, and proceeds received, and our claim as at this date and interest to date of payment has been paid." The defendants at that time held debentures of the Town of P. as security for certain advances and with power to sell them at a certain figure. They assumed the debentures at that figure; notified the town that the debentures had been sold; and enclosed an account crediting the town with the amount. The defendants asserted that their claim included certain other debentures of the Town, which they then held as owners.

Held, 1. That evidence was admissible to identify the debentures referred to in the acceptance. (a.)

2. That the debentures had been "sold," and the proceeds had been received within the meaning of the acceptance.

3. Upon the evidence, the "claim" must be limited to the advances, and did not include the other debentures.

Action brought on a bill of exchange, accepted, payable conditionally. Motion by defendants to set aside the verdict for plaintiff, and enter a verdict for defendant or nonsuit.

(*a*) This point was more fully discussed in the judgment appealed from.

H. M. Howell, Q.C., and *T. D. Cumberland*, for defendants.

The first condition is (1) when the balance of debentures were sold by defendants, (2) when the proceeds were received, (3) when the acceptors claim and interest were paid. All three conditions must be complied with. Defendants owed no duty to the Ontario Bank to sell the debentures, and there was no estoppel as against the Bank by transactions with the Town of Portage la Prairie. *Cote* v. *Stadacona Ins. Co.*, 6 S. C. R. 235; *Bigelow on Estoppel*, 492. Circumstances surrounding acceptance must be looked at to interpret it, *Swan* v. *Cox*, 1 Marsh, 176.

J. S. Ewart, Q. C., and *A. E. Richards*, for plaintiff.

The cases show a trustee can always sell to himself, but it is subject to the right of a court of equity to avoid same. Evidence shows there had been a sale. Not necessary money should pass to make a receipt of the proceeds..

(*11th February, 1889.*)

DUBUC, J.—This action is brought on a bill of exchange drawn by the Town of Portage la Prairie in favor of the plaintiffs, and accepted by the defendants. The acceptance is conditional and as follows: "Accepted payable when balance of debentures, $37,000 in our hands are sold by us, and proceeds received and our claim as at this date and interest to date of payment has been paid." The acceptance is dated 2nd February, 1885.

There are three conditions attached to the acceptance: sale of debentures, proceeds received, and payment of defendants' claim as at that date.

On the 29th June, 1885, the defendants wrote to the Mayor of the Town of Portage la Prairie that, acting under power given them in an agreement dated 17th February, 1883, they had sold the $37.000 Portage la Prairie debentures which they held as collateral security for certain advances made to the Town, at 97½ cents on the dollar, and had put this amount to the Town's credit, less 2½ per cent. commission as agreed.

In his evidence, Boyle, one of the defendants, states that they had, at the same time, made entries in their books crediting the Town Corporation with the amount realized by the debentures, and debiting their own account with it.

On the 3rd July, 1885, a statement was prepared by the defendants and sent to the said Town Corporation showing the state of accounts between them and including the credit of proceeds of said debentures.

Now, the defendants contend that they never sold the said debentures, but only assumed them as a sale to themselves, and that they have them still in their hands. They argue that whatever they may have written or stated to Portage la Prairie in regard to the pretended sale of said debentures, cannot estop them from contending with the plaintiff's bank, which is the fact, that they never sold the debentures, and that, therefore, the first condition of the acceptance has not been fulfilled.

The Town Corporation of Portage la Prairie had entrusted the defendants with the sale of their debentures.

As such trustees, the defendants could make sale of said debentures to themselves.

The sale was not void; it was only voidable and could be avoided by the *cestui qui trust*, the Town Corporation. But the Town Corporation, on being made aware of the transaction did not repudiate it. The plaintiffs, as shown by the evidence of Porter, the manager, were also notified of the transaction, and the account rendered by the defendants to the Town Corporation showing the sale of the debentures, was communicated to them. And they acted upon it by presenting the draft to the defendants shortly after.

The defendants admit that they are estopped by their own action from contesting with the Corporation of Portage la Prairie that the debentures were not sold. They had the right to sell the said debentures to themselves; they have done it; at least they have done everything required on their part to make the sale complete. The transaction was acknowledged and accepted by the only parties who could raise any objection; it was known and acted upon by the plaintiffs who were the third party having an interest in said sale.

I do not think they can now, under all the circumstances, have any legitimate ground to repudiate as to the plaintiffs, the sale in question.

The first condition of the acceptance is therefore fulfilled.

As to the second condition, the proceeds received, the sale being made to themselves, and the amount of the proceeds being entered in their books as received, and a statement of same being sent to the Corporation of Portage la Prairie as above stated, it follows the first condition as of course.

The third condition is: "And our claim as at this date has been paid." The claim of the defendants against the Corporation of Portage la Prairie is made up of a promissory note for $27,800, an overdrawn account for $4,071.75, some interest, some coupons on debentures of the Town Corporation, and a few other small items. These appear in the statement of account of the 3rd July, 1885, already referred to. They now put, as part of their claim, $17,000 of railway debentures of the Town Corporation which were not due at the date of the acceptance, nor in July following when the statement of account was made.

As to the $17,000 of railway debentures, Boyle himself in his evidence is not very clear as to whether they were to be considered as part of their claim as at the date of their acceptance. He is not certain where they were at the time, as they had been taken to London. Neither were they computed as part of their claim in the statement of the 3rd July rendered to the Town Corporation. But there are in said statement certain coupons mentioned which are not shown by the evidence to be of such a nature as to form part of the claim of the defendants as of the date of the acceptance. Part of these coupons was paid by the defendants to some of their clients to keep the credit of the Town, as stated by Boyle. These, as stated by the learned Chief Justice, before whom the case was tried, were voluntary payments which the defendants have no right to claim as at the date of the acceptance.

Barring those which were not and could not then be considered as part of the claim of the defendants as at that date, the proceeds of the $37,000 of debentures were more than sufficient to cover the claim of the defendants as contemplated and understood at the time, and also the amount of the bill of exchange in question held by the plaintiffs.

I think the verdict should be affirmed with costs.

Killam, J.—The plaintiff bank sues the defendants upon a bill of exchange for $3,530.00 alleged in the declaration to have been drawn by the Town of Portage la Prairie upon the defendants and to have been accepted by the defendants in these words, "Accepted, payable when balance of debentures ($37,000) in our hands are sold by us and proceeds received and our claim as at this date and interest to date of payment has been paid." The declaration alleges and the pleas deny fulfilment of the conditions of the acceptance.

The action was tried before the learned Chief Justice without a jury and a verdict was entered for the plaintiff for the full amount of the acceptance.

At the trial the objection was taken that the bill of exchange produced was not drawn by the Town Corporation, but by the individual officers who signed it, but this objection is not now made a ground of motion against the verdict and I do not consider it. The defendants have applied to have a nonsuit or a verdict in their favor entered upon four grounds, viz.:—1. The conditions contained in the alleged acceptance upon the bill of exchange sued on, were not proven to have been performed or complied with; 2. The evidence showed that the said conditions or some of them had not been complied with; 3. The evidence of Mr. Porter and others showed that the true meaning of said alleged acceptance was, that defendants should pay the amount of said bill only when sufficient money had been received from sale of the debentures to pay their own claim and the amount of the bill of exchange; 4. The verdict is against law and evidence and the weight of evidence."

The evidence showed that the acceptance was given in the terms alleged in the declaration on the 2nd February, 1885. The defendants were then carrying on business as bankers and financial agents, and in the course of that business the Town of Portage la Prairie had become indebted to them upon a promissory note for $27,800, made by the Town in favor of the defendants, and an overdrawn account of the Town with the defendants' banking house. At the date of the acceptance the defendants held, as security for these debts, debentures of the Town for the principal sum of $37,000 which the defendants were then endeavoring and expected soon to sell. The evidence sufficiently identifies these as the debentures referred to in the acceptance.

Not having previously effected a sale, the defendants on the 29th June, 1885, assumed to "take over" (as they call it) these debentures to cover the account, and notified the Mayor of the Town by letter that under power in the agreement between them and the Town they had sold them at 97½ cents on the dollar, and placed the proceeds less their commission to the credit of the Town. A few days afterward they rendered to the Town a statement showing a balance of $506.49 against the Town. By this statement, however, it appears that after crediting the proceeds of the debentures and charging against them the old overdraft and the note mentioned, with interest to the 30th June, 1885, there was a balance of $2,147.31 in favor of the Town. This was overcome by charging up payments claimed to have made for the Town, after the date of the acceptance of the bill in question, of interest coupons upon other debentures together with some 34 coupons, for sums amounting together to $510.00, stated at the time to be held by the defendants for a client and to be still unpaid and in the hands of their solicitors for collection. Thus, without this sum of $510.00 which was as the defendants said, still unpaid, there would be a balance of $3.51 in favor of the Town. The correspondence and the evidence of Prest sufficiently identify these 34 coupons so charged as those held for a client and still regarded as unpaid, though it has been suggested that they were for interest upon other debentures of the Town owned by the defendants themselves at the date of the acceptance and thus entitled to be regarded as a portion of the "claim" mentioned in the acceptance.

The evidence amply warrants the finding that the Town acquiesced in this disposition of the debentures, with full knowledge on the part of its officers of the real nature of the transaction.

Was this, then, a sale within the meaning of the acceptance? After all that has been said I am at a loss to find even one plausible argument against its being taken as such a sale.

The defendants' counsel treat the question as one of estoppel and urges that, while they might be estopped as against the Town from disputing the validity of the sale, there could be no such estoppel in favor of third parties.

This appears to me to be a wholly erroneous way of looking at the transaction. The rule that an agent shall not sell to himself the goods of the principal entrusted to him for sale, is one adopted in the interest of the principal alone. Such a sale can be invalid as to third parties only because the principal has a right to treat it as invalid. If the principal has acquiesced in it so that it has become binding upon him, then it is to be treated in every respect as a valid sale. The title to the property is then absolutely vested in the agent, and any third person whose rights depend upon the title having so passed, is entitled to claim that there has been such a sale and that the title has so passed to as full an extent as if the sale had been a regular and ordinary one. I quite agree that if the transaction had been a wholly illusory one in which the parties had gone through the form of a sale and crediting up of the proceeds upon an understanding that it was only a form, the plaintiff bank has not so changed its position upon any representation of its being a real sale that the defendants would be estopped from showing the real character of the transaction. But here the Town and the defendants evidently treated the transaction as a real one, by which the defendants acquired the property in the debentures absolutely and the promissory note of the Town and the coupons charged against the proceeds were returned as paid.

But it is said that the transaction amounted merely to a new agreement in substitution for that under which the defendants originally held the debentures. At the time, however, the defendants assumed to act under and in pursuance of the power of sale in their original agreement, and the Town appears to have acquiesced upon that basis. There is no real evidence that it was intended that the transaction should have any other character.

Then, undoubtedly, it must be held that the proceeds were "received" within the meaning of the acceptance. Not only did the defendants notify the Town of the amount being placed to the credit of the bank account of the Town, but this was acquiesced in and adopted by the Town, and thus there was as effectual a receipt of the proceeds as if the sum had actually been paid to the defendants in cash. The circumstances would be quite sufficient to support a plea of payment if the defendants should sue the Town upon the old note or the overdrawn account. *Eyles* v. *Ellis*, 4 Bing. 112; *Spargo's Case*, L. R. 8 Ch. 411; *Fothergill's Case*, Id. 270; *White's Case*, 12 Ch. D. 511; In *re Barrow in Furness & Northern Counties Land and Investment Co.*, 14 Ch. D. 400.

There remains for consideration the third condition. What was the "claim" referred to in the acceptance? To determine this we have to look at extrinsic evidence of the circumstances. Now, we have evidence of the note and the overdrawn account to secure which the debentures were held. Beyond this we have no distinct evidence of the existence of any claim of the defendants against the Town at the date of the acceptance. Prest, the Secretary-Treasurer of the Town, states that there was no other indebtedness of the Town to the defendants and that the defendants' claim against the Town as it stood on the 2nd February, 1885, with all interest, had been paid at the date of the statement of July, 1885. The statement and the correspondence also afford some evidence that there was no other indebtedness, no other being claimed by the defendants at the time.

The defendants' counsel now suggests two other items of claim, one under certain other debentures of the Town, which may, as claimed by the defendant Boyle in his evidence, have been held by the defendants at the date of the acceptance, and the other under the acceptance itself. Prest has to admit that he does not know whether the defendants did hold such debentures. Boyle, on the other hand, does not clearly show that they were then held by the defendants. They are not formally and absolutely proved.

The defendants contend, and I think, properly contend, that the *onus* is on the plaintiff to show what was the "claim" referred to in the acceptance and that it was paid. I cannot, however, go to the extent contended for by the defendants counsel, who urges that the word "claim," must include all liabilities of every kind of the Town to the defendants, that it is not admissible to consider any evidence for the pnrpose of putting a different construction on the word, and that the plaintiff should consequently negative distinctly the existence of any other liability tban those upon the note and overdrawn account. In my opinion the evidence of the circumstances can be looked at for the purpose of interpreting the word, which may be intended to be limited to certain liabilities only. The evidence appears to me sufficient to negative the existence of any liabilities but those upon the note and the overdrawn account and a possible one upon these other debentures.

These debentures are stated by the defendant Boyle to have been for an aggregate amount of $17,000 of principal. They are called railway debentures, and were obtained by the defendants through transactions with outside holders and not from the Town. The principal was not due at the time the statement of July, 1885, was made up, and they were not included in the defendants current account with the Town There could have been no expectation that these should paid off out of the proceeds of the $37,000 of debentures, both on account of the different objects of the two issues and because this would have required the selling of the latter at a premium of nearly 50 per cent., a price which, as our own knowledge of such matters as well as the financial position of the Town as shown by the evidence and the limitation of 97 per cent. in the agreement as the minimum price of sale indicate, could not possibly have been expected to be realized. There could have been little possible anticipation under the circumstances that the $17,000 of debentures would be paid up in any other way within any reasonably short period after the date of the acceptance. Indeed, this suggestion respecting these debentures appears to have been a mere afterthought arising after the action was brought. I think that the learned Chief Justice was right in rejecting these as forming a part of the "claim."

The other suggestion is, that the amount of the acceptance itself should be included. This is the only point upon which I have felt any real difficulty, but upon consideration I think that this objection also must be rejected. There could not properly be said to be a "claim" for that on the part of the defendants until they should have paid it. It is their "claim as of this date" which is mentioned, and at that date they had no claim for this amount. If they should not effect a sale of the debentures and receive sufficient therefrom to pay the amount already owing to them with interest they would never be liable upon the acceptance or have any claim whatever on account of it. All that the court can now do is to put upon the language of the acceptance what appears to be its proper interpretation, having regard to the circumstances shown by the evidence. We can not add a condition which the language does not reasonably include for the purpose of providing for a contingency for which the acceptor has omitted to provide. I have no doubt that the plaintiff's manager would have been satisfied with such an arrangement as would have given him the surplus after payment of the debt due the defendants, but no such arrangement was made. Upon this point I cannot take his evidence as showing that there was any such agreement really made, even if this view was open to us upon the present record. The most that he shows is that he expected to get some such acceptance. Either the plaintiff is strictly entitled to the full amount or to nothing; there can be no middle course. Interpreting the acceptance as its language imports, it appears to me that all the conditions are fulfilled.

This conclusion undoubtedly produces hardship to the defendants. The opposite conclusion would be productive of hardship to the plaintiff. We cannot be influenced by a consideration of either result.

In my opinion the application should be dismissed with costs.

Bain, J.—In this action the plaintiffs sue to recover the amount of a bill of exchange for $3,530 dated the 23rd day of January, 1885, drawn by the Town of Portage la Prairie on the defendants and accepted by them in the following words, "Accepted, payable when balance of debentures ($37,000) in our hands are sold by us and proceeds received and our claim as at their date and interest to date of payment has been paid." This I take to be an absolute undertaking to pay the bill on the happening of the three events mentioned, that is, when the debentures have been sold, the proceeds received, and the defendants' claim against the drawers, as it then stood, has been paid with interest.

The action was tried before Taylor, C.J., without a jury, when he found for the plaintiffs, and entered a verdict for them for the amount of the bill and interest.

The evidence shews that at the time the acceptance was given, the defendant Boyle was in England trying to negotiate a sale of $37,000 worth of debentures of Portage la Prairie, which, accordto Boyle and the Secretary-Treasurer of the Town, the Town had placed in the defendants hands for sale, but which, until they were sold the defendants had, apparently, the right to hold as security for advances they had made to the Town. The bill was accepted in Winnipeg by the defendant MacArthur, and he doubtless took it for granted that these debentures would be sold and would realize sufficient to pay the defendants' claim against the Town in full, and the acceptance as well. But, Boyle failed to sell the debentures, and the difficulty in this case arises from the fact that the defendants instead of selling the debentures to a third party, took them over or assumed them, as Boyle expresses it, or, as the plaintiffs contend, bought them themselves.

On the 29th of June, 1885, the defendants wrote the Mayor of Portage la Prairie as follows: "We have this day sold the $37,000 Portage la Prairie debentures, which we held as collateral security for certain advances made to your Town, at 97½ cents on the dollar, and we have put this amount to your credit less 2½ per cent. commission, which your corporation agreed to pay us, so the debentures really realized 95 cents."

As the result of this transaction, the defendants credited Portage la Prairie in their books with the sum of $36075, as the proceeds of the sale of these debentures at 97½, and on the 3rd of July, 1885, they sent the Town a statement of account shewing a balance against the Town of $506.49. But, I quite agree with the conclusion of the learned Chief Justice who tried the case, that in this account the defendants have charged against the Town several items which cannot be taken to be part of the defendant's claim as it stood at the date of the acceptance, and when these items are deducted the account shews that the debentures were sold for an amount more than sufficient to pay the defendants' claim as it stood at that date with all interest.

While an agent entrusted with property to sell cannot, as against his principal, make a valid sale to himself, still, with the consent of his principal he can do so, and this consent may be either express or inferred from acquiescence. The defendants' letter to the Mayor notifying him of the sale says, generally, that they had that day sold the debentures without mentioning to whom, but the evidence shows that the transaction was carried out with the full knowledge of the Mayor and Secretary-Treasurer and that they certainly did not object to it. At all events, acquiesced in as it has been by the Town with a knowledge of the circumstances since July, 1885, the Town could not now object to it, and the result seems clearly to be that the property in the debentures has passed from the Town to the defendants, and I think, therefore, they were sold by them, though it was to themselves.

A sale having been made and the proceeds having been credited to the Town's account, it must be taken, I think, as a matter of course that the proceeds of the sale were received by the defendants, as much as if there had been a sale to a third party and the money had been actually paid into their hands.

I do not think the words "our claim" in the acceptance can be construed, or were in fact intended, to include the $17,000 of what are called the railway debentures, or the amount of the acceptance itself.

I think the verdict should stand and the appeal be dismissed with costs.

Appeal dismissed with costs.

WHITLA v. SPENCE.

(IN CHAMBERS.)

Execution issued in bad faith.—Motion against, by third party.—Attachment obtained by misrepresentation.

Where an execution was issued in face of an order that it should not issue for a certain time which had not elapsed,

Held, That this was not merely an irregularity, and that another execution creditor might move against it.

The sheriff having seized and sold goods under the writ, it could not be set aside, but was declared to be deemed to have been placed with the sheriff on the earliest day on which it properly could have reached him.

During a contest for priority between execution creditors, if the sheriff by consent of both parties, proceeds and sells, an agreement that the rights of the parties is not to be affected will almost be presumed.

An attachment was obtained by an attorney who appeared for the plaintiffs, but who was in reality the defendant's attorney, upon the ground that the defendants had assigned their property with intent to defraud their creditors. The fact that the assignment was to the plaintiffs themselves having been concealed, the attachment was set aside with costs to be paid by the attorney.

C. H. Campbell, for plaintiffs.

J. D. Cameron, for defendant.

(*9th January, 1889.*)

BAIN, J.—I granted the summons herein on the application of Mahon & Co., who are judgment creditors, and who also claim to be attaching creditors, of the defendants, calling on the plaintiffs to shew cause why the order for a writ of attachment that they had obtained from me on the 16th of November, and why the writs of execution that they had issued herein on the 22nd of November, should not be set aside.

With regard to these executions, it appears that on the 14th of November, the plaintiffs issued a writ of summons against the defendants, the indorsement on the writ shewing it had been issued by Campbell & Crawford as attorneys for the plaintiffs. The attorney who usually acts for the plaintiffs, is E——, but he entered an appearance for the defendants to this writ. On the 17th of November, the plaintiffs obtained a summons to sign final judgment, and on the return of the summons on the 19th, E—— appeared for the defendants and consented to the order going. Mr. Justice Killam thereupon made an order, giving the plaintiffs liberty to sign final judgment and "to issue execution thereon at the expiration of eight days from the last day for appearance," and I understand that this clause of the order as to the issue of execution was added by the express direction of the learned judge, E—— does not attempt to deny that he was aware of this direction, but in the face of it, on the 22nd of November, he procured the signature of the Deputy Prothonotary to writs of execution against goods and lands which he had prepared, and afterwards had them sealed with the seal of the Court by the Clerk in Chambers, and then placed them in the sheriff's hands. The signature of the Deputy Prothonotary to these writs was obtained by E—— by misrepresentation and by the wilful suppression of facts which it was his duty to have disclosed.

On the 22nd of November, a transcript of a judgment which the applicants Mahon & Co. had obtained against the defendants in the County Court of Selkirk was filed in the Q. B., and a writ of execution against goods was issued in the Q. B. and placed in the sheriff's hands, but subsequent to the plaintiff's executions.

The summons I granted herein contained a stay of proceedings, but on the return of the summons it appeared that in the meantime, by the consent of the attorneys on both sides, the sheriff had sold the goods seized under the plaintiffs' and Mahon's executions. Affidavits were filed by both attorneys, the one alleging that he consented to the goods being sold on the express condition that the sale was not to prejudice Mahon & Co's. position in the application pending, and the other expressly denyiug that there had been any such stipulation. But in the peculiar circumstances of the case, it is hardly possible to suppose the applicants would have consented to a sale without reserving their rights, and in fact had nothing at all been said by either party on the subject, I think such a reservation would almost have to be implied.

The plaintiffs contend that the issuing of these writs was only an irregularity, and that as Mahon & Co. are not parties to the suit, they cannot move against them. If it is only an irregularity, then I suppose Mahon & Co. have not such standing as would entitle them to object. But I look upon the matter not as an irregularity, but as a proceeding taken in bad faith and in direct violation of the judge's order, and one from which the Court, by virtue of the power it has, independently of any statute, to prevent its own process from being abused, cannot allow the plaintiffs to profit. The writ against goods having been executed, I cannot set it aside, but both writs must be deemed to have been placed in the sheriff's hands not on the 22nd of November, but on the day on which under Mr. Justice Killam's order, the plaintiffs would first have been at liberty to issue them.

I rescind the order for a writ of attachment in favor of the plaintiffs, which I made on the 16th day of November on the application of E———, and set aside all proceedings taken under it. I do this on the grounds, that E———falsely led me to believe he was the attorney for the plaintiffs, he having made the application and read his own affidavit in support of it, while in fact he was the attorney for the defendants, and that the affidavit of Cordingly, the plaintiff's bookkeeper, while alleging as a reason for an attachment that the defendants had assigned their personal property with intent to defraud their, or some of their creditors, impudently withheld the fact that this assignment had been made to the plaintiffs themselves. For this suppression, E——— must be held as much responsible as Cordingly, and is probably more to blame for it than he.

The costs of the application will be paid by the attorney E——— personally.

THE CANADIAN PACIFIC RAILWAY CO. v. BURNETT.

(Full Court.)

Sale of land for taxes.—"Sold or occupied."—Constitutional law.

By reason of the legislation extending the limits of the Province, the Legislative Assembly is bound to regard Dominion legislation with reference to The Canadian Pacific Railway Company.

By statute the lands of the Company were to be free from taxation for a certain period unless "sold or occupied." The Company made an agreement for sale of certain of the lands upon certain conditions. The conditions not having been performed, the Company cancelled the agreement, as by its terms it was entitled to do. There never was any actual occupation of the land.

Held, 1. That the land had never been sold or occupied, and that it was, therefore, not subject to municipal taxation.

A bill had been filed for the purpose of having declared void a sale of certain land for municipal taxes. The case came up for argument upon the following:

Special Case.

This is a suit brought for the purpose of setting aside a sale of the south-east quarter of section one (1) township seven (7) range sixteen (16) west of the principal meridian, to the defendant, by the Municipality of South Cypress, for alleged arrears of taxes, and by consent of the parties the following case has been stated for the opinion of the Court, without pleadings.

1. The plaintiffs are a duly incorporated Company under a special Act, 44 Vic. Cap. 1 of the Parliament of Canada, and also under Royal Letters Patent under the Great Seal of Canada issued on the sixteenth day of February, 1881, and published in the Canada Gazette on the ——— day of ——— 1881, which Charter shall be admitted upon production of the Gazette containing the same.

2. Under the said Act and Charter and on and prior to the twenty-seventh day of February, 1882, the plaintiffs became entitled to a patent from the Crown of the said southeast quarter of section one (1) in township seven (7) range sixteen (16) west

of the first principal meridian, which land formed part of the plaintiffs' land grant referred to in clauses nine (9) and eleven (11) of the contract set out in the schedule of the said Act, and the said land at the time of the passing of said Act was situate in the North-West Territories, but is now, and was at the time of the sale for taxes hereinafter mentioned, in the Province of Manitoba.

3. Clause sixteen of the said contract provides as follows:—"The Canadian Pacific Railway and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof and the capital stock of the Company shall be forever free from taxation by the Dominion or by any province hereafter to be established or by any municipal corporation therein, and the lands of the Company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown."

4. On the said twenty-seventh day of February, 1882, the plaintiffs entered into a contract (a copy of which is hereto annexed and is made part of this case) with one Shiels, and the plaintiffs have not entered into any other agreement with reference to the said lands either with the said Shiels or any other person or persons, corporation or corporations.

5. On the said twenty-seventh day of February, 1882, the said Shiels paid the plaintiffs the sum of sixty-six dollars and sixty-six cents, being the first instalment of principal payable under said contract, and also the sum of twenty dollars being the interest for one year on the balance of the principal remaining unpaid.

6. The said land has never been occupied either by the plaintiffs or by the said Shiels or by any other person or persons but the same is and has always been and still is in a state of nature and wholly unimproved.

7. The said contract was declared null and void by the plaintiffs on the fifth day of July, 1884, for default in payment of the second instalment of purchase-money and from and after the said date, all rights and interests thereby created or then existing in favor of the said Shiels and those claiming under him in the said lands either under or by virtue of the said contract or otherwise thereupon ceased and determined.

8. On the thirteenth day of February, 1885, the Municipality of South Cypress, within which the said land is situate, sold the said land to the defendant for arrears of taxes which accrued in the years 1882 and 1883 under the provisions of the Manitoba Municipal Act of 1884.

9. The patent from the Crown for the said lands issued to the plaintiffs on the 9th day of May, 1885, subject to a charge theretofore created as security for land grant bonds issued by the plaintiffs in pursuance of the powers contained in their said Act and Charter, no patent for said lands having been previously issued.

If the court is of opinion that the said land could have been assessed and sold for taxes prior to the issue of the patent, and that under the circumstances aforesaid the said lands have been "sold or occupied" within the meaning of the said clause sixteen, then a decree is to be pronounced for the defendant with costs.

If the court is of opinion in the negative, then a decree is to be pronounced for the plaintiffs declaring the sale of the said land to the defendant to be void and of no effect with costs of suit.

J. S. Ewart, Q.C., and *J. Stewart Tupper*, for plaintiffs.

The B. N. A. Act, s. 125, exempts Dominion lands from taxation, and the present are exempt unless there is some statute rendering them liable. The following Acts were referred to, Municipal Act, 1881, c. 3, s-s. 21, 35, 43, 64, 65 and 66, as amended by the Act of 1882, c. 16, s. 7. Municipal Act of 1883, s-s. 271, 286 and 319, Municipal Act of 1884, c. 1, s. 288 (similar to s. 271 of the Act of 1883); s. 302 (similar to s. 286 of the Act of 1883). Dom. statute 44 Vic. c. 1. The word "sold" does not include "agreed to be sold," word must mean here, "completely parted with." Word "sold" has a technical signification, it implies completion, not a mere agreement which would not necessarily be ever completed. *McLean* v *Young*, 1 U. C. C. P. 62. In *Burt* v. *Burt*, 29 L. J. P. M. & D. 133, as to "marry," "agreeing to marry," not equivalent. *Dawson* v. *Dawson*, 8 Sim. 346; *Kenerson* v. *Henry*, 101 Mass. 152. Agreement to sell is purely executory, sale, something completed, *Street* v. *Kent*, 11 U. C. C. P. 255.

H. M. Howell, Q.C., for defendant. The word "sold" may mean "sold or otherwise disposed of." *U. S.* v. *Watkins*, 97 U. S. R. 223; *Platt* v. *Union Pac. Ry. Co.*, 99 S. C. R. 49; *Burpee* v. *Sparhawk*, 97 Mass. 342; *Macdonald* v. *Campbell*, 2 S. & R. 473; *Dailey* v. *Westchester Ins. Co.*, 131 Mass. 173; *Oakes* v. *Manufacturers Fire Ins. Co.*, 131 Mass. 164. "Sold" means "contracted to sell." *Russell* v. *Nichol*, 3 Wend. 112; *Philadelphia* v. *The Collector*, 72 S. C. R. 720; *Church* v. *Fenton*, 4 Ont. App. R. 169. These lands are not "property of Canada" under section 125 of B. N. A. Act. *Essenden* v. *Blackwood*, 2 App. Ca. 574. Acts exempting from taxation are construed strictly. All property equally taxable. *Cooley on Taxation*, 146; *Mills on Political Economy*, 396; *N. Y. & Erie R. Co.* v. *Sabin*, 26 Penn. St. 242; *Moore* v. *Allegheny City*, 6 Harris, 55; *Minot* v. *Philadelphia*, 85 U. S. R. 206. The Company bound the purchaser by the agreement to pay taxes. This showed the Company acknowledged a right to tax it. Shiels was called the purchaser in the agreement. The land became liable to taxation before default. It would be void only at the option of the Company. The court will not presume in favor of forfeiture.

(2nd March, 1889.)

TAYLOR, C.J.—During the argument, counsel for the defendant dwelt upon the justice of equal taxation, and on the well established rule as to exemptions being strictly construed. Reference was made to the language of *Cooley on Taxation*, at p. 146, "The intention to exempt must be expressed in clear and unambiguous terms; taxation is the rule, exemption is the exception." Or, as it was expressed in *Crawford* v. *Burrell*, 53 Penn. St. 219, "Taxation is an act of sovereignty, to be performed so far as it conveniently can be, with justice and equality to all. Exemptions, no matter how meritorious, are of grace, and must be strictly construed." The same court said, in *New York and Erie Ry. Co.* v. *Sabin*, 26 Penn. St. 242, of the taxing power, that if abandoned in favor of chartered companies, "the surrender must be evinced by terms so explicit as to leave no doubt of the legislative intention to part with it." In this court the necessity and justice of taxation being equal, and not discriminating, was fully and ably dealt with by the late C.J. Wood, in *Hudson's Bay Co.* v. *Atty-Gen.*, Man. R. t. Wood, 209. The present case does not, however, seem to me to raise the question of exemption, at least in the ordinary sense of withdrawing particular property from taxation, to which other property remains subject.

The land in question was originally the property of Canada, and by section 125 of The British North America Act, not liable to taxation. The question is, has it ever become so, not, has it, at one time liable to taxation, been exempted therefrom.

By virtue of the Imp. Act, 31 & 32 Vic. c. 105, and the Order in Council of 23rd June, 1870, pursuant to section 146 of The British North America Act, the land became, and in February, 1881, was the property of Canada. By 44 Vic. c. 1, D., assented to 15th February, 1881, a contract which had been entered into for the construction of The Canadian Pacific Railway, was approved of and confirmed. The contract annexed to the Act provided for the Company receiving twenty-five millions of acres of land, no specific land being designated, further than, that it should be alternate sections of 640 acres each, extending back twenty-four miles deep on each side of the railway from Winnipeg to Jasper House, in so far as such lands should be vested in the Government, the Company receiving the sections bearing uneven numbers. The 16th clause of the contract after providing for certain property of the Company being for ever free from taxation by the Dominion, or by any province afterwards to be established or by any Municipal Corporation therein, said further, "And the lands of the Company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown."

A few days after the passing of this Act, the Legislature of Manitoba passed the 44 Vic. c. 1, (3rd sess.) assented to 4th March, 1881, by which that Legislature consented to the Parliament of Canada, increasing or otherwise altering the limits of the Province, upon the terms and conditions set out in that Act. The first section set out the proposed boundaries, and the second provided that, the increased limits "shall be subject to all such provisions as Parliament has enacted or may hereafter enact respecting the Canadian Pacific Railway, and the lands to be granted in aid thereof." Then the Parliament of Canada passed the 44 Vic. c. 14. D., assented to 21st March, 1881, which, after reciting the passing of the Act of the Manitoba Legislature, by the first section set out the new and increased boundaries of the Province, in the second, set out the terms and conditions upon which the increase was made, and in the third, made provision for the laws, courts, commissions, powers and authorities, and all officers existing at the time continuing, subject with respect to matters within the legislative authority of the Legislature of Manitoba to be repealed, abolished or altered by that Legislature. This Act was to come in force upon the proclamation of the Governor-General, and it was afterwards duly proclaimed on the 13th of June, 1881, to come in force on the 1st day of July following. This was followed by another Act of the Legislature of Manitoba, 44 Vic. c. 6 (3rd sess.) assented to on 25th May, 1881, reciting the Dominion Act and providing by the 1st section, that so soon as the Act of the Parliament of Canada should come into force and operation, "the territorial boundaries and limits of the Province of Manitoba shall be extended and increased as in that Act is mentioned and expressed, subject to the terms and conditions therein contained, and the said Act and all the enactments and provision thereof shall have the force and effect of law in this Province so enlarged and increased as aforesaid, and immediately thereafter the said additional territory and the inhabitants thereof, and all officers therein, within the executive authority or legislative jurisdiction of the Province of Manitoba, shall, as an integral part or portion of this Province, and as officers of the Government of Manitoba, be respectively subject to all the laws and executive regulations of the Province of Manitoba." This Act was to come in force upon the proclamation of the Lieutenant Governor and was duly proclaimed on the 28th of June, 1881, and came in force on the 1st day of July following.

At the same session an Act was passed, 44 Vic. c. 13, to divide the newly added territory into municipalities, by section 8 of which, all the provisions of the Act passed during the same session respecting municipalities, were declared to apply, after the election of warden and councillors, to each of the municipalities then formed.

The Act respecting municipalities there referred to was the 44 Vic. c. 3. By the 21st section of that, the council was to assess and levy taxes on the whole real and personal property within its jurisdiction, except as thereinafter provided, the exceptions being set out in section 35. The first of these was, "Real estate held in trust for Her Majesty or for the public uses of the Province." Section 43 declared, that all assessments imposed under the Act should be due and payable not only by the owner of the property upon which they were imposed, but also by the possessor or occupant of the property and by the tenant or lessee of such property, and the payment of such assessment by any such person should discharge the property. By section 52 the treasurer of each municipality was in each year to prepare a statement of all lands in arrear for taxes for the previous year, and by section 55 and following sections, provision was made for advertising and selling lands on which two years arrears of taxes were due. Section 64 provided that, if at the expiration of one year from the time of sale, the land sold had not been redeemed, a deed should be executed conveying in the name of the municipality the property so sold to the purchaser, his heirs, assigns or legal representatives. By section 65, as amended by 45 Vic. c. 16, s. 7, such deed was to be a legal conveyance of the land, and not only transfer to the purchaser all rights of property which the original holder had therein, but purge and disencumber the land from all privileges and mortgages due thereon, and unless questioned before some court of competent jurisdiction within one year, the deed, notwithstanding any informality or defect in or preceeding the sale, was valid and binding to all intents and purposes except against the Crown. Section 66, however, limited the generality of the foregoing section, as it provided that, "Whenever any lot of land situate in any municipality is sold before the issuing of letters patent from the Crown, granting the same, such sale shall in nowise affect the rights of Her Majesty in such land, but shall only have the effect of transferring to the purchaser such rights of pre-emption or other claim as the holder of such land, or any other person, had acquired, if any, in respect of the same."

In 1883, another Act, the 46 & 47 Vic. c. 1, pt. 1, was passed, which seems to supersede the 44 Vic. c. 3, although the latter is not formally repealed by it. By that Act, provision was for the first time made, in express terms, for the taxation of unpatented lands. Section 252 declares what property shall be exempt, the first exemption being the same as in the Act of 1881. The section as to taxing unpatented lands in the 271st, and it is as follows: "Unpatented land vested in, or held by Her Majesty, which may be hereafter sold, or agreed to be sold to any person or which may be located as a free grant, shall be liable to taxation from the date of such sale or grant, and any such land which has been already sold, or agreed to be sold to any person, or has been located as a free grant prior to the 1st day of January, 1883, shall be held to have been liable to taxation since the 1st day of January, 1883; and all such lands shall be liable to taxation thenceforward under this Act, in the same way as other land, whether any license or occupation, location ticket, certificate of sale or receipt for money paid on such sale, has or has not been or is, or is not issued, and in case of sale, or agreement for sale by the Crown, whether any payment has or has not been, or is, or is not made thereon, and whether any part of the purchase money is, or is not overdue; but such taxation shall not in any way affect the rights of Her Majesty in such lands." By section 286, it was provided that, where the title to any land sold for arrears of taxes was in the Crown, the deed therefor, in whatever form given should be held to convey only such interest as the Crown may have given or parted with or may be willing to recognize or admit that any person or persons possesses or possess under any color of right whatever. Section 66 of the Act of 1881 was reproduced as section 319 in this Act of 1883.

The following year another Act was passed, 47 Vic. c. 11. This Act contains the same exemption of real estate held in trust for Her Majesty, as the two former Acts, and in it sections 288 and 302 are the same as sections 271 and 286 in the Act of 1883. Section 338 is the same as section 65 of the Act of 1881, as amended by 45 Vic. c. 16, s. 7, with the additional proviso that the deed shall be valid and binding provided taxes shall have been due on the lands at the time of the sale, and that the *bona fide* holder of the title, when the deed is questioned shall not have been guilty of, or knowingly a party to, any fraud against the provisions of the Act, or in connection with the sale, transfer or assignment of the land.

The land in question was assessed in 1882 and 1883, under the Acts then in force, and sold for the arrears of taxes under the Act of 1884.

The learned counsel for the defendant argues that as the plaintiffs were, in February 1882, entitled to a patent from the Crown, the land was not then real estate held in trust for Her Majesty, and so was not free from liability to taxation. If, however, the terms of the contract approved by 44 Vic. c. 1, D., as to freedom from taxation of the Company's lands, continued in force after the added territory became part of Manitoba, it is not necessary to consider the effect of the various municipal acts, as to the taxation of unpatented lands, and the effect of deeds given in the case of such land sold for arrears of taxes. The contention is made on the part of the defendant that even if the Legislature of Manitoba by the 44 Vic. c. 1 & 6, did agree to the term imposed by the Parliament of Canada, as to the lands of the Company being free from taxation, yet it had a right to change its mind as to that, and has done so, exempting from taxation only lands held in trust for Her Majesty, and making unpatented lands sold, agreed to be sold, or located as free grants, subject to taxation.

But is this so? Could the Legislature, having regard to the provisions of the 44 Vic. c. 14, D., and the 44 Vic. c. 1 and c. 6, change its mind, and render this land liable to taxation?

The land was in the North-West Territories, and in 1881, belonged to Canada, and was by section 125 of the British North America Act, not liable to taxation. The contract with the Company approved of and confirmed by 44 Vic. c. 1, D., provided for a grant of land, of which the land in question formed a part, being made to the Company, and further, that the land so granted should, until sold or occupied be free from taxation by the Dominion, or by any Province thereafter to be established or by any municipal corporation therein, for twenty years. The Act increasing the boundaries of Manitoba 44 Vic. c. 14, D., expressly provides in section 2, "The terms and conditions upon which such increase is made, are as follows: . . . . . (*b.*) The said increased limit, and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been, or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof." Upon the terms and conditions set out in that Act, the Legislature of Manitoba accepted the extension of the boundaries of the Province. Their Act 44 Vic. c. 6, after reciting *in extenso*, the Act of the Parliament of Canada proceeds, "And whereas the legislature of this Province hath consented to, and doth adopt the several terms and conditions aforesaid in the said

Act of the Parliament of Canada contained," and then enacts that when, and so soon as the Act of the Parliament of Canada should come into force by proclamation, "the territorial boundaries and limits of the Province of Manitoba shall be extended and increased as in that Act is mentioned and expressed, subject to the terms and conditions therein contained." Had the contract been made with the plaintiffs, and the Act confirming it passed before this Province was established, and then a similar term and condition as to the plaintiffs rights inserted in the Manitoba Act, 33 Vic. c. 3, D., there can be no doubt the Legislature of Manitoba would have been bound by the condition and would have had no power to legislate contrary to it. The 44 Vic. c. 14, D., must be treated as if it were with respect to the added territory, part of the Manitoba Act. When the additional territory became part of the Province, the Manitoba Act came into force within it, with the additional terms and conditions contained in the new Act. It is true the third section, which provides that all laws and ordinances in force in the territory, and all courts, commissions and officers existing therein shall continue, concludes with these words, "Subject, nevertheless, with respect to matters within the legislative authority of the Legislature of Manitoba, to be repealed abolished or altered by the said Legislature." But, this does not seem to extend so far as to permit of the contract or arrangement with the plaintiffs being varied. The terms and conditions upon which the increase was made are set out in section 2. The sub-section (*a*) provides, that the enactments and provisions of all Dominion Acts extended to Manitoba are to apply to the added territory, "Subject, however, to the provisions of section three of this Act." Then comes sub-section (*b*) as to the provisions respecting the Canadian Pacific Railway, and the lands granted in aid thereof. This is subject to no proviso as to its being repealed or altered, and certainly the contract with the plaintiffs does not come within any of the general words of the third section. In my opinion, Manitoba received the addition to its territory upon the express condition that the existing contract between the Dominion Government, the then owner of the land, and the plaintiffs, that the lands granted the latter, should, for twenty years, be subject to taxation only in the event of their being sold or occupied, was to be respected and acted upon by the Province. It was in the nature of a contract between the Dominion and the Province, which could be varied only by mutual consent. The effect of conditions in transactions between Congress and States of the American Union, ceding portions of territory, has sometimes engaged the attention of the Supreme Court of the United States. The light in which that court seems to have regarded such conditions is in accordance with the view I have taken. In *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, the question the court had to deal with was, the power of Congress to authorize the construction of a bridge over the Potomac, within the limits of territory ceded to the United States by Virginia and Maryland after a compact between these States as to the free and unobstructed navigation of the river. The court, after remarking that if Virginia and Maryland had retained the portions of territory, they could have so far modified the compact as to have agreed to change any or all of its stipulations and could, by their joint will, have made any improvement which they chose, proceeded to say, "When they ceded to Congress the portions of their territory embracing the Potomac River within their limits, whatsoever the Legislatures of Virginia and Maryland could have done by their joint will, after that cession, could be done by Congress, subject only to the limitations imposed by the acts of cession." So, in *Anderson* v. *Clark*, 1 Pet. 628, dealing with an Act of the Legislature of Virginia ceding to the United States a part of the State territory upon certain reservations and conditions, C.J. Marshall spoke of the Government of the United States as having "received this territory in trust to carry out these." In *Green* v. *Biddle*, 8 Wheat, 1, an article in the agreement between the States of Virginia and Kentucky, when the latter was organized had to be considered. It declared that all private rights and interests of land within Kentucky, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State. The court said, "It plainly imports that these rights and interests as to their nature and extent, shall be exclusively determined by the laws of Virginia, and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky does narrow these rights and diminish these interests, is a violation of the compact and is consequently non-constitutional." *Hawkins* v. *Barney*, 5 Pet. 457, may also be referred to. The same view seems to have been taken by the late C.J. Wood in *Hudson's Bay Co.* v. *Atty.-Gen.*, Man. R. t. Wood, 209, where he had occasion to refer to the stipulation or condition in connection with the surrender by the Hudson's Bay Co., that, "no exceptional tax is to be placed on the Company's land."

The question remains, has this land been "sold or occupied."

The issuing of land grant bonds and the giving a mortgage to trustees to secure these, was not a sale of the lands. The issuing of such bonds is provided for by the contract. Such land grant bonds could be issued even in advance of the grant of the land to the Company, for the contract has special provision for the mode in which bonds issued in advance of the land being earned, shall be dealt with.

On the 27th of February, 1882, the plaintiffs entered into an agreement in writing with one Edward Shiels.

(The learned judge then referred to the terms of this agreement.)

It is admitted by the case, that this contract was on the 5th July, 1884, declared null and void by the Company for default in payment of the second instalment of purchase money, and that from and after that date, all the rights and interests thereby created or then existing in favor of the purchaser, and those claiming under him, in the lands, either under or by virtue of the said contract, or otherwise thereupon ceased and determined.

The defendant contends, that by entering into this agreement, the lands were sold by the Company and that as it gives the purchaser the right to enter into possession, the lands were occupied by him. But, the case itself puts an end to any contention that the lands were occupied, for the 6th clause states that, "The said land has never been occupied either by the plaintiffs or by the said Shiels, or by any other person or persons, but the same is, and has always been and still is in a state of nature and wholly unimproved."

Was the land sold to Shiels by the agreement entered into with him? Clause 16 of the contract between the Government and the Company says, "sold," not "sold or agreed to be sold."

A number of cases were cited to support the contention that such an agreement as was entered into here, was a sale, that the word "sold" may mean and should be read as meaning "agreed to be sold."

Russell v. *Nicoll*, 3 Wend. 112, was a case in which the court had to construe an agreement for the sale of cotton to be delivered at a future day and a question was, whether the title to the cotton had passed or not. The court held the contract executory and said, "If the contract be executory, and such it evidently is, the same interpretation must be given to the word 'sold' that was given it in the case of *Boyd* v. *Siffkin*, 2 Camp. 326. It means 'contracted to sell.'" *Burpee* v. *Sparhawk*, 97 Mass. 342, was a case under a statute as to preferential assignments by insolvents and turned on the terms of the statute. Henry, a manufacturer, had been in the habit of consigning to the defendant for sale, goods which he manufactured, and of receiving advances upon them. Prices declined and the advances made being in excess of the value of the goods, the defendant brought an action and attached the goods, but, upon receiving from Henry a bill of sale of them, proceeded no further with the action. The plaintiffs as assignees in insolvency of Henry, sued for the goods, alleging that the sale and conveyance to the defendant was a fraudulent preference. The plaintiffs had a verdict against which the defendant moved, taking the exception that the judge should have charged that a consignment of goods to a commission merchant to be sold for or on account of the consignor was not such a conveyance of property as was forbidden by the statute. Chapman, J., said, "But the terms of the statute are very broad, and include any assignment, transfer or conveyance of any part of the debtor's property, either directly or indirectly, absolutely or conditionally. A consignment of goods to be sold for or on account of the consignor, is within the fair import of these terms, if the consignee is authorized by it to apply the avails of the sales to a pre-existing debt which the consignor owes him. This must be very clearly so if the consignor gives a bill of sale of the goods, the effect of which is to transfer the legal title to the consignee." Another case cited was *Kenerson* v. *Henry*, 101 Mass. 152. There, land had been conveyed by the plaintiffs to Henry's wife, and at the same time an agreement was made, that, if Henry desired to sell the land before two years, he should first offer it to the plaintiff at a certain price, and if he declined to take it at that, Henry should be discharged from the agreement. Within the two years, Henry and wife sold the land without offering it to the plaintiff, who sued upon the agreement, and had a verdict. On a motion for a new trial, Wells, J., said, "It may be that the defendant was in no worse condition of capability to make a title to the plaintiff after the conveyance to Chase, than while the title was held by his wife. We cannot judge of that. It is enough that the conveyance to Chase imports a sale, that there is no evidence that it was not an actual sale and as such it is a breach of the agreement." In *Oakes* v. *Manufacturers Ins. Co.*, 131 Mass. 164, the court were dealing with a condition in a fire policy, that it should become void, if the insured premises "are sold or conveyed in whole or in part." The plaintiff, the insured, conveyed to Davis, who at the same time conveyed to the plaintiff's wife. It was contended that Davis had only instantaneous *seisin*, and that on the conveyance to the wife, the plaintiff had, as tenant by the courtesy, an estate of freehold. But the court said, the plain purpose of the condition was not merely to affirm the common law rule, that when the interest of the insured ceases, the policy fails, but to protect the insurers against any sale or conveyance which may diminish the motive of the insured to guard his own property from loss by the risk insured against. "It provides against a sale or change of title in whole or in part and any change which produces such diminution of interest, if it is effected by a conveyance of any part of the property, clearly is sufficient to defeat the insurance." *Daley* v. *West Chester Ins. Co.*, 131 Mass. 173, was another case arising on the condition in a fire policy making it void if the property "should be sold." The premises insured were subject to a mortgage and the policy was payable to the mortgagee in case of loss. After the death of the insured, his heirs conveyed the premises to the mortgagee by a deed absolute in form containing no mention of the mortgage and no declaration of any trust in favor of the grantors. The court held that, the evidence of the mortgagee of an oral agreement, which he made on receiving the deed, to sell the estate and account to the heirs for the proceeds, after paying his mortgage, did not show an intention to charge the estate with a trust, or operate to prevent the title to the whole, both legal and equitable, from vesting in him.

McDonald v. *Campbell*, 2 S. & R. 473, was an ejectment suit, and evidence had been admitted of a declaration made by a person under whom the plaintiff claimed as heir, that he had sold and conveyed the land. The objection was taken and on appeal held good, that the parol evidence should not have been received, as it must be understood to mean that he had made a written conveyance. Tilghman, C.J., said, when a man says he has sold and conveyed land, the fair understanding is, that he has conveyed by writing, otherwise he would only have said he had sold the land. In that case, the court was not considering whether a man having entered into an executory agreement to sell, could be said to have sold land. In the *United States* v. *Watkins*, 97 U. S. 223, a petition had been presented in the court below, praying the confirmation of a Spanish grant to lands in Louisiana, and an order had been made confirming it as to part of the land claimed. All, or nearly all the land having been disposed of by the Government, the petitioners asked certificates of location under the terms of an Act of Congress, which provided that, "If the lands or any of them, have been sold by the Government, or cannot be surveyed and located, the claimant, if his title be confirmed, shall have the right to enter a quantity equal in extent to the lands thus sold, upon any of the public lands of the United States," &c. In the Supreme Court the United States Government raised the contention, that the lands had been given as free grants, and not sold, therefore, they were not liable to make good the claim. Mr. Justice Bradley, delivering the judgment of the court, thus disposed of the contention, "As to the point made by the Government, that the lands in question were not *sold* by the United States to third parties, but were *donated* to settlers thereon; and that, therefore, the case does not come within the words of the Act of 1860, we do not think that this objection is tenable. If the Government has disposed of the lands in any manner, we think the fair interpretation of the Act is, that the claimant should have other lands in lieu thereof. As we have so held in several other cases, we do not deem it necessary to discuss the subject further. The Act may well be construed alongside of other acts *in pari materia*, where the words "sold or otherwise disposed of," are expressly used. They are all within the same "mischief and the same reason." In *Platt* v. *The Union Pacific Ry. Co.*, 99 U. S. 48, lands had been granted to the defendants to aid in the construction of the road, one article in the Act granting them being, "All the land granted by this section which shall not be sold or disposed of by the Company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption." The Company not having sold all the lands, but having mortgaged them as security for bonds they had issued, the court held, that the primary object of the grant was to furnish assistance in and during the construction of the road, and that opening the unsold or undisposed of lands to settlement and pre-emption, was only a subordinate and secondary object, and that the words, "or disposed of" were not redundant words, or synonymous with the word sold, but, that they contemplated a use of the lands granted different from a sale and that a mortgage was such a use. None of these cases seem to me, to give much support to the defendant's contention.

The most recent case is one decided in Ontario, by Chancellor Boyd, *London & Canadian, &c., Co.* v. *Graham*, not yet reported, but noted shortly in 8 Can. Law Times, 431. The case came before the court upon a question as to whether the plaintiffs could make a good title to a purchaser. The land had been mortgaged to the plaintiffs, and afterwards the mortgagor conveyed to them the equity of redemption. The charter of the plaintiffs contained a provision that, "The Company may hold such real estate as may be necessary for the transaction of their business, not exceeding in yearly value the sum of one thousand pounds in all, or as being mortgaged or hypothecated to them, may be acquired by them for the protection of their investment, and may from time to time sell, mortgage, lease or otherwise dispose of the same, Provided always, that it shall be incumbent upon the Company to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them, otherwise it shall revert to the previous owner or his heirs or assigns." The objection taken by the purchaser was, that more than five years had elapsed, the land had reverted to the former owner. It appeared that within the statutory period, the plaintiffs had entered into an agreement for the sale of the land, but, that after making some payments, the purchaser made default, which, by the terms of the contract, left the plaintiffs at liberty to determine the agreement. The learned chancellor held, that the plaintiffs had by that agreement, sold the land within the meaning of the statute. He cites no authority in support of the view taken and was plainly influenced by the desire not to give effect to a forfeiture. The language he uses is, "Giving the liberal construction against forfeiture, which is a principle of statutory construction in cases like the present, any *bona fide* sale is enough, though it falls short of conveyance. If there has been a sale which is not carried out, by the default or abandonment of the purchaser, that is such a transaction as satisfies the statute."

While none of the cases relied on by the defendant, and to which reference has been made, support the contention that an agreement such as the one entered into between the plaintiffs and Shiels, a mere agreement to sell the land upon certain conditions being fulfilled, was a sale, there are not a few authorities to the effect that "sold" means a final, complete and irrevocable parting with the land.

In *Bull* v. *Price*, 7 Bing. 237, the defendant employed the plaintiff to negotiate for the sale of a piece of property, agreeing to pay him a fixed commission upon the price obtained. The plaintiff did negotiate a sale, but there being considerable delay in carrying it out and paying over the purchase money, he sued for his commission. At the trial a nonsuit was entered and this was upheld in Term, Tindal, C.J., and the other judges, all agreeing that as the retainer of the plaintiff was for the sale of the premises, not for an agreement for the sale of them, the time for his claiming his commission had not arrived.

In *Dawson* v. *Dawson*, 8 Sim. 346, the testator directed his trustees to permit his son at any time within three months after his decease, to become the purchaser of a house at a named price. The son elected to purchase, but did not pay the purchase money, and it was not until the last day of the three months that a solicitor was instructed about the preparation of the conveyance, the abstract of title not being delivered until a week after the three months had expired. The question being, whether the son could still exercise his option, V.C. Shadwell held that he could not. He said the son was allowed three months to become the purchaser, "but *prima facie*, the becoming the purchaser would include not only the payment of the purchase money, but also the taking of the conveyance." In *Jackson* v. *Silvernail*, 15 Johns. 280, the covenant on the part of the lessee for lives, was, that he would not "sell or dispose of, or assign" his estate in the demised premises, and he made a lease for twenty years of part of the premises. On an ejectment for the alleged forfeiture, the court held that nothing short of an assignment of the lessee's whole estate in the land, could work a forfeiture. *Edwards* v. *Farmers Fire Ins. & Loan Co.*, 21 Wend. 467, is a most instructive case upon this question, argued by able counsel and very fully considered by the court. The defendants held a mortgage upon land, and after default in payment instituted foreclosure, and according to the practice in New York, the lands were under the foreclosure decree offered for sale, a large part of them being purchased by the President of the Company for the Company. The sale under the foreclosure proceedings took place in August, 1834, but the deeds in pursuance of that sale were not executed until 25th June, 1835. On that day the Company prepared a statement shewing the amount due them, after crediting the purchase money of the other purchasers, and on the same day the plaintiff tendered to the President an amount more than sufficient to satisfy the principal interest and costs due. This he declined to receive, because the Company had sold the land. Their charter provided that, "In all cases where the said corporation have become the purchasers of any real estate on which they have made loans, the mortgagors shall have the right of redemption on payment of the principal interest and costs, so long as it remains in the hands of the said corporation unsold." It further provided, as in the case of *The London & Canadian Loan & Agency Co.*, that the corporation should be bound to sell any real estate so acquired within five years, and that in default of doing so, it should be forfeited to and vested in the people of the State. What the Company had done was this, in March, 1835, they entered into a contract for the sale of the lands purchased by the President, covenanting that they would grant and convey them to the purchasers, within a reasonable time after the legal title should be vested in the Company, the purchasers covenanting to pay one third of the purchase money in May and the *residue* in five years, to be secured by bond and mortgage. The lands having been afterwards conveyed to the purchasers, the mortgagor brought an action of ejectment contending that the lands had not, at the time of his tender, been sold, but only contracted to be sold. This contention the court held to be well

founded. Mr. Justice Cowan, who delivered the judgment of the court, said, "That here was a strict sale, cannot be pretended within either the legal or common definition of the term. It was a contract to sell at another day, on conditions yet to be performed. . . . In short, this contract with the Merritts was for a sale to be made." Again he said, "A contract to sell, such as the one before us, is executory and operates *in personam* only. Though one has agreed to sell his farm unconditionally, it must still, in legal propriety be considered as unsold. The agreement creates but *jus ad rem*; a sale to be complete must carry the *jus in re*. The former is a step towards the act of sale; the latter is the act itself." He afterwards proceeded, "Is it then, permissible to leave the primary legal and most common meaning of the word "sale," and resort to secondary, accidental or constructive meaning? I am aware that we are here again brought to encounter the opinion of the learned Chancellor in *Merritts* v. *Lambert*. He thinks, that after the creation of a right to a future specific performance, the property is no longer to be considered unsold. If this be so, it must depend on the rule peculiar to this court, that what ought to be done shall be taken as done. I admit that this is a rule very healthful in overreaching those who buy, or come in under the covenant, or with notice. But, it is after all no more than a fiction, and should never be strained to the working of injustice. The utmost of the argument is, that the word "sale" has in Chancery a constructive meaning, comprehending a class of contracts not known to the law; that for certain purposes it considers a contract executed which is not so, and we are required to construe a word used by a statute in the same broad sense; in short, to adopt the equitable, not the legal meaning of the word. Aside from objections arising *a priori* to such a test of statute meaning, I think it will be found that all the cases, so far as they have spoken, are against it." In *Livington* v. *Stickles*, 7 Hill, 253, the covenant in a lease was that if the lessee "should be minded or inclined to sell or dispose of the estate in the hereby demised premises," he might do so on obtaining the consent of the lessor and first offering him the pre-emption or refusal of buying the same. The court having to construe this covenant, Mr. Justice Nelson said, "Before a breach can be predicated upon the words of the covenant in this case, such a sale or assignment of the term must be shown as shall operate to divest the vendor or assignor of the whole of his legal interest, or estate in the same. Anything short of this would be carrying the restraint beyond the express stipulation of the parties. For the words 'sale' or 'assignment' technically speaking, mean the actual transfer of the legal interest and estate; not a mere equitable right to such transfer which might be enforced in a court of equity."

The same subject has also come under consideration in the Supreme Court of the United States. *Ham* v. *Missouri*, 18 How. 126, was a case of a conviction for trespass and waste upon a section of land, alleged to be school land belonging to the inhabitants of the township. The claim of the public to the land rested upon an Act of Congress, authorizing the people of Missouri Territory to form a constitution and state government, which gave the State for school purposes, section 16 in each township, unless "sold or otherwise disposed of," in which case, other equivalent lands were to be granted. The question was, whether the section in question, by the way in which it had been dealt with previously by the United States Government, had been sold or disposed of. Mr. Justice Daniel in giving the judgment of the court, said, "Sale necessarily signifying a legal sale by a competent authority; is a disposition final and irrevocable of the land." The phrase "or otherwise disposed of" must signify some disposition of the property equally efficient and equally incompatible with any right in the state, present or potential, as reducible from the Act of 1820, and the ordinance of the same year." In so expressing its mind, there can have been no room for doubt on the part of any of the learned judges of the court, for the judgment was not only the unanimous judgment of the court, but it was one written and delivered by a judge by no means inclined to defer to the opinion of his brother judges, of whom indeed it was recently said by a writer in The American Law Review, that he devoted "a long judicial life chiefly to the writing of dissenting opinions."

Having regard then, to the weight of authority on the construction of the word "sold," bearing in mind the wide difference, well recognized, between a lease and an agreement to lease, and the words used in the contract being not "sold or agreed to be sold," as in the assessment Act of Ontario and in the Municipal Act of this Province, but, "sold or occupied," and any occupation of the land being negatived by the special case, it must, I think, be held, that the land in question was not, by virtue of the agreement entered into with Shiels, sold. "Sold," as used in the contract between the Company and the Government must mean completely, finally, and irrevocably, parted with. The judgments in so many American cases seem to me to put this beyond all doubt.

Having come to that conclusion, there should, in my judgment be a decree for the plaintiffs, declaring the sale of the land in question to the defendant to be void and of no effect, with costs.

KILLAM, J.—I shall not stay to repeat the provisions of the 16th clause of the Company's contract with the Government, or those of the statutes extending the limits of the Province so as to embrace the lands in question, as they have been so fully given by the Chief Justice. I will say, merely with reference to the latter statutes, that I agree fully with the view of them taken by the learned Chief Justice. The provisions making the added territory subject to the enactments of parliament "respecting the Canadian Pacific Railway and the lands to be granted in aid thereof," appear to me to be clear limitations upon the legislative authority of the Legislature of Manitoba, and not merely stipulations in a contract or treaty which might be broken by that Legislature. In reality that question is not raised by the special case, which makes the validity of the sale for taxes depend (so far as this part of the case is concerned) upon the lands having or not having been "sold' or occupied" within the meaning of this 16th clause.

The defendant's counsel made a faint attempt to argue that there was a constructive occupation of the lands by virtue of the agreement, but, both because the special case admits that the lands were not occupied, and because I am of opinion that the occupation referred to must be an actual occupation, I pass over this alternative without further comment, observing merely that I do not mean to determine that there must be an actual physical taking of possession of every square inch of the soil.

The real question is, were the lands "sold" to Shiels by the Act of the Company in entering into the agreement mentioned?

In discussing this question I propose to add very little to what the Chief Justice has said respecting the authorities to which we have been referred by counsel for the defendant. He has already stated sufficient to show their inapplicability to the case now before us. On the other hand, it appears to me that the cases on which reliance is placed by counsel for the plaintiff, with one possible exception, present to us merely a number of *obiter dicta*, important, chiefly, as concurrently pointing in one direction.

The one exception to which I have reference is *Edwards* v. *The Farmer's Fire Insurance and Loan Co.*, 21 Wend. 467, 26 Wend. 541. There by the charter of the defendant Company it was provided that, "In all cases in which the corporation have become the purchasers of any real estate on which they have made loans, the mortgagors shall have the right of redemption on payment of the principal money, interest and costs, so long as it remains in the hands of the said corporation unsold." Having purchased through its president, certain lands mortgaged to it, at foreclosure sale under its mortgage, as by the practice in the State of New York the mortgagee might, the corporation entered into an executory agreement for the sale of the lands, received one third of the purchase money, the balance of which was to be payable in five years and to be secured by bond and mortgage, agreeing to convey to the purchaser within a reasonable time after the legal title should be vested in the Company, it being then in the president, and gave possession to the purchaser. The lands having been conveyed to the Company by the president and the mortgagor seeking to redeem, it was held that the lands were still to be considered as in the hands of the Company unsold and to be subject to redemption by the mortgagor. Without criticizing closely some of the circumstances, I will take this as a direct judicial decision which, if binding, would determine the case now before us, but it is one, on the other hand, which could be overruled without necessarily leading us to the opposite conclusion in the present instance. Its importance as an authority is weakened by several considerations. It was concurred in by only two of the three judges in the Supreme Court and was affirmed in error by a majority of three, the court standing 11 to 8 (26 Wend. 541). Although the grounds of Mr. Justice Bronson's dissent are not given in the report of the judgments in the court below, in 26 Wend., it appears that he did not agree with the other members of the court upon the only question on which the case is of present importance. The

Chancellor dissented in the court of error, referring for his opinion to ***Merritt*** v. *Lambert*, 7 Paige, 344, where he had taken a different view, merely stating there, however, the opinion that if the contract with the purchaser was a valid and *bona fide* one, the lands did not remain in the hands of the Company unsold, but giving no reasons. If a similar case were now before us, I should think the question still open to serious consideration. I therefore treat this case also merely as one in which much of the reasoning of Cowen, J. in the court below and that of Senator Verplanck in the court of error may suggest some considerations to be attended to in the attempt to determine the primary meaning of the word "sold."

There can be no doubt that the word "sold" is very generally used to describe the making of an executory agreement of sale, both popularly and by legal text-writers, and even by judges. A hasty glance at the works of Mr. Dart and Lord St. Leonards on Vendors and Purchasers is sufficient to justify this assertion with reference to text-writers. I would refer also to *Addison on Contracts*, 8th Ed. pp. 869, 872, 892, 899, 900, 904; *Anson on Contracts*, 3rd ed. pp. 278, 279; *Browne on the Statute of Frauds*, pp. 151, 320; *Smith on Real and Personal Property*, vol. 1, p. 630. In *Lysaght* v. *Edwards*, 2 Ch. D. 499, in which a party who had made his will by which he charged a property called Bury Farm with his debts, and had also devised all the real estate which at his death should be vested in him as a trustee to one Hubbard, and had afterwards entered into an agreement for the sale of that farm to the plaintiffs who, before the testator's death had accepted the title and paid a portion of the purchase money, but had received no conveyance, Jessel, M.R., held that the lands went to Hubbard under the devise of trust estates, and with reference to the charge of debts he said, "He has sold Bury Farm, he had not got Bury Farm at the time of his death; if he had not Bury Farm beyond all question he could not charge it."

Other illustrations of such a use of the word might be supplied almost indefinitely. It has even found its way into statutes. For instance, by Lord Cranworth's Act, 23 & 24 Vic. c. 145, s. 11, provision is made with reference to power "to sell by public auction or private contract subject to any reasonable conditions he may think fit to make and to rescind or vary contracts of sale or buy in and resell the property from time to time in like manner." Here, to "sell" is evidently to make an executory contract for sale. And by section 15, "The person exercising the power of sale thereby conferred shall have power by deed to convey or assign and vest in the purchaser 'the property sold.'" This, too, is a statute which we should expect to be carefully drawn and technically expressed and to be closely considered by other eminent lawyers besides the noble lord whose name usually distinguishes it.

A less important statute in view of these considerations is that relating to auction duties, 17 Geo. 3, c. 50. By section 5, a duty of 3d on every 20 shillings is made payable on the purchase money "arising by sale at auction of any interest in lands, houses," &c., to be paid by the auctioneer "out of the moneys arising at each and every such sale or auction as aforesaid." By section 6, the auctioneer had to give a bond that he would within fourteen days "after each and every such sale or auction," deliver to a person appointed, an account of the "total monies bid at such sale" and of the "articles, lots or parcels which shall have been sold, the price of each," &c. Similar language occurs in 19 Geo. 3, c. 56.

In *Jones* v. *Nanney*, 13 Pri. 76, where the plaintiff, an auctioneer, sued the defendant for the auction duty which, by the conditions of sale was to be paid to the auctioneer by the "purchaser," it appeared that the defendant had refused to carry out the purchase, though the lands had been knocked down to him, but no memorandum in writing had been signed so as to satisfy the Statute of Frauds. It was held that the defendant was not a "purchaser" within the meaning of the condition, but that the condition referred only to "a real and legal purchaser who would be effectually bound by his contract" (per Graham, B., p. 107) "a purchaser who both at law and in equity would be bound by the contract" (per Hullock, B., p. 109.)

In *Atcherley* v. *Vernon*, 10 Mod. 518, a testator after having made his will, entered into agreements for the purchase of various parcels of land, of which some purchases were completed and conveyances made in his lifetime, and some were only contracted for, and part of the purchase money paid, but no conveyances made, and in some cases the time for making the conveyances had not arrived at the time of his death. While matters stood thus, he made a codicil to his will, by which he devised to trustees "all the lands purchased by me since the making of my will." It was held that all the lands thus contracted for passed by this codicil.

It thus appears upon considerable authority that the word "sold" and its correlative "purchased," are frequently employed in the sense for which the defendant here contends.

In *Blackstone's Com.*, vol. 2, p. 446, a "sale or exchange" is defined to be "a transmutation of property from one man to another in consideration of some price or recompense in value; for there is no sale without a recompense. There must be a *quid pro quo*. If it be a commutation of goods for goods, it is more properly called an exchange, but if it be a transferring of goods for money it is called a sale." This definition, however, as the latter part shows, has reference particularly to sales of goods. It occurs in the 30th chapter, which expressly proposes at the commencement to discuss the methods of acquiring title to things personal, and the whole chapter discusses only personal property.

In *Bouvier's Law Dictionary*, "sale" is defined as "An agreement by which one of the contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price." . . . . "To constitute a valid sale," proceeds the author, "there must be 1. Proper parties; 2. A thing which is the object of the contract; 3. A price agreed upon; and 4. The consent of the contracting parties and the performance of certain acts required to complete the contract." After enlarging upon these matters and giving several rules he says, "The above rules apply to sales of personal property. The sale of real estate is governed by other rules. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains in the vendor, and it does not become vested in the vendee until he shall have received a lawful deed of conveyance from the vendor to him." It is thus uncertain, though probable, that he means his definition of the word "sale" to have full reference to real property, and to make the passing of the property a necessary ingredient in such case.

In *Brown's Law Dictionary*, "sale" is defined as "the transferring of property from one person to another in consideration of some price or recompense in value," (almost a copy of Blackstone's definition.) The writer then proceeds, "The contract of sale in English law is a real contract or in the nature of a real contract, some tender or transfer being required by the common law to make the sale complete." This latter part would appear to relate to sales of personalty, and the writer at once goes on to point out the difference between the English and the Roman law as to sales of goods. Afterwards he says, "A sale of land is either by public auction or private contract and in either case is according to certain previously agreed upon conditions of sale. A deposit is usually paid but, unless by the express agreement of the parties, no deposit is necessary to complete the bargain as a binding contract." Then, after referring to several steps subsequent to the making of the contract with reference to title, rescinding, &c., "but otherwise the contract proceeds and is finally completed by payment of the residue of the purchase money and obtaining a legal conveyance of the land free from incumbrances and by delivery over of the title deeds to the purchaser." And "conditions of sale" are said to be "the conditions upon which land is sold, and when the sale is by private contract, they are embodied in the agreement for sale, but when the sale is by public auction then the conditions of sale are a separate document."

Throughout, then, the words "sold" and "sale" have reference here to the executory contract of sale; but the reference to completion by payment and conveyance is important.

Wharton's Law Dictionary, takes Blackstone's definition of "sale" as I have already given it, also that contained in *Mr. Benjamin's work on Sales of Personal Property*, giving the same requisites as *Bouvier* and referring to *Benjamin* for them.

Throughout all of these authorities, then we have no distinct technical definition of the words "sell" and "sale" as applied to lands, no clear indication that the general definition of a "sale" applies to sales of lands.

In the Imperial Dictionary the word "sell" is defined as "To transfer, as property or the exclusive right of possession to another for an equivalent; to give up for a consideration; to dispose of for something else, especially for money. 2. To make matter of bargain and sale of; to accept a price or reward for, as for a breach of duty, trust, or the like; to take a bribe for or to betray." There are given as analogous Anglo Saxon "*sellan, syllan*, to give, to deliver up; Low German *sellen*, Icelandic *selja*, to sell, to deliver; Gothic *saljou*, to offer, to sacrifice."

In Stormouth's Dictionary, to sell is "to give or transfer to for a price, the opposite of to buy; to part with for an equivalent; to have traffic; to betray for a reward." "Sold" is "did sell; given for a price"; and "sale" is "the act of selling; the exchange of any article of goods for money or equivalent value." In Webster's Dictionary, to "sell" is "to transfer to another for an equivalent; to give up for a consideration; to dispose of in return for something, especially for money; to exchange, to barter; hence, to make a matter of bargain and sale of, to accept a price or reward for:" "sale" is "the act of selling; the transfer of property from one person to another for a price in money paid or to be paid." In Worcester's Dictionary, to "sell" is "to deliver, part with or dispose of for some equivalent in money; to exchange for money; to vend;" and "sale" is "the act of selling; the exchange of goods or property for money."

In the Encyclopedia Britannica, *sub nom* sale, "Sale in English law may be defined to be a transfer of the absolute or general property in a thing for a price in money." It is stated that this definition is taken from *Benjamin on Sales* and "though applied in the work cited only to sales of personalty seems to be fully applicable to sales of any kind of property."

From these definitions I gather that the primary idea of the word "sell" included the subordinate idea of a change of the property, and that it did not properly refer to a mere agreement to do so *in futuro*. It would appear that its technical use in English law in reference to sale of goods, is only a perpetuation of the original simple meaning of the word, and that any difficulty in its application to lands has arisen from the necessity of a formal transfer by livery or by writing to complete a title.

Of course, it is well known that to prove a count for goods bargained and sold, there must be shown a transaction by which the property has passed to the buyer.

The form of *indebitatus* count for the price of lands given by the Common Law Procedure Act, is "for lands sold and conveyed," and this is the only form given by the books of pleading, as if "sold" did not include the passing of the property. In *Hallen* v. *Runder*, 1 C. M. & R. 271, counsel, *arguendo*, said "It has been the practice where the possession of land sold has been given to insert a count for lands bargained and sold," whereupon, Parke, B., remarked, "There you must show an actual conveyance of the land to the defendant, and the mere act of giving possession would not be sufficient to maintain the *indebitatus* count," as if the learned Baron accepted the count suggested as a proper one, but considered that, to prove it, as in case of goods, the passing of the property was necessarily required. This would be to make the word "sold" imply a transaction by which the absolute property had passed.

In *Blackstone's Commentaries*, vol. 2, p. 286, under the heading "Of Title by Alienation," it is said, "The most usual and universal method of acquiring a title to real estates is that of alienation, conveyance or purchase in its limited sense, under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, mortgage, settlement, devise or other transmission of property by the mutual consent of the parties, 'sale' being clearly put as one mode of the transmission of property."

By the statute of *Quia Emptores*, s. 1, under which the alienation of lands upon a sale became fully recognized by the law, it was enacted that, 1. "For as much as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees to the prejudice of the lords to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees . . . . from hence it shall be lawful to every freeman to sell at his own pleasure his lands or tenements or part of them so that the feoffee shall hold the same lands or tenements of the chief lord. 2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the quantity of the land or tenement so sold," &c. The Latin word "*vendere*," here always translated to sell, applies not merely to a sale of lands for a price in money, "but to any alienation by gift, feoffment, fine or otherwise, but sale was the most common assurance," 2 Inst. 500. It appears here, then, that the word *vendere*, which is the exact equivalent of our word sell, *barganizavit et vendidit* being the words subsequently used for "has bargained and sold" in a deed of bargain and sale, is used to express, not a mere kind of contract, but a voluntary transfer of the estate, whether for consideration or not, just as *Blackstone* uses "sale" to refer to one species of transmutation of the title. This forms a precedent for the construction of the United States statute given in *The United States* v. *Watkins*, 97 U. S. 219, but that case does not, any more than the statute *Quia Emptores*, form any authority for holding that the word "sold" is satisfied by a mere executory agreement for sale.

In *Bull* v. *Price*, 7 Bing. 237, 5 Mo. & P., the defendant had employed the plaintiff by a letter stating, "I hereby empower you to negotiate with the commissioner of woods and forests for the sale of my freehold ground in Chandos Street," &c. "And I hereby undertake to pay £2 per cent. on the sum which may be obtained either by private treaty, arbitration or trial by jury, for your trouble and exertions on my behalf." The premises were sold to the commissioners under the authority of statute, and a jury awarded £4000 to the defendant. Some question arising as to a supposed charge of an annuity, the commissioners, under the authority of the statute, paid the whole purchase money into the bank for the benefit of the parties entitled. While it lay thus in the bank and before any portion was paid out to the defendant, the plaintiff sued for his commission. At the trial, before Tindal, C.J., the plaintiff was nonsuited. The ground of nonsuit, as given in the report in Bingham, was, "That Mrs. Price had not obtained the sum on which he claimed his £2 per cent." And this, according to both reports, was the determining ground upon which the nonsuit was affirmed by the court *in banc*, though Bingham reports Tindal, C.J., on the latter occasion as saying, "Looking at the retainer, we find that the defendant offers to the plaintiff to employ him in negotiating with the commissioners for the sale of her premises; not for an agreement for the sale of them. That goes some way towards enabling the court to put a construction on the agreement." In the report of Moore & Payne, the words "not for an agreement for the sale of them," are omitted, but the grounds given for the granting of the nonsuit at the trial, are, that the Chief Justice "thought the word sale must be construed strictly, a sale consummated and conveyance executed; that the fund recovered was that out of which the plaintiff's per centage was to be paid and, consequently, that by the terms of the contract the plaintiff was bound to wait until the money was actually obtained by the plaintiff." In both reports of the judgment *in banc* he is made to refer to the use of the word "sale" only as going some way towards assisting in the construction, which does not appear to be to make his remark upon the word, a determining ground of decision, and which renders it probable that he spoke in much the same way at the trial. I can, therefore, take the remark only as *obiter dictum*, though important as giving the view of one able judge with reference to the strict and technical sense of the word "sale."

Jackson v. *Silvernail*, 15 Johns, 280, determined only that the making of an under lease for twenty years was not a breach of a covenant not to sell and dispose of or assign a leasehold interest. It was put on the ground that "the plaintiffs claim is *stricti juris* and to entitle him to recover on the ground of forfeiture he must bring his case within the penalty on the most literal and rigid construction of the covenant," citing *Doe d. Pitt* v. *Hogg*, 4 D. & R. 226, as showing that such a covenant referred to the legal interest.

Livingstone v. *Stickles*, 7 Hill. 253, is somewhat more in point in the wording of the covenant and the act relied on as a breach, but it was there pointed out that "covenants of this description are always construed by courts of law with great jealousy to prevent the restraint from going beyond the express stipulation of the parties." It would be impossible to determine the present question by decisions based on such considerations. The only importance to be attached to *Livingstone* v. *Stickles*, arises from the remark of Nelson, C.J., that, "The words 'sale' or 'assignments,' technically speaking, mean the actual transfer of the legal interest and estate, not a mere equitable right to such transfer which might be enforced in a court of equity."

To these *dicta* may be added that of McCouen, V.C., in *Gates* v. *Smith*, 4 Edw. Ch. 702, "The legal title could not vest in her without a deed of conveyance. In strictness of law it was not a sale, but only a contract of sale until consummated by a conveyance of the legal title and estate."

Ham v. *Missouri*, 18 How. 126, is another case which I can take only as furnishing us with another *dictum*. The expression there being construed, was "disposed of." Probably land for the sale of which a valid executory contract should have been made, might have been considered to have been "disposed of" within the meaning of the statute there in question."

In *Dawson* v. *Dawson*, 8 Sim. 346, it appeared that a testator had devised a house to trustees upon trust to permit his son at any time within three months after the testator's decease to become the purchaser thereof at or for the price or sum of £4000, and to sell and convey the same to the son, his heirs or assigns, as he or they should direct; but the will contained the proviso, that should the son not complete the purchase within three months, the trustees were to hold on other trusts. Within two months from the testator's death, the son verbally declared to the trustees, his intention to purchase, but they did not deliver the deeds to their solicitor or instruct him to prepare the conveyance until the day before the expiration of the three months, and the son paid no purchase money and no conveyance was executed within the three months. It was held that his right to purchase was gone. Here, of course, the son was in no way bound, and until he was there could not in any sense be deemed to be a purchase at all, but the language of Sir L. Shadwell, V.C. is important. He said, "*Prima facie* the becoming the purchaser would include not only the payment of the purchase money, but also, the taking of the conveyance. . . . . How, then, can a purchase be said to be completed where there was no conveyance on the one side and no payment of the purchase money on the other?" This case, then, turned principally on the term "complete the purchase" as well as on the circumstance that the son had in no way become bound.

The cases which I have been considering have been nearly all from courts of law, or the expressions have had reference to a strict legal interpretation of the word "sale." The remarks which I have cited from them, however, serve only to strengthen the inference which I would draw from the definitions to which I have referred, that the words "sale," "sell" and "sold," in their primary and proper sense include the idea of the passing of the property in the thing sold.

The question, then, is whether the property in these lands can properly be said to have ever passed to Shiels so as to satisfy the word "sold." If it once did, and the lands were once sold, they became subject to taxation and their reversion to the Company would not avail to render them again exempt.

Now, it is in some sense the doctrine of courts of equity that, under a contract for the sale of lands, the equitable or beneficial interest in the lands passes to the purchaser and the vendor becomes a mere trustee for him and retains merely a charge for the purchase money. This doctrine is relied on by Jessel, M.R., as the ground of his decision in *Lysaght* v. *Edwards*, 2 Ch. D. 499, and is so generally adopted that other authority for it need not be cited.

It is, however, stated in many cases that the vendor is only a trustee *sub modo*. *McCreight* v. *Foster*, L. R. 5 Ch. 604; *Acland* v. *Gaisford*, 2 Mad. 32; *Mackrell* v. *Hunt*, 3 Mad. 34, n. This expression is largely explained and commented on by Sir Thomas Plumer in *Wall* v. *Bright*, 1 Jac. & W. 494.

In *Tasker* v. *Small*, 3 M. & Cr. 63, Lord Cottenham, L.C., held that a party having a mere agreement of purchase of an equity of redemption was not entitled, before completing the purchase, to redeem the mortgagee. He said, "It was argued at the bar that the plaintiff was in equity invested with all the rights of Mrs. Small, upon the principle that by a contract of purchase the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance. Before the contract is carried into effect the purchaser cannot, against a stranger to the contract enforce equities attaching to the property."

So, in *Hill* v. *Cumberland Valley Mutual Protection Society*, 59 Penn. St. 474, Thompson, C.J., said, "It was an executory contract and was dependent on the payment of the purchase money for a transfer of the legal title. True, the vendee had a contract which might entitle him to a conveyance and he had an equity to the extent of the purchase money paid, contingent as to both for title on full performance of his contract. This was an interest in the property, but was not title or ownership. . . . . In such contracts as this, the vendee, while he has an interest in the property, has no title. He has an equity, and whether that will ripen into a title, will depend upon the future; it is within the range of possibility that it never may. The nature of the equity and how it may result is a matter, however, obviously between the vendor and vendee alone or persons in privity with them. It is not for strangers to assert mere equities between them."

It is true that in *Lysaght* v. *Edwards*, 2 Ch. D. 499, Jessel, M.R., critizes much that was said by Sir Thomas Plumer in *Wall* v. *Bright*, but even he held that there was no conversion until either the vendor had made out a good title or the title had been accepted by the purchaser. Even upon this view there could not be said to have been any title transferred to Shiels, as the patent was not issued until the 9th May, 1885, before which date no title could be made by the Company.

Sir George Jessell, however, does not assert that as to outside parties any title could be taken to have passed, and if such a conclusion is deducible from his judgment, I much prefer the opinions of Lord Cottenham and Sir Thos. Plumer.

In *In re Carpenter*, Kay, 418; *In re Cuming*, L. R. 5 Ch. 72, and *In re Colling*, 32 Ch. D. 333, it was held that while the contract remained executory on the part of the purchaser, there could not, upon the death of the vendor, be an order made under the Trustee Act vesting the lands in the purchaser or appointing a trustee.

It then appears to me that this doctrine of the passing of the equitable estate is really a mere fiction of a court of equity adopted as a convenient basis for settling the rights of the vendor and purchaser as between themselves, but not to be taken as the statement of a fact for all purposes or as determining the rights or liabilities of other parties not in privity with them. The municipality, and the Legislature and Government of Manitoba in case of attempted provincial taxation, are outside parties who can have no right to assert this equitable doctrine for the purpose of showing that the lands are "sold."

I have already noticed the expression "complete the purchase," referred to in *Dawson* v. *Dawson*, 8 Sim. 346, and "complete the contract," in *Brown's Law Dictionary*. So, in *Smith* v. *Hibbard*, 2 Dick. 730, it is said, "The Lord Chancellor was clear, that until the money was paid the contract could not be said to be completed." "Completion of the purchase" and "Completion of the sale" are well known terms, referring not to the making of the contract of sale, but to the payment of the purchase money and the giving of the conveyance.

Thus, in *Chitty's Precedents of Pleading*, 3rd Ed., p. 263, there is a count by vendor against vendee of an estate sold by auction "for not completing the purchase." "For that the plaintiff caused to be put up to sale by public auction, a certain messuage, &c., subject to the following conditions of sale, ... that the purchaser should complete the purchase on or before the ——— day of ——— " &c. Similarly, the same expression is used in other forms of counts in that work, and in *Bullen and Leake's Precedents*.

How can lands be properly spoken of as "sold" when the sale has not been "completed." If, then, it be a correct expression to speak of the purchase or sale as being "completed" by the payment of the purchase money and the making of the conveyance, it would seem to be only correct to speak of the lands as "sold" when this has been done.

At any rate, until Shiels should have paid all his purchase money and performed the other conditions, it was not intended that he should have an absolute right to the property. In the meantime the "sale" was merely conditional, and it might never be carried out. Taxation is usually of the whole interest in the property. That attempted under our Municipal Acts is an assessment and taxation of the whole interest, legal and equitable. A valid sale of the lands for taxes carries the whole fee simple. The defendant claims this sale to be valid as against the plaintiff. The lands are to be exempt from taxation under this charter of the Railway Company until they are "sold." This language would seem to refer to the whole interest and to a sale of (which involves the transfer of the property in) the whole interest. The equitable doctrine referred to, until the purchaser becomes absolutely entitled by completing his purchase, admits an interest to remain in the vendor, and so long as that remains in the Company, it would seem that the lands are not "sold" in the proper sense of the term. I desire to leave for consideration until the case shall arise, the question whether the lands would be properly considered to be "sold" within this 16th clause, if the purchaser had completed the purchase on his side and become absolutely entitled to a conveyance.

It is true that statutes exempting the property of a subject from liability to taxation in common with the property of other subjects, should be construed very strictly. But it is to be considered that, before being granted to this Company, these lands were the public lands of Canada, and as such, they would have been exempt from taxation by the provinces or municipalities, under the British North America Act. It is well known, too, that this Company was incorporated to build and operate the Canadian Pacific Railway as a matter of public policy and not upon an application in the interest of private promoters alone. The way in which such an undertaking is to be regarded, is ably set out in *Platt* v. *The Union Pacific Railway Co.*, 99 U. S. 48. Without determining that any sale which would free the lands from the exemption must be assented to by the trustees for the bondholders, the position in which the land stood as charged with the land grant bonds is an element to be considered in construing the exemption clause.

Without, then, discussing the correctness of the view which Chancellor Boyd felt at liberty to take in *The London & Canadian Loan & Agency Co.* v. *Graham*, 8 C. L. T. 431, I do not feel that the nature of this enactment is such, that we are at liberty to depart from the primary and proper meaning of the word "sold," and to ascribe to it therein the loose sense in which it was used in the instances I gave at first. It necessarily follows that the lands were not "sold or occupied within the meaning of the said clause sixteen," and that in accordance with the terms of the special case, there must be a decree declaring the sale of the lands in the pleadings mentioned to the defendant to be void and of no effect, with costs.

It is, thus, unnecessary to consider the other question raised, with reference to the assessment of the lands before the issue of the patent.

Bain, J.—(After referring at length to the statutes and contract.) The plaintiffs contend that the land in question was not, under the above contract with Shiels, "sold" within the meaning of the word in the clause of their contract, and that it was not, therefore, liable to be assessed and sold, and that in any case it could not be assessed and sold before the issue of the patent.

The defendant contends that, although the Provincial Legislature did agree that the plaintiffs' lands should be free from taxation as mentioned in the clause of the contract, still, it had the power, after they became part of the Province, to make them liable; that at all events, by the contract or agreement with Shiels this parcel of land was sold, and so lost its freedom from taxation, and that the municipality had the right to assess and sell it, notwithstanding that the patent had not been issued.

By 44 Vic. c. 13, the territory added to the Province was divided into municipalities, and all the provisions of the Municipalities Act passed at that session, were made applicable to these municipalities after the first election of warden and councillors. This Act, the Municipalities' Act and chapter 6 above mentioned, were all assented to on the same day, the 25th of May, 1881. Section 21 of the Municipalities Act, directed that the council should assess and levy in each year on the whole real and personal property within its jurisdiction, except as thereinafter provided, a sum sufficient for the payment of the debts and expenses of the municipality falling due within the year. The Municipalities Act of 1882 contained a similar provision, and in neither Act were these lands of the plaintiffs mentioned among the properties that were declared to be exempt from taxation. Therefore, the defendant says, the Legislature has, by implication repealed its agreement that they were to be free from taxation.

With this contention, I cannot, for a moment agree. In the first place, I think a fair and reasonable construction of the Acts will acquit the Legislature of any intention to commit the breach of faith imputed to them by the defendant, and in the second place, if the Acts could bear the construction contended for, the attempt to tax these lands contrary to the terms of the contract would be entirely *ultra vires*.

As we have seen, the Imperial Act authorized the Parliament of Canada to increase the limits of any Province upon such terms and conditions as might be agreed upon by the Legislature of that Province. The Legislature having agreed upon the terms and conditions, and the Parliament of Canada having increased the limits subject to these terms and conditions, it seems to follow at once, that the terms and conditions specified, become, as it were, part of the constitution of the added territory, subject to which the Provincial Legislature can alone exercise jurisdiction, and which it cannot alter or vary without the consent of the Imperial or Dominion Parliaments, any more than it could any of the provisions of the Manitoba Act. And in another view, the legislation above detailed may be looked at as an express contract between the Parliament of Canada and the Provincial Legislature, one of the terms of which was, that these lands were to be free from taxation, and neither this nor any other term specified can be varied by one party without the agreement of the other.

If the Legislature intended to tax these lands, that intention, on the defendant's contention, is as much expressed in the Municipal Act of 1881 as in any subsequent Act, and he expressly argued that the lands not being specially exempted in this Act shewed the intention of the Legislature to tax them. But chapter 6 above mentioned came into effect and spoke from a later day than this Act, and in chapter 6 the terms and conditions of the increase of the limits were again expressly adopted. And it is a rule of construction that a general enactment is not to be construed as repealing a particular one on the same subject, unless the intention to do so is manifest in explicit language or from irresistible implication. But here we have in three special Acts, which deal alone with the increase of the limits of the Province, the provision that these lands are to be free from taxation, and it is not to be supposed that, because in another general Act passed at the same session, and in subsequent general Acts, this special exemption was not again repeated, the special provision was intended to be repealed. These lands never having been liable to taxation, there was no necessity specially to exempt them in the general Acts, and the general Acts must be read as silently excluding from their operation the cases which already had been specially provided for.

The Legislature, then, neither having the right nor the intention to tax these lands, before or after the issue of the Crown patents, until they became liable to taxation under the terms of the contract, that is, until they were "sold or occupied," and the parcel in question never having been occupied, it only remains to consider if the plaintiffs in making the agreement with Shiels sold the land in the meaning of the word in the contract.

The defendant says that, as we are dealing with a case of exemption from taxation, the instrument must be construed most strongly against the plaintiffs who are claiming the exemption. But these lands never were liable to be taxed by the Provincial Legislature, and the instrument we are construing is not a statute or a charter by which the Legislature has conferred an exemption on the plaintiffs for their own profit but a contract entered into between the Parliament of Canada and the plaintiffs for essentially public purposes and for the construction of a public work to which the Dominion had committed itself, but which Parliament deemed it more advantageous to have carried out by the plaintiffs than by itself. The contract cannot, therefore, be looked upon as a private charter obtained on the petition of the promoters, but it is an ordinary contract in which each party must be deemed to have given an equivalent for the promises of the other.

In the nature of things, a sale and an agreement for a sale are distinct and different, a difference frequently recognized in the wording of statutes, and I see no reason to lead me to suppose that the contract, in saying that lands which the plaintiffs had sold should be no longer exempt, meant also, that lands which they had agreed to sell, but had not sold, should not be exempt.

The word "sell" has, I think, a strict and technical meaning, and generally speaking, it has this same meaning in ordinary and popular use. There are, of course, well defined cases in which it means "contracted to sell," and others may occur where, from the context or extrinsic circumstances, it will be found necessary to give it this meaning. But this is not the primary or accurate meaning of the word; and in the case before us, I have seen nothing to lead me to think it was used in any other than its primary and accurate sense.

In the strict as well as in the ordinary use of the word, the idea of a complete and absolute transfer of property, or right of property, seems to be involved. *Blackstone's* definition of a sale is, "A transmutation of property from one man to another in consideration of some price." *Benjamin* defines it as a transfer of the absolute or general property in a thing for a price in money. In *Bull* v. *Price*, 5 Moore & Payne, Tindall, C.J., spoke of a sale as meaning, in his opinion, a sale consummated and conveyance executed. And in *Williamson* v. *Berry*, 8 Howard, 543, the Supreme Court of the United States said, "Sale is a word of precise legal import, both at law and in equity; it means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." In this case, a statute empowered a trustee to sell or mortgage certain lands, and so strictly was the word sell construed that a deed by which the trustee had conveyed some of the lands was held to be invalid, because he had conveyed for a consideration other than money.

Now, by this agreement with Shiels, no property, at law, passed or was transferred to him. The title to the land never left the plaintiffs, and it still remains in them entirely unaffected by the agreement. He acquired nothing but an equitable right or a right of action, and, as was remarked in *Edwards* v. *Farmers Iusurance and Loan Co.*, 21 Wen. 466, a case referred to at length by the Chief Justice, the agreement was only a preliminary step towards the act of sale, which, itself, has never been consummated.

If by the agreement, the plaintiffs can be said to have sold the land to Shiels, he must be said to have bought it, for the two words are correlative. But there having been no change of ownership and he having paid but a small part of the price agreed on, it would be only by using the word in a careless and slovenly sense that this could have been said; and anyone who had simply been told that he had bought the land, would have been entirely mislead as to the nature of the transaction.

I quite agree with the conclusion of the learned Chief Justice, that the cases to which we have been referred by the defendant do not bear out his contention as to the construction we are to place on the word; and after the full and careful examination that has been given of the cases, it is unnecessary for me to refer to them in detail.

I think the land in question was not sold in the meaning of the term in the contract, and that, therefore, it was not liable to be assessed and sold for taxes.

The plaintiffs are entitled to a decree declaring the sale of the land for taxes to be void and of no effect, and to their costs of suit.

Decree for plaintiffs.

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RULES AND ORDERS.

The Judges of the Court of Queen's Bench for Manitoba, do hereby, in pursuance and execution of all powers and authorities enabling them in that behalf, order and direct as follows:—

1. General Orders of this Court on its Equity side, 179, 180, 405, 406, and General Order 38 of the 17th of February, 1883, are hereby repealed.

2. General Order of this Court on its Equity side, 248, is hereby amended by striking out the words "to the presiding Judge in Chambers, on any day that he may sit in Chambers;" also the word "decree," wherever the same occurs; and also the words "and the presiding judge may then hear or adjourn into court or otherwise dispose of such matters on such terms as he thinks proper."

3. Terms for the hearing of cases, including examination of witnesses, are to be held five times a year, on such days as the Court from time to time appoints.

4. A Judge will sit in Court every Wednesday, except during vacation, for the purpose of disposing of the following business in Equity: Injunctions; Motions for Decree; Hearings *pro confesso* on bill and answer, on further directions; Petitions, Demurrers and Appeals from any order, report, ruling or other determination of the Master.

5. Appeals from the referee in chambers, and such chamber applications in equity as cannot be disposed of by the referee, may be brought on for hearing upon any day, before the judge presiding in chambers.

Dated 26th August, 1884.

Lewis Wallbridge, C. J.
J. Dubuc, J.
T. W. Taylor, J.
R. Smith, J.

Order 457, of the Equity General Orders of this Court, is hereby amended by adding thereto the following words: "But where costs at law, or costs incurred in and about the exercise of a power of sale contained in any mortgage, and allowed by the bill and by the special endorsement upon the office copy thereof served, the Master may, under a decree issued upon præcipe, allow such costs where it is shown to his satisfaction that the same were *bona fide* and reasonably incurred."

Dated 16th February, 1885.

Lewis Wallbridge, C. J.
J. Dubuc, J.
T. W. Taylor, J.

The Court of Queen's Bench for Manitoba, in pursuance of the power and authority conferred by the ninetieth section of The Summary Convictions Act, passed by the Parliament of Canada, doth hereby order and direct as follows:—

90. No motion to quash any conviction, order or other proceeding, by or before any justice or justices of the peace, police magistrate or stipendiary magistrate, and brought before this Court by *certiorari*, shall be entertained, unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the peace of the county or place in which such conviction or order has been made, or before a judge of the court, or of a county court, in this Province, or to have made a deposit to the satisfaction of a justice or justices of the peace, or of a judge of this Court, or judge of a county court, with a condition to prosecute such writ of *certiorari* at his own costs and charges with effect, without any wilful

or affected delay, and if ordered so to do, to pay the person in whose favor the conviction, order or other proceeding is affirmed, his full costs and charges, to be taxed according to the course of this Court.

Dated 3rd October, 1887.

LEWIS WALLBRIDGE, C.J.
J. DUBUC, J.
T. W. TAYLOR, J.
A. C. KILLAM, J.

The Judges of the Court of Queen's Bench, in pursuance and execution of the powers enabling them in that behalf enact, order and direct as follows :—

91. All rules, orders and decrees made by the court *in banc*, shall be issued and signed by the prothonotary; provided, however, that when requested by the prothonotary, the registrar in equity may settle minutes of any such order or decree in suits or matters in equity.

All decrees and orders in equity made by the court *in banc*, shall be entered by the registrar in equity, in the book kept for the purpose of entering decrees and orders in suits in equity.

Dated this 9th day of January, A.D. 1888.

T. W. TAYLOR, C.J.
J. DUBUC, J.
A. C. KILLAM, J.

In pursuance of the powers conferred upon them, the Judges of Her Majesty's Court of Queen's Bench for Manitoba, hereby order:—

1. In any case in which for special reasons it shall seem proper, a judge may entertain and determine any application which, by the General Orders or practice of the Court the referee in chambers is authorized to entertain.

2. The deputy-master in equity may perform any duties, which, by the General Orders and practice of the Court, may be performed by the master in equity whether under an order or decree specially referring any matter or duty to the master in equity or otherwise, and without the deputy-master in equity being specially named in such order or decree.

3. In the performance of his duties and the conduct of references under the last preceding order, the deputy-master in equity shall have all the powers and authorities of the master in equity; and all the orders and practice of the court relating to proceedings by and before the master in equity, and to his reports and certificates and appeals therefrom, shall govern proceedings by and before the deputy-master in equity, and the reports and certificates of the deputy-master in equity and appeals therefrom.

Dated at Winnipeg this fifth day of March, A.D. 1888.

T. W. Taylor, C.J.
A. C. Killam, J.
Jno. F. Bain, J.

Whereas, by the statute made and passed in the session of the Legislature of Manitoba, held in the fifty-second year of the reign of Her Majesty, intituled "An Act to further amend chapter fifteen of forty-eight Victoria, being The Court of Queen's Bench Act, 1885," it is enacted that the Chief Justice and Judges of the Court of Queen's Bench or any three of them of whom the Chief Justice shall be one, unless there is no Chief Justice, may at any time make rules and alter and amend the same for certain purposes therein mentioned.

It is, therefore, ordered by the judges of the Court of Queen's Bench for Manitoba, in pursuance of the powers thereby conferred and of the other powers previously conferred upon them as follows:—

92. The referee in chambers shall be and he is hereby empowered and required to do any such thing and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom or by the rules of practice of the Court of Queen's Bench, whether at law or in equity, were at the time of the passing of the said Act, and are now done, transacted or exercised by any judge of the said court sitting in chambers, except in matters relating to the liberty of the subject, appeals and applications in the nature of appeals, applications for advice under chapter thirteen of forty-nine Victoria, being the Act respecting trustees and executors and administration of estates and matters affecting the custody of children, and except in respect of the following proceedings and matters, that is to say:—

i. All matters relating to criminal proceedings.

ii. All matters relating to proceedings for imposing or enforcing fines, penalties or punishments for breaches of any statutes or municipal by-laws, but not including proceedings in actions at law for the recovery of penalties.

iii. All matters in respect of which the jurisdiction of a judge in chambers is not derived from legislation of the Legislature of Manitoba.

iv. The referring of causes or matters to arbitration.

v. Reviewing taxation of costs.

vi. Staying proceedings after verdict or decree.

vii. Applications for leave to appeal or rehear, or to move against a verdict or in arrest of judgment or for judgment *non obstante veredicto*, or to move to reverse or vary an order of a judge, after the time limited for so appealing, rehearing or moving has elapsed.

viii. Applications for payment of money out of court.

ix. Proceedings under chapter four of the Consolidated Statutes of Manitoba, "The Manitoba Controverted Elections Act," and Acts amending the same.

x. Proceedings under chapter forty-three of the Consolidated Statutes of Manitoba, the "Act respecting lunatics, persons *non compos mentis* and drunkards," and Acts amending the same.

xi. Proceedings under chapter fifty-four of the Consolidated Statutes of Manitoba, "The Overholding Tenants Act," and Acts amending the same.

xii. Proceedings under the Act of the forty-fourth Victoria, chapter twenty-seven, "The Railway Act of Manitoba," and Acts amending the same.

xiii. Proceedings under the thirty-first section of the Act of the forty-eighth Victoria, chapter fifteen, "The Court of Queen's Bench Act, 1885," and under the fifty-sixth and seventy-second sections of the Act of the forty-eighth Victoria, chapter seventeen, "The Administration of Justice Act, 1885."

xiv. Proceedings under the Act of the fifty-first Victoria, chapter six, "The Expropriation Act, 1888," and Acts amending the same.

xv. Proceedings under "The Real Property Act of 1885," and Acts amending the same, and proceedings under "The Real Property Act of 1889."

xvi. Applications for the allowance of fees of attorneys, solicitors or counsel, greater than those taxable by the taxing master without special order, except fees in respect of matters before the referee in chambers.

93. Orders may be made by the referee in chambers under the following of the General Orders in Equity, made on the twenty-ninth day of August, in the year of our Lord one thousand eight hundred and eighty-one, that is to say:—Orders numbered twenty-five (25), fifty-seven (57), sixty (60), seventy-four (74), seventy-six (76), seventy-eight (78), seventy-nine (79), eighty (80), one hundred and five (105), one hundred and twenty-three (123), one hundred and twenty-four (124), one hundred and twenty-eight (128), two hundred and sixty-nine (269), two hundred and seventy (270), two hundred and seventy-one (271), four hundred and fifty-two (452), four hundred and fifty-three (453), four hundred and fifty-four (454), and four hundred and sixty-six (466).

94. In case the Judges of the Court are absent from Winnipeg or there is no judge sitting in chambers upon the day on which any application in respect of any of the above excepted matters numbered from iv to xvi, both inclusive, is returnable, the referee in chambers may adjourn such application upon such terms as he may consider proper.

95. In all such above excepted matters numbered from iv to xvi, both inclusive, the referee in chambers may issue a summons returnable before a judge.

96. All applications which may be made to the referee in chambers shall be so made. But, at any time, a judge may, in his discretion, hear and determine any application which may be made to, or which is returnable before the referee in chambers.

97. Appeals from the order or judgment of the referee in chambers shall be made by summons, such summons to be taken out within four days after the order or judgment complained of has been pronounced, or such further time as may be allowed by a judge or by the said referee. The appeal shall not operate to stay proceedings unless so ordered by a judge or by the said referee.

98. The costs of an appeal shall be in the discretion of the judge.

99. The practice in reference to proceedings before the referee in chambers, shall be that heretofore followed in proceedings before a judge in chambers, in actions at law and suits in equity respectively.

100. No seal or stamp shall be required to be affixed to orders made in chambers, but they shall be signed by the judge or the referee in chambers making the same.

101. Admission and acceptance of the service of a bill, writ, demand, notice, summons, order, or other paper or proceeding, upon the opposite solicitor or attorney, need not be verified by affidavit.

102. The provisions of Order numbered one hundred and seventy-five of the above mentioned General Orders in Equity, shall apply to all orders made in chambers, whether by a judge or by the referee in chambers and whether in a proceeding at law or in equity.

103. The prothonotary or such other officer or clerk in his office as he shall from time to time direct, shall act as clerk in chambers and take charge of all papers filed in chambers. Papers filed in the office of the Prothonotary, Registrar in Equity, Clerk of Records and Writs, or Master in Equity, may be used in chambers without refiling; and for this purpose they shall be produced to the referee in chambers or to a judge by the officer having the custody of the same, or by such person as such officer shall direct.

104. The time of vacations under the General Orders in Equity shall be the same as are provided by the sixty-first section of "The Court of Queen's Bench Act, 1885," as amended by the third section of the Act passed in the fifty-first year of Her Majesty's reign chaptered nineteen.

105. During vacations no business shall be taken in chambers except such as from its nature or from facts shown, shall appear to be of pressing importance; and in such cases if the applications be contested, they shall, so far as may be consistent with justice, be adjourned until after the vacation upon such terms as may seem just.

106. In suits and proceedings in equity and in cases of motions in actions and proceedings at law, in which, under former gene-

ral rules of court, the practice in equity is followed there must be at least two clear days between the service of a notice of motion, or of the setting down of the matters for hearing, and the day named in the notice for hearing; unless, in case of any application to the referee in chambers, he shall, or in case of any application to the court or a judge, the court or a judge shall give special leave to the contrary; and in the computation of such two clear days all days on which the offices are closed are not to be reckoned.

107. Except as hereinafter provided, the scale of costs for all matters in chambers, whether before the referee in chambers or before a judge, shall be the same as hitherto fixed for business done by and before a judge in chambers.

108. The taxing masters may hereafter allow such sum for the fee of a counsel upon a special and important argument before the referee in chambers, as such referee shall direct, not exceeding twenty-five dollars ($25); or where the argument is before a judge in chambers, such sum as the judge shall direct.

Where no special direction shall be given, the fees for attendance or argument in chambers shall be allowed according to the scales of costs heretofore used.

109. The same fees shall be taken by the clerk in chambers in law stamps, as heretofore taken in chambers upon proceedings in equity and at law respectively.

110. Orders for examination upon pleadings or affidavits shall contain no provision for payment of costs, except in special cases; but where the examination is had for the purposes of an application in chambers or to the court, the costs shall be in the discretion of the judge or referee in chambers or of the court, to be disposed of with the application; and in other cases the costs may be allowed by the taxing master to the party entitled to the costs of the cause or of an issue, if, and so far as the costs of an examination are found to have been reasonable and proper to have been incurred, subject, however, to the usual right of appeal from the master's decision on a taxation.

111. Orders numbered twenty-eight (28), one hundred and eighty (180), one hundred and ninety-six (196), two hundred and one (201), two hundred and fifty-nine (259), four hundred

and twelve (412) and four hundred and thirteen (413) of the above mentioned General Orders in Equity are hereby repealed and abrogated.

112. In all actions at law hereafter commenced, the fees, costs and charges of attorneys and counsel shall be taxed and allowed upon the superior scale of costs provided by the General Rules of the Court, made on the tenth day of February, in the year of our Lord one thousand eight hundred and seventy-five, without regard to the amount or value of the property recovered, unless otherwise ordered by the court or a judge. But in no case in which the action is of the proper competence of a county court shall the costs taxed exceed those taxable in the county court if the same action had been brought therein, unless the court or a judge shall have otherwise certified or ordered.

These rules shall take effect and come into force and operation on and after the 16th day of April, A.D. 1889.

Made at Winnipeg this thirteenth day of April, A.D. 1889.

T. W. Taylor, C.J.
J. Dubuc, J.
A. C. Killam, J.
Jno. F. Bain, J.

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DISALLOWANCE.---*Continued.* PAGE

cil was published in the *Manitoba Gazette*, and following it was also published a certificate of the Governor-General of the day upon which the Act was received. *Held*, That such publication was a sufficient signification of the disallowance. Attorney-General v. Ryan 81

ELECTION LAW.—*Preliminary objections.—Appeal from single judge.—Petition without prayer.—Amendment.*—An appeal will lie against the order of a single judge allowing preliminary objections, and thereupon dismissing a petition. An election petition set forth certain corrupt practices and concluded as follows: "Your petitioner alleges that by reason of one or more of such acts or practices, the election of said C. E. H. was void." *Held*, (Overruling Dubuc, J., 4 Man. L. R. 270), 1. That these words constituted a sufficient prayer for relief. 2. That, if necessary, an amendment could be made. *Re* Shoal Lake Election 57

ESTOPPEL. *See* Patent.

———*See* Tax Sale.

EVIDENCE, CORROBORATIVE. *See* Marriage, Breach of Promise.

——— PAROL, OF IDENTITY. *See* Bill of Exchange.

——— PROOF OF INTESTACY. *See* Real Property Act.

EXAMINATION—*De bene esse.—Ex parte.*—This was an application to set aside an order made *ex parte*, for the examination of B. as a witness on behalf of the plaintiff. Taylor, C. J. decided that according to the established practice, the order should not have been made *ex parte*. The order was therefore set aside. Holmes v. The Canadian Pacific Railway Co. 346

EXECUTION. *See* Power of Appointment.

———AGAINST LANDS.—*Sale of defendant's interest under registered judgment.*—An execution creditor cannot, under a *fi. fa.* lands, sell the charge which the judgment debtor may have upon the lands of a third party by virtue of a registered judgment. If the interest which a judgment debtor might acquire in such lands by docketing his judgment under the English statutes, could be sold under execution, it would only be after such lands had been "delivered in execution by virtue of a writ." Abell v. Allan. 25

FRAUDULENT CONVEYANCE.—*Onus as to solvency.—Vendee liable for proceeds of property.*—C. being indebted to the plaintiffs in an amount exceeding $1,600, part of which was shortly coming due, sold his entire business, receiving $1,000 in cash and $3,500 in notes. He transferred the notes and all his book debts to his wife the defendant, and shortly afterwards left the country, making no provision for plaintiff's claim. Upon a bill filed to set aside this transaction, the wife swore that she had lent to C. large sums of money, and that the transfer was in consideration of this indebtedness. *Held*, (reversing Bain, J.) 1. That the unsupported and bald statement of a loan by a wife to