THE TERRITORIES LAW REPORTS

VOL. V.

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CONTAINING

REPORTS OF CASES DECIDED IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

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BEFORE THE FULL COURT:

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BEFORE SINGLE JUDGES:

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TABLE OF CASES REPORTED

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VOLUME V.

CALDER v. HALLETT.

Sale of Goods Ordinance—Statute of Frauds—Memorandum in writing—Omission of term of agreement—Connecting documents evidence.

Plaintiff's agent took a verbal order for goods from the defendant, one of the terms of payment being that he should, in a certain event, have six months' credit. The plaintiff's agent signed a memorandum containing all but this term of the contract. The defendant subsequently wrote cancelling the order. This led to further correspondence. In none of the letters was any reference made to the term allowing six months' credit.

The Sale of Goods Ordinance, Ord. No. 10, 1896, s. 4 (now C. O. 1898, c. 39, s. 6), (substantially a re-enactment of the 17th sec. of the Statute of Frauds), was pleaded.

Held—(1). That it was open to the defendant to prove, as he had, that the term as to six months' credit was part of the contract, and, as it did not appear in any of the documents submitted to constitute the note or memorandum in writing, the plaintiff was not entitled to recover.

(2) That as the statement of claim alleged the term as to six months' credit to be part of the contract sued on, it was unnecessary for the defendant to have proved it, and he might have taken the objection immediately upon the written evidence of the contract being put in.

(3) That a letter cancelling the contract for the purchase of goods cannot be taken to constitute an acceptance of the goods.

Semble—(1). That parol evidence is admissible to connect several writings so as to constitute them together a note or memorandum under the Ordinance.

Oliver v. *Hunting*,[1] referred to.

[1] 44 Ch. D. 205; 59 L. J. Ch. 255; 62 L. T. 108; 38 W. R. 618.

That a memorandum of sale required to be in writing may be complete and binding, though silent as to price and to time and mode of payment, if no agreement in fact was made on these points, the omission being equivalent to a stipulation for a reasonable price and immediate payment in the usual mode. *Valpy* v. *Gibson*[2] referred to.

[WETMORE, J., *May 31st, 1900.*

Statement.

Trial of an action before WETMORE, J., without a jury.

E. A. C. McLorg, for the plaintiff.

W. R. Parsons, for the defendant.

[*May 31st, 1900.*]

WETMORE, J.—On the 27th September, 1898, the defendant verbally ordered from the plaintiff's agent, one R. J. Butler, a quantity of clothing to the value of $114.75, to be delivered at Saltcoats on or before the first April, 1899. The price and terms of payment were agreed on at the time of the bargain, and the terms of payment were to be six per cent. discount from the agreed price if paid within thirty days after the first April, and if the defendant could not avail himself of the six per cent. discount, he was to have six months from the 1st April to pay for the goods. The plaintiffs' agent prepared a written memorandum, which he signed and delivered to the defendant. This memorandum was in the following form:—"Saltcoats, Sept. 27, 1898. W. H. Hallett, Esq., Bt. John Calder & Co., 6 off 30 days, 1 April." Then followed a description of the goods and the prices. On the 11th October following, the defendant wrote and signed the following letter to the plaintiffs.

"Saltcoats, 11|10, 1898. John Calder & Co., Hamilton. Gentlemen,—On Sept. 27th I gave your traveller, R. J. Butler, an order for some clothing, which I wish you to cancel at once. Yours truly, W. H. Hallett."

On the 22nd November, 1898, the plaintiff wrote the defendant an answer to that letter, in which he stated (I only give the portions material to this case): "You ask us to cancel order, but give us no reason for doing so. We

[2] 16 L. J. C. P. 241, at p. 248; 4 C. B. 837; 11 Jur. 826.

would remind you that this order was given by you to our traveller in September, and all the numbers are in a more or less forward state of manufacture, so to cancel them now would impose a certain amount of loss and inconvenience to us, and we hardly think you would expect us to cancel same without giving very good reasons for doing so. We will wait your further letter on the subject." On the 28th November, 1898, the defendant wrote and signed the following letter to the plaintiff. Judgment. Wetmore, J.

John Calder & Co., Hamilton. Saltcoats, 28|11, 1898.

Gentlemen,—Yours of the 22nd to hand, and contents noted. On the 11th October I wrote you to cancel my order, and I know by that time nothing was in a state of manufacture for me. If they are now, it is your own fault. You ask for a good reason why I cancel order. The first is that I will not do business with a house that has the reputation that you have, and in the second place, I have all the goods, bought from good houses, that I can pay for, and were bought before I gave your traveller that order.

Yours truly, W. H. Hallett.

P. S.—As I told you before, if you are so foolish as to ship goods, I will most certainly decline to accept same. —W. H. H."

On Dec. 7th, 1898, the plaintiff replied to this last letter, stating in effect that the defendant's reason for cancelling the order was unsatisfactory, and would not be accepted, resenting the imputation against the reputation of his house, and that he would forward the goods in due course. The goods arrived by railway at Saltcoats, but the defendant refused to accept them.

There was no reference in any of the writings to the six months' credit in case the defendant could not avail himself of the six per cent. discount. The defendant contends that the contract in question is not enforceable by action, because the provisions of paragraph 1 of s. 4 of "The Sale of Goods Ordinance, 1896" (No. 10 of 1896) were not complied with.

Judgment. Wetmore, J.

I have some doubts whether the letters written by the defendant sufficiently refer to the memorandum made by the plaintiff's agent Butler, so as to afford internal evidence of the fact, and if they do not, whether there is sufficient parol testimony to point out the connection between these letters and that memorandum, assuming that parol testimony can be received for that purpose. It would seem, under the authority of *Oliver* v. *Hunting*,[1] that parol testimony is admissible for that purpose. I do not consider it necessary to determine this question, because I am of opinion that the plaintiff must fail on another ground, namely, that the note or memorandum in writing, which consists of the several writings before referred to taken together, does not contain all the essential terms of the contract, inasmuch as there is no reference to the six months' credit. It is unnecessary to cite authority for the proposition that the note or memorandum must contain all the essential terms of the contract. It is true that Wilde, C.J., in *Valpy* v. *Gibson*,[2] lays it down that "the omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale," and he goes on to give the reason; he says: "Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some further agreement, or to be determined by what is reasonable under the circumstances." But I should infer from that that, when the price and terms of the payment have been expressly agreed upon between the parties, they are most essential parts of the contract, and should be, under the authorities, embodied in the note or memorandum in order to satisfy the Ordinance. According to a note in Benjamin on Sales (3rd ed.) *185, this has been held in three American cases—*O'Donnell* v. *Leeman*,[3] *Davis* v. *Shields*,[4] and *Salmon Falls Mnfg. Co.* v. *Goddard*[5]—and, according to a note in the Digest of English Case Law, vol.

[1] 43 Me. 158. [2] 26 Wend. N. Y. 341. [3] 55 U. S. (14 How.) 446.

4, col. 40, it has also been held by Stephen, J., in *McCaull* v. *Strauss*.[6] Judgment. Wetmore, J.

It was urged for the plaintiff that the defendant's letters amounted to an acceptance of the goods within par. 3 of sec. 4 of the Ordinance. I am at a loss to conceive how letters written before the goods were ready for being forwarded requesting that the contract be cancelled can be held to be an act done in relation to the goods. It seems to me to be an act done in relation to the order for the goods, not in relation to the goods themselves. It is true such a writing may, if it contains the proper essentials, amount to a note or memorandum in writing to satisfy the first paragraph of the section. But I cannot understand how a letter requesting the order to be cancelled can possibly be construed to be an acceptance of the goods. Certainly such a letter would not be an acceptance to satisfy the Statute of Frauds. See *Taylor* v. *Smith*.[7] While I can find no case where such a letter has been held to be an acceptance within the Statute, I can find cases where a very trifling meddling with the goods themselves has been held to be an acceptance, and I think par. 3 of sec. 4 of the Ordinance was framed to declare the law in accordance with those cases.

It was also set up that, because the defendant did not in his statement of defence specially deny the contract, as set out in the statement of claim, the plaintiff was entitled to recover. There is nothing in this contention. The defendant did set up in his defence that the contract did not comply with par. 1 of sec. 4 of the Ordinance, and that raised the whole question. When the note or memorandum of the contract relied on was put in the defendant could have shown by parol testimony that it did not contain an essential term in the agreement. The authorities are clear on that point, and that is what the defendant did do in this case. As a matter of fact, he need not have done so. Under the pleadings he might have claimed that the note or memorandum put in did not contain all the essential terms of the

[6] 1 Cab. & E. 106. [7] 61 L. J. Q. B. 331; [1893] 2 Q. B. 65; 67 L. T. 39; 40 W. R. 486—C. A.

Judgment.
Wetmore, J.

contract, even according to the plaintiff's own pleadings. See par. 3 of the statement of claim, which sets out that the six months' credit was part of the agreement.

There was an application on behalf of the plaintiff, under Rule 258 of the Judicature Ordinance, to prove another memorandum made by Butler. I took this application into consideration. I refuse to grant this application. In the first place, I cannot see how this paper is admissible, under any circumstances. The memorandum made by Butler, and received in evidence, was only admissible on the ground that it was presumably the order which the defendant had in his mind and referred to in his letters to the plaintiff. He could not possibly have had the other memorandum in his mind, for he had never seen it before the trial. Moreover, this memorandum can serve no useful purpose, it does not refer to the six months credit.

Judgment for the defendant with costs.

BOLDUC v. LAROSE AND STIRRETT.

Third party notice—Application for directions—Right to indemnity or contribution—Warranty of title.

Plaintiff brought action against the defendants for breach of warranty of title to a horse sold by the defendants to the plaintiff. Defendants, in pursuance of leave given, served a third party notice on Grieve, from whom they had bought the horse, claiming to be indemnified by him to the extent of any damages recovered against them by the plaintiff, on the ground of breach of warranty of title by Grieve.

Held, that upon the application for directions as to trial the Court should consider the defendants' right to contribution or indemnity, and if satisfied that they were not so entitled should refuse to give directions, which refusal will be tantamount to a dismissal of the third party from the action.

Held, also, that in the circumstances the defendants' claim against Grieve was not properly one for contribution or indemnity, and that no direction as to trial should be given.

[SCOTT, J., *October 17th, 1900.*]

Statement.

This was an application by the defendants, who had served a third party notice under Rule 64 of the Judicature Ordinance (C. O. 1898 c. 21), for directions as to the trial.

The facts appear sufficiently from the judgment.

[*17th October, 1900.*]

SCOTT, J.—This is an application by the defendants for an order for directions as to the trial of the action.

The statement of claim alleges that the defendants, by warranting that they had a lawful right to sell a certain horse, sold same to the plaintiff for $70.00; that defendant had not the lawful right to sell said horse, and that in consequence plaintiff was afterwards obliged to deliver up same to one Grant, who had the right and title thereto, and plaintiff lost said horse and the price he had paid therefor. He claims $100.00, the value of the horse.

After service of the writ upon them, the defendants, in pursuance of leave obtained for that purpose, served a third party notice upon one Ludwig Grieve, claiming to be entitled to contribution from, and to be indemnified by, him to the extent of all sums that may be adjudged against them in this action for damages and costs, together with their costs, on the ground that he, by warranting that he had a good and lawful right and title to sell the horse in question, sold the same to the defendants and received valuable consideration therefor, and on the ground that they, relying on his said warranty, sold said horse to the plaintiff, who now claims that they had no right or title to sell same, and that same was, and now is, the property of Grant.

Grieve, the third party, duly entered an appearance to the action, and this application is for directions as to the trial and disposal of the questions arising between defendants and himself.

It appears to be well settled that the question of the defendants' right to contribution or indemnity should be considered on the application for directions, and that, if the judge to whom the application is made is satisfied that a

Judgment.
Scott, J.

defendant is not entitled to such contribution or indemnity, he should refuse to give directions, and that the effect of his refusal will be to dismiss the third party from the action. (See *Carshore* v. *N. E. Ry. Co.*,[1] *Baxter* v. *France*,[2] *Schneider* v. *Batt*.[3]

Rule 60, under which leave was granted to serve the third party notice, authorizes the service of a notice only in cases where a defendant claims to be entitled to contribution or indemnity over against the third party. It is taken from English Order 16, Rule 48 (Marginal Rule 170), which has been in force since 1883. The rule in force prior to that time authorized the service of a third party notice where the defendant claimed to be entitled to contribution or indemnity, "*or to any other remedy or relief*," over against the third party. It, therefore, follows that cases decided under the old rule afford but little, if any, assistance in ascertaining the scope and effect of the present rule.

Speller v. *Bristol Steam Navigation Co.*[4] appears to me to strongly support the contention of the plaintiff that the defendants' claim against the third party is not one for either contribution or indemnity within the meaning of Rule 60. That was an action for breach of contract by the plaintiff to recover for damages to a cargo of sugar, caused by the alleged unseaworthiness of the ship in which it was carried by the defendants under their contract to deliver same at Bristol. Defendants sought to add the owner of the ship as a third party, alleging that they had hired the ship from him under a charter party, by which he had covenanted that the ship was seaworthy, and had undertaken to keep her seaworthy during the period over which the charter party ran. It was held by the Court of Appeal that the defendants' right over against the owner was not a right of indemnity, and that, therefore, they had no right under the rule to bring in the owner as a third party.

[1]54 L. J. Chy. 760; 29 Ch. D. 344; 52 L. T. 232; 33 W. R. 420. [2]64 L. J. Chy. 337; (1895) 1 Q. B. 591; 72 L. T. 183; 43 W. R. 341; 14 R. 265; 11 Times R. 234. [3]50 L. J. Q. B. 525; 8 Q. B. D. 704; 45 L. T. 371; 30 W. R. 420. [4]53 L. J. Chy. 322; 13 Q. B. D. 96; 50 L. T. 419; 32 W. R. 670; 5 Asp. M. C. 228.

Judgment.
Scott, J.

In so far as the application of the principle is concerned, I can see no material difference between the circumstances of that case and the present one. Both are practically actions for breach of warranty, and in each it is claimed that the person sought to be added as a third party had given a warranty to the defendant similar to that under which the plaintiff claimed.

I cannot find any case in which the principle laid down in *Speller* v. *Bristol Steam Navigation Co.*[4] has been questioned or departed from. Upon referring to *Baxter* v. *France*[2] above, upon which defendants rely, I find that it does not lay down any different principle.

It was not contended, nor do I think it could reasonably be contended, that the defendants' claim against the proposed third party is one for contribution.

For the reasons I have stated, and solely on the ground that I am of opinion that the defendants have not disclosed any right of contribution or indemnity over against the proposed third party, I refuse to make an order for directions.

REPORTER:

Chas. A. Stuart, advocate, Calgary.

IN RE BONGARD.

Extradition—Foreign warrant—Proof of—Proof of warrant being in force —Return—Discharge.

A warrant under The Extradition Act (R. S. C. 1886, c. 142, s. 6*) for the apprehension of a fugitive was issued upon duly authenticated copies (1) of an indictment found by a grand jury in a foreign country charging the accused with an extradictable offence, (2) of a bench warrant issued upon the said indictment, accompanied by a copy of a return thereto by the sheriff dated 10th April to the effect that he could not find the accused and believed that he was without the jurisdiction, and (3) of depositions of witnesses tending to show that the accused was guilty of the offence charged.

On the hearing, the proceedings above mentioned were put in as evidence subject to objection, and the said sheriff gave evidence that the accused, whom he identified, had been in custody from about the 1st May until the sittings of the Court at which he was indicted, and that he was at that sittings discharged from his custody.

Held, (1) That, in order to give jurisdiction to a Judge to issue such a warrant, either a foreign warrant of arrest must be proved or an information or complaint must be laid before the Judge at or before the time of the issue of the warrant.

(2) That, in case of a foreign warrant, it must be shown to be outstanding and in full force, and that the evidence failed to establish this.

Semble, That in case of a foreign warrant, the original must be produced.

The accused was therefore discharged.

[SCOTT, J., *October 19th, 1900.*

Statement. Hearing of an application for extradition.

C. A. Stuart, for the State of Minnesota.

Hon. J. A. Lougheed, Q.C., for the prisoner.

[*19th October, 1900.*]

SCOTT, J.—On the twelfth day of October, inst., upon the application of Mr. Stuart, acting on behalf of the State

*"Whenever this Act applies, a Judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him, and on such evidence, or after such proceedings as in his opinion would, subject to the provisions of this Act, justify the issue of his warrant, if the crime of which the fugitive is accused or alleged to have been convicted, had been committed in Canada.

2. The Judge shall forthwith send a report of the fact of the issue of the warrant, together with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice."

of Minnesota, I issued a warrant, under The Extradition Act, to the constables of the North-West Mounted Police, directing them to apprehend Gerhard Bongard, and to bring him before me or some other Judge under the Act, to be further dealt with according to law. Judgment. Scott, J.

Upon the application for the warrant there were produced before me the following documents, viz.:—

1st. A duly authenticated copy of an indictment found by the Grand Jury of the County of Carver, in the State of Minnesota, on the 17th day of March last, whereby said Bongard was charged of the crime of wilfully misappropriating and feloniously converting to his own use certain moneys amounting to $6,450.75, of and belonging to said county, deposited with and received by him as treasurer of said county, the particulars of said offence being set out in detail in such indictment.

2nd. A duly authenticated document, purporting to be a copy of a bench warrant issued upon said indictment from the District Court of the 8th Judicial District of said State, on the 15th day of March last, directed to any sheriff of said State, and commanding him forthwith to arrest said Bongard, and bring him before the said Court to answer said indictment. The copy produced shews that the warrant was issued by order of said Court, and was signed by the clerk thereof, and that it bore a seal, but it does not shew that the seal was the seal of the Court from which the warrant issued. Accompanying the copy of warrant was a copy of a return thereto by the Sheriff of Carver County, dated 10th April last, wherein he returns that said warrant was placed in his hands on 15th March last, that under and by virtue thereof, he had made diligent search for said Bongard, and was unable to find him in said State, and that he believed that said Bongard was without said State, and sought an asylum without said State so that service of said warrant could not be made upon him.

3rd. Duly authenticated copies of the depositions of certain witneses taken by and before Francis Cadwell, Judge of said District Court, on the twelfth day of April last.

Judgment.
Scott, J.

Under the warrant issued by me, said Bongard was brought before me on 16th day of October instant, when I proceeded to hear the case. Mr. Stuart, on behalf of the State, tendered as evidence the documents above mentioned, and certain other documents in the nature of certificates, authenticating them, and by consent of counsel for Bongard, I received them subject to any objections that might thereafter be raised by him to their admissibility as evidence. Mr. Stuart then called as a witness the Sheriff of Carver County, who made the return above referred to. He identified the prisoner as the person referred to in the bench warrant referred to, and stated that, to his knowledge, Bongard had acted as treasurer of Carver County, and had received money from him as such. His further evidence, so far as material, was to the effect that he saw Bongard in Carver County on 10th February last, that the next time he saw him was at Olds, Alberta, about the beginning of May last, that about that time Bongard accompanied him from Olds to the city of Chaska, in Carver County, Bongard being then in his custody, that he held Bongard in his custody at Chaska for about fourteen days, until the sittings of the Court, and that he was discharged from his custody at that sittings of the Court.

No further evidence was adduced in support of the application for extradition, nor was there at any time any information, charge, or complaint against Bongard laid before me.

Among the objections taken by counsel for Bongard were the following:—

That there was no foreign warrant produced before me at the time I issued the warrant for the arrest of Bongard, nor was there any information or complaint laid before me at that time, that, therefore, I was not justified in issuing the warrant, and it follows that the proceedings founded upon it are void; that the only document in the nature of a foreign warrant was, at the most, an authenticated copy of such a warrant, and there is no provision made for the

production of a copy in lieu of the original; and that the evidence shews that the warrant, of which a copy was produced, was satisfied, the sheriff having taken Bongard into custody under it, and that he was discharged from custody by the Court. Judgment. Scott, J.

I think there can be no doubt that, by virtue of the Imperial Order in Council of 21st March, 1890 (See Dominion Statutes, 1890, p. xliii), the procedure with respect to the extradition of criminals from Canada to the United States is regulated by the provisions of The Extradition Act, R. S. C. c. 142. Section 6 of that Act provides that a Judge may issue his warrant for the apprehension of a fugitive on a foreign warrant, or on an information or complaint laid before him, *and* on such evidence, and after such proceedings, as in his opinion would, subject to the provisions of the Act, justify the issue of his warrant if the crime, of which the fugitive is accused or alleged to have been convicted, had been committed in Canada.

It follows from this that, in order to give a judge jurisdiction to issue a warrant, there must be either a foreign warrant or an information or complaint made before him. There is nothing in the Act to shew that the existence of a foreign warrant may be proved by the production of an authenticated copy, or in any other way than by the production of the original. In fact, sec. 10 of the Act would seem to indicate an intention that the original warrant should be produced, for in addition to expressly providing that copies of depositions or statements, if authenticated in the manner therein prescribed, may be received, it also provides that, if the warrant purports to be signed by a judge, magistrate, or officer of the foreign state, and is further authenticated in the manner therein prescribed, it may be received in evidence in proceedings under the Act.

The case of *Queen* v. *Ganz*[1] was relied upon by Mr. Stuart as supporting his contention that a foreign warrant may be proved by the production of a duly authenticated

[1] 51 L. J. Q. B. 419; 9 Q. B. D. 93; 46 L. T. 592.

Judgment.

Scott, J.

copy. Upon referring to that case, I find that it has no application to the present case, because it is a decision upon the effect of sec. 15 of the Imperial Extradition Act of 1870, which expressly authorizes that mode of proving the warrant.

For the reasons I have stated, I entertain serious doubts whether, in cases where the proceedings are founded upon a foreign warrant, the original must not be produced.

I am, however, of the opinion that the last objection above referred to is well taken, and that it has not been shown that there is now outstanding any foreign warrant for the apprehension of Bongard. The only foreign warrant of which there is any evidence is shewn to have been returned on 10th April last by the sheriff, in whose hands it was placed for execution. Presumably, it was returned to the Court from which it issued.

It is open to question whether, after having been so returned, it could again be delivered to the same or any other sheriff for execution. At all events, there is nothing to shew that it was so delivered, or that it was re-issued. It is true that the same sheriff afterwards took Bongard into custody, but it does not appear that it was under the same warrant, and even if such had been shewn, that fact would not be evidence of the validity of the warrant. It would, however, shew that, even if it had been properly re-issued, its force had been spent, as the person whose arrest it directed had been arrested under it, and brought before the Court from which it issued.

It was contended by Mr. Stuart that, under sec. 9 of the Act, I must hear the case in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada; and that if a prisoner charged with such an offence is brought before a justice without any information or complaint having been previously laid, he might then draw up an information or charge against him

and proceed to hear it. He relied upon *Regina* v. *Hughes*[2] in support of his contention. In that case the Court of Crown Cases Reserved appears to have held that a justice would have jurisdiction to hear a charge under those circumstances, and I was at first inclined to the view that by analogy I might pursue the same course under the Act, but upon further consideration of the question, I cannot so hold. Judgment. Scott, J.

Sub-sec. 2 of sec. 6 of the Act prescribes that forthwith after the issue of the warrant the judge shall send to the Minister of Justice a report of the fact of the issue of the warrant, together with certified copies of the evidence and foreign warrant, information, or complaint. It thus appears that where the proceedings are founded upon an information or complaint it must be in writing at the time of the issue of the warrant.

The fact that a copy of it must at once be forwarded to the Minister of Justice leads me to conclude that the intention of the Act is that the proceedings under it must be founded upon either a foreign warrant or on an information, or a complaint in writing, laid before the issue of the warrant.

I direct the discharge of the prisoner.

REPORTER:

Chas. A. Stuart, advocate, Calgary.

[2]48 L. J. M. C. 151; 4 Q. B. D. 614; 40 L. T. 685; 14 Cox C. C. 284.

POWELL v. HILTGEN.

Malicious prosecution—Reasonable and probable cause—Information bad in law—Assisting in prosecution—Crown Prosecutor laying charge.

The trial Judge found the following facts:—

The defendant went before a Justice of the Peace with the intention of laying an information against the plaintiff for stealing the defendant's calf. He asked the Justice to take such an information, but the Justice declined, and prepared one disclosing no criminal offence, charging the plaintiff with unlawfully taking the defendant's calf into his possession. The defendant swore to the information, and the plaintiff, as the result of the preliminary investigation, at which the defendant and a number of witnesses subpoenaed at his request appeared, was held to bail to appear for trial. The defendant intended to prosecute, and believed he was prosecuting, the plaintiff for a criminal offence. He honestly believed the calf to be his (though the Judge found it to be, in fact, the plaintiff's), but did not honestly believe that the plaintiff was guilty of a theft; and, though he did honestly believe him guilty of some criminal offence in relation thereto, his belief was not based upon a conviction founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would lead an ordinarily prudent and cautious man, placed in the position of the defendant, to the conclusion that the plaintiff was probably guilty of a criminal offence. The Crown Prosecutor at the next sittings of the proper Court, after examining the papers transmitted to the magistrate, and without having had an interview with the defendant, laid a charge of theft. The defendant, when the charge was preferred to the Court, was then at least aware that the charge was one of theft, and he lent his aid and assistance in endeavouring to secure a conviction for the offence so charged. The defendant was, both in laying the charge and in aiding the prosecution before the Justice and the Court, actuated by actual malice. On the facts so found by himself, as the trial Judge, WETMORE, J.:

Held. 1. That the defendant, without reasonable and probable cause, laid the information before the Justice as for an indictable offence and procured the plaintiff to be prosecuted for theft before the Court, and was liable in damages to the plaintiff.

2. Against the contention that, inasmuch that the information disclosed no criminal offence, the defendant could not *quoad* that information be held liable for malicious prosecution—that though no action will lie for maliciously and without reasonable and probable cause bringing a civil action, an action will lie where the procedure is criminal in form, though the charge be bad in law. *Jones* v. *Gwynn*,[1] *Attwood* v. *Moringer*,[2] *Quartz Hill Mining Co.* v. *Eyre*,[3] *Rayson* v. *South London Tramway Co.*[4] considered.

[1](1713) 10 Mod. R. 148; Gilb. K. B. 185. [2](1653) Sty. 378. [3]52 L. J. Q. B. 488; 11 Q. B. D. 674; 49 L. T. 249; 31 W. R. 668—C. A. [4]62 L. J. Q. B. 593; (1893) 2 Q. B. 204; 4 R. 522; 69 L. T. 491; 41 W. R. 21; 17 Cox C. C. 691; 58 J. P. 20—C. A.

3. That the defendant was liable for the part he took in prosecuting the charge before the Court. *Fitzjohn* v. *MacKinder*[1] followed.
4. Against the contention that the laying of the charge by the Crown Prosecutor was an act of that officer for which the defendant was not responsible—that the defendant, having "set the stone rolling," was responsible for the consequences, inasmuch as he had not, as he should have voluntarily done, informed the Crown Prosecutor of the facts, not appearing on the depositions, which would have probably resulted in the proceedings being dropped.
5. That the following items should be allowed as special damages:—
   (*a*) Among paid witnesses attending trial of criminal charge.
   (*b*) Amount paid for subpoenas and serving.
   (*c*) Counsel fee paid at trial of criminal charge.
   (*d*) Expenses of plaintiff and wife attending such trial.
   (*e*) Expenses of plaintiff and man attending preliminary examination.

[WETMORE, J., *December 1st, 1900.*

Statement.

Trial of an action before WETMORE, J., without a jury. The statement of claim alleged that the defendant maliciously and without reasonable and probable cause preferred a charge against the plaintiff before a Justice of the Peace, of having unlawfully taken into his possession a calf belonging to the defendant, causing the plaintiff to be sent for trial on the charge of stealing the calf, and prosecuted the plaintiff thereon at a sittings of the Supreme Court. The claim set out particulars of special damage amounting to $275.25 and claimed $1,000 damages.

The statement of defence (1) denied the several acts and matters complained of; (2) alleged that the defendant had reasonable and probable cause for preferring the charge as alleged, and that the defendant in so doing acted without malice and in a bona fide belief that he was discharging a public duty; and (3) objected that the statement of claim did not disclose a good cause of action in alleging that the preferring of the alleged charge caused the plaintiff to be sent for trial on a charge of stealing; such course, if taken, being contrary to law and an act of the committing justice, and one for which the defendant was not liable.

E. L. Ellwood, for plaintiff.

D. H. Cole, for defendant.

[1] 9 C. B. (N. S.) 505; 30 L. J. C. P. 257; 7 Jur. (N. S.) 283; 4 L. T. 149; 9 W. R. 477.

Statement. The facts and points of law involved sufficiently appear in the pleadings and the judgment.

[*December 1st, 1900.*]

WETMORE, J.—I find the following facts in this case: The calf, the subject of the alleged theft, was the property of the plaintiff, and not of the defendant. The defendant honestly believed the animal to be his property, but he did not honestly believe that the plaintiff stole it.

On the 30th November, 1898, the defendant requested Mr. Field, the Justice of the Peace, to prepare an information against the plaintiff for stealing the calf, and intended to lay and prosecute such charge, but Mr. Field refused to entertain such a charge, and in consequence prepared the information put in evidence, which does not contain a charge of any criminal offence whatever, and the defendant signed and swore to such information. The defendant at the time he signed and swore to such information honestly believed that the plaintiff had unlawfully taken into his possession his calf, and, as a matter of fact, the plaintiff had, on demand being made for such calf by the defendant, refused to give him up.

In laying such information, the defendant believed that he was proceeding against the plaintiff for a criminal offence and intended to do so. It is impossible for me to believe that the defendant thought that he was commencing a civil proceeding. Mr. Field issued a summons to the plaintiff on such information which was served on him, and he appeared at the return thereof, and the defendant appeared at the same time, and the preliminary examination was held and the defendant prosecuted the charge, produced witnesses who were examined under oath, and procured the plaintiff to be sent up for trial in the Supreme Court, and the plaintiff was held to bail to appear at the then next sittings of the Supreme Court for the Judicial District of Eastern Assiniboia, to be held at Yorkton. In doing all this, the defendant intended to and believed that he was prosecuting the plaintiff for a criminal offence.

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I may say here that the Justices also thought that they were proceeding against the plaintiff for a criminal offence. Their action is inexplicable on any other ground, and it seems to me that they must have been under the belief that they were proceeding against him for theft or something kindred thereto, otherwise I cannot understand their proceeding under section 783, paragraph a, and section 786 of the Criminal Code, as Mr. Field states that they did. The defendant at the time he laid the information and prosecuted the preliminary examination honestly believed that the plaintiff was guilty of a criminal offence, but such belief was not based upon a conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would lead any ordinarily prudent and cautious man, placed in the position of the defendant, to the conclusion that the plaintiff was probably guilty of a criminal offence, because an ordinarily prudent and cautious man would, under those circumstances, if he did not believe the defendant guilty of theft, come to the conclusion that the plaintiff was merely a tort feasor, for which only a civil remedy would lie.

At the next sittings of the Supreme Court, holden at Yorkton in May, 1899, the Crown prosecutor preferred a charge against the plaintiff for stealing the calf, to which the plaintiff pleaded not guilty, and having been tried upon such charge, he was acquitted. The Crown prosecutor prepared this charge upon the information laid before the Justice of the Peace by the defendant, the evidence taken at the preliminary examination and the committal by the justices, and prior to the sittings of the Supreme Court he had no communication with the defendant.

Prior to such sittings the defendant was served with a subpœna to attend thereat, to give evidence "touching and concerning a certain criminal charge to be . . . preferred against John Powell." He was, therefore, aware before the charge was preferred that the plaintiff was about to be prosecuted at the sittings of the Supreme Court for a criminal offence. It is very difficult for me to believe that

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by this time the defendant had not realized that the only criminal offence to which the evidence, which had been given at the preliminary examination, or which he could produce before the Court, would give colour to at all, was theft. He aided and assisted the prosecution of the criminal charge, which he had notice by the subpœna would be prosecuted, by subpœnaing and procuring the attendance of witnesses not produced at the preliminary examination and not known to the Crown prosecutor.

There is no direct evidence upon the point, but it seems to me incredible that the defendant was not aware of the nature of the charge which the Crown prosecutor intended to prefer as soon as he arrived at Yorkton, and I am not prepared to say that I might not infer under the evidence that he was so aware of the nature of the proposed charge. But I make no finding on that point. But I do find that when the charge was preferred in the Supreme Court the defendant became aware of the nature of it, and that he knew it was for theft, and that he then proceeded and lent his aid and assistance in endeavouring to secure a conviction for the offence so charged.

I have already found that the defendant did not honestly believe that the plaintiff stole the animal. I further find that the state of circumstances which existed, assuming them to be true, would not lead any ordinarily prudent and cautious man placed in the position of the defendant to believe that the plaintiff was guilty of theft. I find the last stated fact, because the only apparent reasons that the defendant had for believing that the plaintiff stole the calf (assuming that he did so believe) were that he had lost his calf and that the plaintiff had in his possession one like it, which the defendant believed to be his, and that the plaintiff's wife had refused to let this calf suck its alleged mother. when the plaintiff was not there. On the other hand, the defendant knew that the plaintiff claimed this calf as his property, and I find also that he knew, especially from his interview with the Wilds, that the plaintiff did not have in his possession any more calves than he ought to have by

reason of the natural increase of his herd and by purchase, that he had not disposed of any calves, and that the cow which the plaintiff alleged to be the mother of the calf had a calf which, at least, must have strongly resembled the one he lost. Judgment. Wetmore, J.

Having found the aforegoing matters of fact, I hold that the defendant, without reasonable and probable cause, laid the information mentioned before the Justice Field as for an indictable offence, and procured all the subsequent steps stated to be had and taken upon such charge, and appeared at the sittings of the Supreme Court at Yorkton, and without reasonable and probable cause caused the plaintiff to be prosecuted there for theft.

In considering the facts as affecting the question of reasonable and probable cause and my holdings upon my findings, I have been largely influenced by what is laid down in *Hicks* v. *Faulkner*.[6] I will give my reasons for finding that the defendant did not honestly believe that the plaintiff stole the calf, and I reach that conclusion largely from the defendant's own testimony. Referring to the laying of the information, he testified in his examination in chief as follows:—"At the time I laid the information before Mr. Field, I said to Mr. Field I wanted to swear out an information against Mr. Powell, and Mr. Field went and wrote it out. I was in the other room while he was writing it; he came in and wanted me to sign it. I read it, and told him I could not sign that information, as I could not charge Mr. Powell with stealing because I did not see him steal. The paper Field had written out charged Powell with stealing." And on cross-examination, referring to this information, which he stated Field had prepared, he testified:—"I read it over, and I could not sign it, being that Mr. Powell was accused of stealing. I told Mr. Field I was not accusing Powell of stealing." I have found that the defendant did ask Field to prepare an information against the plaintiff for

[6] 51 L. J. Q. B. 268; 8 Q. B. D. 167; 30 W. R. 545; affirmed, 46 L. T. 127; 46 J. P. 420—C. A.

Judgment. Wetmore, J.

stealing, and I am very much inclined to the opinion that the testimony which I have quoted was presented to me for a purpose.

The counsel for the defence was evidently much impressed at the trial with the idea that, inasmuch as the information laid before Mr. Field did not charge a criminal offence, the defendant could not, *quoad* that information, be held liable for malicious prosecution, and that the issuing of the summons and holding the preliminary examination and committing the plaintiff for trial were the erroneous acts of the justices, and that the charging of the plaintiff in the Supreme Court was the act of the Crown prosecutor, and that the defendant could not be held liable for any of these acts. No doubt this phase of the question had been considerably discussed, because it is set out in the statement of defence, and I am inclined to think that the evidence I have referred to was given for the purpose of accentuating, not only in law but in fact, that the defendant not only did not, but that he did not intend to charge the plaintiff with stealing, and with that view to impress upon me the fact that at the time he laid the information he had no reason to believe that the plaintiff stole the animal. He need not feel surprised that when dealing with another aspect of the case I have taken him at his word.

I also find that the defendant was actuated by actual malice, both in preferring the information before the justice and in proceeding with and prosecuting the charge in the Supreme Court. I infer that fact from my finding want of reasonable and probable cause on the grounds I have set forth. I am also influenced in coming to this conclusion by his expressed desire to Mr. Field to have a warrant issued against the plaintiff and the plaintiff held as a prisoner until the trial. I am not at all impressed with the idea that there was any malice arising out of the Hay-Slough matter.

It was very strongly urged on behalf of the defendant that he was not liable in this action because no charge of a criminal offence was laid before the Justice, or, in other

words, that the information was bad. I can find no authority to support that contention. *Jones* v. *Gwynn*,[1] is cited in Stephen on Malicious Prosecution at page 12,* and it is in that text book stated that the indictment was held to be bad, and that it was, therefore, argued that no action for malicious indictment would lie. "But that Parker, C.J., in delivering judgment disposed of the point in the most conclusive manner. He pointed out that the cause of action was the trouble and expense to the plaintiff, which were equally incurred whether the indictment was good or bad. . . . If the badness of the indictment were an answer to the subsequent action, it would make it safe to indict maliciously so long as you make a slip in drawing the indictment." *Attwood* v. *Monger*,[2] cited in Stephen at p. 13,* was an action for a false presentment before the conservators of the Thames. It was urged after verdict that the conservators had no jurisdiction. Roll, C.J., is cited in Stephens as holding:—"It is all one whether there were any jurisdiction or no, for the plaintiff is prejudiced by the vexation." I am of opinion that an action for malicious prosecution will lie for maliciously, and without reasonable and probable cause, laying an information such as that laid in this case if the party against whom it is laid is in consequence prejudiced. The question whether such an action would lie for maliciously, etc., bringing a civil action was discussed in the *Quartz Hill Gold Mining Company* v. *Eyre*,[3] and it was held that such an action would not lie. The question is discussed at considerable length by Bowen, L.J., in his judgment at page 492, and, quoting from Lord Holt, he states:—"The third sort of damages which will support such an action is damage to a man's property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused." I am at a loss to know why this should be confined to expenditures to acquit the person of a crime of which he is charged. If a person has been maliciously and without reasonable and probable cause compelled to expend money, wrong has been

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done in law, and there must be a remedy at law for such wrong. I quite agree, as laid down in the *Quartz Hill Gold Mining Company* v. *Eyre*,[3] that an action will not lie for maliciously bringing a civil action, and for the reasons stated in that case, and anyway I presume the decision in that case is binding upon me. But, laying this information was not bringing a civil action. The plaintiff has in consequence been put to costs and expenses, and there is no method whatsoever of recovering such costs and expenses except by action. In a civil action, the person against whom the action is brought, if he successfully defends it, is indemnified by having costs awarded to him, unless for some special reason he is deprived of them by the Judge. In this connection I also draw attention to the observations of Lord Esher, Master of the Rolls, in *Rayson* v. *South London Tramway Company*.[4] In that case the plaintiff was summoned for an alleged offence against a Tramway Act, and, having been acquitted, brought an action for malicious prosecution. It was urged that this was not a criminal proceeding, and, therefore, the action would not lie. The Court held that it was a criminal proceeding, but in delivering judgment, Lord Esher says:—"I am not prepared to say that if the proceedings taken . . . in this case were not criminal proceedings the action would not lie, if these proceedings were taken without reasonable and probable cause and maliciously." It would seem, therefore, that I am not estopped by authority from holding as I have held in this case.

Possibly, however, this is not very material, as I have held the defendant liable by reason of the part he took in prosecuting the charge in the Supreme Court. For this action is not merely for the part the defendant took in laying the information before the Justice, but also for the part he took in prosecuting the charge in the Supreme Court, and, under *Fitzjohn* v. *Mackinder*,[5] that is sufficient to maintain the action.

It was further urged that the preferring of the charge in the Supreme Court was the act of the Crown prosecutor,

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and that the defendant is not responsible for that. I cannot agree with that contention. In the Territories there are no grand juries. The Crown prosecutor to a great extent, *quoad* criminal prosecutions, exercises the functions of a grand jury. That is, he determines usually from the depositions taken at the preliminary examination whether there is a *prima facie* case on which to found a charge, and I cannot bring my mind to the conclusion that a charge preferred by a Crown prosecutor under such circumstances has any more effect to protect the real prosecutor than a true bill presented by a grand jury would have. It is to be borne in mind that the defendant, to use an expression I find in some of the books, set the stone rolling in this case. If it had not been for him, this charge would never have been preferred, and he has got to take the consequences of what has followed.

This is not a case where the defendant was forced into the position he was in. Every step along the whole line was taken by him voluntarily. The Crown prosecutor only knew what appeared in the depositions. If he had informed the Crown prosecutor what he honestly believed, namely, that in his opinion the plaintiff had not stolen the calf, but that he was holding it in the honest belief that it was his property (although the defendant may have felt strongly, even certain, that such belief was erroneous), and had stated his reasons for such opinion, no charge would, in my judgment, have been laid in the Supreme Court.

I have reached my conclusions in this case with a full apprehension of how cautious I should be not to lay down law which will have the effect of deterring persons from laying criminal charges from fear of serious consequences to themselves. But that consideration ought not to deter me from giving a party his legal rights when he has established them to my satisfaction.

There is, however, a matter from another standpoint I will refer to, and that is that I think there is a disposition on the part of some persons who have lost an animal and have found it, or imagined they have found it, in another

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person's possession, and the right of the property is disputed, to resort to the criminal procedure in the Courts in the hopes that their rights to the animal may be pronounced. They do this without any honest idea that the animal has been stolen, and knowing that the alleged thief is claiming the property under clear colour of right, and without any fraudulent intention whatever. They launch the prosecution simply because they think it will be a cheap method to them of having the right of property tried out. If they can convince the Court there has been a larceny, they will get possession of the animal. If they fail to do so, no harm happens to them, and they will get paid for their loss of time anyway.

I do not know that the evidence in this case will warrant my finding that the prosecution against Powell was influenced by such considerations, but I may say that I tried Powell on the charge of theft, and that was the conclusion I formed in my own mind at such trial.

Judgment for the plaintiff for $300, made up as follows:

Paid Witnesses attending trial of criminal charge.	$130
Expenses of Plaintiff and Man attending Preliminary Examination	10
Paid for serving Subpœnas	12
Paid Clerk Court for Subpœnas	1
Counsel Fee paid Counsel on trial of criminal charge	30
Expenses of Plaintiff and his wife attending Court, made up as per scale of fees for witnesses	40
Insult, Indignity, and Wounded Pride	77
	$300

VANCOUVER LAND & SECURITIES CO. v. McKINNELL.

Pleading—Mortgage action—Alternative provisoes—Embarrassing or unnecessary—Striking out.

Allegations in a statement of claim unnecessary inasmuch as they merely anticipate a possible defence are not necessarily embarrassing.

The plaintiffs in paragraph 2 of their statement of claim alleged that the defendant by deed dated 13th November, 1888, in consideration of £1,003 lent him by one A. M., mortgaged his reversionary interest in his father's estate, and that in the said deed it was provided that if the defendant should within ten years after the date of the mortgage become entitled to the said reversionary interest by the death of the tenant for life, and should within 30 days after obtaining possession of the same pay the said A. M. $2,000, with compound interest at 10 per cent. per annum, then the mortgage should be void. In paragraph 3 it was alleged that it was further provided by the mortgage that if the defendant should at the expiration of 10 years from the date of the mortgage repay to A. M. the said sum of £1,003, with interest compounded yearly at 10 per cent., then the mortgage should be void. In paragraph 4 it was alleged that the defendant covenanted in the said deed to pay the mortgage money and interest and observe the provisoes therein contained. In paragraph 5 it was alleged that A. M. had duly assigned the mortgage to the plaintiffs; in paragraph 6, that the defendant did not within 10 years become entitled to the property mortgaged by the death of the life tenant, and in paragraph 7 that the defendant had not paid any sum whatever on the mortgage. The plaintiff claimed £1,003 and interest at 10 per cent. compounded yearly.

Held, on an application to strike out the whole statement of claim, or at any rate either paragraph 2 or paragraph 3 as embarrassing, that the pleading was not embarrassing, and should stand; that so far as any of the allegations might be unnecessary they merely anticipated a possible defence, and were not on that account embarrassing.

[SCOTT, J., *February 1st, 1901.*

Statement.

Summons to strike out statement of claim as embarrassing. The facts sufficiently appear from the judgment.

James Muir, K.C., for the defendant.

P. McCarthy, K.C., for the plaintiffs.

[*1st February, 1901.*]

SCOTT, J.—This is an application by the defendant to strike out the whole or certain portions of the plaintiff's

Judgment. Scott, J.

statement of claim on the ground that they are embarrassing, and certain portions thereof on the ground that they are unnecessary.

Paragraph 2 of statement of claim alleges that defendant by his deed dated 13th November, 1888, in consideration of £1,003 (equal to $4,876.81) mortgaged to one Alfred McKinnell his (the defendant's) reversionary interest under the will of one Alfred McKinnell, deceased, in certain real and personal property, and that in said mortgage it was agreed and provided that if the defendant should within ten years of the date of the mortgage become entitled to the mortgaged property by the death of the tenant for life, and should within thirty days after receiving the same pay to the mortgagee the sum of $2,000 with interest thereon from 31st December, 1888, at the rate of ten per cent. per annum to be compounded yearly on 31st December on each and every year the mortgage should be null and void.

Paragraph 3 alleges that by said mortgage it was further provided that if the defendant should at the expiration of ten years from the date thereof repay to said Alfred McKinnell the said sum of £1,003, with interest thereon from 31st December, 1888, at the rate of ten per cent. per annum compounded yearly on 31st December in each and every year the mortgage shall be null and void.

Paragraph 4 alleges that defendant by said mortgage covenanted to pay to said Alfred McKinnell the mortgage money and interest, and to observe the provisoes therein contained.

Paragraph 5 alleges that said mortgage was duly assigned by Alfred McKinnell to the plaintiff company.

Paragraph 6 alleges that the defendant did not within ten years of the date of the said mortgage become entitled to the mortgaged estate by the death of the tenant for life.

Paragraph 7 alleges that defendant has not paid the above mentioned sum of £1,003 and interest thereon as aforesaid, nor any part thereof.

Plaintiffs claim from the defendant the sum of £1,003 and interest thereon from 31st December, 1888, at the rate of ten per cent. per annum compounded yearly on 31st December in each year. Judgment. Scott, J.

Defendant applies to have struck out:—

1. All of plaintiff's Statement of Claim except so much thereof as set out such facts as entitles plaintiff to payment of the mortgage money and interest, as unnecessary.

2. Either the second or third paragraphs on the ground that same are embarrassing.

3. The whole statement of claim as embarrassing and tending to prejudice the fair trial of the action, or that plaintiff should be ordered to amend the same so as to shew with certainty the amount claimed by the plaintiff both for principal and interest.

It was contended on behalf of the defendant that this being an action upon the covenant in the mortgage, plaintiff should allege only such facts as will entitle him to recover under the covenant, that unnecessary facts are set up, namely, claims for two different sums are shewn, and only one of them is sued for.

I cannot bring myself to the conclusion that this pleading contains unnecessary matter or that it is embarrassing. Assuming that the action is upon the covenant in the mortgage, I must take it for granted that its effect is properly stated in the pleading.

It is stated to be a covenant to pay the mortgage money and interest, and to observe the provisoes therein contained. A question that naturally arises is what is the mortgage money. Upon the happening of a certain event it is to be $2,000 and interest, otherwise it is to be $1,871.27.

These are among the provisions in the mortgage which the defendant covenants to observe. If the plaintiff claims a larger sum it does not appear to me to be out of place for him to allege facts to shew that it and not the smaller sum is the mortgage money. In fact, I doubt whether it is not

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necessary that he should do so, but, if not necessary, he is merely anticipating a defence by the defendant that the smaller sum is the mortgage money, and his taking that course would not necessarily render the pleadings embarrassing.

I cannot see that there is any uncertainty as to the amount claimed by the plaintiff for principal and interest. As I interpret the claim, it is one for $4,871.27, with interest as stated, compounded yearly on 31st December in each year up to the time of this action. Whether he is entitled so to claim is a question that does not arise on this application.

Application dismissed with costs to the plaintiff in any event on final taxation.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

CARTE v. DENNIS.

Copyright—Sole right of dramatic representation—Infringement—Imperial Acts—Evidence—Examination for discovery—Admissibility thereof as evidence against co-defendants.

Sec. 16 of the Imperial Copyright Act, 1842 (5 & 6 Vic. c. 45), provides that the defendant in pleading shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of the action. Sec. 26 allows the pleading of the general issue.

Held (RICHARDSON, J.), that s. 16 is complied with if the objections intended to be relied on are taken in the statement of defence. *Dicks* v. *Yates*[1] followed.

Where, under rule 201 of the Judicature Ordinance, 1898, a party to the action has been orally examined before trial, Rule 224, which allows any party to use in evidence any part of the examination so taken of the opposite parties, does not limit the effect of such evidence, or provide that it may only be put in as against the party examined, and, therefore, any part of such examination is admissible as evidence against opposite parties other than the one actually examined, provided they had an opportunity to cross-examine the party actually examined.

[1] 50 L. J. Ch. 809; 18 Ch. D. 76; 44 L. T. 660.

At the trial of an action against the officers and members of the committee of management of an unincorporated society for infringement of plaintiff's sole right of dramatic representation of an opera, plaintiff put in as evidence parts of the examination for discovery of B., one of the defendants, the secretary-treasurer of the society. All the defendants were represented by the same advocate, who had attended such examination on behalf of all the defendants and cross-examined the witness.

Held, that the testimony given on such examination was admissible as evidence against all the defendants as well as against B. himself.

Plaintiff proved that the opera in question, and an assignment to him of the sole right of dramatic representation thereof, had been duly registered at Stationers' Hall. On said examination B. testified that he knew the opera in question, and that the performances complained of were meant to be performances of this opera. He also identified one of the programmes used on the occasions in question, and what he thought to be a poster advertising the performances. Both programme and poster designated the opera by its registered name, and specified the author and composer thereof. L. also testified at the trial that he knew the opera in question, which he had seen and heard performed many times; that he had been present at one of the performances complained of, and that what had been performed on such occasion was the opera in question.

Held, that this was sufficient proof of the identity of what was performed by defendants with the opera in question, and consequently of the infringement.

Per WETMORE, J.—Objection to secondary evidence of the contents of a written document must be distinctly stated when it is offered, and if not objected to it is received, and is entitled to its proper weight, and the weight to be attached to it will depend upon the circumstances of each case.

Each programme of an entertainment is an original document, not a mere copy.

Per MCGUIRE, J.—The rule excluding oral testimony of a witness of the contents of a written document which he had read was not applicable to the present case. What was sought to be proved was not the contents of any book or document, but the resemblance or identity of two performances, partly verbal, partly musical, and partly made up of dramatic action, gesture and facial expression.

Sufficiency and admissibility of evidence of resemblance or identity of the performance or of copy with original discussed.

Judgment of RICHARDSON, J., reversed.

[RICHARDSON, J., *October 29th, 1900.*

[*Court en banc, March 7th, 1901.*

Statement.

The action was tried before RICHARDSON, J., June 22nd, 26th and 28th, 1900.

Ford Jones, for plaintiff.

T. C. Johnstone, for defendants.

Statement.

The pleadings and evidence are sufficiently set forth in the judgment. No evidence was adduced on behalf of the defendants.

[*October 29th, 1900.*]

RICHARDSON, J.—By the plaintiff's claim he asserts:—

1. He is the assignee of a copyright in a musical composition or comic opera, "The Pirates of Penzance," registered 18th August, 1880.

2. Defendants on 27th and 28th December, 1899, infringed plaintiff's copyright by representing or causing to be represented (without plaintiff's consent) the said musical composition at a place of dramatic entertainment, that is, the Town Hall, Regina.

Damages claimed, $200.

Injunction and costs.

Defence.

1. That plaintiff is not assignee of the alleged copyright.

2. The said musical composition was not copyrighted.

3. Defendants did not nor did any of them infringe the said copyright by representing or causing to be represented as alleged.

4. Plaintiff's claim discloses no cause of action.

At the hearing Mr. Jones appeared for plaintiff and Mr. Johnstone for defendants.

Before submitting any testimony the plaintiff's counsel drew attention to the fact that no notice had been given by the defendants under the Copyright Act, 1842, 5 & 6 Vic. (Imp.) c. 45, s. 16, and consequently the plaintiff's title to the copyright was admitted.

When this Act was passed an entirely different system of pleading was in use from that brought into operation by the Judicature Act, 1873, practically followed in this Court. By section 26 of that Act, 5 & 6 Vic. c. 45, the general issue was pleadable, under which a defendant could

give special matter in evidence. The importance of giving notice of objection a defendant intended to rely upon at the trial is obvious, as otherwise the plaintiff would be ignorant of what might be set up on the trial and be taken by surprise. Since 1873, when, as in this case, the facts on which the defence is based are set out in the pleadings it has been held (*Dicks* v. *Yates*,[1] in appeal, and I follow this), that the notice called for by section 16 is sufficiently given if the facts intended to be relied upon are stated in the pleadings.

By them the defendants simply traverse the facts on which plaintiff asserts his right of action, and before he can recover in his action the plaintiff is required to prove them.

Towards proving them:

1. The plaintiff put in exhibit "A," a certificate purporting to be signed by the registering officer appointed by the Stationers' Company under Imperial Act 5 & 6 Vic. c. 45, shewing that on August 18th, 1880, William Schwenck Gilbert and Arthur Seymour Sullivan, alleging themselves to be proprietors of the sole liberty of representation or performance of a dramatic or musical composition entitled, "The Pirates of Penzance," the time and place of first representation or performance being the Bijou Theatre, Brighton, Devon, 30th December, 1879, of which they, Gilbert and Sullivan, were the author or composer, obtained an entry thereof in the Book of Registry of Copyrights and Assignments kept at the Hall of the Stationers' Company pursuant to the Act above named.

2. The plaintiff followed exhibit "A" by putting in exhibit "B," a certificate of the same officer showing that on 18th December, 1893, the same Gilbert and Sullivan assigned to the present plaintiff the sole liberty of representation or performance of the dramatic piece or musical composition described in exhibit "A" for Great Britain and Ireland (outside the four-mile radius of London), Canada,

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Australia, and all British colonies and possessions, also for the continent of Europe (in the English language).

These two exhibits "A" and "B" established, section 11 (their authenticity not having been questioned), the proprietorship and the assignment of the dramatic piece or musical composition as therein expressed, with the time and place of its first representation or performance, so far as the right of representation or performance of the same extends within the limit named, in the plaintiff as assignee of the composers.

The examination before the clerk of one of the defendants, Briggs, for discovery was put in, in which he stated that he knew a comic opera called "The Pirates of Penzance," and had heard what was so called; that the comic opera he knew and had seen is practically the same; that he last heard it performed on 27th and 28th December, 1899, in the Town Hall, Regina; that admission to these performances was by tickets sold to such of the public as chose to purchase them, of which numbers availed themselves and did attend; that the performance was got up and made by the Regina Musical Society, an unincorporated society of which all of the defendants were members, and of whom all except the defendants Haultain, Hogg, Goggin, Fraser and Pocklington took part in the performance.

With the exhibits put in on this examination, identified by Briggs, is a public advertisement or poster, giving public notice that the Regina Musical Society intended to perform "Gilbert and Sullivan's opera, The Pirates of Penzance," at the place and on the dates I have referred to, to which the public would be admitted on paid-for tickets.

Briggs further stated that at a meeting of members of the society held in September, 1899, at which defendants Dennis, Goggin, Brown, Pocklington and Napier were present, it was agreed upon to produce and entertain the public with the opera named; that early in November a notice was received demanding payment of license fees to plaintiff as a condition

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for allowing the proposed performance, it being protected by copyright, and that as some members of the society had learned that in other places, which he named, the same opera had been performed without license fees being paid, no notice beyond acknowledging its receipt, was given to that letter. Mr. Briggs produced vouchers and accounts showing receipts and expenses in connection with the performance, and further stated that no permission was ever asked or obtained from any person so far as he knew for the production of the opera, nor did he know of his own knowledge whether or not the opera of "The Pirates of Penzance" is or ever was copyright; that the scores of the opera the society produced were obtained from New York before its production, and returned after, they being only hired for the occasion.

Mr. LeJeune was called as a witness. He was present at the public performance of 28th December, 1899, and purchased and paid for a ticket which admitted him. He identified defendant Pocklington as one who took part in the performance and several of the others named by Briggs. He, about twenty years ago in England, saw and heard an opera which had been publicly advertised to be performed, as stated in the advertisement, by one of the D'Oyly Carte Companies as "The Pirates of Penzance," and what he heard produced 28th December, 1899, was the same he had heard in England twenty years ago.

By the production of exhibits "A" and "B" the plaintiff's right to bring his action is established. Then, by his claim, the plaintiff charges the defendants with having given representation in public of the opera "The Pirates of Penzance," of which he holds the copyright as assignee of the author, without his permission.

The defence set up in the action, that is, the defendants did not, nor did any of them, infringe said copyright by representing, or causing to be represented, the said composition at a place of public entertainment known as the Town Hall in the town of Regina, raises the question whether

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or not the representation proved to have been made infringed the rights of the plaintiff secured to him by the registration at Stationers' Hall, and upon the plaintiff devolves the onus of establishing:

(1) The original composition to which the certificate of registry relates.

(2) That what was performed on the occasions, or either of them, at the dates named, was practically the same as contained in the original composition, in order to convince the Court of the identity of the production in Regina with the original composition alleged. The original composition itself, which would be the best legal evidence of its contents, was not produced, nor was its non-production accounted for in order to admit secondary evidence of its contents.

LeJeune's statement that twenty years ago he heard in England a company advertised as D'Oyly Carte's, who at best has only been the owner of the copyright seven year, perform what, according to his memory, was performed under a like name or title in Regina, in my judgment, falls far short of compliance with the rule laid down in *Boosey* v. *Davidson* [2] and *Lucas* v. *Williams*,[3] and is insufficient to raise the presumption of identity on which the plaintiff's case depends.

As I had already on an interlocutory application decided that the plaintiff's statement of claim was sufficient in point of law, reference to clause 4 of the defence is not now necessary.

The plaintiff appealed. The appeal was heard December 3rd and 5th, 1900.

Ford Jones, for appellant :—Though the term "copyright" is often used to designate the right in question (Cunningham & Mattinson's Precedents of Pleading, 2nd ed., 246; Ruling Cases, Vol. 9, 868; Encyclopædia of Laws

[2] 13 Q. B. 257; 18 L. J. Q. B. 174; 13 Jur. 678. [3] 61 L. J. Q. B. 595; (1892) 2 Q. B. 113; 66 L. T. 706.

of England, Vol. 3, 398) it is so used incorrectly. This "sole right of dramatic representation" is distinct from "copyright" proper—*Chappell* v. *Boosey*,[4] *Clark* v. *Bishop*.[5] Copyright is strictly protected by the Courts: *Walter* v. *Lane*,[6] *Warne* v. *Seebohm*.[7] The remedy is conferred by 3 & 4 Wm. IV., c. 15, and 4 & 5 Vic. c. 45. *Wall* v. *Taylor*.[8] Argument.

The performance complained of need not be in a public place, nor for profit: *Duck* v. *Bates*,[9] *Russell* v. *Smith*.[10] No guilty knowledge is necessary: *Lee* v. *Simpson*.[11]

Plaintiff's evidence at trial was not secondary. There is no original composition which could have been produced. Registry of copyright of a drama and of the sole right of representation thereof is effected by making an entry in the register at Stationers' Hall only (5 & 6 Vic. c. 45, s. 20), and a copy is not deposited anywhere, as is the case with books, etc. (5 & 6 Vic. c. 45, ss. 6, 8 and 9.) The evidence was at least sufficient to make out a prima facie case. Le-Jeune's evidence was not secondary—*Lucas* v. *Williams*.[3] *Lucas* v. *Williams*[3] is an authority strongly in favour of the appellant.

T. C. Johnstone and *Horace Harvey*, for respondents:—Power having been conferred upon the Federal Government by section 91 of the B. N. A. Act to legislate as to copyright, and that Government having passed "The Copyright Act," the Imperial Acts no longer apply. There was no sufficient evidence of infringement: *Boosey* v. *Davidson*,[2] *Lucas* v. *Williams*.[3] Plaintiff complains of infringement of copyright, but the evidence goes only to show infringement of the sole right of representation. The trial Judge's find-

[4]51 L. J. Ch. 625; 21 C. D. 232 46 L. T. 854; 30 W. R. 733. [5]25 L. T. 908. [6]69 L. J. Ch. 499; (1900) A. C. 539; 83 L. T. 289; 49 W. R. 95. [7]57 L. J. Ch. 689; 39 Ch. D. 73; 58 L. T. 928; 36 W. R. 686. [8]52 L.J. Q. B. 558; 11 Q. B. D. 102; 31 W. R. 712, affirming 51 L. J. Q. B. 547; 9 Q. B. D. 727; 47 L. T. 47; 30 W. R. 948; 46 J. P. 679. [9]53 L. J. Q. B. 338; 13 Q. B. D. 843; 50 L. T. 778; 32 W. R. 813; 48 J. P. 501. [10]12 Q. B. 217; 17 L. J. Q. B. 225; 12 Jur. 723. [11]3 C. B. 871; 4 D. & L. 666; 16 L. J. C. P. 105; 11 Jur. 127.

Argument.

ings are findings of fact, and should not be disturbed. There is no evidence connecting the programme and poster with the defendants. The evidence of Briggs given on his examination for discovery is an admission, and as such can be used against himself only: *Meyers* v. *Montriou*,[12] *Saltmarsh* v. *Hardy*.[13]

Ford Jones, in reply:—The Imperial Acts are still in force in Canada: *Smiles* v. *Belford*,[14] *Routledge* v. *Lowe*,[15] *Anglo-Canadian* v. *Suckling*.[16] The trial Judge made no findings of fact, but even if so, the Court will not hesitate to overrule such findings if the Court would not, on the evidence, have come to the same conclusion: *Coghlan* v. *Cumberland*,[17] *Colonial* v. *Massey*.[18] Briggs' examination is available to plaintiff as evidence at trial: J. O. r. 224. The exhibits form part of the examination: *In re Hinchliffe*,[19] *Hands* v. *Upper Canada Furniture Co.*[20] Briggs' evidence can be used against all the defendants, they being connected together as the officers and committee of an unincorporated society, and being all represented by the one advocate, who, on behalf of all, attended the examination and cross-examined Briggs: *Allan* v. *Allan & Bell*.[21] *Meyers* v. *Montriou*[12] and *Saltmarsh* v. *Hardy*[13] refer to admissions contained in pleadings. Having established his legal right and its invasion, plaintiff is entitled to an injunction and damages as of course: *Fullwood* v. *Fullwood*,[22] *Cooper* v. *Whittingham*,[23] *Shelfer* v. *City of London El. L. Co.*,[24] *Ager* v. *P. & O. Steam Nav. Co.*,[25] *Warne* v. *Seebohm*.[7] Plaintiff paid to defendants' advocate their taxed costs in the Court

[12]9 Beav. 521. [13]42 L. J. Ch. 422. [14]25 Grant 590; 1 O. A. R. 436. [15]37 L. J. Ch. 454; L. R. 3 H. L. 100; 18 L. T. 874; 16 W. R. 1081. [16]17 O. R. 239. [17]67 L. J. Ch. 402; (1898) 1 Ch. 704; 78 L. T. 540. [18]65 L. J. Q. B. 109; (1896) 1 Q. B. 38; 73 L. T. 497; 44 W. R. 212; 12 Times Rep. 57. [19]64 L. J. Ch. 76; (1895) 1 Ch. 117; 12 R. 33; 71 L. T. 532; 43 W. R. 82. [20]12 P. R. 292. [21](1894) P. 248; 63 L. J. P. 120; 70 L. T. 783; 42 W. R. 549; 6 R. 597; 10 Times Rep. 456. [22]47 L. J. Ch. 459; 9 Ch. D. 176; 38 L. T. 380; 26 W. R. 435. [23]49 L. J. Ch. 752; 15 Ch. D. 501; 43 L. T. 16; 28 W. R. 720. [24]64 L. J. Ch. 216; (1895) 1 Ch. 287; 12 R. 112; 72 L. T. 34; 43 W. R. 238. [25]53 L. J. Ch. 589; 26 Ch. D. 637; 50 L. T. 477; 33 W. R. 116.

below. This amount should be refunded by defendants to plaintiff. Argument.

[*March 7th, 1901.*]

WETMORE, J.—This was an action for infringing the plaintiff's rights as assignee of the copyright in a musical composition or comic opera called "The Pirates of Penzance," by representing or causing the same to be represented without his consent at a place of dramatic entertainment known as the Town Hall in Regina. The plaintiff claims damages and an injunction restraining the defendants from representing or causing to be represented without his consent the said musical composition or comic opera during the term of the copyright. The right infringed was really the sole right of representation or performance of the piece or composition. In the shape the case was presented to this Court nothing, however, turns upon that fact. A question of law was raised by the fourth paragraph of the statement of defence. It does not appear from the appeal book to have been urged before the learned trial Judge, and it was not urged before this Court on appeal. I assume, therefore, that it was abandoned. Probably the defendants' counsel was satisfied that it could not be successfully put forward.

The learned trial Judge in effect found that the proprietorship of the sole right of representation in Canada of a dramatic piece called "The Pirates of Penzance" was vested in the plaintiff. This finding was not questioned by any of the parties to this action. The learned Judge, however, found that the evidence failed to establish that the composition or comic opera in question performed at Regina was identical with the original the right to represent which was registered in the book of the Stationers' Company, and he, therefore, gave judgment for the defendants. From this judgment the plaintiff appealed.

It was urged on behalf of the defendants that, assuming that all the evidence offered on the part of the plaintiff and received by the trial Judge was properly received, the finding was

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correct. And it was also urged that a portion of the evidence, namely, the examination of Briggs, one of the defendants, was improperly received, and that in the absence of such testimony there was no evidence to establish the identity of the piece performed at Regina with that registered. I will first deal with the question of the admissibility of this testimony.

The defendants' factum alleges that the evidence of Briggs was put in subject to objection. The plaintiff's counsel at the argument stated that no objection was taken to the reception of it. I can find nothing in the appeal book which shows that the reception of this testimony was objected to. I made enquiry of the trial Judge whether any and what objections were taken to its admissibility, and he informs me that when the evidence was tendered counsel for the defendants raised the objection that the exhibits referred to by Briggs in his examination were not properly before the Court, because there was no notice to produce them, and stated that when Briggs was examined before the clerk he had objected to their production, but his objection was overruled, and he renewed the objection before the Judge. It does not appear that any other objection was then taken to the admissibility of this evidence. There was nothing in this objection. In the first place the minutes of the examination before the clerk do not disclose that the defendants' counsel took any such objection except as to one question respecting the contents of certain correspondence between Briggs and one Tams. Briggs answered that question subject to the objection, but the answer was entirely immaterial and does not affect the matters in issue. So far as certain documents were concerned, counsel for the defendants refused to produce them for reasons stated by him, and the Clerk ruled with him. I think possibly the plaintiff had more reason to complain of that ruling than the defendants had. So far as the clerk's minutes of the examination show the exhibits actually put in at Briggs' examination were put in without any objection whatever. But apart from this there was nothing

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in the objection. The only object of a notice to produce is to enable the party giving it to put in secondary evidence of the contents of a writing if the original, being in the possession of a party to the suit to whom the notice is given, is not produced. If the party chooses to produce the original without notice, or if the person desiring to put in the original gets possession of it and puts it in, it is no objection that a notice to produce was not given. The exhibits in question were not copies, they were originals, so I gather from the clerk's minutes and the examination.

After Briggs' examination was put in, and during the argument of the case upon its merits, a question was raised as to the effect of that testimony, and that was that it was only admissible as against Briggs, and did not affect the other defendants. That question was also raised on appeal, and it, in my opinion, requires careful consideration. The examination of Briggs was taken under Rule 201 of The Judicature Ordinance, and was offered in evidence and received under Rule 224. There can be no doubt that this testimony was admissible as against the defendant Briggs, and I am of opinion that under the rule it was admissible against the other defendants, or, in other words, that it was testimony in respect to the whole case. The defendant Haultain was president, Brown vice-president, Briggs secretary-treasurer, Dennis conductor and manager, and the other defendants members of the committee of management of an unincorporated society known as The Regina Musical Society, which it is alleged infringed the plaintiff's right to represent the piece in question. The object of Rule 201 is for discovery, to obtain from a party to the suit opposed in interest to the examining party evidence, not merely as against the party examined, but for the purpose of the case, and Rule 224, which allows the evidence to be put in, does not limit the effect of such testimony or provide that it may only be put in as against the party examined. Why should it be necessary to recall the party examined and reswear him, and go all over the ground again? *Allan* v.

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Allan[21] was cited on behalf of the plaintiff. It seems to me that it is only important, in so far as the question involved in this case is concerned, in that it establishes that it is not open to the defendants to object to the testimony on the ground that there was no opportunity to cross-examine Briggs on behalf of the other defendants, because Mr. Johnstone appeared at the examination for all the defendants, and was at liberty to cross-examine the witness if he wished to do so. I am not prepared to state what the consequences might have been as to the admissibility of this testimony as against the other defendants if counsel for such defendants had not had an opportunity of cross-examining Briggs. *Saltmarsh* v. *Hardy*[13] was cited for the defendants. That was a suit by a wife against the trustee in bankruptcy of her husband to establish her equity to a settlement. The husband was a party defendant, and filed an answer, in which he admitted a certain statement in the plaintiff's bill. The plaintiff asked to put this admission in as against all the defendants, and counsel for the trustee in bankruptcy objected that it was not evidence against his client. The Lord Chancellor at first was disposed to overrule the objection, but eventually allowed it. He evidently allowed it on the ground that, being an admission, it was only evidence against the party making it, and, moreover, that a party to a suit making an admission in his answer, in the manner the husband had, does not bind himself to the truth of it. He merely submits to have it considered true as against himself for the purpose of the suit. It must be remembered that the testimony of Briggs is not merely an admission by Briggs, it is sworn testimony by him of facts within his knowledge.

Having reached the conclusion that Briggs' examination was admissible, as well against all the defendants as against himself, I am of opinion that the plaintiff establishes a fair *prima facie* case against at least some of the defendants, and that the judgment of the trial Judge ought to be reversed.

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The evidence established that the sole liberty of representation or performance of "The Pirates of Penzance," a dramatic piece or musical composition, of which William Schwenck Gilbert and Arthur Seymour Sullivan were the author and composer, was registered at Stationers' Hall in favour of the author and composer on the 18th August, 1880, and that an assignment of such sole right to the plaintiff was registered there on the 18th December, 1893. These facts were found by the trial Judge and were not disputed at the hearing of the appeal. Briggs testified in substance that he *knew* an opera called "The Pirates of Penzance," and that he had heard an opera called "The Pirates of Penzance" at the town hall in Regina on 27th and 28th December, 1899, which was intended to be the same as the opera which he knew called "The Pirates of Penzance;" although it was not identically the same, and that this opera was so produced at the town hall by the Regina Musical Society. These productions were the infringement complained of. Briggs also produced a programme which he testified was a copy of the programme of the performance given by such society on the occasions referred to, and that programme stated on its face that the programme was of "*Gilbert and Sullivan's Opera,* The Pirates of Penzance." I may remark that Briggs testified that this was "a copy of the programme." I do not understand him to have meant that it was a copy of an original document. We all know that a number of programmes of such performances are printed for the use of the people going to the performance, and circulated among them, and I understand Mr. Briggs to mean that the document put in evidence was a copy of one of those programmes, and therefore it was not secondary evidence. I mention this in view of what I have hereinbefore held as to the admissibility of the testimony. Returning to the effect of the testimony, we have the fact established that the society caused to be published programmes stating that the opera they were performing was Gilbert and Sullivan's Pirates of Penzance. Briggs also produced a poster, which he stated he thought was a poster

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advertising the performance. He did not remember having seen them; he had nothing to do with the advertising, but he knew from the accounts that the performance in question was advertised, and this poster was put in evidence. Now, all this evidence as to the poster was received without any valid objection. The only objection raised, as I have stated, was that no notice to produce had been given. It was not necessary to give a notice to produce in order to enable testimony of that character to be given or put in. I can conceive of a most serious objection to the reception of this poster, but it was not raised before the trial Judge or on this appeal. And I am very strongly of opinion that an objection to the reception of testimony cannot be raised after the case is closed. So we have this poster in evidence. It refers to the performances in question, and states that "The Regina Musical Society" will perform "*Gilbert and Sullivan's* opera, The Pirates of Penzance." We ought to assume that the opera which the society advertised they would perform was the one they actually did perform. In fact, I think the evidence establishes that, apart from any assumption. I have referred to the testimony of and respecting the poster. That testimony might be struck out and the strength of the plaintiff's case not impaired, because the evidence of and respecting the programme would remain with all the inferences to be drawn therefrom. *Lucas* v. *Williams*,[3] was an action for the infringement of copyright in a painting by Marcus Stone. The original picture was not produced in evidence. The alleged infringement was a sale of a photograph of a picture, and at the time of the sale a card was attached to the photograph with the words "Painted by Marcus Stone, R. A." upon it. The Court held that there was evidence in that case for the jury, that the picture which the defendant sold was a copy of the original picture, in respect of which the plaintiff had copyright, and the verdict was sustained. The judgment did not altogether turn upon the fact that the photograph had this card attached to it. In fact, the especial weight was given to other testimony which was given,

but Lord Esher, M.R., in delivering his judgment, stated (see p. 117):—"There was more proof in the present case, because on one of the pictures sold by the defendants were the words, 'Painted by Marcus Stone, R. A.,' which is some evidence of an admission by the defendants that the picture which they sold was a copy of the picture painted by that artist." So, in my opinion, going a step further than Lord Esher, the announcement made by the society in their programmes that the play they put on was Gilbert and Sullivan's opera The Pirates of Penzance, afforded, with the other testimony in the case hereinbefore and hereinafter referred to, strong *prima facie* evidence that it was the piece or composition of which William Schwenke Gilbert and Arthur Seymour Sullivan were the author and composer. Then there was the evidence of Henry Le Jeune, who swore that he *knew* the opera "The Pirates of Penzance," of which W. S. Gilbert and A. Seymour Sullivan were the author and composer, that he had heard and seen performances of it several times, that the first time he heard and saw it it was advertised as by one of the plaintiff's companies about twenty years before the trial, and that he heard and saw the same opera performed in Regina on 28th December, 1899. There was no objection whatever raised to the reception of this testimony, and counsel for the defendants declined to cross-examine the witness. The learned trial Judge commented on the fact that Le Jeune swore that twenty years before he had heard and seen the opera, as advertised by one of plaintiff's companies, and that the plaintiff had only been owner of the right since December, 1893. Le Jeune swore to *about* twenty years before, and there was nothing improbable in it, for one of the plaintiff's companies might have put on the piece by license of the author and composer, who then had the sole right of representation, just as the defendants in this case might lawfully have performed it at Regina if they had complied with the request of the plaintiff's advocates, and paid the royalty they demanded. The trial Judge found for the defendants, because he was of opinion that the evidence of identity fell

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short of compliance with the rule laid down in *Boosey* v. *Davidson*[2] and *Lucas* v. *Williams*[3] above cited. I do not understand *Boosey* v. *Davidson*[2] as laying down any rule as to what evidence is necessary to prove identity between the piece or composition registered and that by which its right of representation is alleged to be infringed. That case turned partly on the question of the admissibility of certain testimony, not upon the effect which that testimony would have had if it had been admitted. The action was brought for the infringement of the plaintiff's copyright in musical pieces taken from Bellini's opera of "La Somnambula." The infringement was by *publishing* the pieces. Bellini was an Italian, and the defendant called a witness who stated that the opera was represented at Milan about March, 1831. The witness was then asked whether he had seen printed copies of some of the airs in "La Somnambula," in the shops at Milan prior to 10th June, 1831? This question was objected to at the trial and rejected on the ground that it amounted to parol evidence of the contents of a written document without accounting for the nonproduction of the original. In other words, that the evidence offered was secondary evidence, and was not admissible for the reasons stated. This ruling was upheld by the Court of Queen's Bench. The same witness testified that before the 10th June, 1831, he had heard persons in society sing parts of the opera in question at a piano with printed music before them as if performing therefrom. (I have extracted this from the judgment of Lord Denman, at p. 177 of the Law Jour. Rep. It is slightly different from what the reporter alleges that the testimony was. I assume that Lord Denman's statement would most likely be correct.) It does not appear from the report in the Law Journal that the admission of this evidence was objected to. The defendant was endeavouring to show that there was a *publication* not *merely* a representation of the opera in question prior to 10th June, 1831, the date of entry at Stationer's Hall. The trial Judge ruled that there was no evidence of such publication. According to the judgment

referred to, "the evidence in question was adduced to show that the printed paper lying before the musical performer had been purchased in the usual way, . . . and also that its contents were the same as those of the work registered by the plaintiff." The Court held that for the then argument it might be assumed that the printed paper lying before the musical performer had been purchased in the usual way, but that "the printed paper itself is the legal evidence of its contents, and that the plaintiff had a right to object that there was no legal evidence of its contents unless it was produced or accounted for." It will be borne in mind that the witness in that case did not inspect the printed paper that was before the performer. His testimony was the same as if some person attempted to prove the contents of a written document, and that they were the same as another document, because he had heard a third person read from the document first mentioned. I can quite understand that evidence of that character, even if admitted without objection, would prove nothing. But, suppose the witness had gone further, and sworn that he inspected and read the printed paper, and that it was the opera in question, and that such evidence had been tendered and received without objection. Would it prove nothing? I am of the opinion that it would amount to evidence of the contents of the paper so inspected and read by the witness. I do not understand the judgment in *Boosey* v. *Davidson* [2] to intend to decide the contrary. If it did, I most respectfully beg leave to dissent from it in that respect. My understanding of this rule has always been that objection to secondary evidence of the contents of a written document must be distinctly stated when it is offered, and if not objected to, it is received and is entitled to proper weight, and the weight to be attached to it will depend upon the circumstances of each case. I think that this is borne out by the text in Roscoe's *Nisi Prius Evidence* (16 ed.) 7, and *Williams* v. *Wilcox* [26] there cited. The rule laid down

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[2] 8 A. & E. 314; 3 N. & P. 606; 7 L. J. Q. B. 229; 1 W. W. & H. 477.

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in that case (L. J. 236) is a safe one, not only for the reasons stated by the same learned Judge (Denman, C.J.), but because it is quite possible if the objection is raised the party offering the testimony may be able to account for the non-production of the original. In *Lucas* v. *Williams*[2] the evidence in question there was objected to when tendered. The evidence was received, and at the argument it was urged that the evidence ought not to have been received, because it was secondary evidence, but the court held that it was properly received, because it was original evidence. While I am not prepared to hold that the testimony of Briggs or Le Jeune is of the same character as that in *Lucas* v. *Williams*,[3] I am inclined to think that the trend of that case is more favourable to the plaintiff than to the defendants in the case now under consideration. It is certainly in favour of the plaintiff in that it establishes that it is not necessary in every case to produce the original of the book, piece, composition, or picture the copyright or sole right of representation of which is registered at Stationer's Hall. Giving the weight to the evidence of Messrs. Briggs and Le Jeune to which it is entitled, it having been received without objection, and to the exhibits produced by Mr. Briggs, to which I have already referred, I have come to the conclusion that the opera performed at Regina was the piece or composition of which the plaintiff had the sole right of representation. That the Regina Town Hall was a "place of dramatic entertainment" within the statute is beyond question. Tickets for admission of the public were sold. The hall was, therefore, used for the public representation for profit of the opera, and comes within the decision in *Russell* v. *Smith*.[10]

The next question which arises is how many and which of the defendants are liable. The evidence establishes that the performance complained of was produced and put on by The Regina Musical Society, before referred to. There can be no doubt as to the liability of the defendants Dennis, Brown, Briggs, Hamilton, Martin, Napier, Balfour, and Pocklington. That is, assuming there was any liability by

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any person, because they took an actual part in the performance, and this was practically conceded by the defendants' counsel. I am of opinion that there is also evidence to fix the liability of the defendant Goggin. While it is true that there is no evidence to establish that he took an actual part in the performance, the evidence of Briggs establishes that Mr. Goggin was a member of the executive committee of the society, or committee of management; that a meeting of such committee was held, at which he and others were present, when it was decided that the society should take up "The Pirates of Penzance;" that the productions in question were the result of that decision, and that *all* who were present agreed to the proposition. Then, at a meeting on 29th September, 1899, Mr. Goggin was present and seconded a resolution: "That the secretary be instructed to write to Tams, of New York, regarding "rent of orchestral and vocal scores." This resolution was carried, and Briggs swore that that resolution referred to renting orchestral and vocal scores of the opera in question for the performance thereof in December (the time when the performances complained of were had). Then, as appears by the minutes, Mr. Goggin seconded a resolution "That Messrs. Pocklington, Balfour, and Hamilton be a stage committee." This was also carried, and evidently has reference to the same performances. This sufficiently fixes Mr. Goggin with taking an active part in procuring the representation to be performed, and the plaintiff's rights infringed. I am also of opinion that there was evidence sufficient to fix the liability on the defendant Hogg, although it is not so strong as that to which I have referred as fixing the liability on the defendant Goggin. Mr. Hogg was a member of the executive committee, and, while there is no evidence that he was present at the meeting of that committee which resolved to put the performance on the stage, he was present at a meeting of the committee on 15th November, and seconded a resolution "That Mr. Dennis be authorized to procure the necessary coats 'for policemen

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and wigs.'" This was carried, and Mr. Briggs swore that it referred to costumes to be used in the productions in question. That is, in my opinion, sufficient to fix his liability. I have some doubts whether there is sufficient evidence to fix liability on the defendant Haultain. While it is true that he was president of the society, there is no evidence to show that he was present at any meeting which authorized the production or performance of the opera, or at which any action was taken or had respecting its production or performance. In fact, the evidence is rather the other way, that he took no part in the performance or its production. It is true that he was present at a couple of rehearsals, and took part in the chorus thereat, but, as the other members of the court are of opinion that this is sufficient to fix his liability, my doubts are not sufficient to warrant my dissenting. I can discover no evidence whatever to fix liability on the defendant Fraser.

It is not necessary to support this action, for the plaintiff to prove registration under "The Copyright Act" (R.S. C. c. 62), the Imperial Act, 5 & 6 Vict. cap. 45, applies to Canada by express enactment. The Dominion Act has no provision relating to the right to dramatic representation, and, moreover, the reasonings of the learned Judges in *Smiles* v. *Belford*,[14] appear to me as quite conclusive, so far as the question is concerned. As to the question of damages and costs, I am of opinion that the Imperial Act, 51 & 52 Vic. c. 17, applies to this country, and that the damages should be for such an amount as this Court considers reasonable, and that the costs should be in the discretion of the Court.

The judgment of the trial Judge should be reversed, and judgment entered in the Court below against all the defendants, except the defendant Fraser, for thirty-five dollars ($35.00) damages and costs, and that the defendants, except Fraser, should be restrained by injunction order from representing or causing to be represented without the authority or consent of the plaintiff or of his assigns, the said musical composition or comic opera called "The Pirates

of Penzance" during the term of the sole right of representation therein, and that the said defendants, except Fraser, pay to the plaintiff his costs of this appeal. Under the circumstances there will be no costs to the defendant Fraser either here or in the Court below. The costs paid by or on behalf of the plaintiff to the defendants' advocate to be repaid by the defendants. Judgment. Wetmore, J.

McGuire, J.—The plaintiff appeals from the judgment of Mr. Justice Richardson, dismissing the plaintiff's action brought to recover damages for infringement, by the defendant, of what is described in the statement of claim as his copyright in the musical composition or comic opera called "The Pirates of Penzance," but which would be more accurately described as an infringement of his sole right of representation or performance of said opera, on the 27th and 28th of December, 1899, at Regina.

The plaintiff claims that he is the proprietor of the sole right of representation or performance of said dramatic piece or musical composition by virtue of an assignment by the authors, Messrs. Gilbert and Sullivan, that such right extends to Canada, and that the defendants infringed his said rights by representing and performing said opera at a place of dramatic entertainment at Regina on the dates mentioned without his license or consent. The defendants deny the assignment, that the said musical composition was copyrighted, and the alleged infringement, and object that the statement of claim does not disclose any cause of action, because it does not show where the alleged copyright was obtained or how it was assigned or that the assignment was registered, or that the representation complained of was for profit. At the trial the plaintiff put in a certified copy of the entry in the book of registry of copyrights and assignments kept at the Hall of the Stationers' Company pursuant to Act of Parliament, 5 & 6 Vic. (Imp.) c. 45, being the original entry by the authors, W. S. Gilbert and Arthur S. Sullivan, on August 18, 1880, of a "dramatic piece or musical composition," the title of which was "The

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Pirates of Penzance, or The Slave of Duty—Comic Opera," and the first representation or performance of which was at the "Bijou Theatre, Paignton, Devon, on 30th December, 1879;" also a certified copy of an entry in said book on December 18th, 1893, of an assignment of the sole liberty of representation or performance of said opera, described as in the above entry, from said Gilbert and Sullivan to the plaintiff for, among other places, Canada. These copies had underwritten certificates duly signed and stamped by Charles Robert Risington, describing himself as "Registering Officer appointed by the Stationers' Company," pursuant to s. 11 of said Act, 5 & 6 Vic. c. 45. By said section the said book of registry is required to be kept at said hall, and the officer appointed by said company is authorized to give a copy of any entry in said book certified and impressed with the stamp of said company, and it further makes such certified copy *prima facie* proof of the proprietorship or assignment of copyright or license as therein expressed, and in the case of dramatic pieces or musical compositions it shall be *prima facie* proof of the right of representation or performance. The learned Judge in the judgment appealed from found that the production of the certified copies above mentioned established the plaintiff's right to bring his action for any unauthorized representation or performance of said opera, and nothing was shown in the argument before this Court to affect the correctness of such finding.

The learned Judge, however, dismissed the action on the sole ground that the evidence was not sufficient to establish the identity of the composition to which the certificates relate with the opera shown to have been performed by the defendants. The evidence before him on that point was that of Mr. LeJeune, given orally at the trial. He swore that he knew the opera "The Pirates of Penzance," author and composer W. S. Gilbert and A. Seymour Sullivan — had heard and seen the performance several times. First time was about twenty years ago—when it was advertised as by one of the plaintiff's

companies—that he last saw it performed on 28th December, 1899, in Regina, and that the performance in Regina was the same he had heard and seen twenty years ago, and he mentions that the defendant Dennis was the conductor of the representation, and that the defendants Brown, Briggs, Hamilton, Napier, Balfour and Pocklington took part in the performance on 28th December, 1899. This witness was not cross-examined by the defendants' advocate. The learned Judge took the view that this evidence "falls far short of compliance with the rule laid down in *Boosey* v. *Davidson*[2] and *Lucas* v. *Williams*,[3] and is insufficient to raise the presumption of identity on which the plaintiff's case depends." In *Boosey* v. *Davidson*[2] the evidence relied on was that of a man who asserted that some sixteen years before he had seen in Milan a printed copy of the music in question, which statement, if sufficient, would have destroyed the plaintiff's copyright on the ground of prior publication in a foreign country. It was pointed out in the judgment there that this evidence was an attempt to prove by oral evidence the contents of a document alleged to be in existence sixteen years before. In the present case there is no evidence offered as to the contents of any document or book. Mr. LeJeune says he heard and saw something performed and that that something was the comic opera named in the plaintiff's statement of claim. The performance would be something appealing both to the eye and the ear—to the ear by words sung or spoken and with orchestral accompaniment, to the eye by the scenery and costumes and by the dramatic action of the players. Some at least of this could not well be printed or written, and there is no evidence that what Mr. LeJeune speaks of ever was so printed or written. He is not speaking of the score or music from his recollection of seeing the same on paper. He says he heard and saw this opera performed several times. Then he says he heard and saw the opera that was performed in Regina Town Hall on 28th December last, and he says the opera so performed was the same as the opera he had seen and heard on the previous

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occasions. Given, a witness with good memory, a trained ear for music, a familiarity with that class of performance and a faculty for observation, the testimony of such a one might be much more satisfactory evidence than the attempted record on paper of so much of such a performance as is capable of being represented to the eye alone on paper. It seems to me that the rule rejecting the oral testimony of a witness as to the contents of a document he had read does not apply here at all. What is sought to be proved in this case is not the contents of any book or document, but the resemblance or identity of two performances, partly verbal, partly musical and partly made up of dramatic action, gesture and facial expression. It is quite possible that the argument of the case before the learned trial Judge was less full than it was before this Court, and especially would more emphasis be laid by the counsel for the plaintiff, on the argument of this appeal, upon the point on which the judgment in the Court below was adverse to him. The learned Judge was possibly of opinion that by the copyright law in England a copy of the dramatic piece or musical composition was required to be delivered at the British Museum under section 6 of 5 & 6 Vic. c. 45, or at the Stationers' Company's Hall, under section 8. These sections, however, speak only of books, and the opera in this case comes within not the definition of a "book" but of a "dramatic piece." By section 20 the "provisions hereinbefore enacted in respect of the property of such copyright and of registering the same shall apply to the liberty of representing or performing any dramatic piece or musical composition . . . except that the first representation or performance of any dramatic piece or musical composition shall be deemed equivalent . . . to the first publication of any book." The provisions as to "property" are in section 3, and as to "registering" in section 11. This latter section, it will be noted, does not make registration compulsory—"a register wherein may be registered, etc." It is section 24 which makes registration necessary, but only in the case of copyright in books by making it a condition precedent to

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bringing an action for infringement. Section 20, it will be remembered, speaks of "provisions . . . hereinbefore" which obviously does not include the provisions of section 24. This latter section, however, expressly (though possibly with superfluous caution) provides that nothing herein shall prejudice the remedies which the proprietor of the sole right of representing any dramatic piece shall have "by virtue of 3 & 4 Wm. IV. c. 15, although no entry shall be made in the book of registry aforesaid." There is, therefore, no statute requiring the delivery at the British Museum or elsewhere of a printed copy of a dramatic piece or musical composition. If there ever was, therefore, anything which could be called an original (in print or manuscript) of the "Pirates of Penzance" it was the manuscript scores furnished by Messrs. Gilbert and Sullivan respectively. Will it be argued that such original must be produced on every trial for infringement of the proprietor's rights? There is by statute no means provided whereby a certified copy of such original could be obtained. There are, it is true, the provisions in sections 8 and 13 qualified by section 20, that certain entries may be made in the book there mentioned, and that certified copies thereof shall be *prima facie* proof of the right of representation of dramatic or musical pieces.

It comes, then, so far as LeJeune's evidence is concerned, to a question of whether it is such as to be entitled to any appreciable weight, for—as there was no attempt to deny, by any evidence tendered for the defence, that the two performances were identical with each other, and with the one referred to in the certificate from the Stationers' Company—the plaintiff must succeed on the question of identity if LeJeune's testimony is entitled to rank as at least *prima facie* evidence of the fact. I do not understand that the learned Judge at the trial rejected Mr. LeJeune's evidence on the ground of being of no weight. He thought he was governed by the decision in *Boosey* v. *Davidson*[2] and *Lucas* v. *Williams*.[3] As already pointed out, I do not think the former case was parallel to this one, and as to *Lucas* v.

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Williams,[3] it seems to me a fairly strong case for the plaintiff. In that case there was an original painting in existence, yet a witness was allowed to use an engraved copy of it, and to speak from memory of the picture, and to say that the photograph complained of as an infringement was a bad photograph of the engraved copy of such original painting. In that case, it is true, one of the two things between which the plaintiffs sought to prove a sufficient resemblance to constitute an infringement was in Court, i.e., the infringing photograph, but if it was allowable to speak from memory as to one of the two things compared—the painting itself—it is only carrying the principle one step further to allow the witness to speak from memory of the other subject of comparison. The Master of the Rolls, in fact, discusses this very proposition, but for an obvious reason, does not actually decide the point. He says: "Supposing that neither the alleged copy nor the original picture was produced. It is not necessary now to say, and I do not say that it would not be sufficient to call a witness who had seen both to say that they were exactly alike. . . . I do not know that it is necessary to produce either the original picture or the alleged copy."

Lopes, J., said: "I am of opinion that in an action like this you may call a witness to prove the infringement by saying that he knows the original picture, and that the alleged copy is exactly like it. That is not secondary evidence." So far as the evidence of the witness is concerned, it would seem immaterial whether or not he had the copy before him at the moment of expressing his belief in their similarity—its production could only be of advantage (if any) in enabling the jury to see it and compare it with the description given of the original. But that would, as pointed out in *Lucas* v. *Williams*,[3] affect only the weight of the evidence.

It may be remarked that the language just quoted from *Lucas* v. *Williams*,[3] and particularly that of Lopes, J., is quite in point in this case. LeJeune is a witness called "to prove the infringement by saying that he knows the

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original, and that the alleged infringing performance was exactly like it. That is not secondary evidence."

As to the proof of identity between the performances LeJeune saw twenty years ago and what is spoken of in the entries in the book of Stationers' Hall, I think the identity of the rather peculiar name of the piece—of the authors—of there being two authors—and of the time of its performance and that by one of the plaintiff's companies—and that no two different pieces could be registered under the same name—all amount to sufficient to shift the onus to the defendants of showing want of identity.

But there was other evidence produced by the plaintiff, the examination on oath of the defendant Briggs, who says he was secretary of the society to which the defendants belonged, and who undertook the representation which constitutes the alleged infringement. Before further considering his evidence it is necessary to deal with the objection that Briggs' evidence taken on examination and not at the trial, would bind only himself, and not his co-defendants. Rule 224 of the Judicature Ordinance says: "Any party may at the trial of an action or issue . . . use in evidence any parts of the examination of the opposite party." There is nothing here limiting it to use against himself. The Judicature Ordinance permits the cross-examination of such a party after his examination in chief—and Briggs was, in fact, cross-examined by Mr. Johnstone, who was the advocate for all the defendants, and who all joined in their defence. I have found no case to support the contention that the use of Briggs' examination would be admissible only as against himself. The decision in *Allen* v. *Allen and Bell*[21] contains language that shows the test to be whether the other defendants or their counsel had the opportunity to cross-examine the witness. If they were denied that privilege, then the evidence given by a co-defendant ought not to be used against them. In the Allen case, if counsel for Bell had been allowed to cross-examine Mrs. Allen, her evidence would have been held usable as

Judgment. against him, but as the trial Judge refused him such privi-
McGuire, J. lege her evidence ought not to have been used against him. Here, as we have seen, the defendant could have been cross-examined on behalf of his co-defendants by their common counsel, and he was in fact so examined. His interest was identical with that of the other defendants. There is no suggestion that he was otherwise than friendly to them, and he was the secretary of the dramatic society. I am of opinion that this evidence was admissible against all the defendants.

That being so, I think there was ample evidence to show that the opera produced was the one mentioned in the certificates put in. Exhibit W to Briggs' examination (the programme) sets out that the performance was by the Regina Musical Society, to which he says all the defendants belonged, says it is a "performance of Gilbert and Sullivan's opera 'The Pirates of Penzance,'" and sets out the names of all the defendants as officers of the society as taking part in the performance. Exhibit X to Briggs' examination is the poster advertising the performance, and is also spoken of by Mr. LeJeune. It also represents the opera as being produced by the Regina Musical Society, and that it is Gilbert and Sullivan's "with full cast, chorus and orchestra." Mr. Briggs in his evidence says he knows the comic opera called "The Pirates of Penzance," that it was produced in the Regina Town Hall on 27th and 28th December, 1899, by the Regina Musical Society, and that he thought none of the prominent parts or features of the opera were omitted in the performance in question. "Was it practically the same? It was intended to be the same." (Briggs' examination.) I think this was ample evidence, uncontradicted as it was, to entitle the plaintiff to succeed.

The Regina Town Hall was, I think, unquestionably a place of dramatic entertainment—on the occasions referred to at least—the performances being public and in no sense private or domestic: *Duck* v. *Bates*.[9]

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Smiles v. *Bedford* [14] is a decision that 5 & 6 Vic. c. 45 is in force in Canada, and was not repealed by the Canadian Copyright Act of 1875. Chapter 62 of R. S. C. does not make any provision as to sole right of representation or performance.

As to the damages, Briggs' evidence shows that the net proceeds of the entertainments was $50.89. 3 & 4 Wm. IV. c. 15, s. 2, provides that the damages shall be forty shillings for each representation, or the full amount of the benefit or advantage arising from such representation or the injury or loss sustained by the plaintiff, whichever shall be greater. There is no evidence as to what the injury or loss sustained by the plaintiff was, but the pecuniary benefit arising from the performance was $50.

This Act was amended by 51-2 Vic. c. 17, making the damages in the discretion of the Court or Judge, so that they "be reasonable." The costs also are left in the discretion of the Court. Double and treble costs were abolished by 5 & 6 Vic. c. 97.

The Act 51-2 Vic. c. 17 is, I think, in force here. The Act 3 & 4 Wm. IV. c. 15 extended to Canada by its terms, and is in force here not by virtue of the North-West Territories Act. That being so, amendments or changes made since 1870 are to be observed here. It appears on evidence that the license fee demanded by the plaintiff would have been $35. I think the verdict should be for that amount in favour of the plaintiff.

I think there is evidence implicating all the defendants except the defendant Fraser, who does not seem to have taken any part in causing the alleged infringing representation, nor at the rehearsals nor in the representations themselves, and judgment should not be against him. The formal judgment should, therefore, be in accordance with the judgment in this Court of my brother WETMORE just read.

ROULEAU and SCOTT, JJ., concurred.

Appeal allowed with costs.

REPORTER:

Ford Jones, advocate, Regina.

LAMONT v. THE CANADIAN PACIFIC RAILWAY CO.

C. P. R. Co.—Service upon—Judicature Ordinance, sec. 14 (3) and Dominion Statutes of 1881, cap. 1, Schedule A, sec. 9.

44 Vic. (1881) c. 1, intituled "An Act Respecting the Canadian Pacific Railway Company," Schedule A. s. 9 (†), providing for a place of service in each Province or Territory, is special legislation, and is mandatory and not merely permissive, and, therefore, *quoad* the C. P. R. Co., overrides the general provisions as to service of sec. 14 (3) of the Judicature Ordinance.

Judgment of McGUIRE, J., reversed.

[McGUIRE, J., *May 7th, 1900.*]

[*Court in banc, March 7th, 1901.*

Statement. The cause of action arose in the Territories. The writ of summons was served upon the defendants' station agent at Prince Albert. The defendant, under the provisions of section 9 of Schedule A of chapter 1 of 1881, had by by-law appointed the office of the company at Regina as the place where service of process might be made on it in respect of any cause of action arising within the Territories, and had on August 28th, 1883, deposited a duly-authenticated copy

(†) "The chief place of business of the Company shall be at the city of Montreal, but the Company may, from time to time, by by-law, appoint and fix other places within or beyond the limits of Canada at which the business of the Company may be transacted, and at which the directors or shareholders may meet, when called as shall be determined by the by-laws. And the Company shall appoint and fix by by-law, at least one place in each Province or Territory through which the railway shall pass, where service of process may be made upon the Company, in respect of any cause of action arising within such Province or Territory, and may afterwards, from time to time, change such place by by-law. And a copy of any by-law fixing or changing any such place, duly authenticated as herein provided, shall be deposited by the Company in the office, at the seat of Government of the Province or Territory to which such by-law shall apply, of the clerk or prothonotary of the highest, or one of the highest, courts of civil jurisdiction of such Province or Territory. And if any cause of action shall arise against the Company within any Province or Territory, and any writ or process be issued against the Company thereon, out of any Court in such Province or Territory, service of such process may be validly made upon the Company at the place within such Province or Territory so appointed and fixed; but if the Company fail to appoint and fix such place, or to deposit, as hereinbefore provided, the by-law made in that behalf, any such process may be validly served upon the Company, at any of the stations of the said railway within such Province or Territory."

of said by-law with the Clerk of the Supreme Court for the Judicial District of Western Assiniboia. Statement.

The defendant moved before McGUIRE, J., in Chambers, to set aside the service of the writ of summons.

[*May 7th, 1900.*]

McGUIRE, J.—The defendants took out a summons calling on the plaintiff to shew cause why the service of the writ of summons in this action should not be set aside because made on the station agent at Prince Albert on the ground that service could validly be made in the Territories only at Regina, the place appointed and fixed by a by-law of the defendants, "where service of process may be made upon the company" pursuant to s. 9 of c. 1 of Dominion Statutes of 1881.

Assuming, as alleged, that such by-law was passed, and that the provisions of the section were complied with so as to make Regina a place in the Territories where process issued out of a Court in the Territories for a cause of action arising therein may be served, the question then comes up, is service elsewhere, and which, but for said section 9, would be a good service on the defendants, invalid?

Our Judicature Ordinance has in section 14, sub-s. 3, provided that in the case of corporations the service of process may be made upon a number of persons, among these being an "agent or other representative, by whatsoever name or title he be known, of such corporation, or of any branch or agency thereof in the Territories," and there is the further provision, "that every person who within the said Territories transacts or carries on any business of or for any corporation whose chief place of business is without the Territories, shall for the purposes of being served with a writ of summons, etc., be deemed an agent thereof."

It was not disputed by the defendants that if section 9 of the Dominion Act did not apply, the station agent at Prince Albert would be an agent of the defendants within the meaning of the Judicature Ordinance, and service upon

Judgment. McGuire, J.

him would be valid, nor was it questioned that the Territorial Legislature had jurisdiction to provide for the mode of service of writs so long as it did not conflict with Federal legislation. Is said section 9 to be construed as making *Regina the only* place where service can be validly effected? If that is the true reading of the section, then, notwithstanding the conflict with the section referred to of the Judicature Ordinance, the former must prevail because all Territorial Ordinances are "subject to any Act of the Parliament of Canada" (s. 13, N. W. T. Act).

The language of section 9 (c. 1, 1881) seems to me to be permissive. The company "shall appoint and fix at least one place in each Province or Territory where service of process may be made upon the company," in certain cases. And if the company does so fix such place and comply with the other requirements of the section, then, in the cases provided for, "service of such process *may* be validly made upon the company" at that place, but if the company shall fail to fix such place as provided, then, "any such process *may* be validly served upon the company at any of the stations of the railway within such Province or Territory." If two sections of the same or different Acts dealing with the same subject can be read together, without conflict, then they should be so read so as to give due effect to both. The Dominion Act nowhere says that service in the Territories *must* be at the place, if any, so fixed by the company's by-law; it merely, as I take it, says that service *may* be validly made there.

In *Tytler* v. *C. P. R.*,[1] at p. 659, Meredith, J., seems to take the same view when he says: "But the words relied upon are merely enabling, they must be served in the manner provided for, not they must be served in that manner only." It seems to me that if Parliament had intended to restrict service within any Province to the place therein duly fixed by by-law of the company the language employed would

[1] 29 O. R. 654.

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McGuire, J.

and could easily have so indicated. The permissive word "may" is used twice, first in declaring the purposes of the by-law which the company are required to pass, "where service of process *may* be made upon the company," and again in declaring that upon the due appointment of such place, "service of such process *may* be validly made there." The only thing in the Act which seems to lend colour to the defendants' contention is the provision, in case of default, in duly fixing a place in the Province where service may be made, that the service may be made "at any of the stations of the company within such Province, etc." It may be said that this is useless if our Ordinance applies whether a place has been fixed or not. I have not considered whether there may not be cases where the last cited provision of the Act would make good a service which would not be good under the Judicature Ordinance, or vice versa. Had our Legislature not dealt with the subject facilitating service as it has done, then the Federal provision might be valuable. There is nothing in the Act saying that service can be effected at any station *only* in case of default by the company in fixing a place. Parliament is not, without necessity, at least, to be presumed to have meant more than it has said, and assuming that reasons may exist in some cases for extending the language employed, I can see no reason for so doing here. The statute says that, given a place duly fixed by by-law, all services there are valid. The defendants contend that this universal affirmative has as a logical converse—the proposition "all valid services must be there." It is elementary that a universal affirmative has no logical converse, otherwise this argument would be good—all horses are quadrupeds, therefore all quadrupeds are horses.

The summons will be discharged with costs to be paid by the defendants.

The defendant appealed. The appeal was argued December 3rd, 1900.

Argument.

H. A. Robson, for appellant:—The defendant having, pursuant to section 9 of Schedule A of c. 1 of 1881, by by-law fixed Regina as the place in the North-West Territories where service of process might be made upon the company in respect of any cause of action arising within the Territories, and having deposited a duly-authenticated copy of such by-law in the office of the Clerk of the Court at Regina, the seat of Government of the Territories, the mode of service on the defendant company of writs of summons in respect of causes of action arising within the Territories is restricted to service at the place so appointed. By s. 2 of c. 1 of 1881 the defendant's charter, having been duly published in the Canada Gazette, has the same force and effect as if it were an Act of the Parliament of Canada. Clause 3 of Rule 14 of "The Judicature Ordinance" does not apply, (1) because s. 9 of Schedule A of c. 1 of 1881 is special legislation, and excludes the application of such general legislation whether passed before or after the special legislation, and (2) because s. 9 of Schedule A of c. 1 of 1881 is, as to the defendant, inconsistent with clause 3 of Rule 14, and being Dominion legislation is, therefore, paramount. Clause 4 of s. 12 of Ordinance No. 4 of 1878 is of exactly the same effect as Clause 3 of Rule 14. Parliament must be presumed to have known, when passing c. 1 of 1881, the state of the law: Maxwell on Statutes, p. 30; Endlich on Statutes, par. 29, 53; *Ex parte Kent County Council.*[2] The special legislation overrides the general: Thompson on Corporations, vol. 6, p. 5961; *Fitzgerald* v. *Champneys*,[3] *Thorpe* v. *Adams*,[4] *The Queen* v. *Champneys*,[5] *Dodds* v. *Shepherd*,[6] *In re Smith's Estate*, *Clements* v. *Ward*,[7] *Ex parte Attwater*, *In re Turner*,[8] *Yarmouth Corporation* v. *Simmons*.[9] The

[2](1891) 1 Q. B. 725; 60 L. J. Q. B. 435; 65 L. T. 213; 39 W. R. 465; 55 J. P. 647. [3]30 L. J. Ch. 777; 2 J. & H. 31; 7 Jur. (N. S.) 1006; 5 L. T. 233; 9 W. R. 850. [4]L. R. 6 C. P. 125; 40 L. J. M. C. 52; 23 L. T. 810; 19 W. R. 352. [5]L. R. 6 C. P. 384; 40 L. J. C. P. 95; 24 L. T. 181; 19 W. R. 386. [6]1 Ex. D. 75; 45 L. J. Ex. 457; 34 L. T. 358; 24 W. R. 322. [7]35 C. D. 589; 56 L. J. Ch. 726; 56 L. T. 850; 35 W. R. 514; 51 J. P. 692. [8]5 Ch. D. 27; 46 L. J. Ch. 41; 35 L. T. 682; 25 W. R. 206. [9]10 Ch. D. 518; 47 L. J. Ch. 792; 38 L. T. 881; 26 W. R. 802.

Argument.

special method of service must be followed unless service cannot be effected in that manner: *Evans* v. *Dublin and Drogheda Ry. Co.*[10] "If" or "when" in a stipulation usually creates a condition precedent: *Bromfield* v. *Crowder*,[11] *Festing* v. *Allen*,[12] *Duffield* v. *Duffield*, correctly *Duffield* v. *Elwes*,[13] *Jolly* v. *Hancock*.[14] The provisions of s. 9 exclude all other provisions as to service which might otherwise be applicable: *Ex parte Vicar and Churchwardens of St. Sepulchres, In re Westminster Bridge Act, 1859*,[15] *London, Chatham & Dover Ry.* v. *Wandsworth Board of Works*,[16] *Ont. R. W. Co.* v. *C. P. R.*[17] *Tytler* v. *C. P. R.*[1] is distinguishable, as there the cause of action arose in British Columbia, and the action was brought in Ontario, so that the case did not come within s. 9. Territorial legislation is expressly subject to Dominion legislation, whereas Ontario legislation is not. Territorial legislation is inoperative where it is inconsistent with Dominion legislation: *Re Claxton*,[18] *Massey* v. *McCormick*.[19]

Hamilton, Q.C., for respondent:—Clause 3 of Rule 14 of "The Judicature Ordinance" is not *ultra vires* of the Legislative Assembly—N.-W. T. Act, sec. 13 (10). Sec. 9 of schedule A of chap. 1 of 1881 is permissive, and not mandatory—*Tytler* v. *Can. Pac. Ry. Co.*[1] Clause 3 of Rule 14 of The Judicature Ordinance, and sec. 9 of schedule A of chap. 1 of 1881 can and should be read together without conflict, so as to give due effect to both—Endlich on Interpretation of Statutes, pp. 237 and 71.

[*March 7th, 1901.*]

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE, and SCOTT, JJ.) was delivered by:

WETMORE, J.—A Chamber summons was granted in this case by my brother MCGUIRE to set aside the service of the

[10]14 M. & W. 142; 3 Rail. Cas. 760; 2 D. & L. 865; 14 L. J. Ex. 245; 2 Jur. 474. [11]1 B. & P. N. R. 313. [12]12 M. & W. 279; 13 L. J. Ex. 74. [13]3 Bligh (N. S.) 260; 32 R. R. 70. [14]22 L. J. Ex. 38; 7 Ex. 820; 16 Jur. 550. [15]33 L. J. Ch. 372; 4 DeG. J. & S. 232; 3 N. R. 594; 10 Jur. (N. S.) 298; 9 L. T. 819; 12 W. R. 499. [16]42 L. J. M. C. 70; L. R. 8 C. P. 8. [17]14 O. R. 432. [18]1 Terr. L. R. 282. [19]N. W. T. Rep., vol. 2, No. 1, 1.

Judgment.

Wetmore, J.

writ of summons on the defendants on the ground that such service was not effected in accordance with the provisions of cap. 1 of 44 Vic. (1881) entituled "An Act respecting the Canadian Pacific Railway." On the return of the Chamber summons, the learned Judge dismissed the application with costs, and from this order the defendants appealed. The writ of summons was served on one Davidson, the defendants' station agent at Prince Albert. The defendants, under the provisions of sec. 9 of the schedule A to the Act of 44 Vic. before referred to, had by by-law appointed and fixed the office of the company at Regina as the place where service of process might be made on it in respect of any cause of action arising within the North-West Territories, and had on the 28th August, 1883, deposited a copy of such by-law, authenticated by the secretary of the company, under seal, with the Clerk of the Supreme Court for the Judicial District of Western Assiniboia. I assume the making of the by-law referred to, and the depositing of a copy of the same, duly authenticated, with the proper officer, to be conceded, because no contention was raised to the contrary at the argument of the appeal or by the respondent's factum. I also, for the same reason, assume it is conceded that the cause of action herein arose within the North-West Territories. The service on Davidson was made under the provisions of Rule 14, paragraph 3, of The Judicature Ordinance (Con. Ord., cap. 21), and the learned Judge held the service to be a good service on the defendants under that rule. The defendants appeal on two grounds:—

1. That *quoad* the defendant company, paragraph 3, of Rule 14 is *ultra vires* the Legislative Assembly, because it is inconsistent with the provisions of sec. 9 of the Act before referred to.

2. That this sec. 9 is special legislation providing the mode of service of process on the defendant company. That the legislation was made by an authority having power to legislate on the subject, that such mode of service must be followed, and that paragraph 3 of Rule 14 of the Ordinance

was not applicable by reason of the maxim "*Generalia specialibus non derogant.*" Judgment. Wetmore, J.

It was argued on behalf of the plaintiff:—

1. That the paragraph of the rule is not so *ultra vires.*

2. That section 9 of the Act is merely permissive, or enabling; that while it provided a mode of service on the company, it was quite competent for the Legislative Assembly to provide another mode.

I have presented all the questions which were argued before this Court.

I express no opinion with respect to the question of *ultra vires* of paragraph 3 of the rule. It is not necessary for me to do so, in view of the conclusion I have reached upon the other objection.

I have with very great reluctance arrived at the conclusion that the other ground of objection raised by the appellant is fatal to the service of the writ. I cannot escape the conclusion that the sec. 9 of 44 Vic. is special legislation, and I cannot bring my mind to the conclusion that the provisions therein contained respecting the service of process are merely permissive and enabling. In the first place, at the time that section was enacted there were provisions in force in the Territories under which, apart from such section, service of process could have been made on the company. I refer to paragraph 4 of sec. xii. of The Administration of Civil Justice Ordinance, 1878 (No. 4 of 1878), which is almost word for word identical with paragraph 3 of Rule 14. I do not think that I am mistaken in stating that there were similar provisions in every Province of Canada through which the proposed railway was to pass, for service of process upon corporations, all of which were more simple and more convenient for the plaintiff as regards the manner of service than what is provided in sec. 9 of the Act. Lord Blackburn in *Young* v. *The Mayor of Royal Leamington Spa* [20] lays down the following:—"We ought in general,

[20] 8 A. C. 517; 52 L. J. Q. B. 713; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660.

Judgment.
Wetmore, J.

in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law." And in *ex parte County Council of Kent*[2] Lord Halsbury says:—"We think the Legislature must be taken to have been aware of the state of the law as pronounced by the House of Lords in 1878." We must assume, therefore, that when the Parliament of Canada enacted section 9 of the Act of 1881 it was aware of the state of the law as to service of process on corporations. Where, then, was the necessity for this section as a mere enabling provision? Then, take the provisions of the section itself whereby, if the company failed to appoint and fix a place for service or to deposit a copy of the by-law, service might be made in another prescribed manner. It seems to me that, under that section, service in this other prescribed manner could only be made when there was a failure to fix a place by by-law, and then as contemplated by the section, it could only be made in the manner so prescribed. Moreover, we have the fact that this Act, 44 Vic., cap. 1, is a special Act relating to the defendant company. All these considerations are, to my mind, utterly irreconcilable with the idea that the section in question is merely enabling or permissive. The plaintiff relied very strenuously upon the judgment of Meredith, J., in *Tytler* v. *The Canadian Pacific Railway Company*,[1] at page 659, who, referring to the same section 9, lays it down:—"But the words relied upon are 'merely enabling, they (i.e., the process), *may* be served in the manner provided for, not that they must be served in that manner only." And my brother McGUIRE also quotes this opinion with approval. I am unable to agree with it. It will be observed that that case was carried to appeal,[21] and, while the appeal was dismissed, the judgment of Meredith, J., was not sustained on the ground of the section being merely enabling, but because the case did not come within the section, as the cause of action did not arise within the Province of Ontario, but in the Province of British Columbia. (I draw attention to the wording of

[21]26 O. A. R. 467.

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the section in this respect.) Members of the Court threw out a suggestion that possibly the section might be *ultra vires* the Parliament of Canada. I have no hesitation in saying that, so far as Ontario and the other provinces of Canada originally confederated under The British North America Act are concerned, this suggestion is worthy of the most serious consideration. But it will serve no purpose to consider it, so far as this appeal is concerned, because beyond all question, in so far as the North-West Territories are concerned, Parliament has full powers of legislation in respect to all matters affecting the Territories. The provisions of the section 9 of 44 Vic., cap. 1 are, therefore, in my opinion, special. Those of paragraph 3 of Rule 14 of the Ordinance, and all antecedent provisions of the same character in the Ordinances respecting the administration of justice passed by either the North-West Council or the Legislative Assembly are general, and, in my opinion, the maxim "*Generalia specialibus non derogant*" applies. There are a number of cases which deal with the application of that maxim. It will be sufficient for me to refer to the last case I can find on the subject. Lord Hobhouse, in delivering the judgment of the Judicial Committee of the Privy Council in *Barker* v. *Edger*,[22] at p. 754, lays it down:— "When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly." I am of opinion that the general enactment in question does not interfere with the special provisions. On this point I draw attention to *Palmer* v. *Caledonian Railway Company*,[23] as being in one branch of it of a somewhat parallel character. Having reached the conclusion that the provisions of this section 9 are special, I have no doubt that, in view of the powers of Parliament to legislate with respect to the Territories, they would override *quoad* the defendant company the provisions of paragraph 4 of section

[22](1898) A. C. 748; 67 L. J. P. C. 115; 79 L. T. 151. [23](1892) 1 Q. B. 823; 61 L. J. Q. B. 552; 66 L. T. 771; 40 W.R. 562.

Judgment. Wetmore, J.

xii. of the Ordinance of 1878, and, in this connection, I draw attention to the fact that the large powers to legislate with respect to the administration of justice and procedure in the Courts conferred by section 15 of The North-West Territories Act, were not possessed by the North-West Council until 1886, when they were conferred by 49 Vic. (1886), cap. 25, sec. 27.

In view of the manner in and circumstances under which the schedules mentioned in 44 Vic., cap. 1, were passed, I cannot avoid the conclusion that the intention of the section 9 was far from that of enabling provisions. It seems to me that the intention of the section was to provide a mode of service whereby the company would not be liable to be served with process upon any of its agents over an extended area of country, and whereby service could only be affected in one stated manner, and at one fixed place in each Province and Territory.

I very much regret having come to the conclusion I have, because I am of opinion that the mode of service prescribed by the section of the Act in question is, in view of the general circumstances of the Territories, very inconvenient, and the provisions of paragraph 4 of Rule 14 are convenient and suitable, and would work no hardship or injustice whatever.

In my opinion, this appeal should be allowed with costs, the judgment of my brother McGUIRE reversed, and the service of the writ of summons set aside with costs.

Appeal allowed with costs.

REPORTER:

Ford Jones, Advocate, Regina.

McCARTHY v. THE MUNICIPALITY OF THE TOWN OF REGINA.

Separate Schools—Assessment and Taxation—N.-W. T. Act, sec. 14, and School Ordinance.

A ratepayer to a Separate School District is not liable to taxation to meet debenture indebtedness of the Public School District incurred prior to the establishment of the Separate School District.

[*Court en banc, March 7th, 1901.*

Statement.

This was a case stated for the opinion of the Court. The facts as stated were:—

1. The defendant Municipal Corporation was duly erected on December 1st, 1883.

2. The Regina Public School District is a corporation duly organized on December 20th, 1884, under the provisions of The School Ordinance of 1884, and its limits are those of the defendant municipality.

3. In 1895 and in 1899 the said Public School District duly issued and sold debentures to raise money for the erection of school houses.

4. The said Public School District has always been, and is supported by rates levied by the defendant at the request of the trustees of the said Public School District, under the provisions of the School Ordinances, from time to time in force.

5. One of the rates which the said Public School District has yearly requested, and did for the year 1899, request to be levied and collected by the defendant is an annual rate required to provide for the indebtedness incurred by the issue and sale of the said debentures.

6. The plaintiff has for some years been and is a ratepayer of the said defendant corporation and of the said Public School District, and has, up to the year 1899, paid without complaint the annual rate levied in respect of the said debenture indebtedness.

Statement.

7. On February 24th, 1899, the Roman Catholic ratepayers within the said defendant municipality duly organized the Gratton Separate School District within the limits of the Public School District.

8. Upon the organzation of the said Separate School District, the plaintiff became, and has ever since been, a ratepayer thereof, and the school taxes therefor are collected by the defendant upon request of the trustees of the said Separate School District.

9. The plaintiff was assessed for, and paid to the defendant, taxes for the year 1899 amounting to $15.93, being at the rate of 23.06 mills on the dollar, which said rate included a rate of 2.9 mills on the dollar to provide for the said debenture indebtedness, which said last-mentioned rate amounted to $1.95, and was paid by the plaintiff under protest.

The plaintiff sued to recover this $1.95, and the question submitted for the opinion of the Court was whether or not the plaintiff, by reason of his being a ratepayer of the said Separate School, was exempt for the year 1899 from taxation for the rate imposed in respect of the said debenture indebtedness.

It was agreed that judgment was to be entered in the action pursuant to the opinion of the Court.

The case was heard December 5th, 1900.

W. C. Hamilton, Q.C., for plaintiff.

N. Mackenzie, for defendant.

[*March 7th, 1901.*]

RICHARDSON, J.—The facts admitted are:—

1. That on the 24th February, 1899, the Grattan Catholic Separate School District was established in the town of Regina by the Roman Catholic ratepayers, the limits of the School District being those of the Municipality of the Town, as also the limits of the previously organized Public School District of Regina.

Judgment.
Richardson, J

2. That at the time of the establishment of the Separate School District the Public School District was liable for debts, to secure the repayment of which, by yearly instalments (one falling due in 1899), that Corporation had issued debentures.

3. That for the purpose of meeting this payment, the Board of Public School Trustees included the amount with other sums necessary for school purposes for that year, and required the Municipal Council of the Town to assess for and collect it along with other rates of the Municipality for the year. This the latter body proceeded to do in the usual way, by exacting payment from McCarthy of $1.95, his assessed proportion of the said rate. He claims the Council had no power or right to do this for the reason that, being a ratepayer of the Separate School District, he is only liable to be assessed for such rates as are imposed by the Board of Trustees of the Separate School District.

In my opinion, McCarthy's contention is correct.

In arriving at this conclusion, I place this construction upon sec. 14 of The N.-W. T. Act, which enacts "That . . . the ratepayers establishing such Separate Schools (i.e., here the Roman Catholic ratepayers of the Grattan Separate School district), shall be liable only to assessment of such rates as they impose upon themselves." This section, in so far as material in this case, forms sec. 36 of the School Ordinance, and sec. 40 provides that, after the establishment of a Separate School District, it (i.e., the Separate School District) shall possess and exercise all rights, powers, privileges, and be subject to the same liabilities and methods of government as is (by the Ordinance) provided in respect to Public Schools. The result is that *quoad* the particular rate referred to, the subject of the present case, the Municipal Council had not the power claimed for it of assessing and levying, because the Board of Trustees of the Public School District ceased, with the establishment of the Grattan Separate School District, to have the power of assessing and levying rates on ratepayers of the last-named

Judgment. School District, as they are expressly declared to be liable
Richardson,J. only to assessment of such rates as they impose upon themselves, and this board could not confer upon the Municipal Council powers in excess of those they could legally exercise.

Judgment in the action should go for the plaintiff, with costs in the Court below and in this Court.

WETMORE, J.—The question intended to be presented to the Court by this Special Case is whether a ratepayer of a Separate School District is liable to assessment to pay debenture indebtedness created by the Public School District for the erection of School Houses in the district before the Separate School District was organized, such ratepayer having been a ratepayer of the Public School District before the organization of such Separate School District. I do not know that the facts stated raise the question as clearly as it might be raised, because the assessment in question was for the year 1899, and the Separate School District was only organized on the 24th February of that year, and there is nothing to show when the assessment list was prepared, whether before or after that date. However, as there was no attempt to assess the plaintiff or to impose a rate on him in respect of any other liability of the Public School District than the debenture indebtedness, I think we may assume that he was assessed after the organization of the Separate School District. Moreover, the doubt which has occurred to me was not raised by counsel. The broad question which I have above set forth was the only one argued. I am of opinion that judgment should be given for the plaintiff.

The powers which the Legislative Assembly have to legislate with respect to education are conferred by sec. 14 of The North-West Territories Act (R. S. C. c. 52), as amended by the Acts of 1898, c. 5, sec. 6, which provides that "The Legislative Assembly shall pass all necessary ordinances in respect to education; but it shall therein always be provided that a majority of the ratepayers of any District or portion of the Territories, or of any less

portion or sub-division thereof . . . may establish such schools therein as they think fit, and make the necessary assessment and collection of rates therefor; and also that the minority of the ratepayers therein, whether Protestant or Roman Catholic, may establish Separate Schools therein, and in such case the ratepayers establishing such Protestant or Roman Catholic Separate Schools shall be liable *only* to assessment of such rates as they impose on themselves in respect thereof." Section 36 of the School Ordinance (C. O. 1898, c. 75), contains strictly the provision with respect to the minority of the ratepayers provided for in the Act, including the provision that the ratepayers establishing Separate Schools "shall be liable *only* to assessment of such rates as they impose upon themselves in respect thereof." It was urged that these words which I have last quoted, both in the Act and in the Ordinance, have only relation to liability to assessment in respect to the Separate Schools. I am unable to take that view. It seems to me that for such a purpose they would be unnecessary; it would be inconceivable that any person could possibly imagine that the authorities of the Public School District, who had no interest in the Separate School, could impose a rate on the Separate School ratepayers for the purposes of such Separate Schools. The intention of the enactments was that the ratepayers of the Separate Schools should cease to be liable for any other rates than those imposed upon themselves for their Separate School.

Judgment. Wetmore, J.

It was further argued that the plaintiff was liable to the assessment and rating in question by virtue of sub-section 6 of section 128 of the Ordinance. That section is as follows:—"Notwithstanding anything contained in this and the two last preceding sections, any land liable to assessment for debenture indebtedness at the time of the issue of any debentures shall remain liable to and subject to assessment for such debenture indebtedness until the whole of such indebtedness has been paid and satisfied." The special case does not bring the plaintiff within the provisions of

Judgment. Wetmore, J.

that sub-section, as it is not stated that the assessment or rating upon him is in respect of land. It was intimated at the argument that the assessment and rating on the plaintiff was in respect to land, and the Court suggested that if its opinion was desired on the right to assess the land, the special case had better be amended so as to bring that question forward. As the suggestion was not acted upon, I assume that such opinion is not wished, and as I do not propose dealing with matters *coram non judice*, I will confine my opinion to what is submitted by the case. A number of cases were cited bearing on the question of the retroactive operation of Statutes. I cannot see that these cases have any application to this question. The facts and condition of affairs in this matter arose after the passing of The North-West Territories Act, and applying section 14 of that Act to the facts, as presented by the Case, is not giving a retroactive operation.

Judgment should be for the plaintiff for $1.95 and costs.

McGuire, J.—This is a stated case presented to this Court. There is no dispute as to the facts. The question submitted is whether, on the facts as set out in the case, a Roman Catholic, who is a ratepayer of a Separate School, is liable to be assessed by the Municipality in which his property is situate, acting at the request of the Trustees of the Public School District within which such property is also situate, in respect of a rate for the current year to meet debenture debts of said Public School District payable during such year, said debenture debts having been incurred in 1899 and 1895, before the establishment of the Separate School. It is contended by the Municipality and the Trustees of the Public School, inasmuch as the property in question was liable to be assessed in respect of these debenture debts at the time they were incurred, that, notwithstanding the subsequent establishment of a Separate School, this land still continues liable to be assessed for payment of these debenture debts until they are satisfied and paid. The plaintiff contends that, upon the establishment of a Separate

School, he, being a member of the religious minority establishing such school and being a ratepayer thereto, ceased to be liable to the Trustees of the Public School District directly or indirectly, whether for debenture debts or otherwise, for school purposes.

On looking at the School Ordinances in force at the dates of the creation of the debenture debts, viz., March, 1899, and February, 1895, I find that section 159, cap. 59, of the Revised Ordinances of 1888, which was in force on January 1st, 1889, has continued unchanged up to the present day. By that section the debentures, when duly executed, "bind the School District," and are a "lien or charge," not on the property of the ratepayers situate in the District, but only "on all School property and the rates in the School District." In the Ordinances which were in force when the debenture debts in this case were respectively incurred, there was no express language declaring that the supporters of a Separate School should continue liable to the payment of rates in respect of debenture debts incurred previous to the establishment of such Separate School District. But on looking back to Ordinance No. 5 of 1884, the first Territorial School Ordinance, we find that, by section 31, it is provided that "any land, and personal property thereon, set apart as a Separate School District shall be assessable by the Public School District for the purpose of paying off any debenture indebtedness that may have been incurred previously to the establishment of such Separate School." Section 41 of Ordinance No. 2 of 1887 is in the same terms. But when the ordinances were revised and consolidated in 1887 this provision was wholly left out, and from that time on, until 1897, there does not appear any provision dealing expressly with the subject matter of the section above cited. During this period the School Ordinances were twice consolidated and revised, viz., in 1892 and 1896, but in the School Ordinance of 1897 somewhat similar language again appears as a sub-section added to section 125 of the Ordinance of 1896.

Judgment.
McGuire, J.

But, before dealing further with this amending sub-section, I shall look at the provisions of The North-West Territories Act and Ordinances passed thereunder in reference to Separate Schools. Chapter 25 of 43 Vic., consolidating the Acts relating to the Territories, by section 10, requires the Local Legislative body to pass all necessary ordinances in respect to education, but placed this limit on the exercise of this power—that such ordinances must *inter alia* provide that the minority, whether Protestant or Roman Catholic, could establish Separate Schools, and, in the event of such schools being established, "the ratepayers establishing such . . . Separate Schools shall be liable only to assessment of such rates as they may impose upon themselves in respect thereof." This limitation has ever since been continued as a condition governing local legislation in respect of Schools. In the first School Ordinance, No. 5 of 1884, section 25 professes to be passed "in accordance with the provisions of section 10 of The North-West Territories Act, 1880," the one just cited. It and subsequent sections do provide for the establishment of Separate Schools, as in section 10 of the Federal Act, but do not follow the language of that section limiting the liabilities of the ratepayers establishing such Separate Schools. Section 31 says:—"Any land and personal property thereon set apart as a Separate School District shall be assessable by the Public School District within whose organized limits it is situated for the purpose of paying off any debenture indebtedness that may have been incurred during the time that such land was included as a part of such Public School Districts in the same manner and time, and at the same rate, as the remaining portion of such Public School District may be assessed to pay off such indebtedness, but for no other purpose whatever." It will be noted that the Federal Act imperatively required that it should be provided in the Ordinance that the Separate School ratepayers should be "liable only to the assessments of such rates as they may impose upon themselves," which seems inconsistent with section 31 of the Ordinance,

Judgment.
McGuire, J.

which provides in effect that they shall be liable to assessments for certain rates imposed by a body other than themselves; for I take it, there can be no difference, except a merely verbal one, between assessing the "land and personal property thereon" and assessing the ratepayer who owns it. Whether s. 31 was or was not a disobedience of the Federal Act need not be now considered, because Ordinance No. 2 of 1887, which amended and consolidated Ordinance No. 25 of 1884, was repealed by the Revised Ordinances passed in 1887, and these latter did not re-enact section 31 of 1884, nor the similar section of 1887, but provided (sec. 41) that "all property within such Separate School District belonging to or held by ratepayers of the religious faith indicated in the name of such School District shall be liable only to assessments such as they may impose upon themselves in respect thereof."

In 1892 the School Ordinances were consolidated, and again in 1896. In these consolidations the phraseology of the section just quoted was changed, and it was provided that the minority, whether Protestant or Roman Catholic, might establish a Separate School, and "in such case, the ratepayers establishing such Protestant or Roman Catholic Separate Schools shall be liable only to assessment of such rates as they impose upon themselves in respect thereof," and such continues to be the language of the School Ordinances down to the present time. Now, this provision is a literal compliance with the requirement of the Federal legislation on the subject, and appears to me to indicate as clearly as the English language will permit, that the ratepayers of a Separate School are not liable to be assessed for School purposes by any body, authority, or corporation other than themselves. There is no language that I can find in any School Ordinance between No. 2 of 1887 and No. 5 of 1897 which could be read as authorizing the Trustees of the Public School, or Municipality for them, to assess the ratepayers of a Separate School for any School purposes whatever.

Judgment.
McGuire, J.

It would appear, then, that on the date when the debenture by-laws in this case were passed, viz., on March 2, 1899, and February 23, 1895, the Ordinances in force made no provision authorizing an assessment of Separate School ratepayers for rates to pay off these debentures, so that if, say in 1896, a Separate School had been established in Regina, the ratepayers establishing it would not have been thereafter liable in respect of these debentures. In 1897, however, a clause was added to section 125 of The Consolidated School Ordinance of 1896 (now subsection 6 of section 128, cap. 9), as follows:—"Notwithstanding anything contained in the three last preceding sections, any land liable to assessment or debenture indebtedness at the time of the issue of any debentures shall remain liable to and subject to assessment for such debenture indebtedness until the whole of such indebtedness has been paid and satisfied." It is urged that, as all lands and all persons in the Public School District were liable at the date of the issue of the debentures in this case to assessment in respect of them, there being then no Separate School established, by virtue of this change in the law the plaintiff's property continued and continues to be so liable. If the Legislature intended thereby to qualify the general language of what is now section 36, one would naturally expect that the amendment would have been made to that section itself, either as a sub-section or by a section immediately following it, or, if placed in some other part of the Ordinance, it would have either referred to that section by its number or by some words which would have included it, as *e. g.*, "Notwithstanding anything in this Ordinance, &c." Instead of that, it is put, as a rider only, on sections 123, 124, and 125, which deal merely with special cases of landlords and tenants, joint ownership, and companies, i.e., cases where there are both Protestants and Roman Catholics connected with the same property, and where doubts might arise as to which School District should be entitled to assess. The question would arise whether such a provision would be within the competence of the Legislative Assembly, if it were intended,

Judgment.
McGuire, J.

or so worded, as to authorize the assessment for any school purposes of the ratepayers of a Separate School by any one other than themselves. Clearly any local legislation contravening the directions of section 14 of The North-West Territories Act would be *ultra vires*. One is not without necessity to assume that the legislature intended to exceed its authority, and if its Ordinances can be reasonably and fairly read so as not to conflict with the paramount legislation of the dominant legislative body, they should be so read. Unless this amending sub-section must necessarily be taken as intending to limit the general language of section 36, it will not be necessary to consider whether it was *ultra vires* the Assembly. I think that the amendment of 1897 was not intended to limit section 36. Nor in the present case would it be necessary unless it would affect the result. At any time prior to 1897, and after the issue of the said debentures, the members of the religious minority were able to relieve themselves from future assessment in respect of said debentures by establishing a Separate School—this was a right they had at the time of the creation of the debenture indebtedness—and persons purchasing such debentures would be taken to know the law then existing, and to buy, knowing that a portion of the property then assessable to pay off the debentures might at any time be withdrawn. As we have also seen, debentures never were declared a lien or charge on property in the Districts not belonging to the School District itself. Can, then, the amending provision be deemed to have a retroactive effect so as to take away the rights of the minority to relieve themselves from future assessments for debentures? The general rule is that, unless the law clearly so provides, legislation is not to be read as retroactive. If this amendment were to be given a retroactive effect, then the ratepayers of a Separate School established on 1st January, 1896, though relieved during that year at least from assessment for these debentures and from any other assessment for school purposes by anyone but themselves, would, after such amendment came in force, be deprived of this right of exemption.

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As to this question, however, as it is not necessary to a decision, I prefer to express no opinion. Whether it were intended to qualify the general exemption granted by section 36 to Separate School ratepayers, or as qualifying only the three sections expressly mentioned in it, as I have already found, I think that sub-section does not affect the present case.

I might have referred to the fact that the Legislature in consolidating and revising the ordinances in 1887 left out the provision in the previous ordinances making Separate School ratepayers liable for debentures issued previous to the establishment of a Separate School. It is not improbable that this omission was intentional, under the belief that such provision was a disobedience of the section in The North-West Territories Act dealing with Separate Schools. It is an argument in favour of the view that the Legislature then and thereafter (until at least the session of 1897) did not intend that Separate School supporters should be held liable in respect to debentures issued prior to the establishment of such Separate School.

It may also be noted that the amendment of 1897 does not assume to interfere with the previous section exempting Separate School ratepayers from assessment other than such as they should "impose upon themselves." It does not provide that the Public School Trustees, either directly by their own officers or indirectly by the Municipality, should have the power to assess such ratepayers. Were it not for the exemption section, such a power might be implied, but I do not think any such implication could be made in the face of the clear and specific and general words of that section to the contrary.

It may be said that it is unjust that property liable, at the time of issue of debentures, to be assessed for the payment thereof should be relieved of such liability; that it throws upon the remaining ratepayers of the Public School District a greater burden than they would have to bear if no portion of the property originally liable had been withdrawn.

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It is doubtless true that the debenture rates must increase as the property assessable decreases. A sufficient answer to this observation would be that the Legislature is responsible for any such alleged injustice, and that the duty of this Court is not to amend unjust legislation but to construe the law as it finds it. But the other side might complain if the law compelled them to continue to pay for schoolbuildings which they can no longer use. There is no provision whereby the minority, on exercising their constitutional right to establish a Separate School for themselves can demand any share of the assets of the District as it existed up to that time. In the case of ordinary partnerships, retiring partners, while still remaining liable for the debts of the firm, are entitled to a proper share of the assets. In the case of supporters of a Public School deciding to withdraw and form a Separate School District they thereby abandon all their share in the assets of the original District—buildings which have been partly paid for by taxes contributed by them become the property of the Public School District. It would seem only fair that at least if they are to be held liable for existing debenture debts they should be entitled to some compensation for their interest in the assets of the District.

If subsection 6 of section 128 is inconsistent with the exemption section (now section 36), it must also be inconsistent with section 14 of The North-West Territories Act, and therefore bad. If it is *not* inconsistent with section 36, then it may be left out of consideration, and the case will turn on whether by said section 14 or section 36 Separate School supporters are liable to assessment for payment of these debentures, and, as I have stated, I think they are not.

The Judgment should, therefore, be for the plaintiff for $1.95 with costs.

Judgment accordingly.

REPORTER:

Ford Jones, Regina, Advocate.

IN RE DEMAUREZ.

Exemptions Ordinance—Alien—Tools and implements of trade—More than one trade—Election—Land and buildings—Division or sale—Incumbered land—Exemption out of excess—Assignment for benefit of creditors—Executions—Mechanic's lien—Priorities—Estoppel — Costs—Advocates undertaking to refund.

A general assignment for the benefit of creditors was made of all the assignor's real and personal estate, except what was exempt from seizure and sale under execution. The land was not specifically described, but the assignment contained a covenant on the part of the assignor to execute such instruments as should be required to effectuate the assignment. An order for the administration of the estate was subsequently made, and this was followed by the sale of the land under the direction of a Judge, and a transfer by the assignor to the purchaser.

The land was subject to two mortgages; and $1,530, the surplus of the price in excess of the mortgages, was paid into Court. The assignor was an alien friend resident in the Territories.

Held, per RICHARDSON, J.—(1) That an alien friend resident in the Territories is entitled to the benefit of the provisions of the Exemptions Ordinance, notwithstanding the provisions of the Naturalization Act, R. S. C. (1886) c. 113, s. 3.

Affirmed on appeal to Court in banc.

The assignor being by trade a repairer of watches and jewelry, and having received the tools and implements appertaining to that trade, exempt under the Exemptions Ordinance, C. O. 1898, c. 27, s. 2, s.-s. 7.

(2) That he could not maintain a claim for such tools and implements as were used in connection with a steam laundry run for him by an expert, "though he sometimes tinkered about the laundry," he himself not being by trade a laundryman.

(3) That the assignor was entitled as an exemption to the extent of $1 500, out of the $1,530, the excess of the price of the land beyond the mortgages to which it was subject.

Affirmed on appeal to Court en banc. *Ontario Bank* v. *McMicken*[1] followed.

(4) That an execution creditor whose execution was registered subsequent to the mortgages, and was the only one registered prior to the assignment, though other executions were registered prior to the administration order and the execution of the transfer by the assignor, was entitled to the $30 in priority to these subsequent executions.

On appeal to the Court en banc, the whole sum of $1,530 was *held* to be subject, in priority to the first execution creditor, to the claim of the holder of a mechanic's lien, who had obtained judgment, and to his costs, which exhausted the $30.

The subsequent execution creditors claimed to be entitled to be paid out of the $1,500 in view of s. 4 of the Exemptions Ordinance, which excepts from its effect "any article . . . the price of which forms the subject matter of the judgment upon

[1] 7 Man. R. 203; 11 C. L. T. 18.

which the execution is issued." Their action was upon promissory notes made by the assignor to the plaintiff. These notes were given to and discounted by the assignor for the purpose of paying certain moneys, for which the C. P. R. withheld delivery of certain machinery which went into the building on the land as fixtures, and were sold as part of the land; and the moneys so raised were partly so applied.

(5) That the subsequent execution creditors did not come within the provisions of s. 4.

(6) That the $1,500 was subject to the payment of a claim under a mechanic's lien which was registered, and on which action was commenced before the date of the assignment; but that it was not subject to the payment of either of two other claims under mechanic's liens registered before the assignment, on the ground (without deciding on the objection that no action to enforce these liens had been commenced, it appearing, however, that the time limited for that purpose had not expired at the date of the assignment), that the claimants had, in their statutory declarations proving their claims against the estate, stated that they held no security for their claims.

No fund being left to pay the general creditors,

(7) That the petitioning creditors were entitled to their costs out of the $1,500, as it was in consequence of their proceedings, which the assignor's conduct forced them to take, that the rights of the various parties were determined and the fund distributed; that the assignee was entitled out of the same fund to his costs and his compensation and expenses as assignee; that the execution creditor, who was entitled to the excess $30, was also entitled to his costs in these proceedings out of the same fund; and that the assignor's advocate was entitled to a lien for his costs as between advocate and client on the same fund.

On appeal to the Court en banc it was

Held, per CURIAM, reversing the decision of RICHARDSON, J., that the petitioning creditors and the assignee must bear their own costs; that the petitioning creditors were liable to pay the costs of the assignor and the assignee, both before the Judge and in appeal; and that the assignor was entitled to the $1,530 after payment thereout of the amount of the claim and costs of the lienholder whose claim had been allowed.

The costs allowed to the various parties by the Judge, having been paid out to their respective advocates upon their undertakings filed to repay the same if so ordered, the Court, in giving judgment on the appeal, ordered payment accordingly.

The Exemptions Ordinance discussed as to the right to call for, and the obligation to submit to, a division of land and buildings claimed to be exempt.

Per MCGUIRE, J.—The sheriff is bound to leave a debtor what is exempt, the debtor having the right, if he chooses to exercise it, to a choice from a greater quantity of the same kind of articles as are exempt. If he does not see fit to make the choice, it is probable he would not be heard to complain that the sheriff had not made the choice most favourable to the debtor.

[RICHARDSON, J., *September 15th, 1899.*

[*Court in banc, March 7th, 1901.*

Statement.

On January 14th, 1899, Demaurez made an assignment in trust for the benefit of his creditors to one Cameron, by

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which he assigned to the said Cameron in trust as aforesaid all his real and personal property "except what is exempt from seizure and sale under execution." His property consisted solely of Lot 17 in Block 40 in Indian Head, according to the registered plan of the said town. Upon the front of this lot was situated a building occupied by him as a shop and dwelling house combined. Upon the rear of the lot was situated a building used by him as a steam laundry. His title to this lot was subject to two mortgages of $500 each. On November 9th, 1898, McKay & Brooks had registered in the Land Titles Office a writ of execution against Demaurez' lands. On November 15th, 1898, C. Peltier, J. Conn and A. W. Sherwood registered mechanics' liens against the lot. On January 4th, 1899, C. Peltier instituted an action against Demaurez on his mechanics' lien and registered a lis pendens. On February 1st, 1899, an order was made and published calling upon creditors to send in their claims. On March 14th, 1899, Edwards and Boyd registered in the Land Titles Office a writ of execution against Demaurez' land. Demaurez refused to execute a transfer of the lot to Cameron as assignee.

On April 29th, 1899, upon a petition of several of the creditors an originating summons was granted for an order for the administration of the trust estate. Affidavits were filed by six of these creditors alleging that the assignee had not used due and proper diligence towards realizing the estate, and was unsuitable and incompetent to perform his trust, and his removal was asked, and the appointment of another as liquidator. Two affidavits of the assignee were filed in reply, and on May 13th the matter was enlarged till June 15th, and the assignee was directed "to proceed with the execution of the trust, and to dispose of the real estate without delay." On May 13th the assignor executed a transfer of the lot to the assignee. On May 23rd Demaurez notified the assignee in writing that he claimed as exempt from seizure, and therefore not included in the assignment, the real estate occupied by him to the value of $1,500 and his tools not in-

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cluded as fixtures of the laundry plant, as well as his household goods and clothing. On May 22nd the assignee demanded possession of the premises, which was refused by the assignor. A writ of summons was issued by the assignee for ejectment and possession, and a notice of motion for immediate judgment was served by leave with the writ. On June 1st the motion was heard, when the assignor appeared in person and claimed exemptions, and that these should be allotted. An order was then made for judgment as asked, with a direction that the judgment should not be entered till June 11th unless it were shown by affidavit that the assignor was obstructing the assignee, the question of costs being reserved. (*a*) Meanwhile the assignee had advertised for offers for the purchase of the real estate. The best offer received was of $1,530 cash for the lot, the purchaser to assume the mortgage. All parties except the assignor recommended the acceptance of this offer. Upon June 17th an order was made directing the acceptance of this offer and the payment of the purchase money into Court. The order also directed that the executions and liens filed against the property should be withdrawn, and that the rights of all parties should be preserved, and should attach upon the fund in Court according to the respective rights and priorities against the land itself, the fund to be administered under the direction of the Court. The question of costs was reserved. On July 6th the assignor was examined as a witness in support of his claim to exemptions, when he swore that he came from the United States of America, and had never been naturalized as a British subject. On subsequent dates verbal and documentary evidence was taken in respect to two of the claims filed with the assignee, also in respect to the claims of the different execution creditors and lien-holders.

The matter was argued on July 31st and September 14th.

(*a*) Note by reporter.—On June 16th the affidavits were filed and judgment entered for possession of the land. A writ of possession was immediately issued and handed the sheriff for execution, under which the assignee obtained possession.

Argument.

James Balfour, for assignor:—The assignor is entitled to $1,500 as exempt from seizure over and above the mortgages: *Ontario Bank* v. *McMicken*;[1] also to all tools not fixtures of the laundry plant, he being a laundryman and not a jeweller. He is entitled to $1,500 of the fund in Court less the amount of Peltier's claim under his mechanics' lien, and this amount to which he is entitled cannot be mulcted for costs.

W. C. Hamilton, Q.C., for assignee:—The assignor, being an alien, is entitled to no exemptions. The rights of an alien are only those expressly given by "The Naturalization Act." If the assignor is entitled to any portion of the fund as exempt, the amount due upon the two mortgages (some $1,171) is chargeable against such portion. The assignee is entitled to remuneration and costs as between solicitor and client out of the fund.

N. Mackenzie, for mechanics' lien-holders:—The right (if any) of the assignor to exemptions will not prevail against the holder of a mechanic's lien.

T. C. Johnstone, for execution creditors:—The execution at the suit of McKay & Brooks was registered before the debtor assigned, consequently the assignee took subject to this claim.

Judgment was reserved.

[*September 15th, 1899.*]

RICHARDSON, J.—On an application, 29th April, 1899, by petition supported by affidavit of Francis L. McKay, James Conn, Adiel W. Sherwood, Daniel McLean, William Boyd and Samuel R. Edwards of Indian Head, complaining that the above-named Demaurez had on the 14th day of January, '99, made an assignment of all his estate to one William S. Cameron in trust for the benefit of his creditors, and that for reasons disclosed by the above material interference by the Court was sought, I granted an originating summons, calling upon all the parties concerned to be present

the 6th May, 1899, when an application would be made for an order for the administration of the trust estate or such other order as should be proper. Judgment. Richardson, J.

On the return of this, extended some days for the purpose of notice to the assignor, both he, the assignee and a number of persons claiming to be creditors of the estate were present and represented.

The following facts were disclosed on the hearing:—

Charles Oswald Demaurez, according to the records of the Land Titles Office, was on and prior to the 14th January, 1899, the registered owner of lot 17 in block 40 according to the registered plan of the town of Indian Head in the registration District of Assiniboia, subject to two mortgages thereon to the Dominion Building and Loan Association amounting to $1,000 and interest, and had during 1898 erected thereon a laundry operated by steam power.

By indenture dated the 14th January, 1899, made between himself described as a laundryman of the first part, William S. Cameron, trustee of the second part, and the creditors of the said party of the first part, of the third part, it was recited :

That the said party of the first part being indebted to the said parties of the third part in several sums of money and unable to pay the same in full, was desirous of having his estate equitably divided and distributed among all his creditors, and had agreed to transfer and assign all his property real and personal, save what is exempt from seizure and sale under execution, to the said trustee upon the trusts and for the purposes thereinafter mentioned. The said party of the first part did thereby grant and convey unto the said trustee all the real and personal property of every nature and kind whatsoever which he, the said party of the first part, was then seized or possessed of or interested in, save as aforesaid.

And it was thereby declared that the trustee should hold the said real and personal property upon trust to sell and dispose of the same when and so soon as he should deem

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expedient, in such a manner and on such terms, and either together or in lots, and either by public auction or private sale as they or he should deem proper. And it was thereby further declared that the trustee should hold the moneys arising from any such sale or sales as aforesaid upon trust, first, to pay the costs, charges and expenses attending in and about the execution of the trusts thereof, or of any of the powers therein contained, and in the next place to pay the residue of the said moneys unto and among the creditors of the said party of the first part rateably and proportionately and without preference or priority, according to the respective amounts of the respective claims; and lastly, to pay the residue (if any) after the payment of the said claims to the said party of the first part.

It is to be observed that as to real property the said indenture contains no description of the assignor's land, lot 17, intended to pass it so that registration in the Land Titles Office as a transfer to the assignee could be effected, but by a clause in the assignment the assignor Demaurez covenanted that he would execute, perform and do such further assurances, deeds and acts as might be lawfully required by the said parties of the second and third parts or any of them for the purpose of more effectually conveying and assigning the premises thereinbefore assigned, or any part thereof.

Under a Judge's order (Jud. Ord., Rule 595) on 1st February, 1899, Cameron had called for creditors' claims.

From the date of his acceptance of the trust Cameron had endeavoured unsuccessfully to obtain from Demaurez such an instrument as would by describing the land in it enable Cameron to obtain registry in the Land Titles Office, for want of which the latter had been unable to proceed with the execution of the trusts by selling the property assigned; the result being that Demaurez had improperly obstructed the assignee in the execution of the trusts created by the assignment.

After hearing Demaurez' reasons for refusing to execute the formal transfer called for, and overruling them, and it

appearing that as between Demaurez and the creditors, and among the creditors, there were conflicting claims to be adjusted, it was considered proper that the assigned estate should be administered by the Court. Judgment. Richardson, J.

Under directions given by me the necessary formal transfer was executed by Demaurez.

Cameron was instructed to call for tenders to purchase the property, the tenders to be brought in by the 11th June, 1899. Pending these, on the application of the assignee, Cameron, it being shown that Demaurez was still obstructing the assignee by withholding possession of the land from him, on my direction proceedings to eject Demaurez were instituted under which possession was given to Cameron by the sheriff.

On the 13th June, 1899, under an appointment for the purpose, Cameron brought in five tenders received by him for the purchase of the property, Demaurez and creditors interested being present. The lowest of these five tenders was shown to have been put in by Demaurez in the name of one James Jackson, a relative by marriage. The highest in price was by one Bunting; to acceptance of this Demaurez objected, urging that it was lower than the fair cash value of the property, but after hearing evidence of independent valuators, on oath, the creditors recommending it, I directed the acceptance of Bunting's tender of $1,530 for the property subject to the two mortgages existing thereon. To enable the passing of a title to Bunting free of conflicting claims, some creditors asserting preference over the general body under entries appearing in the Land Titles Office affecting the property, and Demaurez claiming certain rights, to which I refer later on, it was arranged that such entries should be rescinded and withdrawn, and the purchase money paid into Court to represent the property to be distributed, and their respective rights adjusted as they stood previous to and at the time of sale.

This arrangement was carried out. The $1,530 was paid into Court and Bunting received his transfer.

Judgment. Richardson, J.

In determining upon the distribution of this $1,530 in Court the following conflicting claims in Court have to be adjusted.

Demaurez asserts, that inasmuch as by the assignment so much of his estate as would be exempt from seizure and sale under execution was reserved to him by the assignment, to that extent his claim stands before the creditors.

To this the creditors object, and urge that Demaurez being, as is admitted, an alien born and not a British subject, is not entitled to claim any exemption from seizure and sale under execution, and, therefore, in law nothing was exempted from the operation of the assignment, and the whole $1,530 belongs of right to his creditors. In support of this contention reference is made to section 3 of the Naturalization Act, and the second proviso.

This section is as follows:—"Real and personal property of any description may be taken, acquired, held and disposed of by an alien in the same manner and in all respects as by a natural-born British subject; and a title to real and personal property of any description may be derived through, from or in succession to an alien, in the same manner in all respects as through, from or in succession to a natural-born British subject; but nothing in this section shall qualify an alien for any office, or for any municipal, parliamentary or other franchise; nor shall anything herein entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly conferred upon him."

Stress is then laid upon the words of the latter proviso, the contention being that because the rights and privileges of exemptions from seizure and sale are not by that section expressly conferred upon aliens, they have none in Canada, and while the words of the Ordinance make no distinction between classes of execution debtors, to include aliens would be inconsistent with the Dominion Act.

I construe this section thus:

An alien shall not be entitled to any rights or privileges in respect of property except taking, acquiring, hold-

ing and disposing of real and personal property of any description in the same manner in all respects as a natural-born British subject; and a title to real and personal property of any description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born British subject, but nothing in this section shall qualify an alien for any office or for any municipal, parliamentary or other franchise. Judgment. Richardson, J.

How otherwise it can be construed so as to give effect to the whole section, and thus gather what I conceive was the manifest intention of Parliament, I fail to perceive.

Laws exempting property from seizure and sale under execution have existed in Ontario for some fifty years, in Manitoba over twenty years, and also in the other provinces, and I have neither observed nor heard of any instance in which such an objection as is now raised has been preferred.

I am, therefore, left to my own construction as above, and therefore must overrule the objection of the creditors.

Having disposed of the question of Demaurez' rights to exemptions as an alien, I have now to determine upon the merit of his claim.

He first asserts that as a laundryman (he is so described in the assignment) such tools and implements as were used in the laundry to the extent of $200 were exempt under section 2, s.-s. 7 of the Exemption Ordinance, which declares free from seizure by virtue of all writs of execution, the tools and necessary implements to the extent of $200 used by the execution debtor in the practice of his trade or profession. As to this claim, the evidence submitted established that during the brief period, six weeks or so, it was operated, the laundry was run by an expert employed by him; that Demaurez was not a laundryman by trade or profession, such was not the business he had learned, or his handicraft; that his particular occupation was that of a watchmaker, or a repairer of watches and jewelry, and that his tools and implements in that line had been either retained by him or handed over to him. True, he started a laundry run by machinery, he employed a man to run it,

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and although he (as put by Mr. Thompson in his work on Homesteads and Exemptions, s. 756) "sometimes tinkered about the laundry," the articles he claims as exempt from seizure under execution are not tools he worked with in contradistinction to his ownership of machinery and its usual adjuncts as a laundry run by steam power.

This claim I, therefore, reject as untenable.

In addition Demaurez claims that out of the $1,530 in Court he is entitled to $1,500 for the reason that the property assigned and sold was the building occupied by him at the time of the assignment and the lot on which the same was then situate; the Exemption Ordinance, s. 2, s.-s. 10, providing these to the extent of $1,500 to be free from seizure and sale under execution.

This claim qualified in amount, as will appear, I feel I cannot refuse to allow.

Demaurez' right to the whole of the $1,500 is contested by two execution creditors, as also by three claimants of mechanics' liens.

As to the executions:

First there is that of McKay and Brooks, which, from the 9th November, 1898, attached upon Demaurez' then interest in the property which was subject to the two mortgages, $1,000, and interest thereon.

Had the present sale been made by the sheriff that officer would have realized a surplus of $30 over the exemptions which would be applicable upon their execution, and to this $30, in my judgment, McKay and Brooks are preferred to the other creditors.

The other execution against Demaurez is that of Edwards and Boyd, delivered to the sheriff and registered in the Land Titles Office, 14th March, 1899, for $390.72, and these execution creditors assert that the exception provided by section 4 of the Exemption Ordinance was applicable, and therefore as against them Demaurez had no right of exemption. Their claim, for which judgment was signed in default of appearance, 11th February, 1899, is for three promissory notes, dated respectively 6th August, 1898, made

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by C. O. Demaurez payable to the order of the plaintiffs at the Union Bank of Canada at Indian Head, two, three, and four months after date, $102, $103, $156, in the payment of which the maker defaulted. It was shown that part of the machinery purchased by Demaurez for use in and placed upon the premises in his laundry on 6th August, 1898, while it was in course of construction was withheld from delivery by the C. P. R. Co. until certain moneys had been paid, and that Demaurez induced Edwards and Boyd to indorse his notes (those sued on) to the Union Bank of Canada, which discounted the notes and paid the proceeds over to Demaurez, who thereupon paid over the amount for which delivery was withheld by the C. P. R., and used the residue of the money received from the bank for his other purposes.

It was not shown that Edwards and Boyd were the vendors of the material at the C. P. R. or in business together, and the records show that the subject matter of the judgment obtained by them was not for the price of any articles sold by them to Demaurez.

Their contention must therefore fail for, by section 4 referred to, exemption from seizure is only removed from and is expressly restricted to articles the price of which forms the subject matter of the judgment, which does not happen in this instance.

Demaurez' right to the $1,500 is then contested by three creditors who claim to have rights superior to Demaurez' exemptions under the provisions of the Mechanics' Lien Ordinance. These are: 1, Clement Peltier; 2, Adiel Sherwood; 3, James Conn.

As to Peltier. An action was commenced in this Court 4th January, 1899, against the assignor Demaurez on a claim in which, after setting out the facts which, under the provisions of the Mechanics' Lien Ordinance, entitled him to claim a lien upon Demaurez' interest in the property sold, and alleging that the formalities required by the Ordinance to perfect such lien had been performed, sought through the direction of this Court to have that interest disposed of, and for such purpose all proper directions

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given. A copy of the writ of summons and claim appear by the files of the Court to have been duly served upon Demaurez on the 17th January, 1899. To this action no appearance or defence was entered, and none having been placed on the files Demaurez must be taken to have admitted the rights as asserted by Peltier in his suit, who at any time prior to the sale made to Bunting was entitled upon taking proper steps to an order enforcing his lien.

Against such an order, or out of the proceeds of a sale of Demaurez' interest in the property the Exemption Ordinance would, in my judgment, have no application in his favour, and Peltier's claim, therefore, forms a first claim on the $1,500.

As to Adiel W. Sherwood and James Conn. These claim to have mechanics' liens against the estate or interest Demaurez had in the land sold, and, being of the same class as Peltier's under the Mechanics' Lien Ordinance, to also rank upon the $1,500 in Court, although neither of them had instituted proceedings in this Court.

As to Sherwood's claim of lien. On the 18th November, 1898, this claimant filed in the Land Titles Office, Assa., a document in which he states that he claimed a lien upon Demaurez' estate in respect of the following material, then setting out an account for articles of lumber, itemized, at various dates commencing 22nd April to 25th June; then after an interval 1st August to 23rd August, then September 8th, 44 cents; September 9th, 48 cents; October 4th, 67 cents, and October 28th, 16 cents, total, $146.40; that these materials were furnished on or before 28th October, 1898, and that Demaurez then owed, after crediting $16.75, $129.65; that lot 17, block 40, Indian Head, was the land to be charged.

It was objected before me that this was not a claim complying with the Ordinance, in that it does not show the purpose for which the materials in the account were furnished, whether for construction, alteration or repair of a building or erection upon the land sought to be charged.

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Richardson, J.

Up to the completion of the sale to Bunting no other proceeding appears to have been taken in the Land Titles Office as in the Peltier suit by the claimant. Sherwood subsequently, i.e., on 21st June, 1899, by a statutory declaration before Mr. Jackson, affirms that Demaurez is indebted to him in $128.82, to which is annexed an account the total of which corresponds with his declaration. As the last item in this is charged 9th September, 1898, or more than thirty days before the claim was filed in the Land Titles Office, and as Demaurez disputes having received the last two items in this account, as well as those of 4th and 28th October, and as Mr. Sherwood deliberately asserts in his solemn declaration of June 21st, "I hold no security for the said indebtedness or any part thereof," he must be taken to have known, when making this declaration, he had no legal rights under the Mechanics' Lien Ordinance.

As to Conn's claim. This, made in similar form to Sherwood's, was lodged in the Land Titles Office November 15th, 1898, and no other proceeding taken under the Mechanics' Lien Ordinance. The account is simply one for lumber supplied 18th to 20th November, 1897, 26th April to 29th October, 1898, at various dates. There is nothing to show the purpose for which the lumber charged was supplied. The amount sworn to as due is $160.78.

To prove that no lien can legally stand, Demaurez brings in an account rendered by Conn, 8th July, 1898, showing a balance due $132.89, and his affidavit attached stating that the building for which the material in this account (and the items are similar to those in the claim of lien as far as they extend) was completed long before the 15th October, 1898. This is corroborated by the affidavit of one Murphy.

As on 26th April, 1899, Conn made an affidavit in this matter that Demaurez owed him $175, and James Edwin Brooks, manager of Conn, on the 4th July, 1899, solemnly declared that Demaurez' indebtedness was $165.62, and that Conn held no security for said indebtedness, and as Demaurez disputes any indebtedness for which a lien would hold, corroborated by Murphy, I have no hesitancy in rejecting his as well as Sherwood's claim.

Judgment.
Richardson, J.

[The learned Judge then considered the proofs of claims of several other creditors, and having disallowed some in respect of which evidence had not been taken, proceeded as follows :]

As regards the other creditors' claims no substantial objections were raised, but as several of these claims are not properly proved, and as there remains in Court no money applicable for the general creditors, and as it may be that on further proceedings an opportunity to properly prove the same may present itself, a consideration of these is at present unnecessary.

There remains now the question of costs to be determined.

As to those of the parties (creditors) who instituted the proceedings, i.e., the plaintiffs in the matter :

Although by my judgment they take no portion of the fund in Court, it is in consequence of their act and by reason of the proceedings forced on by the assignor's conduct that the rights of the parties have been ascertained and determined and the fund distributed.

Their costs, party and party, are to be paid out of the $1,530 in Court and to include a copy of the judgment if required.

As to the costs of the assignee. He not having unreasonably, as I determine, carried on such proceedings as necessarily devolved upon him in the matter, the fund is chargeable with his costs as between advocate and client, including shorthand writer's notes extended.

The assignee is to have a charge upon the fund for his personal expenses and outlay, itemized and verified by affidavit, in connection with the assignment and action thereunder, as also a reasonable sum for his services, independent of his advocate's costs. These to be fixed by the Clerk.

The costs of the plaintiff's advocate, Peltier v. Dumaurez, will include necessary attendances upon proceedings in the matter; the claim of plaintiff including his costs as to above to be fixed by the Clerk.

As to Mr. Balfour's costs. These, as between advocate and client, are to be taxed, and for the amount so taxed Mr. Balfour is to have a charge upon the fund.

No distribution of the fund or any payment out is to be made until after the time allowed for appeal from my judgment, nor then if in the meantime notice of appeal is given by some one interested, in which event the fund is to remain in Court subject to the adjudication in appeal. Judgment. Richardson, J.

The assignor appealed from that portion of the judgment directing payment of the costs of the creditors and of the assignee and the assignee's remuneration out of the fund, and from that portion directing that $30, being the difference between the $1,530 realized by the sale of the property and the $1,500, allowed as exempt, be applied on account of the judgment of McKay and Brooks.

The execution creditors cross-appealed from that portion of the judgment holding that the assignor was entitled to $1,500 as exempt.

Pending the hearing of the appeals the costs of all parties, as awarded by the judgment, were taxed, and paid out of the fund in Court to the respective advocates, upon such advocates filing undertakings to repay the amounts received by them respectively if ordered so to do.

The appeal was heard on June 4th, 1900.

James Balfour, for appellant.—The assignment expressly excluding the property exempt from seizure and sale under execution, this property did not pass to the assignee except for the purpose of separation, and as soon as separated from the balance of the estate it should have been handed over to the assignor. The assignee is liable for damages if he appropriates exemptions: *Cloutier* v. *Georgeson*.[2] The assignee is in the same position as a sheriff, who allows or disallows exemptions at his peril: *In re Gould & Hope*.[3] Exemptions are at the absolute disposal of the execution debtor: *Temperance Insurance Co.* v. *Coombe*.[4] The sale was against the will of the assignor. The fund represents the property. The proceeds of insurance on exempt property is also exempt: *Osler* v. *Muter*.[5] The exemption could

[1] 13 Man. R. 1; 36 C. L. J. 244; 20 C. L. T. 138. [2] 20 O. A. R. 347. [3] 28 C. L. J. 88. [4] 19 O. A. R. 94.

Argument.

not have been seized or sold under a writ of execution, therefore the Court cannot charge the portion of the fund which represents the exemption with the payment of costs. The creditors failed in their proceedings and are not entitled to costs: *Bartlett* v. *Wood*,[6] *Croggan* v. *Allen*,[7] *Fane* v. *Fane*,[8] *Hilliard* v. *Fulford*.[9] The $30 realized is the only fund available for payment of the assignee's costs.

As to the cross-appeal.—"The Naturalization Act" does not interfere with an alien's right to exemptions under "The Exemption Ordinance." Real estate to the value of $1,500 is exempt, and when the real estate is subject to a mortgage the exemption relates to the equity of redemption: *Ontario Bank* v. *McMicken*,[1] *Bertrand* v. *Magnusson*.[10]

W. C. Hamilton, Q.C., for assignee, respondent.—The assignee is a trustee, and as such can be deprived of costs only for misconduct: *Cotterell* v. *Stratton*,[11] *In re Chennell, Jones* v. *Chennell*, [12] *In re Knight's Will*,[13] *Turner* v. *Hancock*,[14] *Farrow* v. *Austin*,[15] *In re Love, Hill* v. *Spurgeon*,[16] *Ex parte Wainwright*.[17] In the absence of misconduct a trustee is awarded his costs, even of unsuccessful litigation: *Pitts* v. *Lafontaine*,[18] or of proceedings instituted without the sanction of the Court: *In re Beddoe, Downes* v. *Cotham*.[19] The proceedings in question were carried on under the direction of the Court. The trust fund must bear the trustee's expenses incurred in the execution of the trust: *Worrall* v. *Harford*,[20] *Smith* v. *Beale*.[21] The question was new and a proper one for the trustee to raise. He is, therefore, entitled to costs: *Yale* v. *Tollerton*.[22]

[6] 9 W. R. 817; 30 L. J., Ch. 614; 4 L. T. 692. [7] 22 C. D. 101; 47 L. T. 437; 31 W. R. 319. [8] 13 C. D. 228; 49 L. J., Ch. 200; 41 L. T. 551; 28 W. R. 348. [9] 4 Ch. D. 389; 46 L. J., Ch. 43; 35 L. T. 750; 25 W. R. 161. [10] 10 Man. R. 490; 15 C. L. T. 200; 31 C. L. J. 430. [11] L. R. 9 Ch. 514; 43 L. J. Ch. 573; 30 L. T. 589; 22 W. R. 607. [12] 8 C. D. 492; 47 L. J. Ch. 80; 38 L. T. 494; 26 W. R. 595. [13] 26 C. D. 82; 53 L. J. Ch. 223; 50 L. T. 550; 32 W. R. 417. [14] 20 C. D. 303; 51 L. J., Ch. 517; 46 L. T. 750; 30 W. R. 480. [15] 18 C. D. 58; 45 L. T. 227; 30 W. R. 50. [16] 29 C. D. 348; 54 L. J., Ch. 816; 52 L. T. 398; 33 W. R. 449. [17] 19 C. D. 140, 153; 51 L. J., Ch. 67; 45 L. T. 562; 30 W. R. 125. [18] 6 App. Cases, 482; 50 L. J., P. C. 8; 43 L. T. 519. [19] (1893) 1 Ch. 547; 62 L. J., Ch. 233; 68 L. T. 595; 41 W. R. 177; 2 R. 223. [20] 8 Ves. 4. [21] 25 O. R. 368. [22] 2 Ch. Chs. 49.

Argument.

The amount due on the two mortgages must be charged against the assignor's exemption. The assignor made no selection of exemptions, which is necessary: *Cloutier* v. *Georgeson*.[2] The assignee's advocates have a lien upon the fund for their fees and disbursements: *Ex parte Yalden, In re Austin*,[23] *Bell* v. *Teetzel*,[24] *Savage* v. *James*.[25]

T. C. Johnstone, for execution creditors, respondents.—The assignor, being an alien, has no rights other than those expressly conferred by "The Naturalization Act," and consequently no right of exemption. If $1,500 is exempt, the amount due on the two mortgages is to be charged against this.

N. Mackenzie, for lien-holders, respondents.

[*March 7th, 1901.*]

WETMORE, J.—I have come to the conclusion that my brother RICHARDSON was correct in holding that the appellant is entitled to $1,500, part of the proceeds of the sale of the real property, subject to Peltier's lien. I must say, however, that it is not without some difficulty that I have reached this conclusion. I do not wish to be understood as holding anything more than is necessary for the purpose of deciding the questions involved in this appeal upon the material presented. I can quite conceive that cases may arise which will involve very nice questions of law in applying paragraph 10 of sec. 2 of "The Exemptions Ordinance" (Consolidated Ordinances, cap. 27), and I am of opinion that this appeal brings us pretty close to one of them. The paragraph in question exempts from seizure under execution "the house and buildings occupied by the execution debtor, and also the lot or lots on which the same are situate, according to the registered plan of the same, to the extent of fifteen hundred dollars." The appellant occupied lot 17, in block 40 (according to the registered plan), in Indian Head. His dwelling house was situated on this lot.

[24] 4 C. D. 129; 46 L. J., Bk. 59; 35 L. T. 720; 25 W. R. 134. [25] 24 S. C. R. 656. [2] Ir. Reps. 9 Eq. 357.

Judgment. Wetmore, J.

There was also another building on the lot, put there for the purpose of a laundry. On what part of the lot this laundry was placed does not appear, nor is there any evidence as to the size of the lot, or as to its capability of being subdivided into two parts so as to leave each part available for any practical purpose. There is evidence that the appellant wanted his dwelling house and eight feet beyond it set off for his exemption. It would appear, however, from the arguments of counsel as if the appellant wanted the front of the lot and eight feet back of the rear of the house and running across the lot. This I can quite conceive might render the rear part valueless, or nearly so, because there might be no access to it without crossing the front part. My brother RICHARDSON informed me on inquiring of him that a division of the lot was not practicable, and that this fact was conceded. I am of opinion, however, that this Court must come to that conclusion, in view of the manner in which this appeal is presented to it. In the first place, no application was made in the proceedings before RICHARDSON, J. for a division. If the lot was capable of being divided so that each portion of it would have an appreciable market value after the dwelling house and lands about it necessary for its usual and proper occupation as such, in all to the value of $1,500, exclusive of the mortgages, had been set apart, an application would have been made to have it so divided, and I am not prepared to say that if the lot was capable of being so divided that would not have been the proper course to have taken, but I express no decided opinion on the subject. In the next place, it was not urged before RICHARDSON, J., or at the argument of the appeal, that the dwelling house, with sufficient of the land around it suitable for its proper enjoyment and occupation, in all to the value of $1,500, should have been set apart. Arriving at the conclusion that the land was not capable of being so divided, I am of opinion that the appellant was entitled to his exemption to the extent of $1,500 in respect to the whole lot, and that that right is not affected by the fact that the value of the lot with the buildings was over $1,500. A person might have a lot of land, the

intrinsic value of which in itself would not be more than $200. He might have buildings on it worth $20,000, and it would be utterly impossible to set aside any portion of the lot worth $1,500. But the person would have the right of exemption to the extent of such $1,500 if the property was embraced by paragraph 10 of the Ordinance in question. In the case before the Court, while, as I have stated, the total value of the property was over $1,500, there were mortgages against it, and as a matter of fact, the equity of redemption was only worth $1,530 (at least, we must practically hold that for the purposes of this case). I agree with what was held in the *Ontario Bank* v. *McMicken*,[1] which, as I understand it, is substantially "that when the land in respect to which the right to exemption attaches is mortgaged, the debtor is entitled to his exemptions out of the value of the equity of redemption." I think this is in accordance with the intention of the Ordinance, namely, that *quoad* such property, the debtor shall be entitled to, if it can be realized, sufficient to provide him with a dwelling place to the extent of the exemption. I do not wish to decide anything further in this respect or to make any suggestions. I simply, for the reason stated, hold that, under the circumstances of this case, the appellant is entitled to the $1,500, subject to the Peltier lien. Subject to what I have hereinbefore stated, I concur in the judgment of my brother McGUIRE and in the conclusion he has reached. Judgment. Wetmore, J.

McGUIRE, J.—This is an appeal from a portion of the judgment of Mr. Justice RICHARDSON in the above matter. Demaurez on the 14th January, 1899, made an assignment in trust for the benefit of creditors to one W. S. Cameron, by which he assigned all his real and personal property to said Cameron in trust as aforesaid, "except what is exempt from seizure and sale under execution."

On the 29th April, 1899, an originating summons was granted on "an application on the part of certain of the creditors," by Mr. Justice RICHARDSON, for an "order for the administration of the trust estate," and an affidavit made by one James Conn, who claimed to be a creditor, was filed

Judgment. McGuire, J.

on that application, which affidavit alleged that the assignee, Cameron, had not "used due and proper diligence towards realizing the said estate," and was, in his belief, "unsuitable and incompetent to perform his trust." Similar affidavits made by five other creditors were also filed. Counter affidavits of Demuarez and Cameron were also filed. The petition on which the originating summons was granted alleged that the assignee had not proceeded to get possession of the property assigned, and had allowed Demaurez to remain in possession and enjoyment thereof, and the petitioners believed Cameron to be unsuitable and incompetent to perform his trust, and asked for his removal, and that another person, one Campkin, be appointed liquidator. On the 13th of May, cause was shewn, and the Judge's note is: "The case stands to 15th June, and the assignee is directed to proceed with the execution of the trust, and to dispose of the real estate without delay." The appeal book shews that on the 22nd May the "assignee demanded possession of the store premises, which demand was refused by the said assignor. A writ of summons for ejectment and possession was issued, and notice of motion for immediate judgment was served by leave, and judgment was given for the assignee, and costs to the amount of $82.52 taxed by the said assignee against the said assignor." On the hearing of this motion for ejectment, it appears that Demaurez appeared in person, and claimed exemptions, and that these should be allotted, and on the 1st June the Judge found "plaintiff entitled to judgment as asked. No judgment to be entered until June 11th, unless it be shewn by affidavit, of which Mr. Balfour is to have notice, that defendant is obstructing plaintiff. Question of costs reserved." On the 13th June the matter came again before the Judge, when counsel for the assignee stated that five tenders for the land had been obtained, one of which was put in by Edward Bunting, offering to pay $1,530, over and above the amount of the mortgage thereon—$1,171. Counsel for all parties, except for Demaurez, recommended acceptance of this tender. Mr. Balfour, for Demaurez, opposed the sale, not considering the offer sufficient.

Judgment.
McGuire, J.

The matter was adjourned till 30th June, and again till 6th July, when Demaurez was examined as a witness as to what property he had, and in his evidence he said he was never naturalized as a British subject, and came from Maine, U.S.A. There were certain mechanics' lien claims against the property, and some evidence was taken as to these, and it also appeared that Demaurez had given a written notice to the assignee as to what he claimed as exemptions. On page 15 of the appeal book is a notice, dated 23rd May, 1899, signed by Demaurez, addressed to the assignee, in which he claims as exempt:—"(1) The real estate occupied by me to the value of $1,500, and (2) the following personal property: my tools, not included as fixtures of the laundry plant I made my living with, household goods, and my clothing," and warns the assignee not to interfere with the said property.

Mr. Balfour, for Demaurez, insisted that the assignor was entitled to $1,500, less the Peltier claim including costs. Peltier was a lien-holder, and had obtained judgment.

Judgment was thereafter rendered, in which the objection that Demaurez, being an alien, was not entitled to any exemption, was not allowed, and the judgment then proceeds to deal with what was exempt. The Judge decides against the claim of exemption set up as to the tools used in the laundry. As to the real estate, he says: "Had the present sale been made by the Sheriff, that officer would have realized a surplus of $30 over the exemptions, which would be applicable upon their execution (that of McKay and Brooks) and to this $30, in my judgment, McKay and Brooks are preferred to the other creditors." Another execution of Edwards and Boyd, it was claimed, was not affected by the exemption set up by virtue of sec. 4 of cap. 27, but this contention is not sustained. The judgment then says: "Demaurez' right to the $1,500 is then contested by three creditors, who claim to have rights superior to Demaurez' exemptions, under the provisions of The Mechanics' Lien Ordinance. These are Clement Peltier, Adiel Sherwood and James Conn." Peltier's claim is allowed, but Sherwood's

Judgment.
McGuire, J.

and Conn's rejected. In the result the Judge decides that Demaurez is entitled to $1,500, less Peltier's claim, and then he proceeds to consider the question of costs. "As to those of the parties (creditors) who instituted the proceedings, i.e., the plaintiffs in this matter, although by my judgment they take no portion of the fund in court, it is in consequence of their acts, and by reason of the proceedings forced on by the assignor's conduct that the rights of the parties have been ascertained and determined and the fund distributed—their costs, party and party, are to be paid out of the $1,530 in Court." The costs of the assignee, he directs, are also to be paid out of the $1,530. Also the costs of Peltier (lien-holder) and of Mr. Balfour, advocate for Demaurez, are to be a charge upon the fund in court.

Demaurez appeals from that portion of the judgment referring to the payment of costs incurred by the creditors and the assignee and against that part which adjudges that the $30 in excess of the $1,500 should be applied on the execution of McKay and Brooks, and asks that this $30 should be applied "on payment of the costs incurred in winding up the said estate," as that sum is all that was realized by the said sale.

The execution creditors, by cross-appeal, ask for a reversal of so much of the judgment as decides that Demaurez was entitled to exemption as to the real estate.

I think the decision of the trial Judge that Demaurez being an alien, did not disentitle him to exemption, was correct.

The contention that section 3 sub-section 1 of The Naturalization Act debars him is due to a hasty and incorrect reading of the sub-section, which merely states that nothing "*therein*," i.e., in that section, shall entitle an alien to any rights or privileges as a British subject, except such rights and privileges in respect of property as are hereby (i.e., by that Act) expressly conferred upon him. It does not say that nothing in any other Act or law shall entitle an alien to any privilege not conferred by this Act. The meaning is that nothing is to be *implied* from section 3 in favour of

an alien beyond what is expressly conferred by this Act; that the rights and privileges in respect of property expressly conferred upon an alien by the Act are not to be amplified or extended as being given by section 3. Judgment. McGuire, J.

Leaving, then, the Naturalization Act, what are the rights of an alien friend resident in the Territories? Lord Cranworth, in *Jefferys* v. *Boosey*,[26] said: "*Prima facie* the Legislature of this country must be taken to make laws for its own subjects exclusively. . . . But when I say . . . its own subjects, I must be taken to include under the word 'subjects' all persons who are within the Queen's Dominion, and who thus owe to her a temporary allegiance."

Jervis, C.J., in the same case said: "Natural born subjects, and persons domiciled or resident within the kingdom, owe obedience to the laws of the kingdom, and are within the benefits conferred by the Legislature."

Our liberal exemption legislation was doubtless enacted with a view to encouraging immigration, and immigrants from foreign countries were welcome as well as those coming from the older provinces of Great Britain. An immigrant from foreign soil must remain an alien for three years at least after coming here, and if the Exemption Ordinance did not apply to him until he became naturalized, the object of the Ordinance, so far as such immigrants were concerned, would be in a great measure defeated.

It does not seem to be disputed, on any other ground than his being an alien, that the judgment appealed from is correct in declaring Demaurez entitled to the house and buildings occupied by him to the value of fifteen hundred dollars. It was objected that he should have pointed out what he claimed as exempt. I think the law is that the sheriff is bound to leave him what is exempt, the debtor having the right, if he chooses to exercise it, to a choice from the greater quantity of the same kind of articles which are exempted. If he does not see fit to make the choice it is probable he would not be heard to complain that the sheriff had

[26] 4 H. L. Cas. 815; 3 C. L. R. 625; 24 L. J., Ex. 81; 1 Jur. (N.S.) 615.

Judgment. McGuire, J.

not made the choice most favourable to the debtor. But even if he was bound to declare what he claimed as exempt, it seems to me he did so by the written notice of 23rd May.

This brings us, then, to the portion of the judgment appealed from by Demaurez, the direction that the costs of the proceedings should be charged against the $1,500 in Court declared to be his exemption. I shall not inquire into the natural justice of the conclusion arrived at by the trial Judge, that the costs of all parties should be paid out of the fund in Court. If not hampered by the Exemption Ordinance I might have come to a similar conclusion. But however hard it may seem to the creditors and the assignee that they should have to bear their own costs—assuming that there is any hardship in this—it is equally hard that Demaurez should escape paying the *debts* he owed these same creditors. The Ordinance, however, says that creditors must go unpaid unless the defendant has property not exempt out of which the executions can be satisfied, or unless the debtor is willing to waive his exemptions. The honesty of the creditors' claims is not in question in such a case as the present, in face of the positive language of the Ordinance. If the judgment here was correct in directing payment of costs, but not of the original debts, out of the debtors' exemption, I do not see why, in all cases where the creditor sues to judgment, the costs of such suit should not be payable out of property otherwise exempt. There is no question whatever that had there been no assignment for benefit of creditors all the creditors could have done would be to get judgments and put executions in the sheriff's hands, and all they would have got out of the real estate here would have been $30. It seems to me the costs were all incurred by the creditors in their efforts to recover the amounts of their claims. These efforts proved to have been ill-advised and ineffectual—they attempted to have the assignee removed, but they failed in that—they found fault with Demaurez because he did not transfer the real estate to the assignee. He never agreed to assign, nor did he assign, his real estate

to the assignee, except subject to his exemptions, and it turns out that, as to his real estate, he in effect assigned only $30. His interest then was $1,500, the assignee's $30 —he would seem to have been justified in declining to execute a transfer, except under the protection and directions of the court. Judgment. McGuire, J.

I think the appeal should be allowed, and that it should be declared that Demaurez is entitled to be paid out of the money in Court the sum of $1,530, after deducting therefrom the amount of Clement Peltier's judgment and costs; that Demaurez should be paid his costs of this appeal, and of the proceedings before Judge RICHARDSON, by the petitioning creditors; that the assignee's costs in this appeal and in said proceedings before Judge RICHARDSON should be paid by the petitioning creditors; that the cross-appeal should be dismissed, with costs to the appellant to be paid by the respondents.

It is further ordered that the sums paid out of the moneys in Court to the advocates of the respective parties on their respective undertakings filed to repay the same if so ordered, be paid back by them respectively into Court to the credit of this cause; that is to say: Messrs. Hamilton and Jones, $363.62; Mr. James Balfour, $160.67; Mr. T. C. Johnstone, $163.10; and Messrs. MacKenzie and Brown, $112.20; and that when said moneys are so paid in the money then in Court to the credit of this cause be paid out to the parties respectively entitled thereto as hereinbefore directed.

ROULEAU and SCOTT, JJ., concurred.

Appeal allowed with costs.

Cross-appeal dismissed with costs.

REPORTER:

Ford Jones, Advocate, Regina.

CLARK v. HAMILTON (No. 1).

Security for costs—Discretion—Affidavit of merits—Cross-examination of deponent.

The practice under R. 520 of the J. O. (C. O. 1898, c. 21) as to security for costs, differs from the English practice in making it obligatory upon the defendant to file the affidavit of himself or his agent alleging he has a good defence on the merits.

Quære, whether it is necessary to set out the grounds of defence.

This rule leaves the granting of the security to the discretion of the Judge under the circumstances of each case. The Judge may order the deponent to be cross-examined upon his affidavit as to the nature of the alleged defence before deciding the motion. Under the circumstances of this case the Judge was *held* to have exercised a proper discretion in refusing security.

Judgment of RICHARDSON, J., affirmed.

[RICHARDSON, J., *January 18th, 1901.*

[*Court en banc, May 7th, 1901.*

Statement.

The plaintiffs claimed from the defendant as acceptor of three bills of exchange $103. Upon an affidavit of the defendant showing that the plaintiffs resided *ex. juris.*, and alleging that, in his belief, he had a good defence to the action on the merits on the ground that he had overpaid the plaintiffs, a Chamber summons, issued on December 10th, 1900, for an order for security for costs. In opposition to the application the plaintiffs filed an affidavit of a member of the plaintiffs' firm, alleging that the defendant was justly and truly indebted in the sum sued for in respect of the acceptances, which were for goods supplied—that the defendant was entitled to no credit which had not been given, and had no set-off or counterclaim—that the defendant had never complained of any error or overcharge in his account, or defect in the goods—that the defendant had no defence to the action, and that the deponent believed that the application was made solely for the purpose of delaying and hindering the plaintiffs in the recovery of their claim; an affidavit of a student in the office of the plaintiffs' advocates, alleging that prior to the issue of the writ of summons he had had several conversations with the defendant in regard to the claim sued on, in

Statement.

which the defendant had admitted his liability on the acceptances sued on, and had offered to pay $25 per month in settlement, and that, in pursuance thereof, the defendant had made one payment of $25 on account prior to the issue of the writ of summons; an affidavit of one of the plaintiffs' advocates, verifying the acceptances sued on, and alleging that prior to the issue of the writ of summons he had had a conversation with the defendant in regard to the claim sued on, in which the defendant had stated that the acceptances sued on represented the balance of an account which he had been carrying with the plaintiffs for years, and that he wished to pay the same; that the defendant had then offered to pay $25 per month in settlement, and had never intimated to the deponent that he had any defence to the claim, and that the deponent believed that the application was made solely for the purpose of delaying the plaintiffs in the recovery of their claim; and a further affidavit of the said advocate, alleging that on December 20th, 1900 (after an enlargement and before the determination of the application), the defendant, in the course of a conversation with him in the defendant's own office, regarding the claim sued on, had admitted his indebtedness, using the words: "I owe the $103."

The application was heard on January 14th, 1901.

The defendant in person.

N. Mackenzie, for plaintiffs.

[*January 18th, 1901.*]

RICHARDSON, J., delivered a verbal judgment discharging the summons with costs to the plaintiff in the cause.

The defendant appealed (by special leave). The appeal was heard on March 5th, 1901.

Ford Jones, for appellant:—In England a summons for security for costs issues on an affidavit showing only plaintiff's residence *ex. juris.*: Eng. Mar. Rule, 981, Dan. Ch. Forms (3rd ed.) 967, Chitty's Forms 223. Here the affidavit must also swear to "a good defence on the merits to the action"—

Argument.

Jud. Ordee. rule 520. A plaintiff residing *ex. juris.* must furnish security for costs—*In re The Percy & Kelly Mining Co.*,[1] *Pray* v. *Edie*,[2] *Crozat* v. *Brogden*[3]—unless he has substantial property within the jurisdiction, or has money belonging to the defendant in his hands, or there is a cross-action. A fourth exception is sometimes mentioned, viz., where the defendant admits his indebtedness. But this exception cannot apply here, because before a defendant can obtain a summons for security for costs here he must file an affidavit swearing to "a good defence on the merits to the action," which is inconsistent with an admission of indebtedness. Even where the action is on a foreign judgment, or where the plaintiff is temporarily within the jurisdiction, security will be ordered—*Crozat* v. *Brogden*.[3] Eng. Mar. Rule 981. (*a*) "The Court cannot upon such an application go into the merits of the action," *Crozat* v. *Brogden*.[3] The affidavit of the defendant is sufficient for the purposes of this an interlocutory application, *Re New Calloa Co.*[4] This is not a case in which the Judge below exercised a discretion which the Court should hesitate about overruling, *Crozat* v. *Brogden*,[3] *Allcroft* v. *Morrison*,[5] *Coghlan* v. *Cumberland*,[6] *The Colonial Securities Trust Co.* v. *Massey*.[7] Security, if ordered, should be in an amount sufficient to cover past as well as future costs: *Brocklebank* v. *Lynn Steamship Co.*,[8] *Massey* v. *Allan*,[9] *Republic of Costa Rica* v. *Erlanger*.[10]

N. Mackenzie, for respondents, was not called upon.

[*March 7th, 1901.*]

Wetmore, J.—There is nothing in this appeal. Down to the passing of section 10 of Ordinance No. 21 of 1890, when

[1] 2 C. D. 531; 45 L. J., Ch. 526; 24 W. R. 1057. [2] 1 Term. Rep. 267; 1 R. R. 200. [3] (1894) 2 Q. B. 30; 63 L. J. Q. B. 325; 70 L. T. 522; 42 W. R. 317, 353; 9 R. 296; 10 Times L. R. 263, 361. [4] 30 W. R. 647; 47 L. T. 175. [5] 19 P. R. 59. [6] (1898) 1 Ch. 704; 67 L. J., Ch. 402; 78 L. T. 540. [7] (1896) 1 Q. B. 38; 65 L. J., Q. B. 100; 73 L. T. 497; 44 W. R. 212; 12 Times L. Rep. 57. [8] 3 C. P. D. 365; 47 L. J. C. P. 321; 38 L. T. 489; 27 W. R. 94. [9] 12 C. D. 807; 48 L. J., Ch. 692; 41 L. T. 788; 28 W. R. 243. [10] 3 C. D. 62; 45 L. J., Ch. 743; 35 L. T. 19; 24 W. R. 955.

Judgment.
Wetmore J.

a plaintiff resided out of the Territories, the defendant, upon making, by himself or his agent, an affidavit that he had a good defence on the merits, was entitled to an order for security for costs. (See "The Judicature Ordinance, 1886," sec. 429, and The Judicature Ordinance, Rev. Ord. 1888, cap. 58, sec. 452.) Under those Ordinances the right to the order was imperative, provided that the affidavit was made. Sec. 10 of the Ordinance of 1890 changed all this, and the defendant was only entitled "to a summons to show cause why an order (for security) should not issue," and that provision has been carried forward into every succeeding Judicature Ordinance. If the contention of the appellant is correct, that amendment served no needful purpose whatever. The effect of the amendment, in my opinion, to a very great extent (not altogether however), assimilated the practice in the Territories with respect to ordinary security for costs to what it is in England. There is still a difference, however, under the Territorial rule. For instance, the form of the order is different. And then there is another difference which applies to this case. Under the English practice it is not necessary that the affidavit on which the summons is granted should state that the defendant has a good defence on its merits. The Territorial practice expressly requires that it shall state it. I can quite understand why the Legislature requires this. It obviously is to prevent defendants who have no meritorious defence delaying plaintiffs and putting them to unnecessary trouble and inconvenience, and, in some cases where security can not be given, putting them out of Court. Then, it seems to me that one of the objects of making the amendment of 1890 was to prevent defendants who were disposed to make false affidavits as to merits from unnecessarily putting plaintiffs to inconvenience or putting them out of Court. And so the matter was left in the discretion of the Judge to deal on the return of the summons with each case as it arises, according to its circumstances. I have no doubt that the Judge could in this or a similar case, make an order for the defendant to be cross-examined on his affidavit, and if on such

Judgment.
Wetmore, J.

cross-examination it turned out as a matter of fact that there was no defence on the merits, to refuse the order for security. I quite agree that the Judge ought not, on an application for security, to try out the merits of the action, but I see no reason why he might not, under certain suspicious circumstances, enquire whether or not there are any merits, or whether the alleged merits are not a mere pretence and an abuse of the process of the Court. In my opinion, the fact that the Territorial rule requires the affidavit to allege merits operates more against the defendant's contention than in its favour. I think my brother RICHARDSON, under the circumstances of this case, exercised a very sound discretion in refusing the order for security.

The defendant's affidavit set forth the nature of the merits he set up. Now, I do not know that it was necessary for him to do so, and it is quite possible that if he had not disclosed the nature of his merits this case might have presented more difficulties than it does, but having disclosed the nature of his merits, it was quite open to the learned Judge to consider the nature of them. The action was brought on three acceptances of bills drawn by the plaintiffs on the defendant. The merits disclosed were of rather a peculiar, and, I must say, suspicious character in respect to such cause of action. They were that the defendant had overpaid the plaintiffs. The acceptances were not denied. It was not alleged that the defendant had paid the amount of the acceptances, nor was any fraud alleged in connection with them, but it was just generally alleged that he had overpaid the plaintiffs. At the return of the summons affidavits were read, one made by one of the plaintiffs' advocates, in which he swore in effect, with all circumstances, that before action the defendant had admitted his indebtedness upon the acceptances, and that such acceptances represented the balances which he owed, and that he asked for time to pay, and also that after the Chamber summons was issued the defendant again admitted his indebtedness and specified the amount sued for as such indebtedness. An

affidavit was also read, made by the clerk of the plaintiffs' advocate, who also swore in effect that the defendant had admitted his liability, and set forth the circumstances under which the liability was admitted. Mr. Hamilton never attempted to answer or explain these affidavits. I do not wish to be understood as laying down any hard and fast rule respecting orders for security for costs. I merely wish to state that, under the circumstances of this case, the learned Judge's discretion should not be interfered with, and that this appeal should be dismissed with costs.

Judgment.
Wetmore, J.

SCOTT, J.—In my opinion, this appeal should be dismissed, for the following reasons:—

In his affidavit filed upon the application for security for costs, defendant alleges that in his belief he had a good defence to the action on the merits on the ground that he had overpaid the plaintiffs. It appears, however, by one of the affidavits filed in answer to the application that the defendant, in a conversation with one of the plaintiffs' advocates, which took place after the application was made, admitted his indebtedness to the plaintiffs in respect of the cause of action sued for. The evidence of this admission is not controverted.

I do not look upon the evidence of this admission as evidence in contradiction of defendant's statement in his affidavit. It merely shows that though, at the time of making the affidavit he entertained the belief that he had a good defence, he, at the time he made the admission, no longer entertained that belief.

In view of this subsequent admission by the defendant of liability, I think my brother RICHARDSON exercised a reasonable discretion in refusing the application.

ROULEAU and MCGUIRE, JJ., concurred.

Appeal dismissed with costs.

REPORTER:

Ford Jones, Advocate, Regina.

McGEORGE v. ROSS.

Master and servant—Dismissal—Servant's wrongful accusations against master—Master's knowledge of the same.

Where a servant, upon unfounded suspicion, endeavoured to make his fellow-servants believe that his master had committed a criminal offence.

Held, that the master was justified in dismissing his servant.

Held, also, that though the master may have been unaware of these acts of his servant at the time of dismissing him, he was entitled to rely upon them as a defence to an action for wrongful dismissal.

Semble, it was sufficient to justify the dismissal that the servant falsely informed customers of the master that he, the servant, had been placed in his position by other persons for the purpose of "straightening out the business."

[SCOTT, J., *May 23rd, 1901.*]

Statement. Action for wrongful dismissal.

The facts appear sufficiently from the judgment. The action was tried at Edmonton on 10th April, 1901.

J. R. Boyle, for the plaintiff, referred to Smith, Master and Servant, p. 132, *Gould* v. *Webb*.[1]

F. C. Jamieson, for defendant, referred to Macdonald, Master and Servant, pp. 108, 207, 210, 212; Smith, p. 170.

[*May 23rd, 1901.*]

SCOTT, J.—Plaintiff alleges that defendant, who is a hardware merchant at Strathcona, agreed to employ him as clerk for the term of one year at a salary of $1,000, that in pursuance of such agreement he entered defendant's employment on 26th September, 1899, and continued to serve him until 28th of May, 1900, upon which date defendant discharged him without lawful excuse. He admits receipt of $660.07, and claims $339.93 as damages for wrongful dismissal.

[1] 4 El. & Bl. 933; 24 L. J. Q. B. 205; 1 Jur. (N. S.) 821; 3 W. R. 399.

Judgment.
Scott, J.

I find that defendant did dismiss the plaintiff on the date claimed. He justifies the dismissal upon the following grounds, among others:—

(1) That on or about 1st May, 1900, plaintiff took an envelope and letter addressed to one J. Hawke from defendant's store, and called in employees of the defendant and shewed them the envelope, and made use of terms with regard to defendant which were improper to be uttered by any employee.

(2) Plaintiff informed one John Delong and others that defendant had nothing to do with his entering his employ, and that he was sent there to look after the interests of the creditors.

Plaintiff in his reply denies the misconduct charged, but does not raise the question whether such misconduct, if proved, would justify plaintiff in dismissing him. That objection, however, was taken upon the argument before me.

As to the first ground. It appears that defendant sometime in May, 1900, received a letter from one J. Hawke in which was enclosed for a reply an envelope addressed to him. Defendant left this envelope on his desk in his office, but when replying to the letter a few days afterwards he could not find the envelope. Upon making enquiries he obtained information which led him to apply to the plaintiff, who informed him that he had it in his pocket at his house. Upon defendant asking him why he had taken it he replied that he was going to write a private letter. McNulty, who is defendant's bookkeeper, states that plaintiff called him and one Montgomery into the office one day and shewed them this envelope, asking them if they would know it again, that he then enclosed it in a blank envelope, drawing pencil lines diagonally across it, and asked them to place their initials upon it, which they did, and that plaintiff then put it into his pocket, saying, "he is kicking, and if he don't quit I will put the son of a bitch in the Penitentiary."

Judgment.
Scott, J.

Plaintiff admits having asked McNulty to place his initials upon the envelope, but denies having made the statement referred to, or any statement at that time. He states that his reason for taking the envelope was that he had been expecting to receive a letter from Hawke, and he thought some one had been tampering with his mail, and that the reason he asked McNulty to put his initials upon the envelope was simply to prove that he had not taken it without letting some person know that he had taken it.

I cannot avoid the conclusion that plaintiff did make the statement referred to by McNulty. It would be difficult for me to believe that the latter manufactured that portion of his evidence, or that plaintiff would have taken the peculiar steps he did take with respect to the envelope without making some explanation as to their object. I am satisfied that defendant intended to convey to McNulty that defendant had committed a criminal offence of which the envelope was proof, and that he intended to hold it *in terrorem* over the defendant. It may be that plaintiff thought at the time that defendant had committed a criminal offence by opening a letter addressed to another, but whether or not he so believed appears to me to be immaterial. The fact of his having merely upon this suspicion, which turns out to have been unfounded, endeavoured to induce a fellow-servant to believe that their master had committed a criminal offence ought, in my opinion, to constitute a sufficient ground for his dismissal by the master.

As to the second ground. One Delong, who appears to have been a customer of defendant's, states that on more than one occasion plaintiff informed him that defendant could not "sack" him as he was sent there to "straighten out the business." Davidson, another witness, states that plaintiff told him that he was sent there to run the business, and a third witness (Tranter) states that plaintiff told him that defendant had nothing to do with hiring him.

Plaintiff denies having made these statements, but I am inclined to accept the evidence of the three independent

and apparently unprejudiced witnesses to the effect that he did make them, and I believe that in making them he intended to lead the persons to whom they were made to believe that he was employed in the business in the interests of others than the defendant. A reasonable inference would be that those others were defendant's creditors, but as there may be a doubt upon that point, and as to whether, if the inference I have suggested is the correct one, plaintiff's conduct in making these statements would justify his dismissal, I do not base my judgment on that ground. Judgment. Scott, J.

It is not clearly shown that defendant at the time of the dismissal of plaintiff was aware of these acts of misconduct on the part of the plaintiff, or that he dismissed him because of those acts, but even if he were not aware of them at the time he is now entitled to rely upon them. See *Boston Deep Sea Fishery Co.* v. *Ansell*,[2] and *McIntyre* v. *Hockin*.[3]

Judgment for defendant with costs.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

THE KING v. WAGNER.

Criminal Code, sec. 360—"Valuable security"—Lien note.

An ordinary "lien note" is a "valuable security" within the meaning of sec. 360 of The Criminal Code, 1892.

[*Court en banc, June 4th, 1901.*

This was a question of law reserved by SCOTT, J., for the opinion of the Court under s. 743 of The Criminal Code, 1892. The defendant was tried before him at Edmonton on May 28th and 29th, 1901, upon the following charge:—

"That he, the said Philip Wagner, on the 8th day of February, A.D. 1901, unlawfully, knowingly and designedly

[2]39 Chy. Div. 339; 59 L. T. 345. [3]16 O. A. R. 599.

Statement.

did falsely pretend to one Hretzko Aronetz, the said Hretzko Aronetz being a Russian and unable to understand the English language, that a certain document which he, the said Hretzko Aronetz, was then through interpretation of him, the said Philip Wagner, called upon to sign, was merely a receipt or memorandum of agreement regarding the sale of a cow by one Frank Lafortune to him, the said Hretzko Aronetz, setting forth that if the cow was not as represented the money which he, the said Hretzko Aronetz, was then paying therefor, forty-five dollars, would be refunded to him, said forty-five dollars being made up of the sum of twenty dollars in cash then paid to the said Frank Lafortune, and the sum of twenty-five dollars due and owing by said Philip Wagner to said Hretzko Aronetz, and by him said Wagner agreed to be paid to the said Frank Lafortune, and did further falsely pretend that the said sum of twenty-five dollars was already paid to said Frank Lafortune, the said Lafortune being indebted to him, the said Wagner in that amount; by means of which false pretences the said Philip Wagner did thereby unlawfully and fraudulently induce the said Hretzko Aronetz to sign a certain lien note in favour of the said Frank Lafortune for the sum of twenty-five dollars with intent thereby then to defraud and injure the said Hretzko Aronetz, whereas in truth and in fact the said document was, as the said Philip Wagner well knew, a lien note for the purpose of securing to the said Frank Lafortune the payment by the said Hretzko Aronetz of the sum of twenty-five dollars, being the money already held by the said Philip Wagner for the said Hretzko Aronetz in trust to pay the same to the said Frank Lafortune, and whereas in truth and in fact said Wagner had not paid said sum of twenty-five dollars to said Lafortune, nor was said Lafortune indebted to him, the said Wagner, in said amount."

The evidence established that the defendant with intent to defraud and injure the said Aronetz had by false pretences induced him to execute the following document, that is to say:

Statement.

"$25.00.

"Edmonton, N.W.T., 8th February, 1901.

"On or before the 8th day of April, 1901, for value received I promise to pay to Frank Lafortune or order the sum of twenty-five dollars at Edmonton, N.W.T., with interest at one per cent. per annum till due, and ten per cent. per annum after due until paid.

"Given for one cow six years old, branded horseshoe on rump, red cow, half of side white."

"The title ownership and right to the possession of the property for which this note is given shall remain at my own risk until this note, or any renewal thereof, is fully paid with interest, and if I shall make default in payment of this, or any other note in their favour, or should I sell, or dispose of, or mortgage my landed property, or if they should consider this note insecure, they have full power to declare this, and all other notes made by me in their favour, due and payable forthwith, and they may take possession of the property and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied in reducing the amount unpaid thereon, and the holders hereof, notwithstanding such taking possession or sale, shall have thereafter the right to proceed against me and recover, and I hereby agree to pay the balance then found to be due thereon.

Witness, P. Wagner.
G. W. R. Almon.

his
H. X Aronetz.
mark

The false pretence was that the defendant represented to said Aronetz that said document was merely a receipt or memorandum respecting the sale of a cow by said Lafortune to him, the said Aronetz, setting forth that if the cow was not as represented the money which said Aronetz was then paying therefor would be refunded to him.

At the conclusion of the trial the defendant was convicted of the offence charged, but sentence was reserved until 25th June, 1901.

Statement.

The question reserved for the opinion of the Court was:—

Was the document referred to a valuable security within the meaning of section 360 of The Criminal Code, 1892?

The case was argued June 4th, 1901.

T. C. Johnstone, for the Crown, referred to *Regina* v. *Scott*,[1] *Regina* v. *Brady*,[2] *Regina* v. *Rymal*,[3] *Regina* v. *Danger*.[4]

No one appeared for the prisoner.

[*June 4th, 1901.*]

The judgment of the Court was delivered by

McGuire, J.—By s. 3, s.-s. (c.c.) the term "valuable security" is defined, and among the various writings thereby included under the term we find "any . . . note, warrant, order or other security for money or for payment of money." If this document is a "note"—meaning a "promissory note"—then it is a valuable security, but even if not a "promissory note"—a point not necessary to decide—it is a document coming within the description "other security for money or for payment of money." It is a document in the nature of a "note" and is a "security for the payment of money." I think it comes also within the words of another part of s.-s. (c.c.) a "document of title to . . . goods as hereinbefore defined," that is, in s.-s. (g), which includes a "document used in the ordinary course of business as proof of the possession or control of goods, authorizing . . . either by indorsement or by *delivery*, the possessor . . . to transfer or receive the goods" mentioned. This document is one of a class in common use for the purposes just mentioned, and expressly authorizes the possessor of it, on certain conditions, to "take possession" of the chattel and "to sell" it.

[1](1878) 2 S. C. R. 349. [2](1866) 26 U. C. Q. B. 13. [3](1889) 17 O. R. 227. [4](1857) Dears & B. C. C. 307; 3 Jur. (N. S.) 1011; 26 L. J. M. C. 185; 5 W. R. 738; 7 Cox C. C. 303.

I think there is no doubt whatever that the signing and delivery of this document was the making of a "valuable security" within the meaning of s. 360 of the code. Judgment. McGuire, J.

REPORTER :

Ford Jones, Advocate, Regina.

THE TRUSTEES OF THE BALGONIE PROTESTANT PUBLIC SCHOOL DISTRICT v. THE CANADIAN PACIFIC RAILWAY CO.

Taxation by School District—Unpatented land set apart for C. P. R. land grant, but not sold or occupied by company—44 Vic. cap. 1, Schedule—Exemption from taxation—Municipal law.

Crown lands which have been set apart for the land grant of the C. P. R. Co., and earned by that company as part of its land grant under the Schedule to 44 Vic. (1881) c. 1, "An Act respecting the Canadian Pacific Railway," but which have never been sold or occupied by the company, are exempt from taxation by School Districts in the Territories by virtue of s. 16 (†) of the Schedule.

Per RICHARDSON, J.—On the ground that a School District is a "municipal corporation."

Per WETMORE, J.—On the ground that the Territorial Legislative Assembly—and consequently a Territorial School District—acts merely by authority delegated by the Dominion Parliament, and, therefore, that taxation by a Territorial School District is taxation "by the Dominion."

Per MCGUIRE, J.—On the ground that the Territorial School Ordinance exempts from taxation lands held by Her Majesty, and does not authorize the taxation of any interest therein, and that as to the lands in question the company is at best in the position of purchasers who had paid their purchase money, but had not yet actually received a conveyance, and, until conveyed, the lands are held by Her Majesty.

Semble, per WETMORE, J.—Territorial School Districts are not "municipal corporations."

Semble, per MCGUIRE, J.—Taxation by a School District is not taxation "by the Dominion," which latter means taxation direct by the Dominion. A School District is not a "municipal corporation." The effect of the Act was not to make *ipso facto* a grant to the company, nor to operate as a grant to the company as each 20 miles of railway was completed, but to entitle the company as each 20 miles was completed to ask for and receive a grant of the land subsidy applicable thereto.

Construction of Statutes discussed.

[*Court en banc, June 4th, 1901.*

(†) Quoted in full in judgment of MCGUIRE, J.

Statement

The plaintiffs sued for $6.40, being $3.20 for taxes for 1899, assessed against each of the S.-W. and N.-W. quarters of Section 9, Township 18, Range 17, West of the Second Meridian. The defendants admitted liability for the $3.20 claimed in respect to the N.-W. quarter, and with their dispute note paid this amount into Court, together with 52c. for costs, but pleaded that the S.-W. quarter was unpatented Crown land, which formed part of their land grant, and was exempt from taxation under sec. 16 of the Schedule to 44 Vic. cap. 1. Instead of going to trial, a case was stated for the opinion of the Court en banc. By the stated case it was admitted that the lands had been duly assessed; that all formalities necessary to impose the taxes had been duly complied with; that the S.-W. quarter (except as hereinbefore mentioned) was land belonging to and vested in Her Majesty, and forming part of the public lands of the Dominion, and that the same had never been patented or granted by the Crown; that the said land formed part of the land set apart as a land grant to the defendants under the contract, a copy of which forms the Schedule to 44 Vic. cap. 1; that the defendants had duly fulfilled the said contract and had earned the said land as part of their said land grant on or about January 1st, 1884; that the said land had never been sold or occupied by the defendants; that up to the time of the passing of 44 Vic. cap. 1 no school districts had been formed in the North-West Territories, nor had provision been made, by ordinance or otherwise, for the establishment thereof; and that at the time of the assessment in question the plaintiffs were, and had since continued to be, a duly-incorporated school district.

The case was heard March 4th, 1901.

H. Harvey, Deputy Attorney-General, for plaintiffs.

J. S. Tupper, K.C., and *F. H. Phippen*, for defendants.

The following cases were referred to:—*Seward* v. *Vera Cruz*,[1] *Garnett* v. *Bradley*,[2] *Regina* v. *Poor Law Commis-*

[1](1885) 10 App. Cas. 59; 54 L. J. P. 9; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386; 49 J. P. 324. [2](1878) 3 App. Cas. 944; 48 L. J. Ex. 186; 39 L. T. 261; 26 W. R. 698.

Argument.

sioners,[3] *London and Blackwell Railway Co.* v. *Limehouse,*[4] *City of Vancouver* v. *Bailey,*[5] *People's Milling Co.* v. *Meaford,*[6] *Doe* dem *Jackson* v. *Wilkes,*[7] *Cornwallis* v. *C. P. R.,*[8] *Ryckman* v. *Van Voltenburg,*[9] *Simcoe* v. *Street,*[10] *Church* v. *Fenton,*[11] *Street* v. *Kent,*[12] *Ruddell* v. *Georgeson,*[13] *Whelan* v. *Ryan,*[14] *Mayor of Essenden* v. *Blackwood,*[15] *Mersey Docks* v. *Cameron,*[16] *Hornsey Local Board* v. *Monarch Investment and Building Society,*[17] *Caledonian Ry. Co.* v. *North British Ry. Co.,*[18] *C. P. R.* v. *Burnett,*[19] *City of Winnipeg* v. *C. P. R.*[20]

[*June 4th, 1901.*]

RICHARDSON, J.—The plaintiffs sued defendants to recover $6.40 taxes assessed against the defendant company for the year 1899 in respect of the N.-W. 1-4 and the S.-E. 1-4 section 9, Township 18, Range 2 West, being lands comprised within the limits of the School District of which plaintiffs were in 1899 the trustees.

As to the N.-W. 1-4 of sec. 9, the defendant company admits its liability, and has paid into Court the $3.20 assessed against it. But as to the $3.20 assessed against the S.-E. 1-4, the defendant company dispute liability for it, alleging that it forms part of the defendant company's land grant under Dominion Statute 44 Vic. c. 1, which has never been patented or granted by the Dominion Government, and is by sec. 16 of the Schedule to that Act exempt from taxation.

Instead of going down to trial in the usual course, the parties have agreed upon certain facts which, by means of

[3](1837) 6 A. & E. 1; 1 N. & P. 371; 6 L. J., M. C. 41. [4](1856) 3 K. & J. 123; 26 L. J., Ch. 164; 5 W. R. 64. [5](1895) 25 S. C. R. 62. [6](1885) 10 O. R. 405. [7](1833) 4 U. C. Q. B. (O. S.) 142. [8](1890) 7 Man. R. 1; 19 S. C. R. 702. [9](1857) 6 U. C. C. P. 385. [10](1862) 2 E. & A. 211. [11](1878) 28 U. C. C. P. 384; 1 Cart. 831; 4 O. A. R. 159. [12](1861) 11 U. C. C. P. 255. [13](1893) 9 Man. R. 43. [14](1891) 20 S. C. R. 65; 6 Man. R. 565. [15](1877) 2 App. Cas. 574; 45 L. J., P. C. 98; 36 L. T. 625; 25 W. R. 834. [16](1865) 11 H. L. C. 443; 20 C. B. (N.S.) 56; 35 L. J., M. C. 1; 11 Jur. (N.S.) 746; 12 L. T. 643; 13 W. R. 1009. [17](1889) 24 Q. B. D. 1; 59 L. J., Q. B. 105; 61 L. T. 867; 38 W. R. 85. [18](1881) 6 App. Cas. 114; 29 W. R. 685. [19](1889) 5 Man. R. 395. [20](1899) 12 Man. R. 581; 30 S. C. R. 559.

Judgment.
Richardson, J.

a Special Case, they have submitted to this Court for the purpose of having it at once determine whether or not the defendant company is liable for the taxes claimed.

The right of the plaintiffs to sue is admitted, as also that the assessment, providing the land was legally assessable, was duly made. It is also admitted that the land has not been patented to the defendant company, although it forms part of the lands set apart as the land grant to the company under the Dominion Act, 44 Vic. c. 1, and was earned as part thereof by 1st January, 1884, and it is further admitted that this land has never been sold or occupied by the defendant Company, and that, when the Act 44 Vic., c. 1, was passed, no provision for the establishment of School Districts in the North-West Territories existed, nor had any School Districts been established therein.

The determination of the question of liability by the defendant company to the plaintiffs depends upon the construction to be placed on sec. 16 referred to, and whether or not by that sec. 16 the defendant company's lands are freed from assessment quoad school purposes.

By sec. 16 Parliament enacted that: * * * "The lands of the company in the North-West Territories, until they are either sold or occupied, shall * * * be free from * * * taxation

(a) by the Dominion, or

(b) by any Province hereafter to be established, or

(c) by any municipal corporation therein,

for twenty years after the grant thereof from the Crown.

At the time 44 Vic. c. 1 was passed the N.-W. T. Act of 1880 was in force. By sec. 14 thereof power was conferred upon the Local Assembly, "when and so soon as any system of taxation shall be adopted, to pass all necessary ordinances in respect to education, and to provide in such ordinances for the necessary assessment and collection of rates for schools."

Acting under this, in 1884 the Local Assembly enacted the first School Ordinance.

Judgment.
Richardson, J.

In the several N.-W. T. Acts since 1880 the same power has not been changed, and in several years subsequent to 1884 the Local Assembly have by consolidation continued the School Ordinance of that year, in each of which "all the property, real and personal, within School Districts" established under them was rendered liable to taxation for the support and maintenance of schools, subject to certain defined exemptions, among these "all land . . . specially exempted from taxation by the Parliament of Canada."

Now, as the Parliament of Canada had, by sec. 16 of 44 Vic. ch. 1 declared that the lands of the defendant company in N.-W. T. shall be exempt from taxation by the Dominion or any Province thereafter to be established, or any municipal corporation therein, the question arises, Is a corporation created by the School Ordinance a municipal corporation within the fair meaning of the words used in the enactment?

Prior to 1884 there were no corporations in N.-W.-T. styled municipal, so that, in my opinion, Parliament, when enacting sec. 16 in 1881 must have intended municipal corporations to mean, i.e., corporations to which in N.-W. T., the management of purely specific local affairs, such as taxation of lands, is given by authority, and which would include such corporations as the plaintiff. That such was the intention of the contract is, in my view, supported by exempting the defendant company's lands within any province established within the N.-W. T. as they existed when the Act was passed. For if the contention of plaintiffs were supported, and the lands in question held taxable now, just so soon as a province were established, including the School District, this land would become exempt unless the conditions as to time limited for exemption had expired. Again, had the Local Legislature termed School Districts municipal corporations, as they might have done, the exemption would have, on plaintiff's own contention, existed, and were the law hereafter changed, and municipal corporations substituted for School Districts, then exemption not previously existing would commence.

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Richardson, J.

In delivering judgment in *Cornwallis* v. *C. P. R.*,[8] the late learned Mr. Justice Patterson thus interprets sec. 16:—"I have no doubt that the proper construction of clause 16 is that, unless sold or occupied, no part of the land subsidy in N.-W. T. shall be liable to taxation until after the specified period of exemption."

The plaintiffs' action should be dismissed, with costs in this and the Court below.

WETMORE, J. (after stating the admitted facts as set out in the Special Case).—The first question that arises for our decision is whether the taxation in question of the south-west quarter of section 9 comes within the language and intention of clause 16 of the contract set out in 44 Vic. (1881), cap. 1? That is, is it a taxation by the Dominion, or by any Province established after the date of such contract (21st October, 1880), or by any municipal corporation therein? I am of opinion that the words "such taxation" in that portion of the clause which relates to "the lands of the company in the North-West Territories" means taxation by the Dominion or any Province established after the date of such contract, or by any municipal corporation therein, and that the words "by any municipal corporation therein" in such clause mean by any municipal corporation in any Province established after the date of such contract. Reading the clause in question with the portions of it herein referred to as I have interpreted them, the question narrows down to this: Is the taxation in question a taxation by the Dominion, within the intention and meaning of the contract to be gathered from its language? I have arrived at the conclusion that it is. In construing this contract, we must give it and every portion of it the operation intended by the parties thereto in so far as such intention can be gathered from its language. The contract has, by virtue of the Act, the operation of law. It is nevertheless, however, to be construed according to the ordinary rules applicable to the construction of contracts. In order to get at the intention of clause 16, the Court must put itself in the

situation of the parties to the contract, and construe its language in the light of the surrounding circumstances and conditions. Upon carefully reading the clauses, I have not the slightest moral doubt that it was the intention of the parties to the contract, and, therefore, the intention of Parliament, to exempt or relieve the lands in question in the North-West Territories from taxes, for the period specified, for any public purpose in so far as any legislation was concerned which the Dominion Parliament could then or thereafter control. That would not be sufficient, however, unless the contract contains apt words to effect that purpose. But if apt words are used, it is the duty of the Court to give effect to such intention. Putting myself in the situation of the parties to the contract at the time it was made, the question arises, where was, then, the taxing power with respect to properties of the various characters mentioned in clause 16? So far as station grounds, workshops, and other properties, of the character mentioned in the first portion of the clause, situated in Provinces which were established at the time of the making of the contract (or the passing of the Act, it is immaterial which) were concerned, Parliament could not affect the taxation of such properties by such Provinces for Provincial purposes, or by any municipal corporation herein, for municipal purposes; such taxing powers were entirely independent of any control or interference by Parliament. Consequently, clause 16 did not attempt to deal with any taxation which these established Provinces or the municipalities within them had or might have the right to impose on such properties. The clause only dealt with such taxation which the Dominion Parliament had then the right to control, or which it would have the right to control in any future creation of Provinces by provisions inserted in any Act creating any such Province. So far as any property, real or personal, situate in the North-West Territories was concerned, the only authority which had original powers to impose taxation upon it was the Parliament of Canada, or, in other words, as

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expressed in clause 16, "The Dominion." The Lieutenant-Governor of the Territories in Council had, at the time of the making of this contract, certain powers of legislation conferred by Act of Parliament. Whether at that time the North-West Council, as it was called, had power to tax real or personal property is not quite as clear as it might have been. I will, however, for the purposes of this case, assume (and possibly the assumption might not be very far astray) that it had such power. But any such powers, as well as any powers of legislation with respect to any other subjects, were delegated powers. In other words, it was Parliament or the Dominion legislating by means of its delegated authority. Therefore I am of opinion that the words "taxation by the Dominion" were capable of and might naturally be used in a broad sense not only to include taxation by Parliament itself, but also to include taxation imposed by any authority delegated by Parliament and which Parliament had the power to control, and that these words were used and intended by the parties to the contract in that sense. It would be an anomalous state of affairs if the delegated authority would be in a position to do what the delegating authority could not do without a breach of faith, and therefore what we must assume that it would not do. Therefore any powers of taxation conferred on either the North-West Council or North-West Legislative Assembly, whether conferred before or after the passing of the Act of 1881, must be so construed as to limit them to go no further than we must assume Parliament itself would go in the face of its own solemn enactment if it had legislated upon the subject itself. I may just mention the fact, as it may have some slight bearing on the question, that at the time of the passing of the Act of 1881 the North-West Council had not, so far as I can discover, passed any ordinance taxing real or personal property. The first taxing ordinance of that character which I can find is The North-West Municipal Ordinance, 1883 (No. 2 of 1883), and no School Ordinance was passed until the School Ordinance of 1884 (No. 5 of 1884). If the construction I have put on the words "taxation by the Dominion" in clause 16 of the contract is not

correct, then the company took very little by the provisions of it in so far as the lands in the North-West Territories are concerned. In fact it took practically nothing so long as the Territories remained Territories. It would only be after a Province would be created within the limits of such Territories that it would derive any practical advantage from the clause. Moreover, we would have this very extraordinary state of affairs that the lands and property in question would be liable to taxation by the North-West Council or Assembly, as the case might be, so long as the Territories existed as such, but the moment they were created into provinces the power to tax would cease. I cannot bring my mind to the conclusion that anything of that sort was ever contemplated by the parties to the contract. Moreover, the parties to the contract knew very well at the time it was executed what the condition of affairs were throughout the whole of Canada. They knew that the powers of direct taxation of property throughout Canada were only exercised by the Provinces for local purposes; that Parliament did not then, nor was it likely in the near future to resort to direct taxation of property for Dominion purposes. It cannot, therefore, be possible that the parties intended to contract by the words in question simply against a taxation which no one ever imagines would be resorted to. Having reached the conclusion that the taxation in question was a "taxation by the Dominion" within the meaning of clause 16 of the contract, any further questions that arise are settled by *The Rural Municipality of Cornwallis* v. *The Can. Pac. Ry. Co.*,[8] in which it was held that the lands were not liable to the taxation from which they were exempted by the clause in question until 20 years after the grant of such lands, unless they were in the meanwhile sold or occupied. I am of opinion that the maxim *generalia specialibus non derogant* has no application to this case.

Judgment.
Wetmore, J.

I express no decided opinion as to whether the school trustees under The School Ordinance are a municipal corporation; it is not necessary in view of the conclusion I have reached to do so. I incline, however, to the opinion that they are not a municipal corporation. *The Can. Pac.*

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Ry. Co. v. *City of Winnipeg* [20] does not determine that question. All that was decided in that case was that the school tax under the circumstances presented, being assessed for and collected by the municipal authority, was a municipal tax and assessment within the provisions of the city by-law then in question.

Judgment should be entered for the defendants, the plaintiffs to have their costs down to date of the filing the dispute note and the payment of the money into Court, the plaintiffs to pay the defendants' costs subsequent to that date, the costs so allowed to be taxed, and the costs allowed to the plaintiffs to be set off against those allowed to the defendants, and defendants to have execution for the balance.

McGUIRE, J.—A case stated for the opinion of the Court. It is admitted that the plaintiffs have complied with all the formalities imposed by the School Ordinance so as to create a valid charge of the taxes sued for unless the land in question is not taxable (a) because it is the property of the Crown, or (b) because, if it is the property of the defendants, it is part of their land subsidy for the building of their railway, and is exempt by virtue of s. 16 of Schedule to cap. 1, 44 Vic., the twenty years there mentioned not having expired.

It is urged on behalf of the plaintiffs that s. 16 does not exempt the defendants from school taxes, first because taxes imposed by a school corporation are not expressly mentioned in the section, and (2) because prior to the passing of Ch. 1, 44 Vic., Parliament had in 1880, cap. 25, conferred upon the Territories the power to impose school taxes; that it would not be assumed that it intended to derogate from the powers so given when the contract with the C. P. R. was subsequently entered into unless it expressed such intention in clear and express terms; and that it has not so expressed that intention, but on the contrary, while mentioning taxes imposed by a municipality, it does not mention those imposed by a school corporation.

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In reply to this it is urged for the defendants that the words of s. 16, and especially the words "municipal corporation," are wide enough to include a "school corporation." Section 16 referred to is in the following terms: "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 20 years after the grant thereof from the Crown." It will be observed that the section is divisible into two main parts. First, perpetual exemption of certain kinds of railway property from taxation (a) by the Dominion, (b) by any Province thereafter to be established, (c) by any municipal corporation therein, i.e., in any Province thereafter to be established. This part does not expressly apply to the Territories, nor apparently by implication, as the Territories are not yet a Province as there intended.

The second part expressly applies to the Territories. The exemption here is (a) of "lands of the company," (b) for 20 years after the grant thereof from the Crown unless sooner sold or occupied, and (c) the exemption is from "such taxation." If the land in question is still Crown land, it is exempt beyond question. If it is "land of the company," then it is exempt from "*such* taxation for 20 years from the grant thereof from the Crown." It is admitted that no patent has issued for the quarter section in question, but that it is part of the land set apart as a land grant for the company, and that it was earned as part of such grant about 1884, that is, less than 20 years ago. Unless, then, it can be held that this land was in effect "granted" to the company by the Act of 1881, the period of exemption has not yet expired. Conceding, however, for the present that the period has not yet expired, and that

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the land is that of the company (about which I shall have something to say later on), what is the *extent* of the exemption? It is not expressed to be from *all* taxation—only from "such taxation," that is, such as is mentioned in the former part of the section—(a) by the Dominion, (b) by a Province hereafter to be established, or (c) by a municipal corporation therein. Taken literally, the last two cannot refer to the Territories. But, if mutatis mutandis we apply these words to the Territories, they might be read to mean (b) by the Territories, or (c) by any municipal corporation in the Territories. Are school taxes here imposed by the Dominion? We must construe the language of s. 16 in the ordinary sense of the words in the English language, as we think they were used by the parties to the contract, as shown by the contract and as applied to the subject matter. The powers of the Territorial Legislature are delegated by the Dominion, and it is contended that all legislation here may be said to be by the Dominion through its delegates. If the acts of a delegated body are to be deemed the acts of the delegating authority, why did the parties to the contract provide against municipal taxation, having provided already against taxation by the Province, for, if the Territories are delegates of the Dominion, surely a municipal corporation is a delegate of its Provincial Legislature. If the parties to the contract had in mind that the acts of the delegate were properly included under the acts of the delegating authority, they would not have mentioned municipal corporations. Their having done so is a reason for believing that when they used the words "taxation by the Dominion" they meant only what is generally understood by such words, namely, taxation direct by the Dominion, just as taxation by a Province would ordinarily be intended to mean taxation direct by the Province. In this view of the section, then, school taxes would not be included under the first head. Are they taxation by "a municipal corporation?" "Municipal corporation" was in 1881 a well-known phrase; the thing itself was familiar to the parties to the contract, and it can hardly be supposed they had in mind anything but what was and is well known as a municipal corporation. If one were looking

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for legislation dealing with school districts, he would hardly look at the Ordinance governing municipal corporations. Putting ourselves in the position of the contracting parties, or of Parliament, would we intend "municipal corporations" to include a school corporation? I scarcely think so. Moreover, as I have already mentioned, had the parties meant "all taxation," presumably they would have said so, but the use of "such" can only mean that they meant something less than "all."

There is then another fact which may help us to understand what was meant by Parliament. It had as early as 1875 given power to the Territories to make all necessary ordinances in respect to education. In 1880 the Act of 1875 (c. 49, 38 Vic.), and subsequent amendments, were revised, consolidated, and continued by chapter 25, and s. 10 thereof provided that "the Lieutenant-Governor, by and with the consent of the Council or Assembly, as the case may be, shall pass all necessary ordinances in respect to education." To provide for the establishing of school districts and enabling them to impose taxes for the maintenance of schools would be a proper provision in such an ordinance. Then it continues: "but it shall therein be always provided that a majority of the ratepayers of any district or portion of the North-West Territories . . . may establish schools therein as they may think fit, and make the necessary assessment and collection of rates therefor." This seems to me clearly not only to empower, but to command, the passing of Ordinances authorizing the establishment of schools, and conferring on the ratepayers the power to assess and collect taxes therefor. The section, it is true, goes on to provide for separate schools, but that does not alter the fact that the Territories were thereby given the power just mentioned. The Act of 1880 was in force when c. 1 of 44 Vic. (1881) was passed. Parliament must be taken to have been aware that it had given these powers to the Territories, and to have expected that c. 25 would be obeyed. It is fair argument that, such being the case, had Parliament intended to limit the power of the ratepayers of

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schools and prevent them taking the company's lands, it would have expressly so declared. This consideration seems to confirm the view that "such taxation" in s. 16 did not include school taxation. I confess I am somewhat inclined to this view, but as I think this land was clearly exempt on another ground, it is unnecessary to dispose of the matter on this ground, or to express any definite opinion on it.

We must now consider if this land is exempt from school taxation under any other statute or ordinance. As already noticed, it is admitted that this land has not been patented or granted by the Crown, unless the effect of c. 1, 44 Vic., and the admitted fact that this land has been earned by the company as part of its land grant, are to be deemed equivalent to a grant—a statutory grant. Assuming that Parliament could, by apt words in a statute, transfer to the company an estate in fee simple in Crown lands without the intervention of the formal instrument known as a "grant" or a "patent," I cannot find that Parliament has done so. Chapter 1 of 1881 is where we would expect to find such a statutory transfer if any existed. Section 3 of that Act says: "The Government *may* grant to the company a subsidy of twenty-five million dollars in money and twenty-five million acres of land, to be paid and conveyed to the company, &c." Clearly this contemplates something to be done thereafter before the company shall become owners of the land. These words no more amounted to a grant of the land than they amounted to a payment of the money grant. Compare section 3 of Schedule A, p. 16, providing for the transfer to the company (on the happening of a named event) of the contract "without the execution of any deed or instrument in that behalf." The Act might similarly have declared that as soon as the company had earned a particular portion of its land grant, the same should become their property, without the giving of any grant or patent, as was done by s. 22, s.-s. 7, of the Dominion Lands Act, to the Hudson's Bay Co. But it has not in this Act so declared. Turning to s. 9 of the Schedule to the Act, s.-s. (b), p. 9, we find this: "Upon the construction of any portion . . . not

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less than 20 miles in length . . . the Government shall pay and grant to the company the money and land subsidies." Section 11 (p. 11) does not provide for a grant to, or a creation of ownership by, the company of any land subject to a right afterwards to "divest" itself of such sections as are "in a material degree not fairly fit for settlement," as argued by Mr. Harvey. The agreement is that "the company shall not be obliged to receive" such sections "as part of such grant"—that is, such sections never become the property of the company. This clearly contemplates an opportunity being given to the company, before the proposed grant is complete, of exercising its right of rejection by establishing the unfitness of any particular sections. Section 12 provides for extinguishment of the Indian title affecting "the lands herein appropriated and to be hereafter granted in aid of the railway." Neither in the Schedule, then, nor in the Act itself, is there any language which is capable of being construed as an actual grant, to take effect immediately or on the happening of any future event, but merely an agreement to grant. This view is further confirmed by s.-s. 28 and 30 of the schedule to the contract (pp. 25, 27). Section 28 provides that the mortgage bonds authorized to be issued "shall not attach upon any property which the company are hereby, or by the said contract authorized to acquire or receive, from the Government of Canada until the same shall have been *conveyed* by the Government to the company." Section 30 has a similar proviso. It seems to me it was understood, not that the Act operated as a grant, to take effect according as each 20 miles of railway would be completed, but that when 20 miles were completed the company were entitled to ask for and receive a grant of the land subsidy applicable thereto.

As the railway was completed so as to entitle the company to a grant of the land in question herein in 1884, the defendants were beneficially interested in this land (unless rejected for "unfitness")—they were, at best, in the position of purchasers who had paid their purchase money, but had not yet actually received a conveyance. Is such land

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taxable? In Ontario (then Upper Canada) we find that the law provided, as far back as 1819, that all lands were ratable when "holden in fee simple, or *promise of a fee simple*, by Land Board Certificate, Order in Council, &c."

Ryckman v. *Van Voltenburg*[9] was a decision on such an Assessment Law. The Crown had in 1820, in effect, agreed to convey to the heirs of one Ryckman, but the patent did not issue until 1851, when it issued to the plaintiff as representing such heirs. In the interim, however, viz., in 1830, the land had been sold for eight years' arrears of taxes, and defendant claimed under the Tax Sale Vendee. Plaintiff contended that the land, being at the time the taxes were imposed the property of the Crown, was not taxable. It was conceded that this would be so as against the Crown, and also that had the patent in 1851 issued to a person other than the original nominee or his representative, the patent would prevail against the tax sale title. But the patentee Ryckman took, just as if he had been the original nominee and had merely delayed taking out his patent. The decision rested on the assessment law allowing the taxation of land held "under promise of a fee simple," or when "described as granted" by the Report of the Surveyor-General, as this land was in 1820, prior to the imposition of the taxes for arrears of which it was sold. In *Church* v. *Fenton*[11] the Crown sold land to plaintiff in 1867. Part of the purchase money was paid in 1858 and the residue in 1867, and in 1869 plaintiff received a patent. It had been assessed during the years 1864 to 1869, and in 1870 it was sold for arrears of taxes for those years. The tax sale was held good as against the patent. The Assessment Act of 1863 provided that Crown land when sold, or *agreed to be sold*, or located as a free grant, should be liable to taxation, and that the *interest* of the person so buying or located might be sold for taxes. Mr. Justice BURTON, referring to this provision allowing taxation of Crown lands "agreed to be sold," says that this legislation was enacted in consequence of the Courts having held that Crown lands "agreed to be sold" but not patented were not assessable. In Manitoba, in the case of *Whelan* v. *Ryan*,[14] we see that the law

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there expressly made unpatented lands taxable saving, however, the rights of the Crown, and, as pointed out by Mr. Justice KILLAM in the Court below, the Municipal Acts of Manitoba defined "land," "real property," and "real estate" as including "all rights to and interests in lands."

Now, there is no provision in our School Ordinance expressly authorizing the assessment of unpatented land which the Crown has merely agreed to sell or convey; the Ordinance is silent on the subject. Nor has it defined "land" or "real estate" as including "all rights to or interests in land," or used any words of similar effect. It has given a definition of "land" as including buildings thereon and fixtures. Nowhere, so far as I can discover, has it expressly dealt with *interests* in land. It directs the assessment of land, and that the assessor shall set forth in his roll the "value of each parcel," and the name of the occupant and of the owner if ascertainable, and provides that the taxes may be recovered from either the occupant or the owner. The occupant is made liable, not by reason of any title or interest he may have in the land, but because he is occupant of it, and there is no provision for assessing an interest—it is the corpus of the land that is to be valued, and the amount set out in the roll. In s. 188 it is provided that "whenever the title of any land sold for arrears of taxes is vested in the Crown, the transfer thereof, in whatever form given, shall 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 possesses under any colour of right whatever." As an "occupant" of land is assessable for it, this section may, and probably was intended to, apply to cases where land has been occupied and has been sold for arrears of taxes due by such occupant. This would seem also to be the view taken of a similar section in the Manitoba Act, s. 37, s.-s. (1), by TAYLOR, C.J., in *Whelan* v. *Ryan*.[14] In *Ruddell* v. *Georgeson*,[13] Mr. Justice DUBUC comments on a section of the Manitoba Statutes similarly worded to our s. 188. He says: "The Legislature merely assumes that the lands

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are taxable and liable to be sold without any positive enactment empowering the municipality to tax." I do not think it must necessarily be inferred from s. 188 that authority was intended to be given to assess the interest of a purchaser from the Crown prior to patent, where such purchaser is not the occupant. Even though it be thought that the Legislature may have intended the taxation of the interest of a person not in occupation, the benefit of the doubt must be given to the person sought to be made liable, as was held in *Nickle* v. *Douglass*.[21] "But if it were even doubtful the decision should be for plaintiff, because whoever claims the right to impose a burden on the subject must establish clearly that there is such a right," per WILSON, J.

I have read the School Ordinance carefully to find if there is any language which would indicate an intention to assess the interest of a person in unpatented land, but I find nothing even looking in that direction, outside of s. 188. All through the Ordinance it seems to be the whole value of the land that is in contemplation, and which is to be estimated at its "actual cash value as would be appraised, &c." In the case of joint tenants or tenants in common or holders of any property (s. 137), each is not to be assessed for his individual interest, but the whole of the property is to be assessed against them collectively, but the whole tax may be recovered from any one or more. But a purchaser from the Crown before patent cannot be brought within the language of s. 137. When land is to be sold for arrears of taxes it is the corpus that is put up for sale, and the transfer, Form L, purports to convey the corpus, not an interest in the land. I, therefore, find no express or clearly implied authority to assess the interest of a purchaser from the Crown prior to issue of patent where he is not the occupant.

We may next look to see what property is assessable. By s. 132 it includes "all real and personal property situated within the limits of any school district . . . subject to the following exemptions:

1. All property held by Her Majesty. . . .

[21](1874) 35 U. C. Q. B. 126.

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3. Where any property mentioned in the preceding clauses is *occupied* by any person otherwise than in an official capacity the *occupant* shall be assessed in respect thereof, but the property itself shall not be liable.

In *Street* v. *Kent*[12] there was a somewhat similarly worded exemption to be considered, and it was held that land purchased from the Crown was not taxable before issue of the patent.

What does the first exemption, "All property held, &c.," mean? The Encyclopædic Dictionary defines "hold" to mean "to retain or keep possession of, to possess, to occupy, to own." Crabb's Synonyms says "hold" is distinguished from "occupy" thus:—"We hold a thing for a long or a short time; we occupy it for a permanence; we 'hold' it for ourselves or others; we 'occupy' only for ourselves; we 'hold' it for various purposes; we 'occupy' only for the purpose of converting it to our own private use. Thus, a person may 'hold' an estate, or, which is the same thing, the title deeds to an estate pro tempore, for another person's benefit."

There are three words used in the Ordinance to indicate the relation of a person to property—"own," "occupy" and "hold." Owner and occupant are used most frequently. Holding would seem to differ from either "owning" or "occupying." The owner may neither hold nor occupy; the occupant may neither own nor hold, and a holder may be neither an owner nor an occupant, whereas any of these relations may be co-existent with either or both of the others. If the Ordinance had meant to exempt only lands "owned" by Her Majesty it would presumably have said so, but it would not then have exempted lands occupied by Her Majesty under lease. "Held" evidently does not refer merely to land occupied or used by Crown officials, for it speaks of land "held by Her Majesty but occupied by persons otherwise than in an official capacity." Had the phrase been "owned by Her Majesty" it might have been urged that land, which the Crown has sold or agreed to grant, and the consideration for which has been fully paid or performed,

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and where nothing remains to be done but to execute the formal grant, has ceased to be "owned" by the Crown. In equity the purchaser would, under such circumstances, be treated as the owner, at least if the vendor was a private individual. But, as pointed out by Mr. Justice KILLAM in *C. P. R.* v. *Burnett*,[19] and by Mr. Justice BAIN in *Riddell* v. *Georgeson*,[13] this fiction of equity applies only as between the parties to the agreement, and cannot be set up by third persons. Moreover, I may refer to the language used by Lord CAIRNS in *Partington* v. *The Attorney-General*:[22] "If the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an *equitable construction*, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute." Somewhat similar language is used in Blackwell on Tax Titles, section 143.

And the same considerations would apply if "held" were to be construed as equivalent to "owned." But I do not think "hold," as here used, is synonymous with "own." A person who has sold, but not yet conveyed the land, has not yet parted with but retains the legal title. Is he not properly described as retaining or holding the same? A stakeholder has no interest or title in the stakes, yet he holds them until he has actually handed them over to the persons entitled. So long as the Crown has not finally parted with its land but retains the legal title, what more apt mode is there of describing its position than to say that it is holding the land? Mr. Justice KILLAM in the *Cornwallis Case*,[8] at p. 21, after considering cap. 1, 44 Vic., thought "that it was not intended that the company should have any recognizable interest in the lands until actually granted by the Crown." The same learned Judge, in *Riddell* v. *Georgeson*,[13] in view of the fact that the company could not compel the Crown to convey the lands to them, thought that the

[22](1869) L. R. 4, H. L. 100; 38 L. J., Ex. 205; 21 L.

company "cannot be considered to have acquired from the Crown any interest or estate in the land." If these opinions be sound these lands must still be held by the Crown. Judgment. McGuire, J.

The conclusion I have arrived at is that the land in question is part of the land set apart by the Crown for the purpose of fulfilling its obligation to the company in respect of the land subsidy, and whatever may be the rights of the company in respect thereof, so far as the assessor was concerned, it was land "held by Her Majesty," and therefore exempt by the Ordinance under which he was acting.

I agree with the judgment of my brother WETMORE as to the result.

SCOTT, J.—I concur.

ROULEAU, J., was absent.

REPORTER :

Ford Jones, Regina, Advocate.

FINDLAY v. C. P. R.

Railway Act—Prescription—Limitation—Amendment—Vested right—"By reason of the railway"—Commission or omission.

The provisions of The Railway Act, 1888, s. 287 (as to limitations of actions for damages or injury sustained by reason of the railway) apply to actions founded on the commission of acts, not to those founded on the omission of acts, which it was the company's duty to perform.

Kelly v. Ottawa R. Co.,[1] *McWillie v. N. S. R. Co.*,[2] *Zimmer v. G. T. R. Co.*,[3] considered.

If, in an action against a railway company, an amendment of the statement of claim is asked for it should not be allowed if s. 287 applies, and the amendment sets up a new cause of action.

[RICHARDSON, J., *June 12th, 1901.*

This action was commenced on 25th August, 1899, to recover damages for injuries alleged to have been sustained by plaintiff while working as an employee of the defendant company. These injuries were caused by his falling, on the

[1] 3 O. A. R. 616. [2] 17 S. C. R. 571. [3] 19 O. A. R. 693.

Statement.

night of 28th October, 1898, into a ditch or excavation made by defendants' servants during plaintiff's absence and without his knowledge.

Defendants, besides pleading not guilty by statute under an Act respecting the Canadian Pacific Railway, 44 Vic., 1881, c. 1, and The Railway Act, 51 Vic. 1888, c. 29, s. 287, and other defences, objected that the statement of claim disclosed no cause of action against them. Issue was joined, and the case prepared for trial, but it having been considered more convenient that the question of law, as it went to the root of the action, should be disposed of, under Rule 149, it was set down for argument.

The question was argued on 20th April, 1901.

T. C. Johnstone, for plaintiff.

H. A. Robson, for defendants.

Johnstone admitted that the statement of claim was defective, and asked leave to amend, by alleging that the ditch or excavation into which plaintiff fell on the night of the 28th October, 1898, was made by defendants' servants during plaintiff's absence and without his knowledge, but with the knowledge and at the instance of defendants, and that on said night it was left unguarded, without a light or other protection to defendants' servants, including plaintiff; and, alternatively, that the excavation was made at defendants' instance by one Sharpe, under contract with defendants, whose duty it was to properly guard the same by a fence, light, or other protection, which not being done, plaintiff, in the dark, fell into said ditch and was injured.

Robson objected to any amendment which would interfere with defendants' vested right of prescription, under section 287 of the Railway Act.

[*June 12th, 1901.*]

RICHARDSON, J.—Whether or not the proposed amendment should be allowed depends upon the answer to be given to the question, Was the alleged injury sustained "by reason of the railway"?

Judgment.

Richardson, J.

1. If not, as contended by plaintiffs' counsel, then only the imposition of terms would have to be considered.

2. If it was, then a vested right accrued to defendants limiting plaintiff's right of action to a period of one year from 28th October, 1898, and the question becomes, Can the proposed amendment be properly allowed?

I am of opinion that if the injury set out in plaintiff's amended statement of claim can be held to have been sustained "by reason of the railway," then, since it sets up an entirely new cause of action, it would interfere with defendants' vested right, and should not be allowed.

From perusal of the Ontario cases to which defendants' counsel referred, it appears that up to and including *Kelly* v. *Ottawa Ry. Co.*,[1] the limitation clause, now section 287 of the Railway Act, was construed to apply to actions for damages, whether the act complained of was one of commission or omission. In the *Kelly* case the Court was composed of Moss, C.J.A., Burton, Patterson, and Morrison, JJ.A. Both Moss, C.J., and Burton, J., while supporting, for the reasons given in their judgments, the principle laid down in former cases, very plainly intimated the opinion that the protection of the statute applied only to acts of commission.

In *McWillie* v. *N. S. Ry. Co.*[2] the action was for damages caused by sparks from one of defendants' engines, negligently managed, setting fire to and destroying plaintiff's barn. Besides other defences, that of prescription under s. 27 R. S. C. c. 109, was set up, and although it appears to have been dealt with in the lower courts adversely to defendants, and with other grounds was appealed by them to the higher tribunal, they abandoned it on the argument. Notwithstanding this, three of the appellate Judges refer to the subject, and approve of the findings of the lower Courts. One of these, Mr. Justice Gwynne, remarks: "There was a plea of prescription upon the record as to which, although the point raised by it was not pressed before us, it may, perhaps, be as well to say that, in my opinion, neither s. 27 of c. 109 R. S. C. nor s. 287 of 57 Vic. cap. 29, have any

Judgment.
Richardson, J.

reference to an action like the present, which is for damages not occasioned by reason of the railway, but by reason of sparks suffered to escape from an engine running upon it by the neglect and default of the company, whose engine caused the damage."

In *Zimmer* v. *G. T. Ry. Co.*,[3] 693, at page 703, Osler, J.A., speaks approvingly of Mr. Justice Gwynne's expression in the *McWillie* case, but as the action was brought by a son of deceased, under the Ontario law, adopting Lord Campbell's Act, the prescription created by the Railway Act did not apply.

In this action plaintiff does not complain of an act done by the railway itself or in its maintenance, but of neglect of the defendants to provide adequate protection in the shape of notice or otherwise to plaintiff, whose duty took him past the excavation described in the claim.

I confess that, in expressing the opinion I do, I am not entirely free from doubt as to its soundness, but I adopt the view expressed in the *McWillie* case in preference to the older Ontario decisions, which have been seriously questioned by more than one of that Province's eminent Judges.

In my judgment as at present advised, the prescription in section 287 of the Railway Act does not apply to such causes of action as are set up in the proposed amended statement of claim, and as no other objection to their being allowed, save terms, which means the payment of all costs incurred by defendants subsequent to appearance is raised, the following order will be made:—

1. Plaintiff to pay all defendants' party and party taxed costs incurred in the action subsequent to the entry of appearance, before 1st July, 1901.

2. That on payment of such costs plaintiff may place on the fyles of the Court his proposed substituted statement of claim in lieu of the existing one.

3. That defendant have ten days to answer such new claim.

4. That on failure of plaintiff to comply with the terms named within the time fixed, his action do stand dismissed without further order with costs. Judgment. Richardson, J.

REPORTER:

C. H. Bell, Advocate, Regina.

HENRY McGOWAN, OVERSEER OF THE WEYBURN LOCAL IMPROVEMENT DISTRICT, NO. 518, v. THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY.

Local improvement taxes—Districts exceeding 72 sq. miles in area—Con. Ordcss. cap. 73. sec. 3—Cap. 17 of 1899, secs. 1¼ and 20, cap. 26 of 1901—Construction of Statutes.

Assessment and taxation—Local Improvement District—Error in formation—Assessment of corporation by other than corporate name—Assessment for whole or portion of year—Exceptional tax—Hudson's Bay Co.—Construction of Statutes.

The construction of statutes generally and of the Ordinances relating to local improvements in particular discussed.

The construction of taxing statutes discussed.

The effect of non-fulfilment of statutory conditions subsequent discussed.

Held, per *Curiam*, affirming the judgment of RICHARDSON, J.—

1. That the designation of a local improvement district by an incorrect number, while its name was otherwise correctly stated in the notice in the Gazette constituting the district, did not invalidate the notice.
2. That the assessment of the defendants was not invalid by reason of their being assessed under the name of "The Hudson's Bay Company"—a name by which they were commonly designated by themselves and the public.
3. That, though the district in question was not constituted until July, 1899, and the defendants not assessed till August, 1899, they were liable for the whole amount for which they were assessed, the rate of assessment being a fixed rate per acre, irrespective of time, and the assessor being expressly authorized to assess at any time during the year.
4. That the assessment of the defendants under the Ordinances in question is not an exceptional tax upon them within the meaning of the Imperial Order in Council of June 23rd, 1870, inasmuch as it was equal and uniform throughout the district.

[RICHARDSON, J., *October 29th, 1900.*

[*Court en banc, July 26th, 1901.*

Statement.

The pleadings and evidence are set forth in the judgment appealed from. The case was tried at Regina before RICHARDSON, J., July 9th, 1900.

H. Harvey, Deputy Attorney-General, for plaintiff.

J. S. Tupper, Q.C., *J. Muir*, Q.C., and *F. H. Phippen*, for defendants.

[*October 29th, 1900.*]

RICHARDSON, J.—By his statement of claim the plaintiff alleges:

That he is the overseer of the Weyburn Local Improvement District No. 518, being a district constituted under the provisions of the Local Improvement Ordinance and amendments thereto.

That the defendants were in and for the year 1899 duly assessed by the overseer of the said local improvement district in respect of 84,320 acres of land, as described in the statement of claim, and by virtue of such assessment the defendants became indebted to the district in $1,054, which not having been paid the plaintiff by this action sues to recover from defendants.

In defence the defendants say—

1. That they deny that the plaintiff was the overseer of the said district, and further say that no overseer ever was appointed or elected for said district in accordance with the provisions of The Local Improvement Ordinance or the amendments thereto.

2. That the said district never was constituted or organized according to the provisions of the said Ordinance or amendments.

3. That the said district was not limited to the area, nor did it contain the population residing therein of the proportions or of the number, nor was the notice of the intention to constitute said district ever prepared, published, posted or addressed as required by the said Ordinance or amendments.

Judgment.
Richardson, J.

4. That the defendants never were the owners or occupants of the lands in the plaintiff's statement of claim mentioned, or any of them, nor were they ever assessed therefor or any part thereof, nor was any assessment roll made out, prepared or posted, nor was there set out in any such assessment roll the information as required by said Ordinance and amendments.

5. Alternatively the defendants say that at the time of the assessment the lands mentioned in paragraph 2 of the plaintiff's statement of claim were owned by and in the name of the defendants, as was well known to the plaintiff, or as he might with reasonable enquiry have ascertained, yet the plaintiff in the assessment roll upon which the claim for taxes is made herein did not set out the name of the defendants as the persons assessed on account of the said lands or as the owners thereof, as required by section 16 of the said Ordinance, but did in the said roll set out the Hudson's Bay Company as the owners thereof and as the persons assessed in respect of the said lands, and the assessment is void and of no effect as against the defendants.

6. Further alternatively the defendants say that prior to the assessment the defendants became, and at the time of the assessment they were and still are, the owners of the said lands under and subject to the provisions, terms and conditions among others referred to and contained in the Rupert's Land Act, 1868, The Imperial Order in Council, 23rd June, 1870, The British North America Act and the surrender, claims and grants thereunder; viz., "that no exceptional tax should be placed upon the said lands of the defendants"; and the local improvement districts constituted, the assessments made and the taxes placed on the said lands in the statement of claim mentioned are so constituted, made and placed under and by virtue of the power, authority and jurisdiction in that behalf of the Legislative Assembly of the North-West Territories, and this action is brought by the said Legislative Assembly, with the said overseer as nominal plaintiff only; and the local improvement districts constituted by the said Legislative Assembly or under the

Judgment.
Richardson, J.

provisions of the said Ordinance and amendments at the time of the assessment did not and they do not include, and the assessments have not been made or the said taxes placed on, all the lands in the North-West Territories over which the said Legislative Assembly has such power, authority and jurisdiction or which come within the requirements and provisions of the said Ordinance and amendments; and the said Legislative Assembly has not assessed or placed the said tax upon other lands subject to and within such powers, authority and jurisdiction owned or occupied by persons or corporations other than the defendants, and has not constituted such other lands into local improvement districts under said Ordinance and amendments, and has not otherwise assessed or placed said tax upon said other lands as the said Legislative Assembly could or should have done. The said tax is an exceptional one within the provisions, terms and conditions upon which the defendants became and were and are the owners of the said lands, and the assessment is *ultra vires* of the said Legislative Assembly and is void and of no effect as against the defendants and their said lands.

Issue was joined.

The hearing took place at Regina, 9th July, 1900; Mr. Harvey, the Deputy Attorney-General representing Mr. Haultain, the Attorney-General, North-West Territories, the plaintiff's advocate on the record, counsel for the plaintiff, Messrs. Tupper, Q.C., and Phippen, of Winnipeg, and Mr. Muir, Q.C., of Calgary, counsel for the defendants.

By arrangement between counsel on both sides all the evidence was taken by a stenographer and has been extended in type.

The evidence submitted on plaintiff's side in substance consisted of

1. A certified copy of an order of the Lieutenant-Governor in Council of the North-West Territories attested as such by John A. Reid, the clerk of the Executive Council, dated 21st July, 1899, constituting certain lands, describing them, which include the lands set out in the plaintiff's

statement of claim, Local Improvement District numbered 518, and to be known by the name of The Weyburn Local Improvement District, under the provisions of section 14 of chapter 17 of the Ordinances, 1899.

This was admitted by me as evidence of the original order in Council of which it purports to be a copy under sub-section (c) of section 9 of the Canada Evidence Act applied to the North-West Territories by sub-section 13 of section 7 of The Interpretation Act of Canada, also by sub-section 55 of section 8 of The Interpretation Ordinance.

2. A certified copy, likewise attested, of an Order-in-Council of 21st July, 1899, authorized by section 15 of chapter 17 referred to, appointing the plaintiff overseer of the Weyburn Local Improvement District No. 518.

This was also received as evidence of the original Order-in-Council of which it purports to be a copy.

3. The assessment roll for 1899 of the district which by section 33 is *prima facie* evidence of the debt.

By arrangement between counsel a copy of so much of this roll as affects the lands set out in plaintiff's statement of claim was substituted in lieu of the original roll.

4. Certified copies of the Government township survey maps of the several townships which comprise the district purporting to have been issued by the Dominion Lands Office of the Department of the Interior, and which show the area comprising the district to exceed 2,000 square miles.

By the above described documents the constitution of the Weyburn Local Improvement District under the provisions of section 14 of chapter 17 of the Ordinance, 1899—which enacts that the Lieutenant-Governor in Council may constitute as a local improvement district any portion of the Territories comprising an area greater than 72 square miles, no part of which is already contained in any local improvement district and exclusive of municipalities and villages—its area and the appointment of the plaintiff as overseer—by section 33 authorized in his own name to sue for the recovery of taxes and arrears of taxes due the district—and the

Judgment.
Richardson, J.

assessment made by plaintiff in 1899 were (subject to the disposition of the other questions raised by defendants) established.

In addition to the production of the assessment roll which by section 33 is *prima facie* evidence of the debt sued for, as also the mailing of notice of assessment under section 17 of chapter 17 of the 1899 Ordinance, the plaintiff was examined as a witness. He explained the nature of the enquiries he made in making the assessment, which I find were made with reasonable (i.e., prompt) diligence. From the maps or plans, that is, those filed, Exhibit D, to which he had access, and other information procured for him by Mr. Dennis, the Deputy Commissioner of Public Works, he ascertained that all the townships within the Weyburn Local Improvement District had been not only surveyed, but that such survey had been confirmed, and he also ascertained (for the Dominion Lands Act so declared) that all the lands he entered upon the roll, that is, those set out in the plaintiff's statement of claim, were by section 22, sub-section 7 of that Act, without the issue of a patent vested in the Hudson's Bay Company in fee simple, and he so assessed them. It appeared, however, that the plaintiff did not post a copy of the assessment roll in a school house or post office within the district, as required by section 18; but that the defendant had notice of the assessment after its completion is made clear by the production from the custody of defendants of the notice plaintiff stated in his evidence he had mailed "the Hudson's Bay Company." Winnipeg—the name it was shown the defendants are commonly known by and use themselves in their ordinary business transactions and in some legal proceedings: *The Hudson's Bay Company* v. *The Attorney-General of Manitoba*.[1]

It is quite true the name by which the defendants are assessed is not the proper corporate name. The omission to ascertain the correct name of the owners of the lands, as also the actual number of acres each parcel

[1](1878) Man. Rep. Temp. Wood 209.

Judgment.
Richardson J.

contains, was at most an omission of duty, section 16. But as the assessor is, in my opinion, a ministerial officer charged with the performance of a statutory duty, (therefore directory) the omission to perform such duty with exactness does not, I conceive, render the assessment void, as against the defendants' lands assessed under the name they derived their title by, one they are commonly known by and use themselves, no injury thereby being shown. I refer to *Caldow* v. *Pixell*[2] and *Town of Niagara* v. *Milloy*.[3]

Neither will the error in acreage void the assessment for the reason, in addition to the foregoing ones, that by sec. 19 of the Ordinance, c. 73, provision is made for rectifying such errors and defendants are entitled through the Court in this suit to have, if plaintiff succeeds, the amount claimed reduced to correspond with the correct acreage of defendants' lands set out in plaintiff's claim. I refer to *London* v. *G. W. R. Co'y*.[4]

It was further urged by counsel for defendants on the argument that because the district was only constituted 21st July, 1899, under an Ordinance which came in force 24th April, 1899, the assessment made 24th July, for the whole year 1899, thus covering a period anterior to both legislation and the creation of the district, is void; with this view I do not agree.

Sec. 17 of the Ordinance 1899 provides that in any district constituted under sec. 14 (as the Weyburn one was), "the assessment may be made at any time of the year," and by sec. 31, sub-sec. 2 of chapter 73, Consolidated Ordinances, all taxes shall be held to be due on the first day of January of the calendar year within which the same are imposed. This would plainly, to my mind, render taxes assessed for in August, 1899, due as of 1st January of and for that calendar year. In my judgment, therefore, there was a valid assessment of the lands named in the roll to the defendants of which they are the owners.

[2](1877) 2 C. P. D. 562; 46 L.J. C. P. 541; 36 L. T. 469; 25 W. R. 773. [3](1885) 21 C. L. J. (N. S.) 394. [4](1859) 17 U. C. Q. B. 262.

Judgment.
Richardson, J.

The legal constitution of the district is attacked and its validity impugned, the ground taken being that the formalities prescribed by sec. 3 of chapter 73 were not complied with in advance of the passage of the Order-in-Council constituting the district above alluded to, and that compliance with these is rendered imperative by sec. 20 of chapter 17 of the Ordinance of 1899. By reference to this, it will be observed that the Legislature have by sec. 20 distinctly incorporated with sec. 14 of that chapter only such provisions of chapter 73 as are applicable to the Local Improvement Districts — not to be created but — created under section 14 (that is, already in existence); consequently sec. 3, in my opinion, has no application to this case, except that portion of it which provides for the publication of "notice of the order constituting the district in the official Gazette." The publication of such a notice was not shewn by plaintiff as part of his case. His counsel contended that publication was a duty cast upon an officer whose omission to publish would not, as defendants' counsel urged, invalidate the Order or the assessment, no injury having occurred to defendants by reason of such omission, and with plaintiff's contention I coincide.

The defendants, however, brought in a copy of the Gazette containing a notice informing the public of the constitution of the district, its name and contents as to land, but giving 516 as the number instead of 518, the correct one. The error was so plainly a printer's one that the objection as to sufficiency on that ground I consider too technical to seriously consider.

In my judgment, the Weyburn Local Improvement District, No. 518, was by the passing of the Order-in-Council of 21st July, 1899, legally constituted. This Order on its face shows it comprises an area exceeding 72 square miles, and that this area is independent of either municipalities or villages within its boundaries is to be assumed in the absence of proof to the contrary, the onus of which would be upon the defendants.

Judgment.
Richardson, J

As to the sixth and last clause of the statement of defence, the contention of the defendants is that as it is undisputed that in portions of the Territories, other than those included in the Weyburn Local Improvement District, the defendants and the other persons and corporations own land not included in any Local Improvement District, and, therefore, not in 1899 subject to assessment, if the assessment claimed for is allowed to stand, it would constitute a violation of clause 11 of the Imperial Order-in-Council of the 23rd of June, 1870, which stipulates that "no exceptional tax shall be placed on the company's lands."

By this Imperial Order-in-Council, which by sec. 146 of the B. N. A. Act is declared to be an Act of Parliament, all the lands comprising what is therein described as the North-Western Territory became from July 15th, 1870, part of the Dominion of Canada, and by the same Order the Parliament of Canada attained power to legislate for the future welfare and good government of the Territory.

Out of this Territory certain lands were by this Order-in-Council reserved to the defendants, which by the Dominion Lands Act, sec. 22, included those referred to in defendants' sixth paragraph of defence, and to all those lands clause 11 of the Imperial Order-in-Council—the condition that "no exceptional tax shall be placed on the company's lands,"—I take it, applies.

Now, by the vesting of the North-Western Territory in the Dominion of Canada and the Parliament of Canada having attained the power of legislating for its future welfare and good government, the right of imposing direct taxation by that Parliament became inherent, exercisable generally over all land for general purposes of the whole, as well as over localities selected by it, where such localities should from time to time be considered to be benefited, for public purposes within them. I refer to *Bank of Toronto* v. *Lambe*[5] and *Dow* v. *Black*.[6] Any variation or limitation of this inherent power would, I conceive, require to be expressed in

[5](1887) 12 App. Cas. 575; 56 L. J. P. C. 87; 57 L. T. 377. [6](1875) L. R. 6 P. C. 272; 44 L. J. P. C. 52; 32 L. T. 274; 23 W. R. 637.

Judgment.
Richardson, J.

unambiguous terms. I think the meaning of "exceptional" as given in the Century and other leading dictionaries as "unusual" or "special," is that intended to be conveyed by the condition in question, and the construction of the condition intended, and which the words used indicate, is that whenever Canada applies its inherent power of taxation upon the whole or part of the North-Western Territory the lands comprising the lands of the company within the area in which taxation is to be imposed should not be taxed in an unusual or special manner, or in other words, that the rule of equality and uniformity should not be departed from.

Instead of legislating direct and imposing taxation upon fixed localities for the public purposes of those localities, as it might, Parliament delegated this power to the Legislative Assembly of the North-West Territories, in so far as lands in the Territories are concerned, by legislation had in several sessions, the last being the amendment to the N. W. T. Act of 1891, by sec. 6 of which the power to make Ordinances in relation to (sub-sec. 2) direct taxation for raising a revenue for local purposes is expressly conferred.

In my opinion, the Ordinance respecting Public Improvements enacted by the Legislative Assembly, under the provisions of which the Weyburn Local Improvement District No. 518 was constituted and the assessment complained of made, rendering taxable equally and without exception or discrimination all lands within its limits, does not infringe upon the condition of clause 11 of the Imperial Order-in-Council of 23rd of June, 1870, by exceptionally placing a tax upon the lands set out in plaintiff's statement of claim.

From such construction there has been, in my judgment, no departure by the Ordinances referred to; consequently the plaintiff is entitled to judgment on the record; but as it appeared at the hearing that in some instances, parcels entered on the roll do not contain as many acres as the assessor entered for them, in my opinion, this is a matter adjustable by this Court, and unless the parties can agree upon the true figures, an application to correct them and adjust the sum

really due in conformity with the Ordinance may be made in Chambers, for which when made the judgment should be entered. Judgment. Richardson, J.

The defendants appealed. The appeal was heard March 5th, 1901.

J. S. Tupper, K.C., and *F. H. Phippen*, for appellants:—

The Ordinance, being a taxing statute, must be construed strictly—*O'Brien* v. *Cogswell*,[7] *Partington* v. *Attorney-General*,[8] *Re Micklethwait*,[9] *Daines* v. *Heath*,[10] *Alloway* v. *Champion*,[11] *Whelan* v. *Ryan*,[12] *Hardy* v. *Desjardins*,[13] *Nanton* v. *Villeneuve*,[14] *Colquhoun* v. *Driscoll*,[15] *Titreault* v. *Vaughan*.[16] Sec. 14 merely enlarged the districts which the Lieutenant-Governor in Council was empowered to constitute, and did not specify the particular form of procedure to be followed, so that even without sec. 20, by necessary implication the procedure to be followed would be that prescribed in regard to the smaller districts, except as varied by express provisions inconsistent therewith. Sec. 20, however, makes this clear. The most important condition precedent to the constitution of a district is that requiring notice to be published in the Gazette and posted up in a post office within the proposed district. This was not done. To hold that sec. 20 applies only to districts after they have been constituted would be to give the word "created" an unnatural construction and to override the plain intention of the Legislature. The notice of the Order-in-Council constituting the district specified its distinctive number as 516, whereas its correct number is 518. The district was constituted on July 31st, 1899, consequently there was no power to assess the land for the preceding portion of the year. Sec. 31 provides that "for the purpose of this section" all taxes shall be deemed to be due on January 1st, but the purpose of the section is solely to secure returns of taxes in arrears. The

[7](1890) 17 S. C. R. 430. [8](1869) L. R. 4 H. L. 100; 38 L. J. Ex. 265; 21 L. T. 370. [9](1855) 11 Ex. 452; 25 L. J. Ex. 19. [10](1847) 3 C. B. 938; 16 L. J. C. P. 117; 11 Jur. 185. [11](1891) 7 Man. R. 506. [12](1891) 20 S. C. R. 65. [13](1892) 8 Man. R. 550. [14](1894) 10 Man. R. 213. [15](1894) 10 Man. R. 254. [16](1899) 12 Man. R. 457.

Argument.

assessment roll was not posted, as required by sec. 17. The overseer did not make diligent enquiry as to the parcels of land owned or occupied within the district, or as to the number of acres they contained, and also neglected to make reasonable enquiry to ascertain the appellants' name. The assessment roll did not show that these appellants were assessed, or that any taxes were due by them. The tax is an exceptional tax upon the appellants within the meaning of the Imperial Order-in-Council of June 23rd, 1870, and the legislation respecting the same. The taxation is *ultra vires* of the Legislative Assembly, as it is not direct taxation for Territorial, municipal, or local purposes within the meaning of the North-West Territories Act.

H. Harvey, Deputy Attorney-General, for respondent:—

The appellants are commonly known as "The Hudson's Bay Company," and are so designated even in Acts of Parliament. Such an error in name would not vitiate the assessment, unless the mistake misled the appellants: *Town of Niagara* v. *Milloy*.[3] As to proof that all conditions and acts required by the Ordinance existed and were performed, the respondent is an official, and the maxim "*omnia presumuntur rite esse acta*" applies. The provisions of sec. 20 apply to a district only after it has been created under sec. 14.

Sec. 4 (6) shows clearly that, notwithstanding the absence of the requisite number of residents, the constitution and organization of the district would be valid: *Caldow* v. *Pixell*.[2] Failure to publish notice of the Order-in-Council could not affect the legal status of a district, because a district must be legally established before the notice is given. As to the assessment being for the whole of the year 1899, though the district was in existence for only a portion of that year, the assessment is of a fixed amount, for a single definite purpose, to be made only once in any one year, but it can be made at any time of the year. The tax is not an exceptional one within the meaning of the Imperial Order-in-Council: *H. B. Co.* v. *Attorney-General for Manitoba*.[1]

The taxation is direct taxation within the meaning of the North-West Territories Act, and consequently *intra vires* of the Legislative Assembly: *Bank of Toronto* v. *Lambe*.[5] Argument.

[*July 26th, 1901.*]

WETMORE, J.—I am of opinion that this appeal should be allowed. I base my judgment upon one ground only, and that is, that no notice of the intention to constitute the Local Improvement District in question was given, as required by sub-section 2 of section 3 of "The Local Improvement Ordinance" (Con. Ord., cap. 73). The Local Improvement District in question comprised a greater area than seventy-two square miles, and was, therefore, constituted under the authority of section 14 of chapter 17 of the Ordinances of 1899. It is urged that the provisions of "The Local Improvement Ordinance" (Con. Ord., cap. 73), which relate to the preliminaries precedent to the constitution of a district under that Ordinance, do not apply to a district constituted under section 14 of the Ordinance of 1899, because (as it is urged) section 20 of the last-mentioned Ordinance limits the provisions of the original Ordinance, not inconsistent with the amending Ordinance, to districts *created* under section 14 of such amending Ordinance, or, in other words, that there is nothing in the section applying the provisions of the original Ordinance to districts "*to be created*" under such section 14, but, on the contrary, the application of such provisions is limited to districts "*created*" by such section 14.

The wording of section 20 is as follows:—"Except as they may be inconsistent herewith, all the provisions of "The Local Improvement Ordinance," and of any amendments thereto, shall apply to local improvement districts created under the first sub-section of section 14 hereof."

I am of opinion that the construction contended for on the part of the plaintiffs is too narow, and, if allowed, would defeat the intention of the Legislature. The Ordinance of 1899 professes to be and is an amendment of cap. 73 of the Consolidated Ordinances, which I will hereafter, as I have hereinbefore done, refer to as the original Ordinance. Section 3 of the original Ordinance authorized the Lieutenant-

Judgment. Wetmore, J.

Governor in Council by order to constitute any portion of the Territories into a district (for local improvement purposes) subject to certain restrictive provisoes mentioned in such section, one of which was "that no district shall comprise an area greater than seventy-two square miles." The object and intention of section 14 of the amending Ordinance was to get rid of that proviso, and enable the Lieutenant-Governor in Council to constitute districts of a larger area than seventy-two square miles with all the provisions of the original Ordinance applicable to such larger districts as were not inconsistent with the special provisions of such amending Ordinance enacted in respect to such larger districts. Suppose that section 20 of the amending Ordinance had not been inserted at all, could there be a possible doubt that all the provisions of the original Ordinance not inconsistent with those of the amending Ordinance would have applied to the larger districts whether they related to matters preliminary or subsequent to their creation? The intention of section 20 was not to limit this operation, but to make it clear. Sub-section 2 of section 3 of the original Ordinance provides that before constituting any district a notice to do so shall be published in the Official Gazette and posted as therein directed. Why should this provision not be just as applicable and as much necessary to the proposed larger districts as to the smaller ones? I fail to perceive any reason for it, notwithstanding the ingenious argument of the learned counsel for the plaintiff.

The object of the section, it seems to me, is obvious, namely, to enable parties interested, and who would by the constitution of the district be brought under the operation of the Ordinance and made liable to the taxes provided for, to make, if they desired to do so, representations with respect to the necessity for constituting the district. The opportunity for doing this seems to me to be just as desirable in the case of the larger districts as that of the smaller ones, possibly more so in the case of the former. I do not wish, in making the latter statement, to be considered as dictating to the legislators; I merely state it as

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one reason which has influenced my mind in reaching the conclusion I have come to, and in endeavouring to ascertain what was the intention of the Legislature in enacting the provision in question. I can perceive nothing in sub-section 2 of section 3 of the original Ordinance inconsistent with the special provisions in the amending Ordinance relating to the larger districts. I am of opinion that the learned trial Judge has placed a too limited construction on the word *created*, in the twentieth section of the amending Ordinance.

It was urged that there was no evidence that notice of the publication of the intention to constitute the district was not published in the Official Gazette, and that the maxim "*Omnia praesumuntur rite esse acta*" applied. There was no evidence that such notice was published, or that it was posted as required, and I am not prepared to say that where the question of the proper constitution of the district is raised by the pleadings, as it was in this case, the onus of proving it is not on the plaintiff. It is not necessary to decide that, however, because it was abundantly proved that this notice of intention was not published in the Official Gazette. John A. Reid, the King's Printer of the North-West Territories and Clerk of the Executive Council, was called as a witness on behalf of the defendants. He produced a copy of the Official Gazette containing a notice of the Order-in-Council constituting the district and of the appointment of the plaintiff as overseer of the district, and swore that he had looked through the Gazette from the time of the passing of the Ordinance under which the districts were formed, and did not find any advertisement of a notice of any intention to form the district in question, and, in substance, that there was not, so far as he knew, any advertisement relating to the formation of this district other than the two I have above mentioned, and that there was not, to his knowledge, any advertisement of a notice of intention to form the district. This evidence was not objected to, and I cannot conceive of any stronger evidence to prove a negative fact than this, unless, indeed, it would be necessary to produce all the Gazettes published

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since the time of the passing of the amending Ordinance and call upon the Judge to search them himself in order to ascertain that there was no such notice published in them. Surely that would not be necessary; if it is, it is entirely new law to me.

It was also urged that the provisions of subsection 2 of section 3 of the original Ordinance are merely directory. I cannot agree with that contention. There is certainly a class of cases which support the contention that certain provisions in a taxing Act are merely directory, although the language in which they are worded is in the imperative mood, but I am of opinion that the provisions in the Ordinance respecting the publication of this notice of intention do not fall within such cases. The Ordinance in question is a taxing Ordinance. The provisions relating to the publication of the notice are a step prescribed in the very constitution of the district (constituted for tax purposes). It is not a step directed to be taken incidentally in carrying out the working of the district when constituted. Strong, J., in *O'Brien* v. *Cogswell*,[1] at page 424, lays down the law as follows:—"The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled; enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favourable to the subject. Further, all steps prescribed by the statute to be taken in the process, either of imposing or levying the tax, are to be considered essential and indispensable, unless the statute expressly provides that their omission shall not be fatal to the legal validity of the proceedings; in other words, the provisions requiring notices to be given and other formalities to be observed are to be construed as imperative, and not as merely directory, unless the contrary is explicitly declared."

This judgment is not that of the Court, it is that of the learned Judge, but he lays down the law, in my opinion, correctly, and the provision in the Ordinance requiring notice of intention to constitute the district is more akin to a step

to be taken in the process of imposing or levying a tax and of a notice to be given in the course of that process, than it is to the cases where it has been held that the step directed to be taken is merely directory. Judgment Wetmore, J.

This appeal should be allowed, the judgment of the learned trial Judge reversed, and judgment entered in the Court below for the appellants with costs. The plaintiffs to pay the defendants' costs of this appeal.

The foregoing judgment was prepared before the Ordinance of the last session of the Legislative Assembly intituled "An Ordinance to remove certain doubts as to the effect of Chapter 17 of the Ordinances of 1899 intituled 'An Ordinance to amend chapter 73 of the Consolidated Ordinance of 1898 intituled An Ordinance Respecting Local Improvement,'" was enacted. I am still of the opinion that were it not for such legislation, this appeal ought to be allowed. In view of this recent enactment, I agree that this appeal must be dismissed; effect must be given to the declared intention of the Assembly: *Attorney-General* v. *Theobald*.[17]

I express no opinion as to what would have been the effect of an omission to publish in the Official Gazette a notice of the Order-in-Council constituting the district in question. I agree with my brother McGUIRE, and for the reasons stated by him, that such notice was so published, and that the mere clerical error of describing the district by the wrong number in such notice did not invalidate it.

Except as above stated, I concur in the judgment of my brother McGUIRE, but with this further exception, that in view of the fact that, were it not for the legislation of the last session, the defendants would have succeeded in their appeal and in this action, the plaintiffs ought not to be allowed the costs of the action or of the appeal.

Judgment will be entered for the plaintiff in the Court below, for an amount to be ascertained as directed by the learned trial Judge in his judgment, without costs.

There will be no costs of this appeal.

[17](1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.

Judgment.

McGuire, J.

McGUIRE, J.—This is an appeal from the judgment of Mr. Justice RICHARDSON in favour of the plaintiff.

The action was brought by the overseer of "Weyburn Local Improvement District, No. 518," to recover payment of taxes imposed under the Local Improvement Ordinance, chapter 73, C. O., as amended in 1899 by chap. 17. By sec. 33 of that Ordinance taxes due to a district may be recovered by suit in the name of the overseer as a debt, and the assessment roll is made *prima facie* evidence of such debt.

The plaintiff duly proved the assessment roll and the assessment of the defendants in respect of certain lands for the amount claimed in the action. The burden was thereupon thrown upon the defendants to shew why they should not be required to pay. They raised a large number of objections to the assessment, the first being that the district had never been constituted, for want of compliance with the requirements of s. 3, chap. 73.

The Ordinance originally provided only for the constitution of districts not exceeding 72 square miles in area. The amending Ordinance authorized the construction of districts comprising more than 72 square miles. It was contended by the appellants that this was an amendment to s. 3 (ch. 73), authorizing the creation of the small districts, and that all the provisions in s. 3 applied to the creation and operating of these larger districts, except where special provisions were made in the Ordinance of 1899, and if there was any doubt as to that, then it was made clear by s. 20 of the latter Ordinance, which is in these words:—

"Except as they may be inconsistent herewith, all the provisions of the Local Improvement Ordinance, and of any amendments thereto, shall apply to Local Improvement Districts created under the first sub-section of s. 14 hereof."

But it was pointed out, for the respondents, that it is only to "districts created" that s. 20 refers, that is, to such districts after they have been created, and, therefore, the provisions governing the creation of the smaller districts were not intended to apply to the creation or constitution of the larger districts.

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Preliminary to the constitution of the smaller districts, "a notice of intention to do so" was required to be published in the Official Gazette, and to be posted in at least one post office, &c." This had not been done before the constituting of the Weyburn District. It was further provided that there must be at least twelve ratepayers in a proposed district, and a population resident therein in the proportion of one ratepayer to each three square miles of area. It was also required that the order constituting the district should be published in the Gazette and that the district should be given "a distinctive number."

It was urged for the respondent that none of these provisions or conditions were intended to apply to the larger districts constituted under s. 14 of chap. 17, 1899. In the smaller districts the ratepayers elect their overseer; in the larger he is appointed by the Lieutenant-Governor in Council; in the smaller districts the ratepayers may commute for the taxes by doing a certain number of days' work in lieu of the money payment; this is not allowed in the larger districts; the rate of tax per acre is $2.50 in the smaller and $2.00 in the larger. Chap. 17, 1899, was not passed as an amendment to s. 3 of the prior Ordinance, as was urged for the appellant, but as an amendment to the whole of that prior Ordinance. S. 14 (2) provides that "this section shall not affect the authority to erect districts under s. 3" of that Ordinance. This provision would be unnecessary if s. 14 was to be deemed an amendment to sec. 3. Sub-sec. 3 of s. 14 (ch. 17) provides that in case of there being within a larger district created under that section a portion in which the conditions prescribed in s. 3 exist, such portion may be formed into a small district on the petition of a majority of the resident ratepayers therein, and such small district when created shall be excluded from the larger district of which it previously formed a part.

This sub-sec. 3 seems to me to indicate that the Legislature did not, in passing s. 14, intend that the conditions necessary to the erection of a small district

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should also exist throughout the larger one. I take it that this sub-section may be read as saying: "If in any portion of a larger district there happen to exist the conditions which would have warranted such portion in being erected into a smaller district under s. 3, such portion may still be erected on the petition of its residents." This seems to me to point to the conclusion that it was not contemplated that these conditions must necessarily exist in the area to be erected into a larger district—only that it *might* happen that they would exist in portions of such area, and in that event, the residents might petition as provided. It is obvious why a certain population should be necessary in the smaller districts and not in the larger, since in the former, among other things, the ratepayers may, instead of paying the tax in money, do certain work, and they are authorized to meet and elect their overseer and to make arrangements as to where the work is to be done, &c. In the larger districts, the area of which is unlimited (provided not less that 72 square miles), it is obvious that meetings of ratepayers might be inconvenient owing to remoteness. As to the use of the word "created," the meaning given to that word by the respondent seems to me the correct one, and to be in harmony with what I have already pointed out as the indicated intention of the Legislature. A district "created" cannot, except by the loosest use of words, mean a district *not yet created* but only proposed to be created. In s. 3 (ch. 73) where something is to be done *before* the constituting of a district, it expressly says: "Before constituting any district a notice of intention" is to be published—"no district shall be erected unless, &c."—"No district shall comprise, &c.," whereas, when the past tense is used, it always refers to something to be done after the district has been constituted. For example, take s. 4 (6), ch. 73. "Should it be made to appear . . . that any district constituted under the provisions of this Ordinance." Here the section is clearly dealing with a district that has been completely formed. Turn to s. 14, ch. 17, sub-sec. 3, and to ss. 15, 16, 17, 18, and we find the words "created," "erected," "constituted," all referring to districts that have

already been created, erected or constituted as the case may be. While a strict application of the rules of grammar is not to be insisted on where so doing would be inconsistent with the obvious meaning of the context—even the ordinary meaning of words used is to yield to the context—still the rule is not to suppose that the Legislature has been either ungrammatical or loose in its use of tenses or words, but the contrary. Words are to be construed in the sense in which they are ordinarily used, unless there is something to show that such was not the meaning intended. Now, here there is nothing unreasonable or inconsistent in the Legislature providing that some of the formalities prescribed by itself as pre-requisite to the erection of small districts should not be required in the creation of larger districts—or that the conditions as to population should not necessarily be the same in both. There is nothing in chap. 17 (1899) inconsistent with the Legislature having intended when using the word "created" to mean just what they said, i.e., that they were speaking of the district as something that had been "created"—not something "created or about to be created," which is the meaning sought to be given it by the appellants. I have, moreover, pointed out why I think the respondent's interpretation is the one which is consistent with the indicated intention of the Legislature, and I have shewn that the Legislature has not loosely used such words as "created" and "erected" in other places in these two Ordinances, but has used them properly and grammatically.

If this view is correct, then s. 20 applies only to matters affecting a district after it has been constituted, such as the appointment of the overseer, his making of an assessment, &c. Sec. 20, having expressed how and when the provisions of s. 3 should apply, viz.: as I have found, after creation, it is proper to infer that it was not intended they should apply prior to creation—*expressio unius exclusio est alterius.*

The appellants objected that notice of the constitution of the district had not been published in the Gazette, as required by sec. 3 of ch. 73. If that notice is a necessary element in the very constitution of the district, then it is

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something to be done after the district has been constituted, and sec. 20 does not make this a condition applicable to the larger districts. If it is something not a part of the creative act, but to be done after the district has been created, then by hypothesis, the district being already a thing in existence, the only way in which the non-performance of this requirement as to notice could affect the district would be by way of destroying it or nullifying its creation. There is nothing in the Ordinance giving such an effect to the non-compliance with any of its conditions subsequent. Compare the language of Coleridge, J., in *LeFeuvre* v. *Miller*.[18] I have seen the report of *Rex* v. *The Inhabitants of Washbrook*.[19] cited, but it does not, I think, help the appellants. It is, however, not necessary to decide what would be the result if this notice had not been given, for the evidence, I think, shews that it was in fact given. The appellants object to the notice as published in the Gazette that it gives the number of the district as "516" instead of "518." I think it was a mere typographical or clerical error, by which nobody was or could be deceived. The notice recites the fact of the constitution of the district, shows what land is included in it, and that it is "to be known by the name of The Weyburn Local Improvement District, and that it be numbered 516," so that the number is not a part of the name by which it is "to be known." Moreover, in the same issue of the Gazette there is a notice of the appointment of Henry McGowan as "Overseer for the Weyburn Local Improvement District, No. 518," the number being given correctly.

Now, will any one seriously say that the defendants were in the slightest degree prejudiced by the typographical error in a single figure of the number? I cannot see how such a thing could be possible unless another district existed bearing the name "Weyburn L. I. District," and even then it would require other facts to establish that they were in any

[18](1857) 8 El. & Bl. 321; 26 L. J. M. C. 175; 3 Jur. (N. S.) 1255.
[19](1825) 7 D. & R. 221; 4 B. & C. 732.

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way thereby prejudiced. Section 14 (ch. 17) does not require the district to be either named or numbered, though sec. 3 of ch. 73 requires a "distinctive number" to be given to the smaller districts. I think this notice, assuming that it was necessary, was sufficiently given.

This objection to the number is very much on a par with another objection I propose now to consider, viz., that the defendants were never assessed at all. On examination, however, it turns out that this apparently formidable objection is an exceedingly harmless matter—it means that the assessor called the defendants "The Hudson's Bay Co.," whereas their correct name is "The Governor and Company of Adventurers of England trading into Hudson's Bay." This company all over the West call themselves by the same name as the assessor did—their letter paper employed by their highest officials contains the short name, and even Acts of Parliament so refer to the company. Further comment on this objection is unnecessary.

Another objection is that the assessor did not post up a copy of the assessment roll in a post office or school as required. The onus of proving this lay on the appellants, but I cannot find a tittle of evidence that this was not done. This remark also applies to their objection that they did not own or occupy the lands in question. No proof is attempted to support this ground.

They object that the Ordinance of 1899 authorizing the creation of this district was passed only on 29th April, 1899, and the constitution of this district was still later (in July), and the assessment was in July and early part of August, and they say that they ought not to be assessed for a whole year when the district was in existence during less than half of such year. The Ordinance says that the assessment may be made at any time of the year. I fail to see how this objection can prevail. Had the assessment been required to be made, as in the smaller districts, by March 1, the assessor could not, in the year 1899, have so assessed, but by sec. 17 he had authority to assess at any time of the year, and he made his assessment with reasonble diligence. It is well

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known that in municipalities and school districts the assessment never takes place until the year is well advanced, though by a special section the taxes when assessed are deemed for some purpose to be due on the first day of that year. The rate of assessment has no relation to time—it is a fixed rate per acre. The delay in assessing postponed the time for payment, a fact not usually considered a disadvantage by those who have to pay.

Appellants also contend that the assessor did not "make diligent enquiry as to the lots or parcels of land owned or occupied within the district or as to the number of acres or the names of persons assessed in respect thereof." The evidence shews what enquiry the assessor did make, and the appellants were able to prove only a few relatively small errors, and these the judgment appealed from allowed to be corrected. The burden of proof rested on the defendants to establish this objection. The learned trial Judge was not convinced, and I do not feel like disagreeing with him.

It was also urged that the tax was exceptional, and for that reason forbidden by the defendants' deed of surrender. Assuming, for the purpose of the argument, that the terms of their charter would control, I think the appellants quite failed to establish that this tax was an exceptional one within the meaning of the deed of surrender. The company's land was assessed just as the land of other persons in the district, neither a cent more or less—the tax was equal and uniform within the given area.

In conclusion, I fail to find wherein the appellants have established any of their objections, and in my opinion the appeal should be dismissed with costs.

SCOTT, J., concurred with WETMORE, J.

Appeal dismissed without costs.

REPORTER:

Ford Jones, Advocate, Regina.

SPRING—RICE v. TOWN OF REGINA.

Assessment—Taxes illegally collected—Repayment of—Voluntary payment—Payment under protest—Mistake of law—Court of Revision.

Certain of the plaintiff's lots were by by-law of the defendant municipality "exempted from payment of taxes" for the year 1899 and other years. The said lots were assessed for taxes for the said year "for school purposes only." Thereafter the plaintiff received from the defendant a statement and demand for payment within 30 days of the taxes on the said lots for the said year, and "in consequence of the said demand" paid the same.

Held, that, assuming the plaintiff was entitled to exemption from taxation for school purposes, this did not amount to such an involuntary payment as would entitle the plaintiff to recover the amount so paid.

Effect of decision of Court of Revision discussed.

[*Court en Banc, July 27th, 1901.*]

Statement.

This was a case stated by consent for the opinion of the Court, the question of costs not to be considered. The facts are sufficiently set out in the judgment.

The case was heard July 25th, 1901.

N. Mackenzie, for defendant:—The matter is *res judicata*: Municipal Ordinance, s. 138 (12); *Angus* v. *Calgary School Board*,[1] *Jones* v. *City of St. John*.[2] The payment was not involuntary: *Vapley* v. *Manley*,[3] *Street* v. *Simcoe*,[4] *Close* v. *Phipps*,[5] *Fraser* v. *Pondlebury*,[6] *Marriott* v. *Hampton*.[7] The mistake, if any, was one of law: *Powell* v. *Smith*,[8] *In re Railway Time Table Pub. Co., Ex parte Sandys*.[9]

F. Jones, for plaintiff:—The onus is on the defendant to prove *res judicata*: *Brandlyn* v. *Ord*.[10] The judgment was not that of a Court—*Rogers* v. *Wood*[11]—the Judge being merely a *persona designata*. To act as an estoppel the judgment must have been pronounced directly on the matter in

[1](1887) 1 Terr. L. R. 111. [2](1901) 21 C. L. T. 401; 37 C. L. J. 411. [3](1845) 1 C. B. 594; 14 L. J. C. P. 204; 9 Jur. 452. [4](1862) 12 U. C. C. P. 284. [5](1844) 7 Man. & G. 586; 8 Scott (N. R.) 381. [6](1861) 31 L. J. C. P. 1; 10 W. R. 104. [7](1797) 2 Smith's L. C. 418; 7 Term. Rep. 269; 2 Esp. 546; 4 R. R. 439. [8](1872) L. R. 14 Eq. 85; 41 L. J. Ch. 734; 20 W. R. 602. [9](1889) 42 C. D. 98; 58 L. J. Ch. 504; 61 L. T. 94; 37 W. R. 531; 1 Meg. 208. [10]1 Atk. 571. [11](1831) 2 B. & Ad. 245.

Statement.

question: *Attorney-General for Trinidad* v. *Eriche*,[12] or it must be shown that in the former suit the plaintiff might have recovered what he seeks in the latter: *Nelson* v. *Couch*,[13] *Hunter* v. *Stewart*,[14] *Whittaker* v. *Kershaw*,[15] *Gibbs* v. *Cruikshank*.[16] There is no estoppel where the matter is not one necessary to be decided at the former proceeding: *The Duchess of Kingston's Case*,[17] *Concha* v. *Concha*.[18] The decision of a Judge on appeal from a Court of Revision is not final: *C. P. R.* v. *Calgary*.[19]

The payment was involuntary, having been made "in consequence of the demand." If the plaintiff had not paid, his goods and chattels in the municipality would have been distrained upon. The parties were not upon equal terms, and the payment not voluntary: *Hooper* v. *Exeter*,[20] *Morgan* v. *Palmer*,[21] *Steele* v. *Williams*,[22] *Bain* v. *Montreal*,[23] at p. 269; *Leprohon* v. *Montreal*,[24] *C. P. R.* v. *Cornwallis*.[25] The taxes not having been legally due and having been paid involuntarily the plaintiff is entitled to recover, the defendant being liable in assumpsit for money had and received: *Hall* v. *Mayor of Swansea*.[26]

[*July 27th, 1901.*]

The judgment of the Court was delivered by

McGuire, J.—The case states that the plaintiff was by a by-law of the defendant corporation exempted "from payment of taxes" for (among other years) the year 1899.

The defendant corporation, treating this as an exemption from taxes for municipal purposes only, and not from

[12](1893) A. C. 518; 63 L. J. P. C. 6; 1 R. 440; 69 L. T. 505. [13](1863) 10 Jur. (N. S.) 366; 15 C. B. (N. S.) 99; 33 L. J. C. P. 46; 8 L. T. 577; 11 W. R. 964. [14](1862) 4 DeG. F. & J. 168; 31 L. J. Ch. 346; 8 Jur. (N. S.) 317; 5 L. T. 471; 10 W. R. 176. [15](1890) 45 C. D. 320; 60 L. J. Ch. 9; 63 L. T. 203; 39 W. R. 23. [16](1873) L. R. 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; 21 W.R. 734. [17](1776) 2 Smith's L. C. 713; 20 How. St. Tr. 537. [18](1886) 11 App. Cas. 541; 56 L. J. Ch. 257; 55 L. T. 522; 35 W.R. 477. [19](1887) 5 Man. L. R. 37; 1 Terr. L. R. 67. [20](1887) 56 L. J. Q. B. 457. [21](1824) 2 B. & C. 729; 4 D. & R. 283; 2 L. J. (O. S.) K. B. 145; 26 R. R. 537. [22](1853) 8 Ex. 625; 22 L. J. Ex. 295; 17 Jur. 464; [23](1882) 8 S. C. R. 252. [24]2 L. C. R. 80. [25](1899) 7 Man. L. R. 1. [26](1844) 5 Q. B. 526; D. & M. 475; 13 L.J. Q. B. 107; 8 Jur. 213.

Judgment. McGuire, J.

those imposable for school purposes, rated the plaintiff for school taxes for that year. The plaintiff appealed from his assessment to the Court of Revision, and, not being successful there, appealed further to the Judge, when again his appeal was dismissed, and the assessment confirmed. Thereafter "a statement and demand for payment within thirty days" of said taxes was made "during the month of September," and "on December 19th, 1899, the plaintiff paid the defendants, in consequence of the said demand, the said sum of $108.13 3-4," being the said school tax. The full Court in Manitoba had recently then held (*City of Winnipeg* v. *C. P. R. Co.*,[27] that under somewhat similar circumstances school taxes were not included in a by-law of the City of Winnipeg exempting the C. P. R. from municipal taxes, and this judgment had been cited in the appeal before the Judge here. So that at the time the plaintiff paid the taxes he was possibly influenced by the Manitoba judgment just referred to, as well as by the result of his appeal to the Judge. Be that as it may, he seems to have paid the taxes, so far as the case shows, without notice that he did so under "protest," and without any warrant of distress having issued, and without even a threat of a distress. As stated in the case, he paid "in consequence of the demand," that is, the "statement and demand" referred to. Subsequently, and after payment, the Supreme Court of Canada reversed the judgment of the Manitoba Court, and the plaintiff thereafter sought to recover back the taxes for 1899 so paid by him. Practically the whole question at issue has narrowed itself down to whether this payment was or was not a "voluntary one." In the absence of any distress or threat of distress or issue of a distress warrant the plaintiff nevertheless, contended that, knowing the Tax Collector had the power to distrain in case of non-payment within the time prescribed, the payment should be treated as if made under pressure of an actual distress. It may be observed that the taxes were not, in fact, paid within the thirty days

[27] 12 Man. R. 581, reversed on this point, 30 S. C. R. 558.

Judgment. McGuire, J.

stated in the notice, but at least a month and a half after the expiration of such thirty days, which, as far as it goes, would seem to indicate that the plaintiff was not influenced by the danger of a distress. What is or is not such pressure as will make a payment of money an involuntary one must depend on circumstances, and may frequently be a nice question to decide. In one sense all taxes may be said to be involuntarily paid—and the same remark, too, frequently is applicable to payments of other debts. But that kind of voluntariness is not what is meant in speaking of "voluntary payments." Usually there is evidence of distress or a demand with threat of distress, and the exhibition of a warrant to support the threat. Or the party paying does so "under protest," usually in writing. We cannot find any case going so far as to make the mere possession of the statutory power of distress by the person making the demand, but without any actual resort to such power, such duress as makes the payment an involuntary one. On the other hand, we find in the case cited to us on the argument, viz., *Bain* v. *The City of Montreal*,[23] that where a payment of taxes had been made by the plaintiff after service of a notice demanding payment within fifteen days, and concluding with these words: "in default whereof execution will issue against your goods and chattels," and signed by the City Treasurer—which notice will be found at pp. 268, 269 of the report, the majority of the Court were, nevertheless, of opinion that the payment was voluntary and could not be recovered back. I would refer to the observations of Strong, J., in the beginning of his judgment, p. 265, and again on p. 266. Taschereau, J., at p. 285 refers to the fact that the payment was not accompanied by a "protest," though with knowledge of all the facts, and that learned Judge thought that in the absence of actual constraint, as distinguished from a threat, the party "ought to accompany this payment" with a protest, if not under the impossibility of making one, and he adds his reasons. It is true that Henry, J., dissented, and thought the demand of payment

served was a threat which rendered the payment involuntary. In the present case we do not know of any threat of proceedings against the plaintiff, in case of default in payment, being embodied in the demand—the case does not inform us, and we have no right to assume that it was, so that in this respect the evidence for the plaintiff is somewhat weaker than in *Bain* v. *Montreal*.[23] We are not convinced by anything that appears in this case that the plaintiff did not pay acting under the belief that he was legally liable to do so. He knew all the facts, and if he was in error, it was one of law and not of fact. While we think, therefore, that the plaintiff is not entitled to recover back the taxes for 1899 so paid, by reason of the payment being a voluntary one, we think there is little room for doubt that had the payment been under duress or accompanied by a protest, he would be entitled to repayment. We can only regret that the defendant corporation should refuse to return the plaintiff a sum of money which they are not entitled to receive, and which they had agreed by by-law to exempt the plaintiff from.

Judgment.
McGuire, J.

The opinion of this Court is that the plaintiff is not, on the facts, as stated in the case, entitled to recover from the defendants the said sum so paid by him to them.

REPORTER :

Ford Jones, Regina, Advocate.

SPENCE v. ARNOLD.

Covenant to deliver possession of land—Dominion Lands Act—Assignment or transfer—Mistake—Rectification of contract.

A covenant contained in an agreement for farming "on shares" to deliver possession of land to which covenantor has homestead rights only, is not an assignment or transfer within the meaning of Dom. Lands Act, R. S. C. 1886, c. 54, s. 42, as amended by 60-61 Vic. 1897, c. 29, s. 5.

Rectification of contract for mistake discussed.

[RICHARDSON, J., *July 31st, 1901.*

Statement.

Trial of an action before RICHARDSON, J., without a jury.

By sealed memorandum of agreement, made between plaintiff and defendant, dated 12th January, 1901, defendant declared himself the owner of a quarter section of land, and covenanted that plaintiff should have possession thereof for five years, from the date of the agreement, as also of certain farm stock and implements, to be properly cared for and kept by plaintiff at his own expense. Defendant was to erect on the land a habitable house for plaintiff's use during the term, to be fit for occupation on or before April 1st, 1901.

In March defendant gave plaintiff written notice that he refused to perform the covenants on his part because:—1. Plaintiff had not fed and cared for the stock from the date of the agreement, and (2) defendant was "not a competent person, and not possessed of sufficient means" to farm the land. In April plaintiff, who contended that the intention was that the agreement should take effect from April 1st, demanded performance by defendant of his covenants, and on refusal brought this action for damages. Defendant, while asserting that the plain words of the deed as to date must govern, set up that the agreement was void under Dom. Lands Act, c. 42, as amended by 60-61 Vic. (1897), c. 29, s. 5.

W. C. Hamilton, K.C., for plaintiff.

J. Balfour, for defendant.

[*July 31st, 1901.*] Judgment.

Richardson, J.

RICHARDSON, J. (having found upon the evidence that the intention of the parties respecting the date of delivery of possession was, owing to the error of the conveyancer, not truly expressed), gave judgment as follows:—

The writing is only evidence of the contract. The true terms, in so far as they relate to the time of the possession of the horses, &c., are the binding ones, and if the defendant had undertaken proceedings to cancel the contract for the first reason given in his notice of March 27th, this Court having the powers of a Court of Equity, would have rectified the mistake and enforced the real agreement. (Pollock on Contracts, p. 493, et seq.).

A further contention of defendant is that the land of which he agreed to give plaintiff possession was not his own, but belonged to the Crown, under whom he had obtained certain statutory rights termed homestead rights, and that, inasmuch as the conditions imposed upon homesteaders had not been fully performed by defendant, he exceeded his powers in executing the contract, which is, therefore, void. His counsel referred to Dom. Lands Act, sec. 42, as amended by 60-61 Vic. (1897) c. 29, s. 5, which declares void "unless the minister otherwise declares, every assignment or transfer of homestead . . . right, or any part thereof, and every agreement to assign or transfer . . . after patent obtained."

By this contract, defendant neither assigned nor transferred, nor agreed to assign or transfer to the plaintiff, either the whole or any part of the quarter section named. He only agreed that plaintiff should have possession of the land for five years, and as this can neither operate as an assignment or transfer nor an agreement to do so after patent issues, the penalty enacted by the section referred to does not apply.

Judgment for plaintiff for $25 damages and costs on the higher scale.

REPORTER:

C. H. Bell, Advocate, Regina.

CLARK v. HAMILTON (No. 2).

Bill of Exchange—Acceptance—Stated account—Opening account—Mistake—Pleading—Amendment.

Acceptance of a bill of exchange is evidence of an account stated to the amount of the bill.

In order to open a settled account it is necessary to particularize specific errors in the account.

In an action by the drawer of bills of exchange against the acceptor, the defendant pleaded generally that he accepted the bills under a mistake as to the state of the account. This defence was struck out, with leave to the defendant to amend on terms of filing an affidavit verifying the facts to be set out in the proposed amended defence.

The proposed amended defence alleged that when the defendant accepted the bills he did so under the mistaken idea that he was indebted to the plaintiff in the amount whereof; that such mistaken belief was occasioned by the plaintiff having represented to him, by statements of account in writing and by drawing the bills, that he justly owed the plaintiff that amount, whereas, in fact, he was not indebted to him in any amount; that the defendant had dealt extensively with the plaintiff for over six years; that in course of such dealings plaintiff had, without defendant's knowledge or consent, made many exorbitant and illegal charges, and that if accounts were taken it would be found that the defendant was not indebted to the plaintiff in any amount. This proposed defence and a counterclaim, based on the same allegations, for an account, were *held* bad; and were not allowed to be filed, and there being, therefore, no defence on file, judgment was given for the plaintiff.

[RICHARDSON, J., *July 31st, 1901.*

Statement. Plaintiff sued to recover $103.75, being a balance claimed upon three overdue bills of exchange drawn by plaintiff upon defendant and accepted by him.

By the defence filed defendant admitted accepting the bills, but alleged that such acceptances were made under a mistake as to the standing of the accounts between plaintiff and himself; and asserted that if proper accounts were taken it would be found that defendant owed plaintiff nothing. By way of counterclaim defendant asked an account of all dealings between plaintiff and himself be taken by the Court.

In his reply plaintiff, besides denying any mistake, objected to the defence as insufficient in law, on the ground that no particulars of, or facts constituting, the alleged mistake were set out; to the counterclaim he objected that no ground was disclosed entitling defendant to relief and also pleaded an account stated.

Statement.

Upon an application to set the cause down for trial the question of the sufficiency in law of the defence arose, and some argument was had resulting in an application by defendant to amend. This was granted, on condition that an affidavit of the truth of the facts alleged in the amended pleading, be filed, following *Stoughton* v. *Kilmorey*.[1]

The proposed amended defence alleged that defendant accepted the bills sued on under a mistaken idea that he was indebted to plaintiff in the amount thereof; such mistake being occasioned by plaintiff having represented to him, by statement of account in writing and by drawing the bills, that he was justly and truly indebted to plaintiff in said amount; whereas he was not at the time of acceptance or since indebted to plaintiff in any amount whatsoever; that defendant had dealt extensively with plaintiff for the past six years and longer; that in the course of such dealing plaintiff had, without defendant's knowledge or consent, made many exorbitant and illegal charges; and that on proper accounts being taken it would be found that defendant owed plaintiff nothing. In the alternative, that by reason of these facts there was a total failure of consideration for the bills. An account was asked for by way of counterclaim.

Defendant's affidavit filed set forth that when he accepted the bills sued on he believed he was indebted to plaintiff in the amount thereof; that such belief was occasioned by plaintiff having represented to him, by statement in writing and by drawing the bills, that he justly owed plaintiff said amount; that defendant had dealt extensively with plaintiff for the past six years and longer, and he verily believed that if accounts were taken between plaintiff and himself it would be found that defendant was not, when the bills were drawn, or since, indebted to plaintiff in the amount sued for.

N. Mackenzie, for plaintiff.

Ford Jones, for defendant.

[1] 2 C. M. & R. 75; 3 D. P. C. 705; 5 Tyr. 568; 1 Gale 91; 4 L. J. Ex. 138.

Judgment.

Richardson,J.

RICHARDSON, J.—Acceptance of the bills sued on forms evidence of an account stated, as to amount: *Wheatley* v. *Williams*,[2] *Rhodes* v. *Gent*[3]; and consideration is presumed till the contrary appears. A defence of absence of consideration must specify the circumstances affirmatively: Byles on Bills, p. 419, and cases there named. Eng. Marginal Rule 202, which is in force in the Territories, prescribes that in all cases in which the party pleading relies upon any fraud, misrepresentation . . . etc., particulars (with dates and items if necessary) shall be stated in the pleading. *Parkinson* v. *Hanbury*,[4] at p. 296, per the Lord Chancellor:—"Where a party seeks to open a settled account there must be a distinct statement of some error in the account. There must be some direct distinct and specific averment of error stated to entitle the party to open the account." And per Lord Cranworth: "Where a party attacks an account already treated as settled, something must be distinctly alleged to the effect that although the accounts are so settled and have been acquiesced in, there are certain errors which escaped his notice, and which must, therefore, be rectified." See also *Wallingford* v. *Mutual Society*,[5] *Forman* v. *Wright*,[6] *Agra & Masterman's Bank* v. *Leighton*,[7] *Warwick* v. *Nairn*,[8] *Jones* v. *Latimer*.[9] "Some specific errors in the account impeached must be particularized"; *DeMontmorency* v. *Devereau*:[10] "To open a settled account some specific error must be pointed out."

In my judgment, as no specific facts are set out which, if proved, would show plaintiff not entitled to recover, the original statement of defence forms no answer to plaintiff's claim, neither does the counterclaim set out a good cause of action.

[2]1 M. & W. 533; 2 Gale 140; 5 L. J. Ex. 237. [3]5 B. & Ald. 245. [4]36 L. J., Ch. 292; L. R. 2, H. L. 1; 16 L. T. 243; 15 W. R. 642. [5]5 App. Cas. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81. [6]11 C. B. 492; 20 L. J. C. P. 145; 15 Jur. 706. [7]L. R. 2 Ex. 56; 4 H. & C. 656; 36 L. J. Ex. 33. [8]10 Ex. 762. [9]1 Jur. 980. [10]7 Cl. & F. 188; 1 Dr. & Wal. 119; 2 Dr. & Wal. 410; West 64.

The proposed statement of defence in substitution is, for similar reasons, insufficient, and is not to be allowed on the record. There is, then, no valid defence to the action, and thus plaintiff is entitled to judgment for his claim, with costs necessarily incurred. Judgment. Richardson, J.

REPORTER :

C. H. Bell, Advocate, Regina.

WALTER CROSSKILL, OVERSEER LOCAL IMPROVEMENT DISTRICT NO. 507 v. THE SARNIA RANCHING COMPANY.

Local Improvement Ordinance, C. O. c. 73—Assessment—Lands held under lease but not enclosed—Assessment of occupant—Personal liability of person assessed.

Where lands are held under lease from the Crown and, though they are not enclosed or fenced, the lessee uses them as pasture for his sheep, the lessee is an "occupant" of the lands within the meaning of The Local Improvement Ordinance, C. O. 1898, c. 73, s. 15.

Notwithstanding the wording of s. 16, s.-s. 2, and of s. 17 of the said Ordinance, the effect of the provisions of ss. 15, 20 and 23 is to create a personal liability to pay, upon which the occupant may be sued.

[SCOTT, J., *August 13th, 1901.*

This was an action by the Overseer of the Medicine Hat Local Improvement District, No. 507, to recover the sum of $189, being the amount of taxes levied by him upon the defendant company in respect of certain lands held by them under lease from the Crown. The facts of the case sufficiently appear from the judgment. The action was tried at Medicine Hat on the 5th day of November, 1900.

Horace Harvey, Deputy Attorney-General, for the plaintiff:—The case of *McGowan* v. *The Hudson Bay Co.*† shows that all the grounds of defence are untenable except the contention that the defendants' lands are exempt by reason of their being Crown lands. As to this contention, the lands themselves are not taxed. There are authorities, however,

† Ante p. 147.

Argument.

which show that the interest of a person in unpatented lands may be sold for taxes: *Mayor of Essenden* v. *Blackwood*,[1] *Doe dem McGillies* v. *Macdonald*,[2] *Wrightman* v. *VanValtenburg*,[3] *Church* v. *Fenton*,[4] *Ruddle* v. *Georgeson*,[5] *Whelan* v. *Ryan*,[6] *Cornwallis* v. *C. P. R. Co.*[7]

Norman MacKenzie, for the defendants:—The assessment roll is merely *prima facie* evidence. The onus is on the plaintiff to show that the provisions of sections 2 and 3 have been complied with, and there is no evidence to show this. *Herren* v. *Rothmines*,[8] *McKay* v. *Chrysler*,[9] *Colquhon* v. *Driscoll*.[10] As to taxes being personal, other sections of the Ordinance show that the intention is to tax the lands. See also Lefroy on Legislative Power, p. 64. The lease to the defendant created merely a license: *Atty.-Gen.* v. *Mercer*,[11] *City of Quebec* v. *Queen*,[12] *Regina* v. *Wellington*,[13] *Quirt* v. *The Queen*,[14] *Simcoe* v. *Street*.[15]

Harvey, in reply:—Even if the provisions referred to did apply they are merely directory and not obligatory: Maxwell on Statutes, p. 521; Hardcastle, pp. 276, 303.

[*August 13th, 1901.*]

SCOTT, J.—This is an action to recover $198 for taxes which plaintiff claims were duly assessed against defendant company, for the year 1899, in respect of certain land within the limits of the district.

The action was tried before me at Medicine Hat sittings on the 5th of November last, judgment being reserved. Before I was ready to deliver judgment an appeal to the Court *en banc* from the judgment of RICHARDSON, J., in a suit of *McGowan* v. *Hudson's Bay Co.*,† had been entered, and as some of the questions arising in this suit were being raised

[1]2 A. C. 574; 45 L. J. P. C. 98; 36 L. T. 625; 25 W. R. 834. [2]1 U. C. Q. B. 432. [3]6 U. C. C. P. 385. [4]28 U. C. C. P. 384, 5 S. C. R. 239. [5]9 Man. R. 407. [6]20 S. C. R. 74. [7]19 S. C. R. 702. [8](1892) A. C. 498; at pp. 501, 521, 523; 67 L. T. 658. [9]3 S. C. R. 436. [10]10 S. C. R. 254. [11]8 A. C. 767; 52 L. J. P. C. 84; 49 L. T. 312. [12]2 Ex. (Can.) 450. [13]17 O. A. R. 471. [14]19 S. C. R. 510. [15]2 E. & A. 211.

† Ante p. 147.

upon that appeal, I, with the assent of counsel for the parties, deferred giving judgment until the appeal was decided. Judgment was delivered upon the appeal on 27th July last. Judgment. Scott, J.

On 9th May, 1899, an order in Council was passed and duly published in the official gazette ordering that a certain defined area (except certain portions thereof included in local improvement districts already created) should be formed into a local improvement district under the name of The Medicine Hat Local Improvement District No. 507. As the lands comprised in the district exceeded 72 square miles, the authority for creating it is to be found in s. 14 of c. 17 of 1899, which amends the Local Improvement Ordinance, C. O. c. 73.

It was contended on behalf of the defendant company that C. O. c. 73 prescribes certain conditions precedent to the formation of a local improvement district, and that plaintiff has not shown that these conditions were complied with, and that the onus was upon him to show this. One of these is that under section 3 no part of a municipality or village shall be within the district, and another that under the same section a district shall not be erected unless it shall contain a population in the proportion of at least three residents to each square mile.

One of the questions raised upon the appeal in *McGowan* v. *Hudson's Bay Co.* was whether the notice prescribed by sub-section 2 of section 3 of intention to erect a district was required to be given in the case of districts proposed to be created under section 14 of the Ordinance of 1899. After the argument of that appeal, and while it was standing for judgment, the Legislative Assembly passed an Ordinance explaining the meaning and intention of the Ordinance of 1899, and the Court en banc subsequently held that by reason of the effect of such explanatory Ordinance that notice was not required to be given in the case of districts so erected. I am unable at present to refer to the provisions of the Ordinance, but my recollection of the effect is that the conditions precedent prescribed by C. O. c. 73 with respect to districts formed under its provisions were

Judgment.
Scott, J.

not intended to apply, and did not apply to districts formed under section 14 of the Ordinance of 1899. Such being the effect it follows that the conditions precedent referred to are not applicable to the district in question.

Another objection raised on behalf of the defendant company was that although the district in question was not constituted until May, 1899, the whole amount of the tax authorized by the Ordinance to be levied in each year was levied for that year, and that such levy was, therefore, improper and illegal.

This same question was raised on the appeal in the *McGowan Case*, and it was there held by the Court *en banc* that such levy was authorized by the Ordinance.

The evidence shows that nearly all the lands in respect of which taxes are claimed are Dominion lands, and are held by defendant company for a term of 21 years from 1st February, 1899, under what is known as a grazing lease granted by the Crown under the authority of "The Dominion Lands Act."

The manager of defendant company states that defendant company's sheep were running on these lands during the year 1899, but that the lands were not fenced nor were the sheep confined to them.

Defendant company contend that under section 15 of cap. 73 it can be assessed only as owners or occupants of lands, and that it was neither the owner nor occupants of the lands comprised in the lease.

In my opinion defendant company was the occupant of the lands to such extent as to render it liable for the payment of taxes in respect of them. Under the lease it had the right of sole occupation subject to certain conditions and exceptions which do not appear to me to affect the question raised, and it exercised that right by running sheep upon the lands during the year 1899. The fact that the lands were not enclosed or that defendant company may have permitted the stock of other persons to run or graze upon them does not, in my opinion, relieve it from liability as an occupant. It was further contended by defendant

company, that under the provisions of c. 73 it is the land itself and not the owners or occupants thereof that is assessed, and that, therefore, the lands comprised in the lease being Dominion lands are not liable to taxation. Section 15 provides that it shall be the duty of the overseer to assess every person, the owner or occupier of land situate in the district, for a certain specified sum in proportion to the quantity of land so owned or occupied by him. Judgment. Scott, J.

Section 16 provides that the overseer shall make out an assessment roll in which he shall set out (a) each lot or parcel of land owned or occupied within the district and the number of acres it contains, and (b) the name of the person assessed on account of each such lot or parcel, and the amount of the assessment, and sub-section 1 of section 30 provides that the overseer shall make up a statement in writing containing, among other things, the names of all persons assessed in the district, with the amount of the assessment, describing the land owned or occupied by each person.

These provisions appear to clearly indicate the intention that it is the owners or occupants and not the lands who are to be assessed. On the other hand, however, subsection 2 of section 16, and section 17, expressly refer to the assessment of the lands, and section 36, *et seq.*, provide for the forfeiture of the lands for non-payment of the taxes imposed upon them.

It would, I think, be somewhat difficult to so construe the Ordinance as to reconcile these apparently inconsistent provisions, but, in my opinion, it is for the reasons which I will now state unnecessary for me to undertake that task.

Section 15, which I have already quoted, provides that the owners or occupants shall be assessed in respect of the lands owned or occupied by them. By section 20 every person shall (unless he commutes by labour) pay the whole amount for which he is assessed.

By section 23 any taxes or arrears of taxes due to a district may be recovered by a suit in the name of the Overseer,

Judgment.
Scott, J.

and under section 34, in case any person neglects to pay his taxes for two months after notice, the same may be levied by distress of the goods and chattels of the persons who occupy the same.

These provisions appear to me to clearly show that there is a personal liability upon those who have been duly assessed as owners or occupants of lands in the district to pay the taxes imposed, which liability may be enforced in this form of action. This is apart from any question which may arise as to whether the lands are or are not made liable to assessment or taxation, or whether the taxes constitute a lien upon them, or whether they or the interest of the owner or occupant therein may be forfeited for non-payment of taxes.

No question was raised before me as to the liability of defendant company for the taxes claimed in respect of lands not comprised in the lease.

There is no evidence that defendant company was not the owner or occupant of them. The assessment roll which was produced before me shows that defendant company was duly assessed for them, and by section 33 it is made *prima facie* evidence of the debt.

I give judgment for the plaintiff for $198 with costs.

REPORTER :

C. A. Stuart, Advocate, Calgary.

IN RE CANADIAN PACIFIC RAILWAY CO. AND THE MACLEOD PUBLIC SCHOOL DISTRICT.

Appeal from assessment—General plan—Onus of proof—land and buildings.

Under ordinary circumstances, it is incumbent upon an appellant who complains that he is assessed too high to shew that the property is not worth the amount for which he is assessed, but where, although this is not shewn, it appears that under the general scheme of assessment, lands of a particular description are assessed generally at a certain fixed sum per acre, and that the appellants' lands of that description, which are of no greater value either by reason of their situation or otherwise, are assessed at a larger amount, the assessment should be reduced to accord with the general scheme of assessment.

A School District assessor assessed certain of the appellants' lands at $800, and the dwelling houses thereon at $2,000.

Held, that the assessment should stand, although the more correct course would have been to assess the whole as "land" and place a single value upon both soil and buildings as "land."

[SCOTT, J., *August 29th, 1901.*

Statement.

Appeal from the Court of Revision of the Macleod Public School District for 1901.

C. E. D. Wood, for the Canadian Pacific Railway the appellants.

C. F. Harris, for the School District the respondents.

SCOTT, J.:—This was an appeal by the Canadian Pacific Railway Company from the Court of Revision of the Macleod Public School District.

Appellants' assessment is as follows:—

Road bed on Secs. 3 and 4, Tp. 9, R. 26..	$1,800 00
S.-w. 1-4 2-9-26 West 4th, 160 acres.. ..	800 00
Ten-stall Round House and Turn-table..	10,000 00
Men's Dwellings on S.-W. 1-4 2-9-26....	2,000 00
E. 1-2 2-9-26 West 4th, 320 acres.....	1,600 00
	$16,200 00

It was admitted on the hearing of the appeal that the N.-E. 1-4 of 2-9-26 was improperly assessed and that the

Judgment.
Scott, J.

assessment thereof should therefore be struck out. It appeared that it is within that portion of the School District which is within the Municipality of Macleod, and should, therefore, be assessed in that municipality.

The S.-W. 1-4 and the E. 1-2 of Section 2 are assessed at the rate of $5.00 per acre. Several witnesses were called, who expressed the opinion that they were worth that amount. It was shown that in 1897 the E. 1-2 was purchased for the appellants for $1,800, and the S.-W. for $1,400, and the assessor states that in 1899 and 1900 appellants offered to sell him 20 acres of the S.-W. 1-4 at $5.00 per acre.

On the other hand, it is admitted that the price of Dominion lands, and of railway lands other than those assessed, is $3.00 per acre. Also, the assessor states that he valued the E. 1-2 at $5.00 per acre because it was close to the town site, that he thinks the S.-E. 1-4, though it does not adjoin the town site, is worth as much as the N.-E. 1-4, because it is better land: that the quarter section immediately east of the S.-E. 1-4 is assessed at $3.00 per acre: that all unoccupied lands in the school district outside the municipality other than the appellants' lands are assessed at $3.00 per acre, and that most of the Government lands adjoining the school district are not yet taken up.

The assessor, when examined before me on 6th July last, stated that he assessed the E. 1-2 of section 2 at $5.00 per acre because it was close to the town site. When his examination was resumed, on 14th August last, he stated that he assessed the appellants' lands adjoining the municipality at $5.00 per acre because he thought they were more valuable by reason of their situation adjoining the station property. In view of these inconsistent statements, it is impossible to ascertain upon what principle he fixed the assessable value.

I cannot hold, upon the evidence, that the lands referred to are not worth the amount for which they are assessed, and, under ordinary circumstances, it is incumbent upon

Judgment.
Scott, J.

an appellant who complains that he is assessed too high to shew that the property is not worth the amount for which he is assessed. But when it is shewn that, under the general scheme of assessment, lands of a particular description are assessed generally at a certain fixed sum per acre, and that the appellants' lands of that description, which are of no greater value, either by reason of their situation or otherwise, are assessed at a larger amount per acre, I think the assessment should be reduced to accord with the general scheme of assessment. If this were not done, the appellants would be called upon to pay an undue share of the taxes of the district, and I am not satisfied that such was not the intention.

It was contended by appellants that the round-house was not liable to assessment other than as part of its roadway. For the reasons stated by me in my judgment upon the appeal of these appellants against the corporation of the town of Macleod, I cannot uphold this contention.

It was also contended by the appellants that the assessment of the dwelling-houses on Section 2 should be struck out on the ground that they formed part of the land upon which they stand, and that their value must be taken to be included in the assessment of the land.

It is apparent that it is not so included, because, while the buildings are assessed at $2,000, the land is assessed at only $1,800, and a glance at the assessment roll will shew that, under the general scheme of assessment, the buildings are valued apart from the land upon which they stand.

I doubt whether this is the correct course to pursue. Sec. 131 of the School Ordinance provides that "land" shall include all buildings and erections thereon. I, therefore, think that the assessed value of the land should include the value of the buildings thereon, and that the value of the latter should not be separately stated, or, if separately stated, the joint value should be shewn. But where, as in the present case, it is apparent that the value of the buildings is not so included, it would be improper to strike out the assessment.

Judgemnt.
Scott, J.

It was admitted upon the hearing that if I found that the round-house was assessable apart from the roadway, it consists of ten stalls, only 7 1-2 of which were in that portion of the school district which is outside the municipality of Macleod, and that its value is at the rate of $920 per stall.

I direct that the following changes be made in the appellants' assessment, viz.: That the assessment of the round-house be reduced from $10,000 to $6,900: that the assessment of the N.-E. 1-4 of sec. 2-9-26 be struck out: that the S.-E. 1-4 thereof be assessed at $480, and that the assessment of the S.-W. 1-4 be reduced from $800 to $480. In all other respects the assessment will stand as it now is.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

THE MACLEOD IMPROVEMENT CO. v. TOWN OF MACLEOD.

Municipal assessment—Real estate and buildings thereon—Occupation of one storey by the Crown—Exemption.

The fact that a portion of a building assessed for taxes under the Municipal Ordinance, is occupied by the Crown under lease, and is therefore exempt under sec. 121, s s. 1 of that Ordinance, does not prevent the remaining portion being assessed for a proportionate part of the value of the whole.

[SCOTT, J., *August 29th, 1901.*]

The appellants were the owners of certain real estate in the town of Macleod, and owned a building situated upon it. The ground floor of the building was occupied by the Dominion Government as a Court House, under lease from the appellants. The appellants were assessed for $1,500 in respect of the whole building. They appealed against this assessment, and the appeal was heard at Macleod on 4th July, 1901.

An officer of the appellants appeared for them.

C. F. Harris, for the town of Macleod.

[*29th August, 1901.*]

Judgment.

Scott, J.

SCOTT, J.—This is an appeal from the Court of Revision for 1901.

Appellants are assessed for $660 for real estate and $1,500 in respect of the building thereon. The evidence shews that it is a two-storey building, that the lower storey or ground floor is occupied by the Dominion Government as a Court House, under a lease from the appellants, and is not otherwise occupied, and that the upper storey is vacant. It is also shewn that the Dominion Government does not rent or occupy or have any control over the upper storey or over the land other than what the building covers.

As the assessment roll does not shew that only a portion of the building was intended to be assessed, I must take it for granted that the whole of it was assessed. In my view, the lower storey being occupied by the Crown under a lease and not otherwise occupied, is exempt from taxation under sub-sec. 1 of sec. 121.

The evidence is silent as to the proportion the lower storey bears to the value of the whole building, but I think I ought to assume that it is at least one-half.

I see no difficulty in the way of dividing a building into two or more portions for the purposes of assessment. If an ordinary tenant were in possession of the lower storey of the building in question under a lease, he would be entitled to be assessed for that portion, and for that portion alone. If it could be separated for that purpose, it could be separated for the purpose of exemption.

I direct that appellants' assessment of the building be reduced from $1,500 to $750, and that the assessment be amended so as to apply only to the upper storey.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

IN RE CANADIAN PACIFIC RAILWAY CO. AND TOWN OF MACLEOD.

Assessment and taxation—Canadian Pacific Railway—Exemption from taxation—Crow's Nest Pass Railway—Branch lines—Municipal Ordinance—"Superstructure"—Value of round-houses, freight sheds, and other buildings.

Clause 16† (relating to exemption from taxation) of the agreement between the Canadian Pacific Railway Company and the Government of Canada, as embodied in the Act, 44 Vic. (1881), c. 1, is not applicable to the Crow's Nest Pass Railway, but is applicable only to the main line of the Canadian Pacific Railway Company and to such branches thereof as the Company was authorized by clause 14§ of the agreement to construct from points on the main line, and does not extend to other distinct lines of railway which the Company may have been subsequently authorized to construct.

Under the Ordinance respecting the Assessment of Railways, C. O. 1898, c. 71, s. 3, the round-houses, station, or office buildings, section houses, employees' dwellings, freight sheds, and other buildings of like nature belonging to a railway company and situated upon it, are not included in the term "superstructure," but may be assessed separately as personal property under the Municipal Ordinance.

Such buildings should not be valued as part of the railway as a going concern, and as having a special value as such, but merely at what they are worth separate and distinct from other portions of the railway.

When only two and a half stalls of a round-house were situated within the municipality, and the round-house was shewn to be worth $900 a stall, the assessment was fixed at $2,250.

[SCOTT, J., *August 29th, 1901.*

Statement. This was an appeal from the Court of Revision for 1901 of the municipality of the town of Macleod.

C. E. D. Wood, for the appellants the Canadian Pacific Railway Co.

C. F. Harris, for the respondents the town of Macleod.

†16. The Canadian Pacific Railway Company, 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 20 years after the grant thereof from the Crown.

§14. The Company shall have the right, from time to time, to lay out, construct, equip, maintain, and work, branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion.

[*August 29th, 1901.*]

Judgment.

Scott, J.

SCOTT, J.—This was an appeal by the Canadian Pacific Railway Co. from the Court of Revision for 1901 of the town of Macleod.

Appellants are assessed as follows:—

Road bed	$1,500
Round House	3,500
Station do	3,000
Road-master's dwelling	800
Store Building	2,000
Section House	800
Freight Shed	800
Loco. Engineer's Dwelling	800
	$13,200

It was contended on behalf of respondent company that the property assessed is exempt from taxation under clause 16 of the agreement embodied in the Act respecting the Canadian Pacific Railway, 44 Vic. (1881), cap. 1, but respondent company's counsel did not argue the question, nor did he state the grounds for the contention.

The road-bed assessed is part of the road-bed of the Crow's Nest Pass Railway, and the other property assessed consists of buildings erected upon and about the station grounds of the company at Macleod.

In my opinion, the exempting clause referred to is not applicable to the Crow's Nest Pass Railway. I think the reasonable interpretation of the agreement referred to is that the clause is applicable only to the main line of the C. P. R. and to such branches thereof as respondent company was authorized by clause 14 of the agreement to construct from points on the main line, and that it does not extend, nor was it intended to extend to the other distinct lines of railway which the company might subsequently be authorized to construct. The Crow's Nest Pass Railway is not a branch from the main line of the C. P. R., but a distinct line of railway.

Judgment.

Scott, J.

The respondent company also contend that the buildings assessed are part of the superstructure of the roadway, and that under C. O. (1898), c. 71, they must be included in the assessment thereof.

Sec. 3 of the Ordinance referred to provides that it shall be the duty of the assessor to assess the lands of a railway company and the roadway thereof, and the superstructure of such roadway, subject to the proviso that the roadway and superstructure thereon shall not be assessed at a greater value than $1,000 per mile.

The Ontario Assessment Act provides with respect to railways that the quantity of land occupied by the roadway shall be assessed at the actual value thereof, according to the average value of land in the locality, but no mention is made of the superstructure of the roadway.

The earliest enactment with respect to the assessment of railway property appears to be sec. 21 of 16 Vic. cap. 182. It is similar to the Ontario Act referred to, except that in the earlier Act the words "road" and "roadway" are both used, but the way in which they are used would appear to indicate that they were intended to mean the same thing.

In *Great Western Ry. Co.* v. *Rouse*[1] it was held that the term "road" (and presumably "roadway") in sec. 21 of 16 Vic. cap. 198, included the superstructure, "such as the iron rails, bridges," etc.

That case was followed in *London* v. *Great Western Ry. Co.*,[2] and by the Supreme Court of Canada in *Central Vermont Ry. Co.* v. *The Town of St. John's*,[3] which was a decision upon a similar statute passed in the Province of Quebec.

In *Toronto* v. *Great Western Ry. Co.*[4] the question was raised whether, under sec. 31 of 16 Vic. cap. 198, the defendant could be assessed for the value of the buildings used or occupied by it for railway purposes when the land occupied by such buildings had been assessed at the average

[1]15 U. C. Q. B. 168. [2]17 U. C. Q. B. 262. [3]14 S. C. R. 288. [4]25 U. C. Q. B. 570.

value of land in the locality, but that question was not decided in that case, nor can I find any case in which it has been decided. Judgment. Scott, J.

In Bouvier's Law Dictionary, under the head of "Roadbed," "Roadway," it is stated upon the authority of certain American decisions that the roadbed of a railroad is the foundation upon which the superstructure of the railroad rests, and that the roadbed is a right of way.

The South Wales Ry. Co. v. *Swansea Local Board*,[5] is a decision upon an Imperial Railway Act which provided that rates should be levied on all properly assessable thereto upon their full net annual value, but that the occupier of *land used only as a railway* should be assessed at one-fourth only of such net annual value. A distinction may easily be drawn between the words "land used only as a railway" and "roadway and the superstructure thereof," but the language used in the judgment in that case appears to me to be applicable to the question I am now discussing.

Lord Campbell, C.J., says, at p. 304:—"Now, it seems to me that the sidings, turn-tables, and so much of the platform as is to be considered as the side of the railway, form part of the railway, and are entitled to be rated at the lower amount. . . . With regard to the buildings in which the goods are deposited, it is conceded by Mr. Bramwell that they are no part of the railway. . . . Then, there are other portions which the case finds to be necessary for the using and working of the railway, and which are occupied by the (railway company) for that purpose. Now the statute does not say that land occupied for the purpose of a railway is to be exempt, but land used only *as a railway*. In popular language, we must take it that there is a distinction between the stations and the railway proper; and that a station is no part of the railway. Therefore, I think that the warehouses and all other buildings and property which are auxiliary to the working of a railway are not exempt under the proviso, according to the fair meaning of the Legislature. . . ."

[5] 24 L. J. M. C. 30; 4. El. & Bl. 189; 3 C. L. R. 18; 1 Jur. (N. S.) 326; 3 W. R. 23.

Judgment.
Scott, J.

Wightman, J., says at same page:—"A distinction has been drawn between a railway properly so called and buildings used with it and auxiliary to it. The language of the statute is very precise. In no case can it be said that these offices form part of the railway property so called, although they may be necessary to the proper and convenient working of it."

Erle, J., says, at p. 35:—"I think, also, that the sidings, having rails laid upon them, and the turn-tables, are land used as a railway only. Then, we come to the offices and warehouses, as to which I am clearly of opinion that they are not entitled to the exemption.

"They are proximately used for the purposes of habitation. The station here is in the middle of a large town, and used for the arrival and departure of passengers and goods. These buildings have been erected under the powers of the Act for taking additional land besides that required for the line of railway, and such buildings ought not to be exempted as part of the railway. I believe that the principle upon which we are now acting has been put into practice upon many railways, viz., that buildings auxiliary to the transit of passengers are ratable upon a different principle from the railway itself. . . ."

In *London & N.-W. Ry. Co.* v. *Llandudno Improvement Commissioners*,[6] it was held that, under a similar enactment, the platform at a railway station and the roof covering the railway, the platform and sidings might be rated as lands used only as a railway. It was also held (per Willes, J., at p. 297), that the term "line of railway" used in another portion of the enactment, is confined to whatever reasonably belongs to the line and is necessary for the physical use of the line as a line of railway, that it would include the engines, turn-tables, and sidings, but not the platform and roofs referred to.

I cannot find any authority to guide me in determining what limitation, if any, should be placed upon the word "superstructure" as it is used in sec. 3 of Ord. Cap. 71.

[6](1897) 1 Q. B. D. 287; 66 L. J. Q. B. 232; 75 L. T. 659; 45 W. R. 350.

Judgment. Scott, J.

In *Grand Trunk Ry.* v. *Port Perry*,[7] it was held by Dartnell, Co.J., that water tanks and platforms are part of the superstructure of a railway, and as such are not assessable apart from the roadway, and in *Midland Ry. Co.* v. *Midland*[8] it was held by Ardagh, Co.J., that a railway wharf upon which railway tracks were placed and which was used as a right of way for the railway was a superstructure, and as such was not assessable.

While the term "roadway" in sec. 3 may mean and include the whole right of way where it is used for no other purpose than as a right of way for the railway track, I am of opinion that the word "superstructure" as it is used therein is intended to mean and include only the superstructure constituting the line of railway, and that it is not intended to include, and does not include, any buildings or structures upon or adjoining the line of railway which, though used for railway purposes alone, form no part of that line of railway. In this view the term would include the ties, rails, turn-tables, bridges, culverts, &c., and (following the principle laid down in *South Wales Ry. Co.* v. *Swansea Local Board*,[5]) it would also include railway platforms, but it would not include station or office buildings, warehouses, storehouses, or dwellings or lodging houses for employees of the railway. Neither would it, in my opinion, include roundhouses.

One fact which leads me to the conclusion I have stated is that sec. 3 implies that the roadway and superstructure thereof or thereon is to be assessed at a certain rate per mile. That may be a reasonable mode of estimating the value of not only the line of railway, including the superstructure of the railway track, but, in my view, it would be reasonable to so estimate the value of not only the line of railway but of all the buildings and erections required for railway purposes at a station like that in Macleod.

It was further contended by the appellant company that the buildings assessed were valueless as such except for the purposes of the railway, and, therefore, that for the purposes

[7] 34 Can. L. Journal, 239. [8] 4 C. L. T. 501.

Judgment.
Scott, J.

of assessment they are of value only for the building material they contain. The *Bell Telephone Company and the City of Hamilton*[9] and *Re London Street Railway Company Assessment*[10] were cited in support of this contention.

As I understand the principle laid down in those cases, adapting it to the circumstances of the present case, it is that the buildings should not be valued as part of the railway as a going concern, and having a special value as such, but merely at what they are worth separate and distinct from other portions of the railway. It may easily be inferred that if the portion of the railway track within the municipality were valued upon that basis its value would be merely the value of the ties and rails, &c., as railway material, because as they now stand they are not of any other use or value except in connection with the rest of the railway land, but it is different with respect to the buildings.

It is not shewn that they are not of value as such for other than railway purposes. Some of them may be of value as they now stand as dwellings, others as storehouses or warehouses, apart from the railway. For that reason, I am unable to hold that they should not be valued as other buildings of a like nature are valued.

The evidence shews that only about two and a half stalls of the round-house are within the municipality, and the value has been shewn to be nine hundred dollars per stall. It was contended by respondent company that, as only a portion of the building is within the municipality, no portion of it could be assessed. As to this, see judgment of Moss, J., in *Re London Street Railway Company Assessment*,[10] at p. 89.

I direct that the assessment of the round-house be reduced from thirty-five hundred dollars to two thousand two hundred and fifty dollars.

The evidence as to the value as buildings of the other buildings assessed is conflicting. It has not, however, been shewn to my satisfaction that in the case of any of them it is less than the assessed value. The assessment as to them will, therefore, stand.

REPORTER:

C. A. Stewart, Advocate, Calgary.

[9]25 Ont. A. R. 351. [10]27 Ont. A. R. 83.

LAMONTAIGNE AND BECKER v. TOWN OF MACLEOD.

Municipal assessment income tax—Basis of assessment—Previous year's income.

Although a person assessed for income tax under the Municipal Ordinance was not during the previous year a resident of the municipality, the previous year's income, wherever earned, may be taken as a basis for determining the amount for which he should be assessed.

Income to the extent of $600 is exempt.

[SCOTT, J., *August 30th, 1901.*]

Statement.

Appeal from the Court of Revision of the town of Macleod for 1901.

The parties assessed—appellants in person.

C. F. Harris, for the town of Macleod—the respondents.

[*30th August, 1901.*]

SCOTT, J.—Upon the hearing it was admitted that Lamontaigne is assessed for $610 for income, that he first became a resident of the municipality about 30th March, 1901, and that his income for the year 1900 was at the rate of $60.00 per month.

It was also admitted that Becker is assessed for $1,000 for income; that he first became a resident of the municipality on 23rd January, 1901, and that his income for the year 1900 was $1,000.

It was contended on behalf of the appellants that their income for the present year is not yet ascertained, and that the Municipal Ordinance does not authorize the taking of the previous year's income as a basis in cases where the person assessed was not at that time a resident of the municipality.

I cannot give effect to this contention, nor can I see any objection to taking the previous year's income, wherever earned, as a basis for determining the amount of the assess-

Judgment. Scott, J.

ment. There is certainly nothing in the Ordinance which would lead to the view that such a course was not intended.

It was also contended that, in any event, only the excess of income over $600 should be assessed.

I have already given effect to this contention in other appeals heard before me at the same sittings.

I direct that Lamontaigne's assessment for income be reduced from $610 to $120, and Becker's from $1,000 to $400.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

IN RE LOUGHEED AND THE CITY OF CALGARY.

Sale for taxes—Liability of purchaser for taxes imposed in the year of sale—Construction of statutes.

Certain lots in the city of Calgary were, on the 27th June, 1896, sold for arrears of taxes due thereon for certain years prior to 1896; the sales were duly confirmed by the Court, and on the 10th July, 1897, and 27th June, 1898, the purchaser received certificates of title in due form from the Registrar of Land Titles, and entered into and remained in possession of the lots as owner. The lots were duly assessed for taxes for the year 1896, but no rate was struck until after the sale. The said taxes for 1896 remained unpaid for two years.

Section 81 of the Ordinance Incorporating the City of Calgary provides that the transfer from the treasurer to the purchaser shall vest in the purchaser all the rights of property of the original holder of the land, and purge and disencumber it from all encumbrances of whatever nature other than existing liens of the City and the Crown.

Held, that the lots in question were liable to be sold for taxes for the year 1896, and that, under section 51 of the same Ordinance, the purchaser was personally liable to the city for the amount of the taxes.

Section 81 was amended by Ordinance 1900, c. 39, s. 4, by the addition after the word "Crown" of the words "including all taxes unpaid upon such land at the day of the date of such transfer, and whether imposed before or after the day of the date of the tax sale at which said lands were sold."

Held, that this amendment did not raise the presumption that the section as it originally stood had not the same meaning; that the amendment was probably made to remove doubts that may have existed.

[SCOTT, J., *September 5th, 1901.*]

This was a stated case, the facts of which are sufficiently set forth in the judgment. Statement.

R. B. Bennett, for the tax purchaser.

J. B. Smith, K.C., for the town.

[*5th September, 1901.*]

SCOTT, J.—The following facts are stated by the parties by way of a special case:—

Certain lots in the city of Calgary were, on 27th June, 1896, duly offered for sale by the city for arrears of taxes due therein for certain years prior to the year 1896, and said James A. Lougheed (hereinafter styled the purchaser) thereupon became the purchaser thereof. The time for redemption having expired, deeds of said lots were prepared, executed, and delivered by the city to the purchaser, which deeds were duly confirmed by the Court, and certificates of title, dated respectively 10th July, 1897, and 27th June, 1898, were issued by the proper Registrar of Land Titles, and the purchaser is still the owner thereof, and is and has been in undisturbed possession thereof. Said lots were duly assessed for the year 1896, but no rate was struck until after the sale. Demand for payment thereof was duly made upon the purchaser. The case further states that the city claims that said lots, being duly assessed for the year 1896, and the purchaser having become the purchaser at the tax sale, and such sale being confirmed, and the purchaser becoming the registered owner of the lots, and being in undisturbed possession thereof at the date of said sale, and continuing since that date, and the taxes for 1896 being two years in arrears and unpaid, the said lots are liable to be sold for said arrears for 1896.

The questions submitted for my opinion are:—

1. Whether the purchaser is liable to the city for the taxes of 1896.

2. Whether said lots are liable to be sold for arrears of taxes for 1896.

Judgment.
Scott, J.

In my opinion, the lots referred to were liable to assessment and taxation by the city during the year 1896, notwithstanding their sale for arrears for taxes during that year. Sec. 38 of the charter (Ordinance 33 of 1893) provides that all lands in the city, with certain specified exceptions, shall be liable to taxation. There is nothing in the charter which specifically exempts land sold in any year for arrears of taxes from taxation during that year, nor is there anything in it which would lead to the conclusion that such exemption was intended. In fact, such an exemption would have the unreasonable effect of throwing the burden of taxation for that year upon those ratepayers who by payment of their taxes had prevented their lands being sold for their payment.

But the purchaser contends that the city cannot derogate from its own grant, and that having conveyed the lots to the purchaser subsequent to 1896, it is estopped from claiming any interest therein which accrued to it prior to said conveyance.

It is true that the lots were duly offered for sale by the city and that conveyances thereof were duly prepared, executed, and delivered by it to the purchaser, but if these facts are correctly stated, it may be open to question whether the procedure followed was authorized by the provisions of the charter. In my view, those provisions direct that the lands shall be sold, not by the city, but by the treasurer, and that he, and not the city, shall transfer the land to the purchaser after the time for redemption has expired if they have not been redeemed. That the treasurer, and not the city, is the vendor is shewn by section 69, which provides that, if no bidder appears for the full amount of the arrears of taxes, costs, and charges, the treasurer shall sell them to the city at the upset price. It is true that, by section 58, the mayor is authorized to command the treasurer to sell lands for arrears of taxes, but such command having been given, the treasurer proceeds to sell in the manner prescribed by the charter, and, although he may be in all other respects

a servant of the city and subject to its control, he is, so far as all matters pertaining to the sale are concerned, a public officer charged by law with the duty of selling the land for the purpose of realizing the claims of the city against them for arrears of taxes. Under the Municipal Acts at one time in force in Ontario, the sheriff of the county was charged with the duty of selling lands for that purpose. While that law was in force, could it be said that the municipality which directed the sheriff to sell lands was the vendor? I think not, nor do I think that it should be said in the present case, because it happens that under the charter the person charged with that duty happens to be an officer of the city.

Sec. 81 of the charter provides that the transfer by the treasurer shall not only vest in the purchaser all rights of property which the original holder had therein, but shall purge and disencumber it from all payments, charges, liens, mortgages, and encumbrances of whatever nature and kinds other than existing liens of the city and Crown. If the lands were duly assessed in 1896, the taxes for that year would appear to constitute a lien of the city thereon, from which the lands would not be purged by the transfer. That section, however, was amended by sec. 4 of Ord. 39 of 1900 by adding after the word "Crown" the following words: "including all taxes unpaid upon such land at the day of the date of said transfer and whether imposed before or after the day of the date of the tax sale at which said lands were sold." It was urged on behalf of the purchaser that the fact of such amendment having been made raised the presumption that the original enactment would not include such taxes. I cannot find any authority for any such presumption, and I doubt whether it exists. It may be that the amendment was passed merely for the purpose of avoiding doubts that may have existed as to the effect of the original enactment.

It was further contended on behalf of the purchaser that if the claim of the city to the taxes for 1896 is upheld, he would be assessed without having any right to appeal against

Judgment.
Scott, J.

the assessment. That might possibly be the result, but I hardly see that it would be ground for holding that the property should not be assessed. If such would be the result, the purchaser must be taken to have been aware of that circumstance at the time he purchased.

Assuming that the sale of lands for arrears of taxes referred to in the case stated was one made by the treasurer pursuant to sec. 58 and following sections of the charter, I answer the second question in the affirmative.

Sec. 52 of the charter provides that all assessments imposed under it shall be due and payable not only by the owner of the property upon which they are imposed, but also by the possessor or occupant of the property.

In view of this provision, under the facts stated, I answer the first question also in the affirmative.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

ENGLAND v. ENGLAND.

Husband and wife—Suit by one against the other—Married Women's Property Ordinance—Land Titles Act.

In an action by a husband against his wife for a declaration that certain real and personal property claimed by both parties, belonged to him, and for an injunction to restrain the wife from disposing of the same.

Held, that a husband can sue his wife in respect of both real and personal property as if she were a feme sole.

Semble, The law in the Territories is practically the same as that in England as to suits between husband and wife, except that in the Territories one may sue the other in respect of torts, while in England this is not so.

[RICHARDSON, J., *September 21st, 1901.*

Plaintiff by his statement of claim alleged that he and defendant were man and wife; that since coming to the Territories in 1890 they carried on business together as bakers, confectioners and merchants; that a house and lot had been purchased in defendant's name with profits derived from

said business, in which the parties and their family lived up to June 4th, 1901, as also a farm consisting of a quarter section of land; and that the fixtures in the store were purchased with plaintiff's money. Plaintiff further alleged that defendant claimed both real and personal estate as her own, refused him the use of the dwelling and furniture, and threatened to dispose of the property for her own use; and claimed a declaration that he was entitled to the property, an injunction, and a receiver to wind up the business. Defendant admitted the marriage, but denied the carrying on of the business together, as also the purchase, out of profits of the business, of the real estate, and the purchase with plaintiff's money of the fixtures. She claimed sole ownership of the property in her own right, and set up that because plaintiff and defendant were man and wife, this action was not maintainable. Statement.

On motion to set the case down it was determined to dispose of this question of law before trial of the facts, since it went to the whole cause of action, and the argument took place on September 18th, 1901.

T. C. Johnstone, for plaintiff.

Jas. Balfour, for defendant.

[*September 21st, 1901.*]

RICHARDSON, J.—Mr. Balfour, in supporting the objection, relied largely upon *Brooks* v. *Brooks* (not reported), where a husband sued his wife, decided by me in 1896. In that case, while resting my decision upon other grounds, I expressed some doubt as to whether in our Courts a husband could sue his wife. It will, however, be observed that this was an action for tort, and also that at the time it was in my hands the question of the validity of the Ordinance respecting Personal Property of Married Women was before the Supreme Court of Canada in *Conger* v. *Kennedy*,[1] that Ordinance having been held *ultra vires* by our Court *en banc*.

[1] 2 N. W. T. R. 10; 26 S. C. R. 397.

Judgment.
Richardson, J.

Ordinance No. 20 of 1890 repealed No. 16 of 1889, and instead of confining the rights and liabilities of a married woman to those in respect of "her personal property," as that Ordinance did, extended them generally "in respect of personal property." Ordinance No. 20 of 1890 now forms ch. 47 of the C. O. 1898, and, as I construe it, enacts that in respect of personal property a married woman shall be under no disability, i.e., legal incapacity, whatever, and is subject to all the liabilities of a femme sole. To hold that there are any liabilities which a femme sole may incur in respect of personal property, for which a married woman could not be sued in this Court, would, in my judgment, amount to legislation annulling the plain intent of the Ordinance.

The same remarks apply to land by virtue of section 11 of The Land Titles Act, 1894.

Mr. Lush in his valuable work on Husband and Wife, at page 464, lays down as plain law in England that since the Married Women's Property Act, 1882, "a husband and wife, notwithstanding the relation existing between them, are entitled to sue one another except for tort, which is by the Act expressly excluded, although the proceedings are not for the protection and security of the wife's own separate property."

In England, by section 17 of the Act of 1882, special provision is made for the settlement, by summary application to a Judge, of disputes between husband and wife as to the title to or possession of property, which may account for the absence of any cases appearing in the reports bearing upon this class of litigation.

Mr. Lush's remarks at page 170 on this Act of 1882 seem applicable here: "As regards her power to contract and to hold and dispose of property, the wife is for all purposes in the same position as a femme sole; she can contract with her husband as with any other person as a femme sole, and there seems to be no possible reason why she should not enter into a contract of partnership either with her husband or with any other person, so far as to be, to all in-

tents and purposes, a partner entitled by virtue of her contract to a share in the profits, and subject as a partner to the partnership debts and liabilities." The law in the Territories is practically the same as that in England as to suits between husband and wife, except that in the former torts are not excluded. Judgment. Richardson, J

In my judgment, where property, either real or personal, is in dispute between a husband and his wife, the latter is liable to be sued by her husband claiming rights therein, just the same as if she were not married.

REPORTER:

C. H. Bell, Advocate, Regina.

PEASE v. TOWN OF MOOSOMIN AND SARVIS.

Municipal Ordinance—Constable—Servant of corporation—Liability of corporation—Indemnity—Validity of by-law, resolution, or order—Declaration of invalidity—Quashing—Limitation of proceedings—Parties—Evidence—Costs.

Where it was evident from the conduct of counsel on both sides that they each took it for granted that the trial Judge had knowledge of certain facts, established in another action, which had been previously tried before him with a jury and out of which the present action arose, and that for that reason no evidence was given of these facts.

Held, that the trial Judge might properly, and in this present case should, in deciding the case, make use of the knowledge of the facts which he was so assumed to have.

Where a constable appointed as such by a by-law of a town corporation arrested a party claiming to have done so for an offence under the Criminal Code (s. 207 "Vagrancy") and the party sued him for false arrest and imprisonment:

Held—(1) That the constable, in making the arrest for such an offence, was not acting as the servant of the corporation; and, therefore, that the maxim *Respondeat superior* did not apply; that the corporation was not liable to the party arrested; that a resolution of the council retaining an advocate to defend the constable and agreeing to indemnify him was *ultra vires*, and that payment by the corporation to the advocate so retained of his costs and to the advocate for the party arrested of his taxed costs, was illegal. *Wishart* v. *City of Brandon*,[1] *McSorley* v. *Mayor of St. John*,[2] *Cornwall* v. *West Nissouri*[3] considered.

[1] 4 Man. R. 453, at p. 452. [2] 6 S C. R. 531, at p. 559. [3] 25 U. C. C. P. 9, at p. 12.

(2) That the payment of a fee to an advocate for his opinion as to the liability of the corporation and of the councillors individually was a legal payment.

(3) That, though possibly the resolution of the council and the payments made thereunder might amount to a ratification of the act of the constable, so as to render the corporation liable to the party wrongfully arrested, it could not make it legal or *intra vires* as against any complaining ratepayer. *Kelly* v. *Barton*[4] referred to.

(4) That, inasmuch as it appeared that the resolution complained of was passed by the council at the instigation of the constable, and that, notwithstanding a by-law (passed after the payment of the costs—the damages not having been paid) to the effect that no further payment should be made in pursuance of the resolution, the constable still maintained that the town was liable to indemnify him by reason of the resolution, the constable was a proper party to the action.

(5) That the Municipal Ordinance C. O. 1898, c. 70, sub-tit. "Application to Quash By-laws," ss. 268 and 269, are merely permissive, and do not oust the jurisdiction of the Court to declare by-laws, orders, or resolutions invalid, nor, *semble*, to quash them on *certiorari*, and do not apply where the by-law, order, or resolution is invalid on its face, and the action is to enjoin proceedings thereunder.

(6) That s. 273 affords protection for acts done under the by-law, order, or resolution, but does not bar an action to restrain the corporation from enforcing it. *Quaere*, as to the effect of s. 101, which applies to by-laws only.

(7) Against the contention that, so far as the claim for a refund of the moneys paid under the resolution was concerned, the action should have been brought in the name of the town or in the name of the Attorney-General—that a ratepayer, suing on behalf of himself and all other ratepayers similarly situated, had a right to bring the action.

(8) That the town, having paid the moneys under the resolution, not under a mistake either of law or fact, though at the constable's request, and having, therefore, no right to recover them from him as money paid to his use, the plaintiff suing on behalf of all ratepayers, had no greater right.

(9) The corporation, having set up the by-law of the council to the effect that no further payments be made under the resolution, and consented to judgment and payment of costs, and the constable, on the other hand, having contested the plaintiff's position throughout, the costs of the action were disposed of as follows: The constable to pay the plaintiff's costs of and incidental to his defence, including the costs of the trial; the corporation to pay the plaintiff's costs of the motion for judgment against the corporation, and the corporation and the constable to pay jointly the other costs.

[WETMORE, J., *October 2nd, 1901.*

tatement.

Trial of an action before WETMORE, J., without a jury.

The defendant Sarvis was secretary-treasurer of the defendant corporation and also a constable, appointed to both offices by by-law of the corporation. He arrested one James without a warrant on view for an alleged offence under the

[4] 28 O. R. 608.

clauses of the Crim. Code, s. 207, relating to "vagrancy." James sued Sarvis for false arrest and imprisonment. Thereupon the council at Sarvis' instigation passed a resolution engaging an advocate and undertaking to indemnify Sarvis. Accordingly this advocate defended the action. Judgment was given against Sarvis for damages and costs. Thereupon the council took legal advice as to the liability under the resolution of the corporation and of the members individually. Following this the council, out of the funds of the corporation paid the fee of the advocate for his opinion as to their liability, the costs of the advocate whom they had retained to defend the action and the costs taxed to the plaintiff's advocate against Sarvis; but as to the damages awarded to James they passed a by-law that no further moneys should be paid out in pursuance of the resolution. Statement.

This action was brought by the plaintiff on behalf of himself and all other ratepayers of the corporation for a declaration that the resolution and all proceedings thereunder were illegal, void and *ultra vires* of the council, for an order that all moneys paid out should be refunded by Sarvis, and for an injunction restraining the corporation from paying any other moneys or otherwise acting further on the resolution.

The statement of defence of the defendant Sarvis, besides traversing the allegations of the statement of claim, took objections in law as follows:

(a) That the Court had no jurisdiction until the resolution complained of had been quashed, which was not alleged, and that the Municipal Ordinance, C. O. 1898, c. 70, s. 268, requires such an application to be made within two months from the final passing of the resolution complained of.

(b) That the plaintiff had no *locus standi* to bring the action for the refund of the moneys; either the corporation or the Attorney-General of the Territories being the only parties entitled to bring such an action.

The defence of the corporation merely set up that the council had passed the by-law that no further moneys be

Statement.

paid pursuant to the resolution, and that, assuming no further substantial relief was claimed against the corporation, the corporation did not further defend the action, and consented to pay the plaintiff's costs properly taxable against the corporation.

E. A. C. McLorg, for the plaintiff.

J. T. Brown, for both defendants.

[*October 2nd, 1901.*]

WETMORE, J.—There is no conflict of testimony in this case. The material facts are as follows:

The defendant Sarvis at the time of the acts complained of was town constable and secretary-treasurer of the town, having been appointed thereto by a town by-law. About the 20th August, 1900, an action was commenced in this Court against Sarvis by one James for false arrest and imprisonment. At a meeting of the town council held on the 4th September, and after Sarvis had been served with the writ of summons at the suit of James, he, Sarvis, informed the council that he had been served with such a writ, and requested the council to take up the case and indemnify him against the consequences thereof. Thereupon the council by resolution resolved to engage a solicitor to defend such action and to indemnify Sarvis against the consequences thereof, and the council at such meeting further resolved that Mr. J. T. Brown be engaged as solicitor to defend such action. That action was defended and was tried before me with a jury on the 15th, 16th and 17th November last, and resulted in a verdict for the plaintiff James for $300, for which judgment was entered against Sarvis with costs.

At a meeting of the council held on the 4th December, and after judgment had been so entered against him, Sarvis requested the council to take the matter up as per the resolution passed on the 4th September. The council thereupon resolved to take legal advice as to their liability, either as a council or personally before moving in the matter, and a committee was appointed to procure such legal advice, who

selected Mr. T. C. Johnstone, and he was consulted on the matter. On the 10th December Mr. Johnstone advised by telegram that the town council should pay Mr. Brown's costs, but not other costs or the damages, and on the same date gave a written opinion that the municipality was not liable for damages or costs ; that the council had no power to divert municipal funds in the way proposed, but that the secretary-treasurer or his sureties might be made to refund, and warned the council against the consequences of such an action as has been brought by the plaintiff Pease. This opinion is not of importance as influencing my judgment. I merely refer to it as it was tendered at the trial on behalf of the defendant Sarvis, and was received without objection, to point out that the council and Sarvis deliberately acted contrary to the advice which the retained counsel had so given. Of course, if Mr. Johnstone's advice was erroneous, the council were justified. If not the councillors seem to have acted in the most headstrong manner, for it does not seem that they ever asked for or obtained any other legal opinion on the subject. Judgment. Wetmore, J.

At a meeting of council held on the 24th December (I may say with Mr. Johnstone's telegram and written opinion before it) cheques were ordered to issue to Mr. Brown for $270.55 in payment of his costs in *James* v. *Sarvis,* to Messrs. White, Elwood & Gwillin for $109.49 in full of costs in the case of *James* v. *Sarvis,* and to Mr. Johnstone for $10.25 for his legal opinion in the matter. There is no direct testimony that Mr. Brown was actually retained as solicitor on the record for the defendant in the case of *James* v. *Sarvis,* in pursuance of the resolution of 4th September, or that Mr. Brown acted on such retainer, but I think that I am warranted in inferring that he was so retained and so acted, because the account, in payment of which the cheque to Mr. Brown was ordered to issue, was made out against the town of Moosomin, and contained all the charges which the attorney on the record for Sarvis would be entitled to charge. Moreover, there is no direct sworn testimony showing in what capacity Messrs.

Judgment. Wetmore, J.

White, Elwood & Gwillim acted in the matter, but I am also of opinion that I am warranted in inferring that they acted as solicitors on the record for James in *James* v. *Sarvis*, because a letter was put in from Mr. Brown to Sarvis, as secretary to the town, enclosing a letter from Messrs. White, Elwood & Gwillim, whom Mr. Brown states to be the plaintiff's advocates in that action, and this letter of Messrs. White, Elwood & Gwillim is written in the matter of *James* v. *Sarvis*, sets forth the amount of damages and taxed costs in that action, credits some costs taxed against James, and claims the balance as the amount due to their client, and asks for a cheque for the same.

I find, therefore, as a matter of fact, that Mr. Brown was retained by the town as advocate on the record for Sarvis in *James* v. *Sarvis* in pursuance of the resolution of 4th September, and that he acted on such retainer, and that White, Elwood & Gwillim were the advocates on the record for James in such action, and that the cheque issued to Mr. Brown was for his costs as such advocate, and that the cheque issued to Messrs. White, Elwood & Gwillim was for their taxed costs as advocates in that case less the costs so taxed against James. No question was raised at the trial as to those last mentioned facts so inferentially found by me. Nothing on account of damages awarded to James has been paid by the town. The cheques above referred to were signed by Sarvis as secretary-treasurer; I hold that, because it was his duty under section 111 of the Municipal Ordinance (C. O. 1898, c. 70) to sign all cheques ordered to be issued by the council, and I assume he acted under that section. This fact was not questioned at the trial of this action.

This action is brought by the plaintiff on behalf of himself and other ratepayers:—

To have it declared that the resolution of 4th September and all the proceedings thereunder are void and illegal, and *ultra vires* of the council.

For an order that the moneys so paid out of the civic funds be replaced by the defendant Sarvis.

For an injunction restraining the town council, their servants or agents, from paying out any other moneys or otherwise acting further on the said resolution. Judgment. Wetmore, J.

On the fifth March last, and after the commencement of this action, the town council passed a by-law by which they recited the resolution of 4th September, stated that certain moneys had already been paid out by the town thereunder, and that it is desirable that no further moneys be paid out of the civic funds thereunder, and enacted that no further moneys be paid out under such resolution.

The town and Sarvis severed in their defences and pleaded separately. The town merely pleaded this last mentioned by-law, and set forth that they assumed that no further substantial relief is claimed against them, and therefore they did not further defend the action, and consented to the payment of the plaintiff's costs of action as against them. The defendant Sarvis disputes the plaintiff's right to relief as against him on various grounds, and the trial hereof was on the issues joined on the pleadings as between the plaintiff and Sarvis.

The case, as presented to me, is not satisfactory in one important particular, and that is, I can find nothing, in the sworn testimony or in the exhibits put in or in the pleadings, to indicate the alleged cause for which Sarvis arrested James, and upon which the action for false imprisonment was based. It is true that the third paragraph of the statement of claim in this action sets forth that Sarvis laid an information under oath before a justice of the peace against James for creating a disturbance by being drunk and swearing on Main street in Moosomin on the morning of the 1st June, 1900. But there is no allegation that James was arrested by virtue of a warrant issued upon such information, and it does not necessarily follow that any warrant was issued upon that information, or that James was arrested on any such warrant. As a matter of fact, as I will point out hereafter, James was not arrested on any such warrant. The arrest complained of was an arrest on view and without a warrant. It is, I think, important to

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know the alleged ground of James' arrest for which he brought his action, in order to determine the questions raised in this case; because it is possible that if Sarvis arrested James "in the legitimate exercise of some duty of a corporate nature which devolved upon him by law or by the direction or authority of the corporation," as, for instance, if he arrested him for a breach of a town by-law, the doctrine of *respondeat superior* might apply, and the town council might have been quite justified in indemnifying him, and in that view it would not necessarily follow that such a resolution would be *ultra vires*—it would depend on circumstances. Then a very nice question would arise. On whom is the onus of proof placed in an action such as this? Is it on the plaintiff to prove that the resolution is *ultra vires*? Or is it on the defendant by his plea to set forth the circumstances under which the arrest was made, and to prove them in order to establish the authority of the council to indemnify? The question occurred to me whether or not I ought to turn this case off on this ground. But on reflection I have reached the conclusion that, under the circumstances, I ought not to do so. No question of the kind was raised at the trial by counsel for either party. It seemed, on the contrary, to be taken for granted on both sides that as the case of *James* v. *Sarvis* was tried before me I was fully acquainted with the alleged cause for arrest of James by Sarvis. As a matter of fact, this is true. But I am of opinion that strictly I have no right in adjudicating upon a case to avail myself of matters of fact within my knowledge when such matters of fact are not established by the testimony produced, although I might, if required, be sworn and testify to such facts. In this case, however, in view of the fact that the counsel on either side have apparently dealt with this case on the assumption that I was acquainted with the alleged cause of arrest, I am of opinion that I will best serve the ends of justice by dealing with it in the same way, and that, under the circumstances, I am warranted in doing so. I think it would be unfair to do otherwise, because, if the question I have now raised had been raised at the trial by

counsel, it would have been a very easy matter to have secured evidence to prove the alleged cause of arrest.

As a matter of fact, Sarvis claimed to have arrested James without warrant, having found him committing an offence under paragraphs (f) and (g) of section 207 of "The Criminal Code, 1892," by causing a disturbance in one of the streets of Moosomin by swearing and being drunk, and by disorderly conduct wantonly disturbing the peace and quiet of the inmates of dwelling houses situate near such street. He did not claim to arrest him for the breach of any by-law of the town. I find that Sarvis made this arrest as town constable or policeman in this but in no other sense; that he was not a constable, so far as the evidence discloses, except as town constable, and if he had not been such constable he would not have made the arrest at all.

It is claimed on behalf of Sarvis, in the first place, that the resolution of 4th September was not *ultra vires* of the council or illegal, and that it is binding on the town, and, which probably would follow as a consequence, that the payment out of the moneys to Messrs. Brown, White, Elwood & Gwillim and Johnstone were legal and within the powers of the council.

The question to be determined in this connection is whether the relationship of master and servant existed between the town and Sarvis in respect of this arrest, so as to make the maxim of *respondeat superior* applicable and render the town liable for Sarvis' act, because, if the maxim applied the resolution in question was quite *intra vires* of the council. I am of opinion that the maxim was not applicable and so hold. The author of Dillon on Municipal Corporations (4th ed.) discussing the question as to when this maxim is applicable, and when not, as regards such corporations, in section 974 states as follows: "It may be observed, in the next place, that where it is sought to render a municipal corporation liable for the acts of servants or agents, a cardinal inquiry is whether they are the servants or agents of the corporation. If the corporation appoints or elects them,

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can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants and the maxim of *respondeat superior* applies."

These views of Chief Justice Dillon are quoted with approval by Taylor J., in delivering the judgment of the Court in *Wishart* v. *The City of Brandon*,[1] at p. 458. Chief Justice Dillon proceeds further in the same section cited above: "It will thus be seen on general principles it is necessary, in order to make a municipal corporation impliedly liable, on the maxim of *respondeat superior*, for the wrongful act or neglect of an officer, that it be shown that the officer was its officer, either generally or *as respecting the particular wrong complained of*, and not an independent public officer; and also that the wrong was done by such an officer while in *the legitimate exercise of some duty of a corporate nature* which was devolved on him by law or by the direction or authority of the corporation." This whole section from Dillon is cited apparently with approval by Strong, J., in *McSorley*, v. *The Mayor of St. John*,[2] at p. 559. Supported by the authority of so eminent a Judge as Sir Henry Strong, and by the judgment of the Court in *Wishart* v. *The City of Brandon*,[1] and the general trend of the judgment of Sir William Ritchie in *McSorley* v. *The Mayor of St. John*,[2] concurred in by Mr. Justice Taschereau, I have no hesitation in holding that Chief Justice Dillon puts the law correctly in so far as he states that in order to make a municipal corporation liable upon the maxim "respondeat superior" for an act of its officer the wrong must be done by such officer "in the legitimate exercise of some duty of a corporate nature." In *Cornwall* v. *West Nissouri*,[3] at p. 12, Gwynne, J., lays down the following: "These municipalities have no jurisdiction, except such as is expressly given them by statute, or such as is necessarily incident to the effectuation

of the powers which are expressly given. A township municipality (as such) has nothing to do with the administration of justice;" and Hagarty, C.J., at page 15 of the same case in delivering the judgment of the Court of Appeal says:— "Here we have to deal with a clearly defined statutable body, constituted for a declared purpose, and whose only means of obtaining funds is by resort to direct taxation. We think such a body must be held to a rigid abstinence from all expenditure not warranted by express enactment or necessary implication. The administration or vindication of public justice is a matter wholly foreign to the purposes of the defendants' corporation."

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I may add that this is in accord with what I have always considered the law on the subject to be. The councillors of a municipal corporation are trustees for the citizens and ratepayers of the corporate funds. It is hardly necessary to cite authority for that, for it is obvious. I will refer in that connection, however, to the remark of Proudfoot, J., in *Morrow* v. *Connor*,[5] at p. 424. The councillors have no power or authority to apply these funds, or any part of them, as they may see fit, or for any other object than such as the Act incorporating the municipality contemplates. There are authorities which support the proposition that a municipal council may render the municipality liable in trespass or for damages to a third person by doing some act not within their corporate powers, and possibly also that it may render the municipality liable to a third person in some instances by ratifying or adopting the wrongful acts of its officers. It is a very different question when, as in this case, the citizens or some of them intervene to prevent the municipality or its officers deliberately misappropriating the municipal funds, and if misappropriation has been made to compel the parties in the wrong to make it good. I will just refer again to *Wishart* v. *The City of Brandon*.[1] That case is very much in point, so far as the question I am now discussing is concerned. That was an action against the city

[1] 11 O. P. R. 423.

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for a false imprisonment by a policeman appointed by a board of police commissioners for the city, and who held office during the pleasure of the board. It was sought to hold the city liable for the wrong on the ground that the policeman was a servant of the city, and that, therefore, the maxim *respondeat superior* applied. The Court held that the maxim did not apply, and that the city was not liable. It is important to notice that the arrest in that case was alleged to have been made for a breach of a city by-law. It is not necessary for me for the purposes of this case to go that far. But in so far as the reasoning in that case is applicable to the liability of a municipality for an arrest not purporting to be made under a municipal by-law, or in the legitimate exercise of some duty of a corporate nature, I quite agree with it.

It was further urged on behalf of Sarvis that the council by this resolution of 4th September ratified his wrongful act and adopted it, and thereby rendered the town liable to an action at the suit of persons for such wrongful act, and, therefore, that such resolution and the payment out of the monies thereunder were *intra vires*. Now, I am not prepared to say that in view of this resolution the council did not ratify Sarvis' act *quoad* James, and that James would not have had a good cause of action against the town. The resolution of the town council in this case went further than that of the executive committee of the City Council of Toronto in *Kelly* v. *Barton*.[4] The resolution of the executive committee in that case merely authorized the city solicitor to defend the action brought against the police officer. The Court held that this did not amount to a ratification of the transaction as a whole (see page 623). In this case the resolution of the council was not only to engage a solicitor to defend the action, but it was also to indemnify Sarvis against the consequences of his wrongful act. We do not know what effect the resolution of the executive committee would have had on the judgment in *Kelly* v. *Barton* if it had gone as far as the resolution in this case, but I have no hesitation in holding that *quoad* the plaintiff in this case and the other

ratepayers he is acting for, and in view of the nature of the relief sought herein, no ratification of Sarvis's wrongful act by the town council can help the defendants. This act of alleged ratification is the very thing complained of, it is the very act which the plaintiff and such other ratepayers claim to have been outside the scope of the power and authority of the councillors as such, and I have upheld their contention. It is idle to say that although it is illegal to have passed the resolution and to have acted on it, yet it must be supported because it has given a third person a right of action against the town which he would not otherwise have had. If James had a right of action against the town it would be because the council by its resolution had *quoad* James rendered the town liable with Sarvis as joint tort feasors. Sarvis is not in that position, especially as between himself and the ratepayers. A muncipal corporation is neither an indemnity company nor a guarantee company, and I cannot see on what principle its council can be held authorized to indemnify a person for an act for which the corporation is in no way liable. It may be of importance to bear in mind that the resolution in question was passed after James had launched his action against Sarvis by issuing and serving the writ of summons, and in this respect, I imagine, differs from the position the executive committee, mentioned in *Kelly* v. *Barton*,[4] were in when they passed their resolution. On this question of ratification I will also refer again to Dillon on Municipal Corporations, sec. 463, where it is stated: "A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are *within the scope of its corporate powers but not otherwise*." And in sec. 147 the following is stated: "When a municipal corporation has no interest in the event of a suit or in the question involved in the case, and the judgment therein can in no way affect the corporate rights, or corporate property, it cannot assume the defence of the suit or appropriate its money to pay the judgment therein, and warrants or orders for the payment of money based upon such a consideration are void." It is true that further on in this sec-

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tion I find the following: "A corporation has power to indemnify its officers against liability which they may incur in the bona fide discharge of their duties, although the result may shew that the officers exceeded their legal authority. Thus it may vote to defend suits brought against its officers for acts done in good faith in the exercise of their office."

A number of American and some English authorities are cited in the note to Dillon for what he here states. I have not been able to obtain the American authorities cited, but I feel quite confident that the officers indemnified were performing acts endeavouring to carry into effect, or bona fide believing that they were endeavouring to carry into effect, some municipal object, or something in aid or for the benefit of the corporate powers. Because, if I take what is stated in Dillon in the last citation as broadly as it is stated, it would be quite inconsistent with what was stated in the preceding portion of the section which I have cited, and also with what is stated in section 463. I have, however, read the English cases cited, and in all of them, and in fact in every case which has been brought under my notice, when officers have been held properly indemnified by a municipal corporation as to the consequences of their acts, or as to the costs of actions brought in consequence of their acts, the act complained of has been one in which the corporation as such was interested by virtue of its corporate powers. In *Lewis* v. *Mayor of Rochester*,[6] the mayor and assessors of the city, at a Court of Revision, expunged the names of a number of burgesses from the burgess list, and the burgesses applied for and obtained rules for mandamus to command the succeeding mayor and assessors to hold fresh Courts of Revision. The corporation retained the plaintiff, an attorney, to shew cause against the rules, and he sued the corporation for his costs. The Court held the corporation liable, upon the ground that the question in litigation under the rules "virtually affected the powers of the constituent body." See judgment of Erle, C.J., at p. 175, and I also refer to what he

[6] 30 L. J. C. P. 169; 9 C. B. (N. S.) 401; 7 Jur. (N. S.) 680; 3 L. T. 300; 9 W. R.. 100.

states at the same page: "The law appears to me to have been well laid down in the case of the *Attorney-General* v. *The Mayor of Norwich*[7] that the right of the corporation to incur expense is limited to expense in respect of the due performance of the trusts imposed upon them in their corporate capacity." In the *Queen* v. *The Lichfield Council*[8] nothing decisive upon the question was decided, but Denman, C.J., and Coleridge, J., stated in effect that they would not say that it was not proper for the council to protect its officer whilst in the duty of his office *in carrying into effect the provisions of the Municipal Act*. The order moved against in that case was quashed for irregularity. In the *Queen* v. *Mayor, &c., of Leeds*[9] the Court quashed orders of the town council for payment of costs and expenses of opposing a rule for a mandamus to receive and count the vote of one Radford Potts. At a corporate meeting of the council of the borough, Mr. Potts' vote had been rejected by the mayor. These orders were quashed on the ground that it did not appear that the rights of the corporation were in any way affected by the question involved. In *Breay* v. *The Royal British Nurses' Association*,[10] cited at the hearing on behalf of Sarvis, the right of the corporation to undertake the defence of the servant was put upon the ground "that the society would be liable for the very same thing," because they themselves published the libel for which the servant was sued. Judgment. Wetmore, J.

Sarvis' next objection is that he did not receive the money complained of, and he denies that such money was paid by the town at his request or on his behalf, and claims that such payment was solely voluntary on the part of the town. It is true that Sarvis did not receive this money himself, and it is not charged that he did, but I find that it was paid out by the town at Sarvis' request and on his behalf. The payment was voluntary on the part of the town in the sense that it was not made under duress, but it was not voluntary in any other sense.

[7] 2 Myl. & Cr. 407, affirming 1 Keen 700; 1 Jur. 398. [8] D. & M. 491; 4 Q. B. 900; 7 Jur. 670; 12 L. J. Q. B. 308. [9] 12 L. J. Q. B. 369; 4 Q. B. 796; D. & M. 143; 7 Jur. 669. [10] 66 L. J. Ch. 587; (1897) 2 Ch. 272; 76 L. T. 735; 46 W. R. 86—C. A.

Judgment.
Wetmore, J.

The minutes of council put in evidence and verified over Sarvis' own signature as secretary-treasurer, prove beyond all question that he was the instigator of the whole trouble, and that the resolutions in question were passed at his request. At the meeting of council of the 4th September he informed the council that he had been served with a writ of summons at the suit of James, and requested them to take up the case and indemnify him, and in consequence, the resolution of that date was passed, and again at the meeting of 4th December, after judgment had been given against him, he requested the council to take the matter up, as per resolution of 4th September. It is idle, under such circumstances, to pretend that these resolutions in question were not passed or the moneys paid out at his request or on his behalf. It was contended that Sarvis brought the matter before the council as town officer. This does not appear to me to be material, but if it is, I have no hesitation in holding that his principal object was personal, namely, to get himself protected by the town against the consequences of the action brought against him by James.

I may say here, in view of this fact, I am of opinion that Sarvis was a proper party to this action, even if an order is not made against him to refund the moneys paid out. In a suit such as this for a declaration to have the resolution declared illegal, and to prevent any further moneys to be paid out under it, Sarvis, who instigated the making of the resolution, and for whose benefit it was passed, was entitled to be heard and brought before the Court; and in dealing with the question of costs, it is to be borne in mind that, while the town has not contested the question of the illegality of the resolutions, but has practically conceded the point, Sarvis has fought the question out, not only on the ground that he is not bound to refund the moneys paid out, but also on the ground that the resolution of the council and the payment of the moneys thereunder were legal and *binding on the town.*

Judgment.
Wetmore, J.

The next objection raised by Sarvis is that this action cannot be maintained, because no application was made to quash the resolution, under sections 268 and 269 of the Municipal Ordinance (C. O. 1898, c. 70), and that he is, therefore, protected under section 273 of the same Ordinance.

These sections are taken from the Ontario Act, and they seem to have given very considerable difficulty to the Courts in that Province in construing them. Sections 268 and 269 are, it seems to me, merely permissive, and allow an application to a single Judge in the way prescribed, and appoint the time within which such application must be made. I would be very much surprised to learn that it ousted the common law jurisdiction of the Court to quash by way of *certiorari*. It is not necessary for the purposes of this suit to express a decided opinion on this point. Section 101 of the Ordinance may have the effect of legalizing any by-law if no application to quash is made within two months. This section does not apply to resolutions or orders. It would seem, apparently, that the Ordinance intended to afford no protection for anything done under an order or resolution, except in so far as it may be afforded by section 273. Under any circumstances, the whole question turns upon whether section 273 is a bar to the plaintiff's right of action. In construing the section in the Ontario Act corresponding to this section, the Courts hold that it only affords protection for acts done under the by-law or resolution, and that it does not bar an action to restrain the corporation from enforcing it if it is invalid. Osler, J., so holds in *Connor* v. *Middagh*,[11] at page 388, and the trend of the judgment of Hagarty, C.J., in the same case, beginning at page 360, and the authorities cited by him, is in the direction that the section was passed in respect to actions sounding in damages, or, in other words, for acts done under a by-law, order, or resolution. In *Rose* v. *Wawanosh*,[12] Street, J., entertained a suit for an injunction to restrain the defendants from

[11] 16 O. A. R. 357. [12] 19 O. R. 294.

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Wetmore, J.

proceeding under an illegal by-law, and granted the injunction, although the by-law had not been quashed, holding that the section did not apply to such a by-law. In *Bannan v. Toronto*,[12] Boyd, C., in an action brought for that purpose, declared a by-law of the city *ultra vires*, and restrained the defendants from proceeding thereunder, holding that "no preliminaries as to notice or quashing are needed, when the by-law is on its face invalid and the relief sought is to restrain action being taken thereon by the municipality which is injurious to the party asking the intervention of the Court."

In this case the resolution in question is invalid on its face, being entirely outside the corporate powers. I agree with these decisions, and hold that it was not necessary for the purposes of this case, so far as the declaration asked for and the restraining of further action under the resolution are concerned, that such resolution should be first quashed.

I have already held that Sarvis is a proper party to this action, and that ruling, in so far as the relief I have just mentioned is concerned, is not affected by section 273, for that section is so framed that it cannot be read with one meaning when applied to the municipality and with another meaning when applied to a person acting under the by-law, order, or resolution. The language of the section as applied to such persons is "every such action," shewing that the action contemplated is *ejusdem generis* with the action provided for against the municipality.

It was also urged on behalf of Sarvis that this action was improperly brought against him by the present plaintiff, that the town of Moosomin are the only proper parties to bring an action against him for the recovery of the moneys in question. It was not alleged in the pleadings by either the town or Sarvis, and I did not understand that it was urged at the hearing, that this action was improperly brought against the town. Assuming that the action was properly brought against the town, Sarvis

[12]22 O. R. 274.

Judgment.
Wetmore, J.

is a proper party to it for the reasons I have stated before. I understand, however, the point raised to be that the present plaintiff has no right of action against Sarvis to compel him to refund the moneys paid out. The judgment of James, L.J., in *Gray* v. *Lewis*,[14] at page 1050, is cited in support of this contention. Assuming, however, the contention to have been that this action was improperly brought by the present plaintiff, both against the town and Sarvis, the question raised is one entirely of procedure and practice, and I point out a distinction between the relief sought in this case and that asked for in *Gray* v. *Lewis*.[14] The relief asked for in *Gray* v. *Lewis* appears at page 1042 of the Report, and it will be observed that the suit was practically brought to recover property, because, while it asked for a decree declaring the acts of the directors *ultra vires*, and that there was a breach of trust on the part of the directors and the bank, it proceeded to ask that the directors and bank might be declared liable to make good the loss to the shareholders, and that relief should be granted in consequence of such declaration. There was no application in that case to restrain the directors or the company from carrying out the acts declared to be *ultra vires*, and it may, therefore, have been with a purpose that James, L.J., limited the rule he referred to to "actions brought to recover property." In this case, the gist of the action is to restrain the corporation from further acting on and carrying out an invalid resolution. The other relief sought is either incidental or asked for with a view to preventing multiplicity of actions. If this action was properly brought against the town and Sarvis to have the declaratory decree and restraining order granted, and Sarvis is liable to refund the money, it avoids circuity of action to ask for that relief in this action. Returning, however, to *Gray* v. *Lewis*,[14] I am not prepared to say that James, L.J., did not intend to lay down a more comprehensive rule than that which I have suggested. If he did so intend, then I am

[14] L. R. 8 Ch. 1035; 43 L. J. Chy. 281; 29 L. T. 12; 21 W. R. 923.

Judgment.

Wetmore, J.

bound to state, of course, with great hesitation and with all respect to the opinion of the Judges of the very high standing of James and Mellish, L.JJ., that, to say the least I very much doubt on perusing the cases referred to in that judgment, namely, *Mosley* v. *Alston*,[15] *Foss* v. *Harbottle*,[16] and *Atwool* v. *Merryweather*,[17] whether they support the rule in the wide sense. Moreover, I am more impressed with the reason given by Dillon in his work on Municipal Corporations already referred to in section 915, for holding that this action is properly brought. This judgment has been drawn out to such a length that I will not quote the whole section, all of which is applicable. I will merely quote the following:—"If the officers of the corporation are parties to the wrong, why may not any inhabitant, and particularly any taxable inhabitant, be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act." A municipal corporation only speaks or acts through the members of the council board. Under the circumstances of this case, it would have been idle before bringing this action to have asked the council to bring the action in the name of the town. Against whom would they have brought it? Not against the town, surely. The town could not sue itself. Then, would it be within any reasonable probability that these officers who perpetrated the wrong would authorize an action to be brought by the town against themselves; because at the time of the commencement of this action there was no change of councillors. I am very much impressed with what was laid down by Killam, C.J., in *Shrimpton* v. *Winnipeg*,[18] at pages 218 and 219. In view of the fact that this is merely a question of practice and procedure, and that, at any rate, on this side of the Atlantic, a practice has grown up of entering suits of this character by shareholders and by ratepayers of municipalities, I feel warranted in holding the practice to be as suggested by Chief Justice Dillon, and I feel that in doing so I am laying down a rule of practice better calculated, at

[15] 1 Ph. 790; 16 L. J. Ch. 217; 4 Railw. Cas. 636; 11 Jur. 315. [16] 2 Hare 461. [17] 37 L. J. Ch. 35; L. R. 5 Eq. 464. [18] 8 Man. R. 211.

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Wetmore, J.

any rate in the case of municipal corporations, to safeguard the rights of the ratepayers. I hold this action to have been properly brought by the plaintiff on behalf of himself and other ratepayers.

The last objection taken is that the Attorney-General is the only proper person to bring the action against Sarvis for the recovery of the money in question. In dealing with this question, I may repeat a great deal of what I have set forth in dealing with the next preceding question. I will, however, merely state that, *quoad* this objection, this suit was properly brought as it has been, and that, in reaching this conclusion, I am influenced by what is laid down in *Bromley* v. *Smith*,[19] *Patterson* v. *Davies*,[20] and *Shrimpton* v. *Winnipeg*.[18]

I have now dealt with all the questions raised, except as to the relief claimed. The plaintiff is entitled to a declaration that the resolution of 4th September, 1900, was illegal and *ultra vires* of the town council, and that the payment of the $270.55 to Mr. Brown and $109.49 to Messrs. White, Elwood & Gwillim was illegal. He is not entitled to a decree that the $10.25 paid to Mr. John Johnstone was illegal. The council were quite satisfied in taking legal advice on the subject, and the payment for that purpose was proper. The plaintiff is also entitled to an injunction order restraining the town from further acting on the resolution of 4th September by paying out any further moneys under or by virtue of such resolution, and from in any wise further indemnifying Sarvis against the consequences of the action of James v. Sarvis, or of the judgment recovered therein against Sarvis. It was urged that there was no necessity for this injunction order, because the town had passed the by-law referred to in its statement of defence that no further moneys be paid out under that resolution. The by-law, however, did not in terms rescind that resolution, and it still stands. Sarvis, however, has appeared before the Court, and claimed that the resolution is valid and

[19] 5 L. J. (O. S.) Ch. 53; 1 Sim. 8; 27 R. R. 139. [20] 4 Grant's Ch. P. 170.

Judgment. Wetmore, J.

binding. He must mean by that that it is binding on the town, or, in other words, that the town is bound to indemnify him. I think the plaintiff has the right to have the town protected by injunction against any attempt on the part of Sarvis to further enforce the carrying out of the resolution.

The only remaining question to determine is whether the plaintiff is entitled to a decree or order that Sarvis refund the town treasury the moneys paid out to Mr. Brown and Messrs. White, Elwood & Gwillim. No question can arise as to the $10.25 paid to Mr. Johnstone, as I have held that payment legal and justifiable. I hold that the plaintiff is not entitled to an order against Sarvis to refund these other moneys. The only ground on which this order is asked is that the illegal resolution was passed and the moneys paid out thereunder at the instigation of Sarvis. I am of opinion that that does not afford a ground for ordering the money to be repaid. It is quite clear that the town could not on the ground set up compel Sarvis to refund the money. That is, an action would not lie against him for money paid to his use, because the town did not pay the money out either in ignorance of law or fact. So far as the payment to Messrs. White, Elwood & Gwillim was concerned, they paid it out right against the advice of the counsel they had retained to advise with on the subject, and I am of opinion that the payment to Mr. Brown was not made in that ignorance of law which, under certain circumstances, might enable the town to recover from Sarvis. I do not think that Pease by bringing this action could compel Sarvis to pay moneys the town could not compel him to pay unless Sarvis was charged as a trustee. Sarvis was not in this action, either on the pleadings or at the hearing, charged as a trustee. At the hearing, my attention was drawn to the fact that Sarvis signed the cheques under which these moneys were paid, and that it was his duty to do so as secretary-treasurer. My attention, however, was only drawn to this by the plaintiff's counsel, when dealing with the alleged voluntary character of the payments

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Wetmore, J.

by the town and to point the fact that they were made at Sarvis's instance and with his full knowledge. I can conceive that possibly Sarvis might on another ground have been ordered to refund these moneys, but as this relief was not asked for on any other ground and as if it had been the question is not clear by any means, I do not feel called upon to decide it. Sarvis must pay the plaintiff's costs arising out of his defence, including the costs of the trial. He has contested every question raised by the plaintiff, and if he had succeeded the plaintiff would not have been entitled to any relief. Sarvis has merely succeeded as to his liability to refund the moneys. If he had merely rested his defence on the question of that liability it would have been different. He attempted to have the resolution held binding on the town. As before stated, there can be no costs exclusively applicable to the question on which he succeeded.

Some evidence was received subject to objection, with the understanding that I should strike it out if I considered it improperly received. I am of opinion that the *Spectator* was improperly received in the absence of any testimony that its contents were ever brought to the notice of the plaintiff. I am also inclined to think, although I have some doubts, that the by-laws were improperly received. The date of the certificate was so long before the facts involved in the case arose, and the oral testimony was that no alteration had been made, with one or two exceptions, up to the 15th June, 1900. I am left in the dark as to what may have happened afterwards. I have not struck the testimony out. However, it has not influenced my mind, and I think it better, should this case go to appeal, that all matters in question should be before the Court. The plaintiff can get the benefit of his objections there, if entitled to it.

Order and Decree.—Declare that the resolution of 4th September, 1900, was illegal and *ultra vires* of the town council, and that the payments of $270.55 to Mr. Brown, and $109.49 to Messrs. White, Elwood & Gwillim, were

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illegal. Injunction order to restrain the town, its servants or agents, from further acting on the resolution of 4th September, by paying out any further moneys under and by virtue thereof, and from in any wise indemnifying Sarvis against the consequences of the action of James v. Sarvis. Sarvis to pay the plaintiff or his advocate his costs of and incidental to Sarvis's defence, including the costs of and incidental to the trial. The town to pay the plaintiff or his advocate his costs of the motion for judgment against the town. The town and Sarvis jointly to pay the plaintiff's other costs of this action.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

RE BLANK ESTATE.

Administrator—Responsibility in paying claims—Corroborative proof of claims—Declaration proving claims.

A Judge sitting on the Probate side of the Court passing accounts is not bound by the rule of procedure requiring claimants against the estate to give corroborative proof of their claims. This rule of procedure is applicable only when the claim comes to be contested in Court.

Semble, a Judge sitting without a jury is not bound any more than is a jury to apply it under all circumstances. Dictum of Jessel, M. R., in *Re Finch, Finch* v. *Finch*, or *Wynne-Finch*,[1] contra, disapproved.

The responsibility of paying claims falls upon the administrator; he must use care and judgment in considering them, and if he does so fairly and honestly, and in the interest of the estate, he will on passing his accounts be allowed such as he has thought fit to pay.

Remarks on the usual form of statutory declaration proving claims.

[WETMORE, J., *October 25th, 1901.*

Application to pass administrator's account.

E. L. Elwood, for administrator.

E. A. C. McLorg, for the mother of the deceased.

[1]23 Ch. D. 267; 48 L. T. 129; 31 W. R. 526.

[*October 25th, 1901.*] Judgment. Wetmore, J.

WETMORE, J.—This is an application to pass the accounts of this estate. The passing of the accounts was opposed on behalf of the mother of the deceased. It was claimed that Young, the administrator, had managed the estate carelessly. I am of a different opinion. His disbursements have been reasonable, and kept within bounds, except as to printing and auctioneer's charges, and they are such as are usually charged in the Territories. And I also think that he has realized from the estate all that is in it.

* * * * * * * * *

Objections were taken to the statutory declarations verifying accounts against the deceased. These declarations are in the usual form, and set forth that the deceased was indebted to the claimant in a specified sum, and refer to an account annexed containing particulars, and state that the claimant holds no security. It is claimed that these declarations are faulty and bad, because they do not state that the prices charged are fair and reasonable, or were the customary prices, or that the goods or work specified were sold or done, as the case may be, at the request of the deceased. Now, while it would, no doubt, be much the best if these facts were set out in such declarations, I am not prepared to hold them bad because they are not set forth. I think to do so would lead to great inconvenience and confusion in winding up estates, in view of the absence of facilities in the case of many persons to procure declarations to be drawn. In many instances they must be drawn by justices of the peace. And the charges which are specified are of a character that the administrator can form an opinion as to whether they are reasonable or not; and if, as a matter of fact, there is no indebtedness and the declaration in that respect should be wilfully false, the declarant would be liable to a criminal prosecution.

It was further urged that these accounts should not be allowed in the absence of corroborative testimony, that is, corroborative testimony other than that of the claimant, and 2 Wm. on Ex. (9th ed.), 1659, was cited in support of

Judgment. Wetmore, J.

this contention. I have looked at the cases cited in the notes in Williams. Those cases do not carry the rule as far as contended for by Mr. McLorg, Mrs. Caroline Blanks' advocate. I doubt very much whether the true rule goes further than this, that when the claim is against the estate of a dead person the evidence ought to be carefully sifted and closely scrutinized, but if it satisfies the mind of the Court it is sufficient although uncorroborated, and I draw attention to what was laid down by Brett, M.R., in *In re Garnett, Gandy* v. *Macaulay*,[2] at pp. 8 and 9, and by Sir James Hannen in *In re Hodgson, Beckett* v. *Ramsdale*,[3] at p. 183. There is no case that goes as far as Mr. McLorg's contention. The case that comes the nearest to doing so is in *In re Finch, Finch* v. *Finch* or *Wynne-Finch*.[1] In that case, Jessel, M.R., at page 271, lays it down that "it is a rule of prudence that, sitting as a jury, we do not give credence to the unsupported testimony of the claimant . . . it is not a rule of law, but it is a question to be decided by a jury, although the Judge must recommend the jury not to trust the uncorroborated evidence; but still, if they did, I do not know that any one could interfere with their verdict. But when we are sitting here as a jury we apply the rule to ourselves." I must say, with great hesitation however, and the most profound respect for such an eminent Judge, that what he lays down is not satisfactory to my mind. It seems to me to mean this, that while a jury may disregard the recommendation, a Judge, sitting as a jury, ought not to do so, or, in other words, he cannot do so. I am much more impressed with what was laid down by Brett, M.R., in *In re Garnett, Gandy* v. *Macaulay*.[2] However, it is not necessary for me to decide the question at present, because, even accepting what Jessel, M.R., lays down, as I have stated I understand him, it only applies to a case where a claim is being contested in Court. That is, the question before the Court must be that of the validity of the claim questioned either by the representative of the estate, that is, by the executor or administrator, or by some person interested in the

[1] 31 Ch. D. 1. [2] 31 Ch. D. 177; 54 L. T. 222; 34 W. R. 127.

estate. If the claim has been recognized and paid by the proper authority, the question is beyond the Courts, except the executor or administrator has so acted in paying the claim as to make himself liable for waste, in which case I am inclined to think he would not be allowed for the payment in passing his accounts. But it would not be sufficient by itself to hold him liable for waste, or to refuse to pass the accounts, that he had not obtained corroborative testimony. How could he procure corroborative testimony as a matter of record? He could make enquiries, and ought to do so, especially if the claim is doubtful, but that is all he could do. If he pays the claim, the payment is not to be disallowed on the passing of accounts on the probate side of the Court simply because he has made it on the uncorroborated declaration of the claimant. A good many considerations arise in such a case. The claimant may be known to the administrator, and his standing may be of such a character that the administrator would be justified in putting full confidence in the declaration. Again, the claim may be of such a character either as to amount or the circumstances in connection with it, that it would be prudent in the interests of the estate to pay it rather than involve the estate in doubtful litigation, which might result in the estate having to pay it after all with large bills of costs added. A case might arise, however, when I, having the parties before me as Judge of Probate, could adjudicate upon the claim, and then the rule which Mr. McLorg urges, if correct, could be set up. And there is a claim in point in this case, and that is the claim of the administrator against the deceased. I refrain from adjudicating on that claim at present for the same reason that I refuse to pass upon Ewen's account, namely, that it may only be payable pro rata.

Judgment.
Wetmore, J.

I draw attention to the fact that the practice requiring a claimant to file a statutory declaration is entirely statutory. It was first required, so far as the Territories are concerned, by Ordinance No. 6 of 1897, sec. 1, sub-sec. 75. I cannot find any such provision in the English practice. The object of it is to protect estates of deceased persons from false claims.

Judgment. Wetmore, J.

The declaration, however, on the one hand, is not conclusive, and, on the other hand, it does not put the administrator in a worse position than he would be in if no such provision existed in the practice. He has got to use care and judgment, and if he does that fairly and honestly, and in the interest of the estate, and pays claims against the estate, he will be protected. In this matter, however, a somewhat novel course has been taken as to the claims against the deceased in his lifetime. The administrator has paid none of them except the Ewen claim which I have mentioned. He has simply laid the claims and the statutory declarations before me, and attempted thereby to ease his shoulders from the burden, and cast the responsibility upon mine. I am afraid that, as this is not warranted by the practice, I will have to decline the responsibility. As a matter of fact the administrator, as matters stand at present, is in a far better position to judge as to the merits of the claims than I am, and, anyway, it is his duty and not mine. I have not in this application to decide what claims the administrator ought or ought not to pay. I have merely to decide whether he ought to be allowed for payments that he has made. On the other hand, I cannot, behind the backs of the claimants, and without giving them an opportunity of being heard, bar their claims against the estate. Therefore I cannot give effect to Mr. McLorg's contention that these unpaid claims are not properly claims against the estate.

I may say in one case (*Re Sapwell*—not reported), and in perhaps one or two more, I did decide as to the validity of claims against the deceased party. In *Re Sapwell* there was not sufficient to pay these creditors in full, they had to be paid pro rata. The claimants had been paid in part, and I decided how much more each claimant should be paid in order to obtain his pro rata share. But it will be observed that in order to do so I had to pass on the validity of the payments made by the administrator on account of each claim before his accounts were filed, and if no objection had been made I would have had no hesitation, in order to save the costs of another application to pass accounts, to direct that the

administration bond in this case be cancelled on the administrator paying the accounts in question and some other moneys. But, in view of the objections raised by Mr. McLorg, I cannot do so. I may also state that the corroborative testimony referred to in the cases does not mean corroborative testimony as to each and every item claimed, or testimony which would in itself be sufficient to technically establish the claim. This testimony may, I think, be of a very general character. Judgment. Wetmore, J.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

CAVANAGH v. McILMOYLE.

Liquor License Ordinance—Ultra vires—Absence of jurisdiction, waiver of.

A Territorial Ordinance enacting that no appeal shall lie from a conviction under a Territorial Ordinance unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit before the Justice who tried the cause that he did not by himself or otherwise, commit the offence, is not *ultra vires* of the Legislative Assembly.

The omission to make such affidavit within the time prescribed is fatal to the jurisdiction of the Court to which the appeal is given, and is an omission which cannot be waived so as to confer jurisdiction.

[*Court en Banc, December 4th, 1901.*]

This was a case submitted by WETMORE, J., for the opinion of the Court en banc. The appellant was convicted before a justice of the peace for allowing playing at cards with betting in his licensed hotel premises contrary to the provisions of The Liquor License Ordinance. He appealed against such conviction to a Judge of this Court sitting without a jury, and such appeal came on to be heard before WETMORE, J. The affidavit required by section 22 of Ordinance c. 32 of 1900, was made by the appellant and filed with the Clerk of the Court, but such affidavit was not made within the time limited for giving notice of such

Statement.

appeal, as prescribed by that section. Counsel appeared for the respondent and for the Attorney-General of the North-West Territories, and stated that he was willing to waive the omission to make the affidavit in proper time if that would confer jurisdiction to hear the appeal; but he urged that such waiver would not confer jurisdiction, or, in other words, that such omission could not be waived. The other preliminaries to the appeal were admitted to be correct. Counsel for the appellant contended that the omission could be waived so as to confer jurisdiction. He also contended that section 22 of the Ordinance in question was *ultra vires* of the Legislative Assembly, because Parliament is the only authority, *quoad* the North-West Territories, which can legislate upon the subject of procedure for the recovery of fines and penalties provided for a breach of a Territorial Ordinance, and therefore that the section 22 in question, being a departure from section 880 of The Criminal Code, was *ultra vires*.

The questions submitted for the consideration of the Court en banc were:—

1st. Is section 22 of Ordinance 32 of 1900, so *ultra vires* ?

2nd. Can the omission to make the affidavit within the time prescribed by that section, be waived so as to give the Judge jurisdiction to hear the appeal ?

The case was heard December 3rd, 1901.

No one for appellant.

H. Harvey, Deputy Attorney-General, for respondent.

The omission to make the affidavit within the prescribed time is not one which can be waived so as to confer jurisdiction: *Alderson* v. *Palliser*,[1] *In re Jones* v. *James*,[2] *Moore* v. *Gamgee*,[3] *Lord* v. *The Queen*.[4] The section in question is not *ultra vires* of the Legislative Assembly: *Regina* v. *Wason*,[5] *Regina* v. *Bittle*.[6]

[1](1901) 2 K. B. 833; 70 L. J. K. B. 935; 49 W. R. 706; 17 Times L. R. 742; 85 L. T. 210. [2](1850) 19 L. J. Q. B. 257; 1 L. M. & P. 65. [3](1890) 25 Q. B. D. 244; 59 L. J. Q. B. 505; 38 W. R. 669. [4](1901) 31 S. C. R. 165. [5](1890) 17 O. A. R. 221. [6](1892) 21 O. R. 605.

[*December 4th, 1901*] Judgment

Wetmore, J.

The judgment of the Court was delivered by

WETMORE, J.—The first question to be decided under the reference in this case is whether or not s. 22 of Ordinance c. 32 of 1900 is *ultra vires* of the Legislative Assembly. By virtue of section 13 of The North-West Territories Act, as enacted by s. 6 of 54-55 Vic. (1891) c. 22, and as amended by s. 6 of 60-61 Vic. (1897), c. 28, the Assembly has power "subject to the provisions . . . of any . . . Act of the Parliament of Canada declared to be applicable to the Territories," to make ordinances for the government of the Territories in relation to, among other things, "the imposition of punishment by fine, penalty or imprisonment for enforcing any Territorial Ordinances." This power will be found in paragraph 11 of the section 13 referred to, and the language of the paragraph is in effect the same as that of paragraph 15 of section 92 of The British North America Act, 1867, conferring powers of legislation with respect to practically the same subject matter as the Provincial Legislatures. It was held in *Regina* v. *Wason* [5] that the power given by par. 15 of s. 92 of The British North America Act to legislate respecting the imposition of punishment by fine, etc., for enforcing any law of the Province, carried with it the power to provide the machinery by or under which the punishment may be enforced; in other words, it empowered the Provincial Legislatures to provide a procedure to enforce such punishment. We entirely agree with the decision in that case so far as that question is concerned, and with the reasons therein given therefor. The only question remaining for decision is, so far as this branch of the reference is concerned, whether s. 22 of the Ordinance in question is inconsistent with the provisions of Part LVIII. of The Criminal Code, 1893, relating to "Summary Convictions," inasmuch as the provisions of the Criminal Code are by virtue of s. 983 thereof made applicable to The North-West Territories, *except in so far as they are inconsistent with the provisions of the North-*

Judgment.
Wetmore, J.

West Territories Act and the amendments thereto. It is a question, to say the least, fairly open to discussion whether the Legislative Assembly has not as incidental to the powers conferred on it by par. 11 of s. 13, as enacted by the Act of 1891, already referred to, power to enact a Summary Convictions Ordinance to enforce the imposition of punishment provided for a breach of Territorial Ordinances. It is not, however, necessary for the purposes of this reference to decide that question, because we are of opinion that the provisions of section 22 of such Ordinance are not inconsistent with the provisions of the Code relating to "Summary Convictions." The question turns upon the reading of section 880 of the Code. That section provides that "every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following"; then the section goes on to provide what are usually called the preliminary proceedings for the bringing and entering of the appeal. Section 22 of the Ordinance merely provides another preliminary requisite which is in no way whatever inconsistent with those provided in section 880 of the Code. As a matter of fact, it does not interfere in the slightest degree with the preliminaries provided for in section 880. We are of opinion, to say the least, that such legislation was quite open to the Legislative Assembly by virtue of paragraph 11 of section 15 as enacted by the Act of 1891, in view of the light turned upon it by the conclusion mentioned as reached in *Regina* v. *Wason*.[5]

We, therefore, advise that section 22 of Ordinance cap. 32 is not *ultra vires* of the Legislative Assembly.

We are also of opinion, and so advise, that the omission to make the affidavit within the time prescribed by that section of that Ordinance, is fatal to the jurisdiction of the Judge to entertain the appeal, and that such omission cannot be waived. We draw attention to a very late case upon the question of waiver of statutory conditions precedent to the exercise of jurisdiction, *Alderson* v. *Palliser*.[1] We are, however, influenced in reaching the conclusion we have upon this branch of the Ordinance by two reasons.

Judgment
Wetmore, J.

1st. The language of the section of the Ordinance in question is not merely imperative, it is prohibitive; it provides that "no appeal shall be . . . unless" the steps pointed out by the section are taken.

2nd. The provision as to time is not imposed principally for the benefit of the party as put by Strong, C.J., in *Lord* v. *The Queen*.[4] It was enacted in the public interest and for the better protection and enforcement of the law respecting the keeping of orderly licensed houses. It is quite well known that this provision was enacted in view of a recent decision of this Court which it was thought rendered it possible for a person convicted of an offence under The Liquor License Ordinance, by a frivolous appeal to practically suspend the operation of that law as to certain ulterior consequences of convictions in certain cases, as, for instance, suspension or forfeiture of his license, and, therefore, it was provided that there should be no right of appeal unless the proposed appellant made the affidavit prescribed by the section, and made it within the prescribed time. In both the respects pointed out the question now under consideration differs from that in *Lord* v. *The Queen*.[4]

REPORTER:

Ford Jones, Regina, Advocate.

IN RE LAND TITLES ACT, 1894, AND BLANCHARD ESTATE.

Land Titles Act—Amendments of 1900—Executions—Filing renewal—Expiry—Memorandum on certificate of title—Sheriff's certificate of expiry, etc.—Judge's order.

The Land Titles Act, 1894, s. 92, provides for the delivery by the sheriff of a copy of a writ of execution against lands to the registrar, until the receipt by whom no land shall be bound by the writ. It also provides that "No certificate of title shall be granted . . . . except subject to the rights of the execution creditors under the writ while the same is legally in force," and also that the registrar on granting a certificate of title . . . shall by memorandum thereon express that it is subject to such rights.

This section was amended by 63-64 Vic. 1900, c. 21, s. 52 (which came into effect on being assented to the 7th July, 1900) by adding a proviso to the effect that every writ shall cease to bind or effect land at the expiration of two years from the date of the receipt thereof by the registrar, unless before the expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him.

Held, that this proviso applies only to writs of execution filed with the registrar *after* the passing of the amending Act, and, therefore, among other consequences, a writ of execution filed with the registrar *before* the passing of the amending Act and regularly renewed does not require to be refiled with the registrar.

The Land Titles Act, 1894, s. 93, provides that upon the delivery to the registrar of a certificate by the sheriff or a Judge's order shewing the *expiration* or satisfaction or withdrawal of the writ, the registrar should make a memorandum on the certificate of title to that effect.

63-64 Vic. 1900, c. 21, s. 3, substituted for the above section a provision that upon the satisfaction or withdrawal from his hands of any writ the sheriff should transmit a certificate to that effect to the registrar, and that the registrar on its receipt or on receipt of a Judge's order showing the expiration, satisfaction or withdrawal of the writ, should make a memorandum on the certificate of title to that effect.

Held, that now a sheriff cannot give a certificate of the expiry of a writ of execution; that unless the proviso added to s. 92 applies and the writ appears by force of that proviso to have expired, the registrar can make a memorandum of its *expiry* only upon a Judge's order.

If the sheriff has begun to execute a writ, e.g., by seizure, it does not require a renewal.

The delivery by a sheriff to the registrar of a copy-writ pursuant to s. 92 is not a seizure or other inception of execution which will prevent the expiry of the writ.

[*Court en banc, December 4th, 1901.*

Statement.

The following questions of law were referred to the Court *en banc* by McGUIRE, J. (After each question is added the answer, extracted from the judgment.)

Case No. 1.

Execution against lands issued in 1895.

Delivered to Registrar in 1895.

Execution never renewed.

Execution never refiled with Registrar.

Execution never acted upon by seizure by the sheriff otherwise than by delivering copy to Registrar.

First.—Can Registrar issue certificate of title without entering a memo. of the execution thereon, without a Judge's order? Answer—"No."

Second.—If not, would above facts justify Judge in making an order that execution expired? Answer—"Yes."

Third.—Had it expired before the amendment to Land Titles Act, s. 2 of 1900, c. 21, repealing s. 92 L. T. Act? Answer—"Yes."

Fourth.—Is the effect of this amendment to revive or continue the binding effect of an execution till end of two years from delivery to Registrar? Answer—"No, because not retroactive and the writ also expired before the passing of c. 21 of 1900."

Case No. 2.

Facts same as No. 1. Except that writ regularly renewed but not refiled with Registrar.

First.—Has it expired because not refiled with Registrar within two years? Answer—"No."

Second.—Is Judge's order necessary? Answer—"A Judge could not make such an order."

Patent has not issued and consequently the land has not been brought under the Act, but party was entitled to patent before 1st January, 1897.

Third.—If patent now issued, dated in 1896, should Registrar in issuing certificate do so free from execution? Answer—"No."

Fourth.—If not, can Judge make order that writ expired? Answer—"No."

Statement. Case No. 3.

Execution dated July 10th, 1898.

Execution delivered to Registrar 10th July, 1898.

Execution renewed on 9th July, 1900, not refiled.

Did it expire on 11th July, 1900 (after two years from delivery to Registrar) ? Answer—"No."

Case No. 4.

Execution issued 1st February, 1898.

Registered 2nd January, 1900.

Never renewed or refiled with Registrar.

Is it still binding for two years from January 2, 1900, notwithstanding not renewed? Answer—"No."

[*December 4th, 1901.*]

The judgment of the Court was delivered by

McGuire, J.—This is a reference by me to this Court of the following questions. (The questions as stated above were here set out.)

No counsel appeared to present any arguments on this reference. The principal reason why these questions are referred is because of the amendment to the Land Titles Act by chapter 21 of 1900, which adds a proviso to section 92, and repeals section 93, substituting new provisions therefor.

Section 2 of c. 21 (1900) adds to s. 92 of The Land Titles Act this proviso: "Provided that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the Registrar of the district in which the land is situate, unless before the expiration of such period of two years a renewal of such writ is filed with the Registrar in the same manner as the original is required to be filed with him." Is this proviso retroactive in its effect, or does it apply only to writs filed with the Registrar after the passing of c. 21 of 1900, namely, the 7th July, 1900 ?

If it applied to writs previously filed with the Registrar this might happen. A writ filed with the Registrar in January, 1898, regularly renewed under the provisions of the

Judicature Ordinance, but not refiled with the Registrar, would on the 7th July, 1900, have been more than two years in his hands, and would cease to bind the land. But prior to the amending Act of 1900 a writ once filed with the Registrar continued to bind "while the same is legally in force" (s. 9 Land Titles Act, 1894), and without being refiled with the Registrar. By hypothesis, the writ being regularly renewed would be "legally in force," and up to the moment of the passing of c. 21 of 1900 would have been binding on the land. Then comes the amendment, and if it has the effect suggested, it would, without warning, deprive the execution creditor of his rights. It is not to be assumed that Parliament intended to deprive parties of their legal rights as they existed under the former law, and if giving the amendment a retrospective effect would be to take away existing rights, such effect should not be given unless the language showed clearly that such was the intention. I think that the intent of the proviso was to enable registrars to treat executions more than two years in their hands without being refiled as having expired without actual proof that they had in fact expired, but this should apply only to executions thereafter filed with them. If I am right in this, then, so far as concerns executions filed with the registrar prior to July 7, 1900, the proviso added to s. 92 L. T. Act, 1894, by c. 21 of 1900, has no application.

Judgment. McGuire, J.

In looking at the new section substituted for s. 93 by s. 3, c. 21 of 1900, it will be observed that while under that section as it existed before the last named Act, the sheriff might give a certificate as to the expiry of a writ in his hands, the new section provides that he may give a certificate only as to satisfaction or withdrawal of a writ; and the expiry of a writ, where not covered by the proviso to section 92, must be dealt with by a Judge's order. That being so, the Registrar would not be warranted in treating a writ as expired by a sheriff's certificate of its expiry being produced to him. Where, therefore, it is sought to have a certificate of title granted freed from an execution, that has been filed with the registrar, on the ground that

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McGuire, J.

it has expired, if the case is not covered by the said proviso to section 92, a Judge's order must be obtained. Producing to the registrar evidence from which he might come to the conclusion that a writ had in fact expired, as for example, that it was in the sheriff's hands entirely unexecuted, and that two years had elapsed from its date without renewal, is not, I think, sufficient. The Act itself has furnished a means of satisfying the Registrar that it has expired—that is, a Judge's order—and (except as to cases coming within the proviso to section 92) it is the only means, and he ought not to exercise his own judgment on the sufficiency of the evidence as to expiry.

In answering the second question in case No. 1, viz., "Would the above facts justify the Judge in making an order that the execution had expired?" there must be taken into consideration the fact mentioned of delivery by the sheriff of a copy of the writ to the Registrar. Is that a seizure or part execution of the writ? By the Ordinance a writ unless executed must be renewed within two years from its date. If it has been executed it does not require renewal. For example, if the sheriff before the expiration of two years from the date of a writ has begun to execute it by seizure, advertising the land for sale, etc., he could sell after the two years without the writ being renewed.

It becomes material, then, to consider whether the delivery by the sheriff to the registrar of a copy of an execution pursuant to s. 92, Land Titles Act, is such an act of seizure as would justify the sheriff in selling after two years from the date of the writ, it not being renewed. The sheriff in delivering a copy of execution to the registrar does so, not with any intention of seizing the land, but simply in compliance with the Land Titles Act. I cannot consider such an act as a seizure or an inception of execution of the writ, and especially is this clear since the Land Titles Act of 1894, because under that Act the sheriff is not required to specify the lands intended to be bound, as was the case under The Real Property Act. If the delivery of

a copy of the writ to the Registrar were deemed an inception of execution of the writ, further evidence would be required, e.g., to show that the seizure had been abandoned or terminated, but if it is not a seizure by the sheriff, then, I think, on the facts set forth the execution in No. 1 had expired, and the Judge would be justified in making an order to that effect. Judgment. McGuire, J.

The four questions in Case No. 1 will, therefore, be answered as follows : to the first "No" ; to the second and third "Yes," and to the last "No, because not retroactive, and the writ already expired before the passing of c. 21, 1900.

As to Case No. 2, the answers to all the questions except the second will be in the negative, and to the second, "Judge could not make such order."

As to Cases Nos. 3 and 4, the answers will also be in the negative.

REPORTER :

Ford Jones, Advocate, Regina.

THE QUEEN v. McLEOD.

Conviction—Appeal—Liquor License Ordinance—Application by Attorney-General to expedite hearing—"Court to which such appeal is made"—Imprisonment for offence of another person—Prior conviction.

Notice having been given of an appeal from a conviction for an infraction of the Liquor License Ordinance, (a consequence of which conviction was a forfeiture of the license of the person convicted), to "the presiding Judge sitting without a jury at the sittings of the Supreme Court for the Judicial District of Western Assiniboia, to be holden at the town of Regina on Tuesday, the 25th day of March, 1902," the Attorney-General applied to a Judge under Ordinance 1901, c. 33 (amending the Liquor License Ordinance), s. 21, s.-s. 3, to expedite the hearing.

Held, that the appeal was to the Supreme Court for the Judicial District named, generally, and not merely to a Court coming into existence only on the day mentioned, and that a Judge had jurisdiction to hear the application:

Held, on the hearing of the appeal, that sec. 64, s.-s. 5, of the Liquor License Ordinance was *intra vires*, although the effect might be to inflict imprisonment (on non-payment of fine) upon a person who had not personally violated the Ordinance:

Held, also, following *Reg.* v. *Black*,[1] that forfeiture of license results under sec. 82 from a second or any subsequent offence against sec. 64, notwithstanding the convictions occurred in different licensing years.

[RICHARDSON, J., *January 10th, 1902.*]

Statement. The appellant was, on 5th December, 1901, convicted before a justice of the peace of having, on 17th November, in the Windsor Hotel at Regina, being a place where liquor may be sold, unlawfully sold liquor during the time prohibited by the Liquor License Ordinance for the sale of the same, without any requisition for medicinal purposes being produced by the vendee; and it appearing to the justice of the peace that the appellant was previously, on 24th October, 1900, convicted before a justice of the peace of having, on 14th October, 1900, unlawfully sold liquor in said premises contrary to the provisions of the Liquor License Ordinance, and it also appearing that on 25th April, 1901, said appel'ant was again duly convicted before a justice of the peace of having in said premises unlawfully sold liquor contrary to the provisions of the Liquor License Ordinance; said first named justice of the peace did adjudge the offence of said appellant so firstly mentioned to be her third offence against said Ordinance, and adjudged her to pay a fine of $175, with absolute forfeiture of license, and if the fine was not paid forthwith to five months imprisonment.

On 7th December, 1901, appellant gave notice of intention to prosecute an appeal "before the presiding Judge sitting without a jury at the sittings of the Supreme Court for the Judicial District of Western Assiniboia to be holden at the Town of Regina on Tuesday, the 25th day of March, 1902," and duly made and deposited the affidavit required by Ordinance 1900, c. 32, s. 22, and Ordinance 1901, c. 33, s. 21.

On December 31st an application was made to RICHARDSON, J., on behalf of the Attorney-General under Ordinance 1901, c. 33, s. 21, on notice to appellant to expedite the hearing, and after argument by counsel, the learned Judge fixed January 4th, 1902.

[1] 43 U. C. Q. B. 180.

Argument.

T. C. Johnstone, for appellant, objected that as the notice of appeal to "the presiding Judge, etc.," complied with sections 879 and 880 of the Criminal Code, the motion could be made only to the same Court, which did not come into existence until the day named, and therefore the learned Judge had, until then, no jurisdiction.

Horace Harvey, Deputy-Attorney-General, for respondent, and the Attorney-General, contended that the appeal lay to the Supreme Court for the Judicial District named, generally, and the sittings mentioned in the notice of appeal merely did not constitute a Court within the meaning of those sections. To hold otherwise would be to virtually remove s.-s. 3 of s. 21, c. 33 of 1901, from the Ordinances.

At the hearing, the appellant produced the notice of appeal, recognizance, and her affidavit, which asserted "that I did not, nor did my agent, servant or employee, or any other person with my knowledge or consent, on the seventeenth day of November, 1901, or at any other time on the premises known as the Windsor Hotel, being a place where liquor may be sold, sell liquor during the time prohibited by the Liquor License Ordinance for the sale of the same, without any requisition for medicinal purposes as required by the said Ordinance being produced." It was admitted on behalf of appellant that the wrongful sale was made, as alleged in the conviction, by the servant or employee of the appellant, and the prior convictions were not disputed. For the respondent, the truth of the matters set out in appellant's affidavit was admitted.

For the appellant it was urged that the conviction was bad, because, upon failure to pay the fine imposed, appellant was liable to imprisonment, although upon the facts as admitted, she had committed no offence. This was an unwarrantable interference with the liberty of the subject and *ultra vires* of the Legislative Assembly. He also contended that prior convictions, in order to support forfeiture of license, must be had under the same license as the subsequent offence, otherwise there could

Argument.

be no limitation. It could not be the intention that offences committed an indefinite number of years ago should be brought up against a licensee.

For the respondent it was submitted that there was no undue interference with the liberty of the subject. By force of the Ordinance, the offence of the servant became the offence of the employer, and a licensee knew, when obtaining his license, the conditions under which it was granted. As to prior convictions he referred to *Reg.* v. *Black*.[1]

[*January 10th, 1902.*]

RICHARDSON, J.—On the application to expedite the hearing, Mr. Johnstone, for appellant, urged that inasmuch as the notice of appeal complied with the requirements of sections 879 and 880 of the Criminal Code, I attained no jurisdiction to hear and determine the matter at any earlier date than that named in the notice, which would be at a regularly constituted sittings of the Court, and that the power given by s.-s. 3, s. 21, c. 33 of 1901, could only be exercised at the time named in the notice.

After hearing Mr. Harvey, Deputy Attorney-General, in reply to this objection to jurisdiction, I overruled it. By referring to s.-s. 3, s. 21, c. 33 of 1901, it will be observed that the power given the Judge on the application of the Attorney-General to expedite the hearing of appeals is dealing with procedure, which was held in *Cavanagh* v. *McIlmoyle*, decided en banc in December term, 1901, to be within the powers of the Legislative Assembly, such power not being inconsistent, in my opinion, with section 879, C. C. conferring the right of appeal from summary convictions.

The hearing of the appeal was then proceeded with. For the appellant, it was contended that as, by the conviction, imprisonment on non-payment of the fine was imposed upon appellant, she not having personally violated

the law, as was admitted by respondent, the conviction was bad.

Judgment.

Richardson, J.

But as by s. 64, s.-s. 5 of the Ordinance, "any contravention of the provisions of this section by a servant, agent, or employee of a licensee" (the appellant being a licensee, and the offence in question being one created by that section) "shall be presumed to be the act of such licensee," and this presumption not having been by any proof rebutted, the objection, in my judgment, is not sustainable, the offence being by the Ordinance her own.

For the respondent it was then established that the appellant was previously convicted of offences under section 64 on two separate occasions, namely, 14th October, 1900, and 25th April, 1901, consequent upon proof of which before the convicting justice, that functionary declared appellant's license absolutely forfeited. This is provided for by section 82, which enacts that "violation of any of the provisions of section 64 hereof shall be an offence for which the person violating shall be liable on summary conviction" . . . "for the second or any subsequent offence to a penalty of" from $100 to $200, with absolute forfeiture of license, and in default of payment forthwith to from 4 to 6 months imprisonment.

It was contended on behalf of the appellant that as the license under which she became licensee did not exist when such prior convictions were made, it could not be affected thereby, as, by the proper construction of section 82, the offences there referred to mean offences committed during the currency of living licenses.

Now, it is to be noticed that in this section 82 the words used are "the person violating," not the "licensee violating," or "the person holding the license violating," which if used, might perhaps reasonably be taken to limit the section, as contended for on behalf of the appellant. I conceive that the proper construction of section 82 is that applied by the Court of Queen's Bench of Ontario in *Reg.* v. *Black*[1] to like words in an Ontario Act regulating liquor licenses, viz.,

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Richardson, J.

that offences under section 82 are not simply offences against the license issued for a particular year, but offences against section 64 and the social order which that section of the Ordinance is intended to enforce . . . "and unequivocally indicates the intention by the Legislature to punish the offences under section 82 as offences against public order" . . . "whether the several offences were committed on several days in the same year, or on different days in different years. The offences are still against social order and still against law." See also *Ex parte Sheritt*,[2] *Reg.* v. *Vine*.[3] In my judgment the present appeal must be dismissed, and the conviction affirmed with costs.

REPORTER:

C. H. Bell, Advocate, Regina.

HOLNESS v. NIEBERGALL.

Justice of the Peace—Powers of—Master and servant—Complaint for non-payment of wages—No rate of wages fixed.

When a servant is employed by a master without any agreement having been made either before entering upon his employment or during the course of it as to the rate of wages to be paid to him, a Justice of the Peace has power under the Ordinance respecting Master and Servant (C. O. 1898, c. 50, s. 3) to fix the rate of wages to be paid to the servant.

Upon appeal the rate of wages fixed by the Magistrate was varied.

[MCGUIRE, J., *February 11th, 1902.*]

Holness, under the provisions of section 3 of Consolidated Ordinances, c. 50, the Masters and Servants Ordinance, lodged with a Justice a complaint against Niebergall for non-payment of wages. On the hearing the evidence showed that at the time when Niebergall engaged Holness to work for him nothing was said as to the remuneration Holness was to receive, neither was any rate of wages agreed upon

[2] L. R. 5 Q. B. 174. [3] 44 L. J. M. C. 60; L. R. 10 Q. B. 195; 31 L. T. 842; 23 W. R. 649; 13 Cox C. C. 43.

during the continuance of the employment. It was objected by counsel for Niebergall that the Justice had under the Ordinance no jurisdiction to fix a rate of wages. The Justice, however, held that it was within his powers, and an order was made for payment of wages computed at the rate of $1.25 per day, and costs. From this decision Niebergall appealed under the provisions of s. 879 of the Criminal Code. Statement.

P. J. Nolan, for Niebergall, referred to *Brown* v. *Craft.*[1]

H. W. H. Knott, for Holness:—A statute should be construed so as to suppress the mischief and advance the remedy: *Heydon's Case,*[2] Maxwell on Statutes, p. 95. A construction which facilitates the evasion of the statute is to be avoided, Maxwell on Statutes, 272. The Imperial Statute, 5 Geo. IV. c. 96, s. 2, was also cited.

[*February 11th, 1902.*]

McGuire, J., overruled the objection, and made an order for wages to be paid by Niebergall to Holness at the rate of $1.50 per day with costs.

Reporter :

Chas. A. Stuart, Advocate, Calgary.

[1](1901) 4 Terr. L. R. 461. [2](1584) 3 Rep. 76.

FRIEL v. STINTON.

Practice—Jury—Counterclaim.

Where the claim is such that it cannot by reason of R. 170 of the Judicature Ordinance (C. O. 1898, c. 21), be tried by a jury, and there is a counterclaim which, if the defendant had sued in a separate action, he would have been entitled to have tried by a jury:

If the counterclaim arises out of the same transactions as the claim, they must be tried together; and in that event the defendant, having accepted the forum chosen by plaintiff, a jury cannot be allowed.

[RICHARDSON, J., *March 6th, 1902.*

Statement.

The plaintiff, a miller, brought his action to recover a debt of $180.78, alleged to be due him from the defendant, a cattle dealer, for goods sold and delivered, etc.

The defendant, besides denying the sale and delivery, alleged that out of 16 tons of chopped stuff supplied by the plaintiff, 11 tons were of a class which the plaintiff was by law prohibited from selling. He further alleged, alternatively, that the goods charged for were delivered under a contract for delivery of 200 tons, and because only 131 tons were delivered he was not liable.

The defendant then set up, by way of counter-claim, this contract and its breach by the plaintiff, alleging that he had sustained damages by reason thereof. He further alleged that plaintiff accepted 618 bushels of wheat for storage in his elevator at the usual rate, and that consequent upon gross negligence in handling and storing the same, the grain became heated and injured in value, to plaintiff's damage; and he claimed $2,000 damages.

On the plaintiff's motion to set the case down for trial,

T. C. Johnstone, for defendant, contended that since the counterclaim was for more than $1,000, he was entitled to a jury to try the issue of fact thereon; that the claim and counterclaim were two separate and distinct actions, and should therefore be separated in this case.

Ford Jones, for the plaintiff, submitted that the claim and counterclaim should be tried together, and since the plaintiff's claim did not exceed $1,000, no jury should be allowed. Argument.

[*March 6th, 1902.*]

RICHARDSON, J.—On the application to set this cause down for trial, it was announced on the defendant's behalf, that he desired a jury for the trial of the issues of fact raised in the action, under the provisions of Rule 170. (This Rule is confirmed by Dominion legislation, 60-61 Vic. c. 32.) Some discussion and argument took place upon the proper construction of this Rule, and as to whether or not the counterclaim should be disposed of by a jury while the plaintiff's action was triable by a Judge without a jury.

The authorities leading up to and including *Amon* v. *Bobbett*[1] and *Stumore* v. *Campbell*[2] have settled the law to be "that claim and counterclaim for all purposes, except execution, are two independent actions, and the counterclaim for all purposes, for which justice requires it, is to be treated as an independent action."

In *Neck* v. *Taylor*[3] the practice seems admittedly settled, that where the counterclaim arises out of the same matter, transaction or contract on which the plaintiff's claim is founded, although in form a counterclaim, it forms really a defence to the plaintiff's action. See also *Smith* v. *Hargrove*.[4] Daniel, 619, 677. There should be but one trial, or rather the counterclaim should be tried with the original action, unless under exceptional circumstances. See *Thompson* v. *Woodfine*.[5]

In this case the counterclaim evidently arises out of the same transactions on which the plaintiff's claim is founded and the claim and counterclaim should be tried at the same

[1]60 L. T. 912; 37 W. R. 329; 22 Q. B. D. 548; 58 L. J. Q. B. 219. [2]61 L. J. Q. B. 463; 66 L. T. 218; (1892) 1 Q. B. 317; 40 W. R. 101. [3]62 L. J. Q. B. 514; 4 R. 344; (1893) 1 Q. B. 560; 68 L. T. 399; 41 W. R. 486. [4]16 Q. B. D. 183; 34 W. R. 294. [5]26 W. R. 678; 47 L. J. Ch. 832; 38 L. T. 753.

Judgment. Richardson, J.

time, following the course laid down by Mr. Justice Fry in *Thompson* v. *Woodfine*.[5]

Having arrived at the conclusion that no exceptional circumstances appear in this case for deviation from the general rule I have adverted to, provided for by English O. 36, Rule 8, the question, novel to me, has arisen:—By what forum, judge, or judge and jury is the action to be tried?

Our Rule 170 thus enacts:—

"On the application to set a cause down for trial . . . in the action (i.e., the plaintiff's action) be for debt (as in this case) . . . wherein the amount claimed . . . (by the plaintiff) . . . to be recovered exceeds $1,000 . . . and either party signify his desire to have the issues in fact therein tried by a judge with a jury . . . the same shall be tried by a jury."

Here the plaintiff on commencing his action selected as of right his forum; he claimed to recover a debt alleged to be due him from the defendant less than $1,000. The defendant, by pleading in the action, accepted, I conceive, such forum, and, however desirous I may be to be relieved from responsibility in settling disputes between litigants where such can properly be done, I feel that in this case there is no alternative but to decline defendant's request for a jury. The order applied for is to be made for setting down the cause for trial at the next sittings in Regina without a jury.

REPORTER :

C. H. Bell, Advocate, Regina.

FORFAR v. SAGE: Ex parte WILKINS.

Sale of land—Agreement—Time of essence—Notice—Rescission—Forfeiture of payments, &c.—Receiver—Accountability for rents—Laches—Specific performance—Costs.

Semble, that the acceptance by a vendor of a payment on account of a past due instalment of purchase money is a waiver of his right to take advantage of a provision in the agreement of sale making time of the essence thereof; but, if there be a subsequent default in payment of a subsequent instalment, that, being a new breach, gives the vendor a right to insist on that provision.

Held—(1). That a vendor, if he gives to the purchaser a notice limiting a reasonable time within which to complete an agreement to purchase, and informing him that after the lapse of the time limited the agreement will be treated as at an end, and if he does no act subsequently to waive the effect of the notice, thereby legally rescinds the agreement, and the purchaser is not entitled to specific performance.

2. That mere delay in enforcing his rights, consequent upon such a rescission, does not disentitle the vendor to a declaratory order that the agreement is rescinded.

3. That in such a case payments on account of purchase money are forfeited to the vendor if there be a provision to that effect in the agreement, and, *semble*, even without such a provision.

4. That where, after such an agreement, the property in question passed into the hands of a receiver appointed by the Court, and he, as well as the purchaser, was given a notice in the terms above mentioned, the receiver was accountable to the vendor for the rents received subsequent to the date on which the notice terminated the agreement.

The receiver, on the grounds of his being an officer of the Court, and of the delay of the vendor in taking steps to enforce his rights, was not ordered to pay the costs of the application in which the above questions were raised.

[McGUIRE, J., *May 5th, 1902.*

Statement.

The plaintiff and defendant being then in partnership entered into an agreement in writing, dated April 2nd, 1900, with one Wilkins for the purchase of certain lots. The agreement provided that $75 should be paid in cash, $100 on the 14th April, 1900, and the balance, $175, on the 30th day of April, 1900, and expressly provided that if default should be made by the purchaser in the payment of any or all of these sums as they became due the agreement should become immediately void and of no effect, and any moneys paid under it should be forfeited, and become the vendor's absolutely. The purchaser went into possession immediately, and $55 was paid on April 2nd, $20 on April

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4th, and $40 on April 23rd, 1900. No more was ever paid. On the 5th August a receiver was appointed to take possession of the assets of the firm, and he continued in possession and collected the rents. Nothing further was done until February 27th, 1901, when Wilkins served the plaintiff and the defendant and the receiver with a notice that unless the balance of the purchase money with interest were paid on or before April 5th, 1901, "the said agreement shall then be and it is hereby expressly declared to be void and at an end and absolutely determined," and that in default he would claim possession and retain payments already made. Nothing further was said or done by any of the parties until March, 1902, when the receiver, who had continued in possession and in receipt of the rents and profits with the full knowledge of Wilkins, obtained an order for sale of the partnership interest in the property.

Wilkins made an application for an order to restrain the sale and declare the agreement rescinded, and to declare that he was entitled to retain the payments made and to an account of the rents and profits after April, 1901.

James Muir, K.C., for Wilkins, the vendor, referred to *Benson* v. *Smith*,[1] *Howe* v. *Smith*,[2] *Jackson* v. *Scott*,[3] *Hamblyn* v. *Ley*.[4]

Chas. A. Stuart, for the plaintiff and the receiver, referred to *Mills* v. *Hayward*,[5] *Hunter* v. *Daniel*,[6] *Webb* v. *Hughes*,[7] *O'Keefe* v. *Taylor*.[8]

[*May 5th, 1902.*]

McGuire, J.—In this matter a summons was granted by Mr. Justice Scott on 24th March, 1902, on the application of Francis Edward Wilkins, calling on all parties concerned to attend in Chambers upon the application of said Wilkins for an order that the order for sale of Lot 10 in Block No. 10, Plan H., in the town of Red Deer, dated the 5th day

[1] 9 Beaven 502; 15 L. J. (N.S.) Ch. 218. [2] 53 L. J. Ch. 1055; 27 Ch. D. 89; 50 L. T. 573; 32 W. R. 802. [3] 1 Ont. L. R. 488. [4] 3 Swans. 301. [5] 6 Ch. D. 196. [6] 4 Hare 431; 14 L. J. Ch. 194; 9 Jur. 520. [7] 39 L. J. Ch. 606; L.R. 10 Eq. 281; 18 W. R. 749. [8] 2 Gr. Ch. R. 103.

of March, 1902, made by Mr. Justice SCOTT, and the proceedings thereunder, be set aside, and that an inquiry be made whether the said Wilkins or the said plaintiff and defendant or either of them, has or have any or what interest in the said land taken possession of by Arthur B. Nash, the receiver appointed in this action, or for such further or other enquiry or order or relief, as to the Judge before whom said application should be made might seem meet, and in the meantime, and until further order directing the sale of said land to stand adjourned. Judgment. McGuire, J.

The matter was argued before me on the 16th day of April, 1902, Mr. Muir appearing as counsel for said Wilkins, Mr. Stuart for the plaintiff and receiver, and no one for the defendant. Mr. Muir read the affidavit of said Wilkins, filed on the application for the summons, and affidavit of Mr. Muir himself, and the exhibits to both these affidavits.

From these it appears that by an agreement in writing signed by Wilkins only, and dated April 2, 1900, he agreed to convey to Lewis M. Sage and E. Forfar all his interest in said lot "for the considerations and upon the fulfilment of the conditions hereunder specified, namely:

1. The payment to me in cash by the said Lewis M. Sage and E. Forfar of the sum of ($75) seventy-five dollars, and

2. The further payment to me by them of the sum of (100) one hundred dollars of lawful money of Canada upon the fourteenth day of April, A.D. 1900, and

3. The further payment to me by them of the sum of ($175) one hundred and seventy-five dollars . . . upon the 30th day of April, 1900. And it is expressly reserved and provided that should default be made by the said Lewis M. Sage and E. Forfar in the payment to me of any or all of these sums as they shall become due then this agreement becomes immediately void and of no effect, and any moneys which may have been paid to me shall be forfeited by them and shall become mine absolutely. (Sd.) Francis Wilkins."

Judgment.
McGuire, J.

The following payments were made: $55 on April 2nd, 1900, and $20 on 4th April, and on 23rd April, $40, in all $115. Neither the balance of the second instalment nor any part of the third instalment was ever paid. The purchasers were in possession of the property until the appointment of the receiver.

Nothing was done by either the vendor or purchaser towards enforcing or further carrying out the contract until about February 27th, 1901, shortly after the trial of this action on February 20th, 1901, when, having heard, as he says, that the receiver was treating the agreement of sale as still binding, Wilkins served the plaintiff and defendant and receiver each with a notice that without prejudice to or in any way waiving his rights under the agreement, he peremptorily gave them notice that unless the balance of the purchase money with interest thereon, as provided by said agreement, was paid on or before April 5, 1901, "the said agreement shall then be and it is hereby expressly declared to be void and at an end and absolutely determined," and further, that on default he claimed and would take possession of the property, and would retain all moneys paid on account as forfeited.

No attention was paid to this notice and no moneys were paid on the date named, or at any time since, nor were there any negotiations or correspondence. Matters remained in this way until Wilkins, in March of this year, learning that the receiver had procured an order from Mr. Justice SCOTT, directing him, among other things, to sell the property in question, served the receiver with a notice that he, Wilkins, claimed to be the owner of the property, and that Sage and Forfar had no estate or interest therein as the agreement for sale had been forfeited and rescinded, and that he, Wilkins, would refuse to acknowledge any sale by the receiver, or to transfer to any purchaser thereof. This was served on the receiver on March 11th, 1902, and as the receiver had advertised the sale for March 26th Wilkins applied for the present summons restraining the sale, etc.

Wilkins claims that time was of the essence of the agreement of sale originally, and that he was entitled to treat it

as rescinded, at any rate, when default made in the payment of $175 on 30th April, 1900. There is no doubt, I think, by the wording of the agreement time was of its essence, but advantage was not taken of the default in payment of the instalment of $100 due April 14th, for the receipt of $40, part thereof, on 23rd April, was an admission that the agreement was considered by Wilkins as still in force, and it might fairly be inferred that, by acceptance of a part of the instalment time was tacitly given for payment of the balance of that instalment. The default in payment of the third instalment was a new breach, which gave a new right to Wilkins to treat the agreement as being abandoned by the purchasers. I do not find any evidence to shew, however, that either party actually intended to treat the agreement as at an end on and after April 30th. Then came the notice of March 2nd, 1901, which, while without prejudice to existing rights, fixed April 5th, 1901, as the date when the contract must be completed, and the wording of that notice is very peremptory and distinct that on default the agreement would then be void. Default was made, and it seems to me that Wilkins was justified in treating this default as an abandonment by the purchasers of the contract. Bowen, L.J., in *Howe* v. *Smith*,[2] said: "Though the purchaser may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused, and given the other side the right to say he has refused, performance." It is urged for the purchasers that Wilkins should have acted promptly and taken proceedings to enforce his rights, e.g., by an application to the Court for an order requiring the receiver to deliver up possession of the property, and that not having done so, and by tacitly acquiescing in the receiver treating the agreement as still in force and his possession of the property as rightful, and tacitly allowing the receiver to lease the property, he thereby waived his right to rescind or to treat the sale as abandoned. I can find no authority to sustain this view—the sections of Fry on Specific Performance and cases referred to by Mr. Stuart do not, I think, bear the construction he would place on them. In *Hunter* v. *Daniel*,[6] the Vice-Chancellor does

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say "But that right should have been asserted the moment the breach occurred," but he explains what he means by what follows. "The defendants," he says, "were not at liberty to treat the agreement as still subsisting and to take the benefit of it at the expense of the plaintiff if they meant to insist that it was at an end. . . . The defendants had no right to accept the money but upon the principle that the agreement was still subsisting." And it was pointed out that accepting payment is as much a waiver of such an agreement as subsequent acceptance of rent is a waiver of a forfeiture of a lease. If Wilkins were relying on the default in payment of the second instalment of $100, I think the language just cited from *Hunter* v. *Daniel*[6] would be authority for saying that subsequent acceptance of $40 was a waiver of that default. But whatever inferences may be drawn as to an intention not to insist on this default in payment of the third instalment, what evidence is there of waiver of the default in complying with the notice of March 2, 1901? Merely that legal proceedings were not immediately taken to enforce Wilkins' rights—no payments were offered or accepted thereafter. No negotiations or correspondence took place from which the purchasers might have been led to think Wilkins was still treating the agreement as subsisting. Wilkins was not "taking the benefit of it (the agreement) at the expense of the purchasers," as was said in *Hunter* v. *Daniel*,[6] for the delay was no advantage to Wilkins nor detriment to the purchasers, but rather to their advantage, as they were enjoying the possession and in receipt of the rents. In *O'Keefe* v. *Taylor*,[8] cited by Mr. Stuart, it is said "that the right to object to delay as a ground for resisting specific performance may be waived by the conduct of the parties in treating the contract as subsisting," but the cases there relied on shew what such "conduct" must consist of. In *King* v. *Wilson*[9] there were subsequent negotiations "considering whether a satisfactory indemnity could not be had." In *Southcomb* v. *Bishop of Exeter*[10] "negotiations had been continued, but under pro-

[6] 3 Beav. 126. [8] 6 Ha. 213; 16 L. J. Ch. 378; 11 Jur. 725.

test, after the time fixed by such notice for the completion of the contract." In the case in which these were cited (*O'Keefe* v. *Taylor* [8]), the plaintiff was a purchaser in possession for three years, making improvements of considerable value, "more than three times the contract price of the land." Defendant knew of this, but without having previously adopted any step for the purpose of determining the contract, at the end of three years re-sold. "It would have been competent to defendant," says the Chancellor, "to have required the plaintiff at any moment after default to have fulfilled his agreement within a reasonable time," as Wilkins did in this case. Moreover, in *O'Keefe* v. *Taylor* [8] the defendant "repeatedly requested plaintiff to complete his engagement," which, as the learned Judge says, was evidence against the vendor, as showing that he was recognizing the existence of the agreement. In that case, too, time was not originally of the essence of the agreement. In *Webb* v. *Hughes* [7] there was a provision for payment of interest in case of non-completion on day named, which has been considered evidence that the parties did not intend time to be of the essence. It was laid down in that case that where time was of the essence of the contract, if the person entitled to the benefit of such a stipulation did not make his stand upon the day specified, "but *continued to negotiate after that date*, he thereby waived his right to insist upon the stipulation."

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I find no case in which mere delay in enforcing his rights, even where the purchaser is in possession, was regarded as fatal to the vendor's right to treat the contract as abandoned. On the contrary, I find cases where delay was not so regarded. In *Benson* v. *Lamb* [1] the purchaser gave a ten days' notice to complete the contract, or he would treat it as at an end. The vendor did not comply. The ten days expired on December 4th. Nothing was done by either side till the following March, when the conveyance was perfected and the purchaser was asked to complete but refused. Vendor brought a suit for specific performance, but it was held that the purchaser had properly given the

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notice requiring completion within the time named, "and the time having expired the contract is at an end." In *Howe* v. *Smith*[2] a notice extending time for completion for one month was given. The month expired on July 20, yet nothing was done by the vendor to enforce his rights or to declare that he treated the sale as at an end until January 31, when he re-sold. There was a delay of over six months. In *Gibbons* v. *Cozens*[11] the notice making time of the essence expired in May, but nothing was done by the vendor. The purchaser in August began suit to recover payments made. In this case the purchaser was in possession.

From the foregoing cases it seems to me that, having given notice limiting a reasonable time within which to complete, and that in default the agreement would be treated as at an end, Wilkins was not bound to give any further notice after default (though he, in fact, did give a notice to that effect to the receiver), and that mere delay to enforce his right to possession in the absence of any negotiations or other conduct shewing that he did not treat the agreement as abandoned, was not a waiver. As said in *Benson* v. *Lamb*,[1] "the time having expired the contract was at an end."

If it is at an end the purchasers are not entitled to specific performance. The delays and defaults in compliance with the agreement debar them from claiming to have the contract enforced. It must not be overlooked, that the written agreement was not signed by the purchasers, and the vendor was the only one bound by it, and as laid down by Fry on Specific Performance, "any delay in the party in whose favour the contract is binding is looked at with especial strictness." The purchasers have not shewn themselves ready to carry out the agreement; not even now are they or the receiver (as he admits) able to pay. As said by Lord Justice Cotton in *Howe* v. *Smith*,[2] specific performance is given only "to those who are ready and prompt." It was said in that case: "He was not ready with the money in

[11] 29 Ont. R. 356.

order to purchase the estate, and at the time when the action was commenced if the vendor had said 'Where is your money? Produce it, and then I will make the conveyance,' he would not have been able to produce the money." The same state of facts exist here. Judgment. McGuire, J.

As to the payments made on account, I think the vendor is clearly entitled to retain these. *Howe* v. *Smith*[2] is authority for this. In that case the agreement contained no clause as to what was to be done with the deposit in case the contract was not performed, yet it was held the purchaser could not recover back what he had paid. In the present case the agreement distinctly provided that in case of default any payments already made should be forfeited and become Wilkins'. The same is laid down in *Jackson* v. *Scott*,[3] *Gibbons* v. *Cozens*,[11] and *Frazer* v. *Ryan*.[12]

The only remaining question is as to the rents collected by the receiver. As I hold that the sale was at an end after the 5th of April, 1901, I think the receiver should account to Wilkins for the rents received by him after that date and still in his hands, and if the amount cannot be agreed on there should be a reference to the Clerk to ascertain the amount of such rents.

The order of Mr. Justice SCOTT should be set aside, so far as it directs the receiver to sell the land in question. Being an officer of the Court, I do not think he should be ordered to pay the costs of this summons, and, moreover, the delay of Wilkins in asserting his rights is, I think, a further reason for not ordering costs.

REPORTER:

C. A. Stuart, Advocate, Calgary.

WRIGHT v. SHATTUCK.

Sale of goods—Passing of property in the goods thereunder—Right of party to waive the performance of a stipulation in his favour.

Wright v. *Shattuck*, 4 Terr. L. R. 455, ROULEAU, J., 1901, affirmed. Opinion evidence discussed.

[*Court en banc, June 4th, 1901.*

Statement. The defendant appealed by special leave from the judgment of ROULEAU, J., reported 4 Terr. L. R. 455. The appeal was heard March 5th and 6th, 1901.

P. McCarthy, K.C., and *J. Muir*, K.C., for appellant:—The property in the animal never passed to the plaintiff. The contract was a conditional one, and neither of the two conditions therein contained was ever fulfilled. Consequently the contract never became executed so as to pass the property: *Shepherd* v. *Harrison*,[1] *Seath* v. *Moore*,[2] *Ogg* v. *Shuter*.[3] Even if the non-fulfilment of the conditions was due to the default of the defendant, the plaintiff's only remedy would be an action for damages: *Heilbutt* v. *Hickson*,[4] *Hanson* v. *Meyer*.[5] The defendant was justified in not withdrawing the charge laid before the association by the plaintiff's conduct: *McKay* v. *Dick*.[6] A demand by the plaintiff was necessary before a right of action for detinue could accrue to him: *Burroughes* v. *Bayne*,[7] *Bain* v. *McDonald*,[8] *Stephens* v. *Cousins*,[9] *Severin* v. *Keppell*,[10] *Jones* v. *Dowle*,[11] *Wilkinson* v. *Verity*,[12] *Spackman* v. *Foster*,[13] *Miller* v. *Dell*,[14] *In re Tidd*,[15] *Peterkin* v. *McFarlane*.[16]

[1](1871) 5 H. L. 116; 40 L. J., Q. B. 148; 24 L. T. 857; 20 W. R. 1. [2](1886) 11 App. Cas. 350; 55 L. J., P. C. 54; 54 L. T. 690; 5 Asp. M. C. 586. [3](1875) L. R., 10 C. P. 159. [4](1872) L. R. 7 C. P. 438; 41 L. J., C. P. 228; 27 L. T. 336; 20 W. R. 1035. [5](1805) 6 East, 614; 2 Smith, 670; 8 R. R. 572. [6](1881) 6 App. Cas. 251; 29 W. R. 541. [7](1860) 5 H. & N. 296; 29 L. J., Ex. 185; 2 L. T. 16. [8](1872) 32 U. C. Q. B. 190. [9](1858) 16 U. C. Q. B. 329. [10](1803) 4 Esp. 156. [11](1841) 9 M. & W. 19; 1 D. (N.S.) 391; 11 L. J., Ex. 52. [12](1871) L. R. 6, C. P. 206; 40 L. J., C. P. 141; 24 L. T. 32; 19 W. R. 604. [13](1883) 11 Q. B. D. 99; 52 L. J., Q. B. 418; 48 L. T. 670; 31 W. R. 548; 47 J. P. 455. [14](1890) 60 L. J., Q. B. 404; (1891) 1 Q. B. 468; 63 L. T. 693; 39 W. R. 342. [15](1893) 62 L. J., Ch. 915; (1893) 3 Ch. 154; 3 R. 657; 69 L. T. 255; 42 W. R. 25. [16](1884) 9 O. A. R. 439.

Argument.

R. B. Bennett, for respondent:—The condition in the agreement as to the withdrawal of the charge before the Association was in favour of the plaintiff. But for this condition, upon tender of the money the animal became the property of the plaintiff. The plaintiff had a right to waive the performance of this condition as he did. It was the defendant's duty to withdraw the charge. Not having done so, he can not now avail himself of the condition: *McKay* v. *Dick*,[6] *Pontifex* v. *Wilkinson*,[17] *Stewart* v. *Rogerson*,[18] *Giles* v. *Giles*,[19] *Hotham* v. *East India Co.*,[20] *Thomas* v. *Fredericks*.[21] As to want of demand, the detention is admitted by the pleadings, the only issue raised being that as to the property in the animal.

[*June 4th, 1902.*]

The judgment of the Court was delivered by

WETMORE, J.—This is an appeal from the judgment of ROULEAU, J., in favour of the plaintiff. The material facts of the case are as follows: The plaintiff Wright at one time owned a heifer named Irene, and the ownership in this animal subsequently became vested in the defendant. Before such ownership became vested in the defendant the plaintiff had caused her to be registered in the books of the Dominion Shorthorn Breeders' Association in Ontario as a thoroughbred Shorthorn heifer, and it was sold to the defendant as such. After this, and on the 25th March, 1899, the defendant laid a charge before the association to the effect that this heifer was not a pure-bred Shorthorn, but was a grade heifer. Notice of such charge was given to the plaintiff, and he was also further notified that the committee of the association would meet on 5th April, I infer, for the purpose of dealing with such charge. On the 27th March the plaintiff and the defendant came together, and agreed to settle their differences, whereupon the following agreement was drawn up and executed by the respective parties:

[17](1845) 1 C. B. 75. [18](1871) L. R. 6 C. P. 424. [19](1846) 9 Q. B. 164; 15 L. J., Q. B. 387; 11 Jur. 83. [20](1779) 1 T. R. 638; 1 Dougl. 272. [21](1847) 10 Q. B. 775; 16 L. J. Q. B. 393; 11 Jur. 942.

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Wetmore, J.

"Agreement made this twenty-seventh day of March in this year 1899 between Herbert Wright of the one part and William D. Shattuck of the other part. Whereas disputes and differences have existed between the said parties with regard to a heifer known as Irene and sold by the said Wright as a thoroughbred heifer to the said Shattuck, and whereas the said parties have agreed to settle all their differences as follows:—

"1. The contract for the sale of the said heifer is to be cancelled, and the said Wright is to repay to the said Shattuck the sum of $115.00, being the price of the said heifer, and $25.00 for expenses, making in all $140.00 to be paid by the said Wright to the said Shattuck.

"2. When the said sum of $140.00 is paid, the heifer and her calf are to be the property of Mr. Wright, to do with as he pleases.

"3. Mr. Shattuck agrees to withdraw the charges made by him to the Shorthorn Breeders' Association in respect of the said heifer, *and upon all proceedings being dropped by the said Association in connection with the matter, the foregoing part of this Agreement is to be carried out, and when so carried out, the parties mutually agree to release each other from any and all claims and demands in connection with the said transaction.*"

This agreement was type-written, down to and including the words "to be carried out" in the third clause. The remainder of that clause, which I have italicized, was written by Mr. Guthrie, a practising solicitor in Ontario, who was acting for the plaintiff, and who testifies that this third clause was inserted in the agreement in the interests of and for the protection of Wright. No objection was taken to the admissibility of this evidence, either before the trial Judge or on this appeal. The defendant signed a letter withdrawing the charge in question, and delivered it to a Mr. Goodfellow with directions to hold it until he, the defendant, gave orders that it should be delivered to the Association or to Mr. Hobson (the Vice-President of the Association). This letter never reached the association, and, as a

matter of fact, as the learned trial Judge has found, the defendant never withdrew the charge as he agreed to do in the agreement hereinbefore set forth; but, on the contrary, he exhibited every disposition to press it. On the 5th April the plaintiff appeared before the committee of the association, and produced evidence with a view of establishing that the heifer was a thoroughbred animal. The defendant also attended this meeting, and he testifies that after he heard the evidence produced by the plaintiff he wanted the case to go on, and he stated that he would bring the heifer back to Ontario. The heifer at the time was in Alberta, in the North-West Territories. The agreement in question was executed in Ontario, and all the meetings of the association referred to were held there. The evidence does not, in my opinion, establish that the association dropped all proceedings in connection with the defendant's charge. A good deal of evidence was adduced with a view of establishing that the association never, as a matter of fact, took any proceedings in the matter at all. This evidence entirely failed to establish that fact. The secretary of the association notified the party charged of the charge. Both parties interested were notified as to when and where the committee of the association would meet to deal with it. The committee met at such time and place; the parties interested appeared before it. And the committee heard witnesses who were produced and received testimony. If this was not taking proceedings in the matter, I would very much like to be informed what would be necessary to constitute "taking proceedings." Judgment. Wetmore, J.

A large amount of evidence was taken under the commission as to what course the association would have taken if a withdrawal of the charge by the defendant had been lodged. In my opinion, the whole of that testimony was for the purposes of this case "*just so much trash.*" As a matter of fact, the association had never before dealt with a similar case. No established rule or usual course of practice, therefore, had been laid down by it, and the testimony of the several witnesses in this respect was consequently merely their own individual opinions upon a hypothetical

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case, which could not be allowed to influence this or any other Court.

The plaintiff, after the agreement was executed, tendered to the defendant the $140.00 therein mentioned, which the defendant refused to accept. The learned trial Judge has found this fact, and it is entirely warranted by the evidence. I may add that I am satisfied, under the evidence, that this money was tendered to the defendant not only at the Wellington Hotel in Guelph between the making of the agreement and the 5th April, the day that the association committee met, but that it was also tendered to him on the 12th April, at the C. P. R. Station in Guelph.

One ground of objection taken on the appeal was that there was no evidence of a demand for and refusal of the animals. That question was not raised by the pleadings, the only question raised thereby is property or no property. The attention of the defendant's counsel was drawn to this at the argument of the appeal. He then intimated that he would apply to amend the statement of defence, so as to enable h m to raise this question. The Court arose almost immed'ately after this intimation was given, and when it assembled the following morning the defendant's counsel stated that the amendment was not pressed, and no further reference was made to that ground of appeal.

The only question, therefore, to be decided is, in whom was the property in these animals vested at the time of the commencement of this action. This depends upon the construction to be given to the agreement hereinbefore set forth. If this agreement had not contained the third clause, there can be no doubt that, under the authorities, the property would have passed to the plaintiff immediately upon payment or tender by him to the defendant of the $140.00. I doubt whether sec. 20, Rule 1, of "The Sale of Goods Ordinance" (Con. Ord. cap. 39), applies to this contract, as it was made, in Ontario. That, however, is immaterial, because that rule only enacts what the rule was at common law. And in this case (if the third clause had been left out of the contract), by virtue of clause 2, the property, instead of passing to the

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plaintiff immediately upon the making of the contract, would not have passed until the money was paid or tendered. The law in this respect is so well understood that it is unnecessary to refer to authorities on the subject. That is, this Court would have been bound by authority to hold that such was the intention of the parties. Then, what effect had the insertion of the third clause of the agreement upon the question of the passing of the property. Lord Coleridge, C.J., lays down the law in *Ogg* v. *Shuter*,[3] at p. 162, as follows: "The result of the decisions . . . is that the question whether the property in goods has passed under a contract of sale is a question of intention to be gathered from all the circumstances, the expressions made use of in the contract, and also the surrounding circumstances." The learned trial Judge has held that the 3rd clause of the agreement was a stipulation in favour of the plaintiff. Applying the rule of construction so laid down by Lord Coleridge, I am of opinion that the learned Judge has construed the clause correctly.

It was argued by defendant's counsel that this was not a stipulation exclusively in favour of the plaintiff, because if the association did not drop the proceedings the defendant might, if they went on, be liable to be expelled from the association, of which he was a member, for making a false charge. I am of opinion, looking at it as a matter of intention at the time the contract was made, that no such idea ever entered the mind of the defendant. I am inclined to think that the idea is rather due to the ingenuity of counsel, conceived after this action was brought. The object of the stipulation was, in my opinion, to secure the plaintiff against any future proceedings on account of the charge preferred against him, and that he would not be bound to pay over his money until that object had been secured. Having reached the conclusion that this condition was a stipulation in favour of the plaintiff, it was open to him expressly to waive its performance. This was not disputed on the part of the defendant. This is stated to be the law in Benjamin on Sales (7th Am. Ed.), sec. 566, and it is

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there stated to be such a clear proposition that it is not necessary to cite authority to support it. The learned Judge has found that the plaintiff waived the performance of this condition by tendering the $140. All that it is necessary for me to state is that I agree with him in that respect.

This appeal should be dismissed with costs, and the judgment of the trial Judge affirmed.

Appeal dismissed with costs.

REPORTER:

Ford Jones, Advocate, Regina.

RE DONNELLY TAX SALE.

Practice—Motion to Court en banc. sufficiency of notice of—Tax sale—Land Titles Act, secs. 95 and 97—Time for registration of tax sale transfer, extension of—Non-prosecution of appeal, excuse for.

Rule 460 of The Judicature Ordinance, C. O. 1898, c. 21, providing for two clear days' notice of motion, except by special leave, applies to motions to the Court en Banc.

An order stopping the registration of a tax sale transfer and Judge's order confirming the sale, as provided for by sec. 97 of The Land Titles Act, also acts as an order extending the time for registration of the transfer, as provided for by sec. 95 of the Act.

An appellant is excused for not having proceeded with the appeal by the fact that the original documents from which the appeal book is to be prepared have remained in the respondent's possession, he having neglected to file them in the Land Titles Office, as directed by the order appealed from.

[*Court en banc, June 4th, 1902.*

On November 16th, 1901, an order was made by RICHARDSON, J., confirming a tax sale of land, of which Mrs. Calvert was the registered owner, and concluding:—"The affidavits and documents submitted on the said application to be filed in the Land Titles Office for the Assiniboia Land Registration District at Regina, together with the transfer herein and this order." On December 6th, 1901, Mrs. Calvert caused a notice of appeal from the said order to be served, returnable before the Court en Banc June 2nd, 1902, and obtained from RICHARDSON, J., an order "stopping the

registration of the said transfer until the appeal should be disposed of or until such further or other time as may be ordered." The transfer and the affidavits and documents used on the application to confirm the tax sale were not deposited in the Land Titles Office, but remained in the possession of the advocate for the purchaser at the tax sale. The appeal had not been proceeded with, and the purchaser moved on notice to set aside the appeal for want of prosecution and to rescind the order stopping registration of the transfer, or for such other order as to the Court might seem meet. The notice of motion was served May 27th, 1902, returnable June 2nd, 1902. The motion was heard June 2nd, 1902. Statement.

Ford Jones, for the registered owner:—The notice of motion is insufficient, not having been served in time. The order in question has ceased to be valid as against the owner, not having been registered within the time prescribed by sec. 95 of "The Land Titles Act." The order stopping the registration was made under sec. 97 of "The Land Titles Act," and is not an order extending the time for registration, as contemplated by sec. 95. The order made under sec. 97 was an indulgence granted to the registered owner; an order under sec. 95 extending the time for registration would be an indulgence to the purchaser. The order has also lapsed through non-compliance by the purchaser with the direction therein contained to file the transfer, order and all material used on the application therefor in the Land Titles Office. In any event, the registered owner is excused from not proceeding with her appeal by the purchaser's omission to lodge the material in the Land Titles Office, as directed. The original material for the appeal book remained in the purchaser's possession ever since the order confirming the sale was made, and the appellant was under no obligation to apply to the purchaser for it or copies thereof.

N. Mackenzie, for the purchaser:—The notice of motion is sufficient, having been served more than two clear days

Argument.

before its return. The order made stopping the registration of the transfer is in effect an order extending the time for registration thereof, as provided by sec. 95 of "The Land Titles Act." The order confirming the sale, so far as filing the material used on the application therefor is concerned, is directory only, and not compulsory. The material for the appeal book could have been obtained at any time upon application therefor to the advocate for the purchaser.

[*June 4th, 1902.*]

The judgment of the Court was delivered by

WETMORE, J.—On 16th November last, RICHARDSON, J., made an order confirming a tax sale of land, of which Calvert was the registered owner. On the 6th December, Calvert caused a notice of appeal for the present sittings against such order to be served, and thereupon RICHARDSON, J., on application on behalf of the appellant, Calvert, made an order staying the registration of the transfer until the appeal should be disposed of or until such further or other time as might be ordered. The appeal has not been proceeded with, and Mr. McKenzie, on behalf of the respondent Donnelly, the purchaser at the tax sale, now moves upon notice of motion to set aside the appeal for want of prosecution and to rescind the order staying the registration of the transfer or for such other order as to this Court may seem meet. The notice of motion was served on the 27th May, more than two clear days before the day upon which the sittings of this Court opened and the day named in the notice for hearing the motion.

Mr. Jones, on behalf of the respondent, raised the objection that the notice was not served in time. We see no reason why Rule 460 of the Judicature Ordinance, which provides that "there must be two clear days between the service of a notice of motion and the day named in the notice for hearing the motion," is not applicable to this motion. It is a motion to the Court. The notice, therefore, was served in time.

Judgment.
Wetmore, J.

The order confirming the tax sale directed that the affidavits and documents submitted on the application to confirm should be filed in the Land Titles Office, together with the transfer and such order. We are of opinion that this embraced all the affidavits and documents used on the application, whether on behalf of the applicant Donnelly or on behalf of Calvert. None of these affidavits or documents have been filed. Mr. Jones, for the appellant, claims that the respondent, not having filed these papers with the Registrar of Land Titles, the transfer has ceased to be valid against his client, 1st, because the Judge's order directed such papers to be so filed, and the omission to do so is a disobedience of that order; 2nd, because under sec. 95 of The Land Titles Act they should have been filed, and an order taken out by the respondent extending the time for registration beyond the two months mentioned in that section.

We are of opinion that the omission to file the papers was not a disobedience of the order. It was not intended that the order in that respect was compulsory on the party applying to confirm the sale. It was merely directory. The applicant was quite at liberty to abandon the order confirming the sale, and if he did so it would not have been necessary to lodge either the order or the papers used on the application. The direction is a very common one to include in orders of a similar character, and the intention is, if the party obtaining the order acts upon it, he must at the time he lodges it with the Registrar, also lodge the material used in and about obtaining it. We are also of opinion that the Land Titles Act does not require the applicant to lodge the order or material upon which it was made at any particular time; we cannot find any such provision. He must however be careful to lodge the order and otherwise comply with its provisions so as to comply with the provisions of section 95 of the Act as to time, unless the time is extended by the order of a Judge. In this case the time was extended by an order of the Judge. The appellant

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having taken that order out we can see no necessity for the respondent to take out a similar order. Mr. Jones contended that the order extending the time was taken out under section 97 of the Act. We are unable to perceive that that makes any difference; the order serves the purpose of either section, and the Registrar is bound to obey it. As by virtue of the order Donnelly could not get his transfer registered until further order, he was not bound to lodge the order confirming the sale, and the papers used in connection with that order and his transfer has not ceased to be valid against the owner of the land, because the time for registering it has by virtue of the order extending the time not expired.

But we are of opinion that the omission to lodge the order confirming the sale and the material referred to affords the appellant a reasonable excuse for not preparing her appeal book and proceeding with the appeal. Knowing that an appeal was pending it would have been prudent for Mr. Mackenzie to have lodged these papers. Strictly speaking Mr. Jones was not bound to wait upon him to obtain these papers with a view to preparing his appeal book. Possibly, if he had done so, there would have been no difficulty in obtaining the papers, and possibly Mr. Jones may not be open to the charge of being over-zealous about getting these papers.

On the other hand, the only course that Mr. Mackenzie could take to get the matter disposed of was to make this motion. We are of opinion that the interests of justice will be served in this case by refusing this application, and by ordering the respondent within three days from this date to lodge the order confirming the sale and all affidavits and documents used in the proceeding before RICHARDSON, J., to confirm the sale with the Registrar of Land Titles for the Assiniboia Land Registration District; and that the appellant be at liberty to proceed with her appeal, provided that the appeal books be filed and the appeal entered with the Registrar of this Court on or before the 1st day of October

next, and the factums of both parties filed on or before the 1st of November. Judgment. Wetmore, J.

The costs of each party to this application to abide the event of the appeal.

Order accordingly.

REPORTER:

Ford Jones, Advocate, Regina.

H. C. YUILL v. KATE WHITE, ADMINISTRATRIX OF A. WHITE, DECEASED.

Landlord and tenant—Lease—Option to purchase—Revocation of by death—Specific performance — Consideration, inadequacy of — Tender—Evidence—Declarations against interest, admissibility of.

A provision in a lease, whereby the lessor grants to the lessee an option to purchase the leased property within a limited time, is not a *nudum pactum*. Such an option is, within the time limited, binding on a deceased lessor's personal representatives, though not so expressed.

Statements, whether written or verbally made, by the lessor as to the terms of the lease are not, after the death of the lessor, admissible as evidence in favour of his successor in title as being declarations against the deceased's interest.

Per MCGUIRE, C.J. Such statements merely amount to statements of an agreement which must be supposed to be made on fair terms, and, consequently, as much in favour of the maker's interest as against it.

Where a tender is made in current bank bills, and objection is made only to the amount tendered, the objection cannot subsequently be taken that the tender was not made in "legal tender."

The questions of the necessity for a formal tender, a contract under seal importing a consideration, the inadequacy of the consideration in an action for specific performance, discussed.

Judgment of ROULEAU, J., affirmed.

[ROULEAU, J., *April 29th, 1901.*
[*Court en banc, June 4th, 1902.*

Th's action was for specific performance of an agreement to sell contained in a lease, and was tried at Medicine Hat before ROULEAU, J., March 8th and 9th, 1901.

James Muir, K.C., and *C. R. Mitchell*, for plaintiff.

R. B. Bennett, for defendant.

Statement

The lease in question was executed by A. White, deceased, in favour of the plaintiff, and was dated May 1st, 1896. There was no subscribing witness to the execution of the lease, but the affidavit of execution thereof was sworn to by A. M. Parker. The lease contained the following clause: "And the said Alfred White hereby grants to the said Harry C. Yuill at any time during the term of two years hereby granted the right of purchasing the said property, at the sum of ($2,500) two thousand five hundred dollars." The evidence established that the lease was prepared by A. M. Parker, who was at the time the advocate for A. White, deceased, and was in his handwriting. It was executed about May 27th, 1899. A. White died in November, 1899, and the defendant was his widow and the administratrix of his estate. A. M. Parker was dead. On July 19th, 1900, the plaintiff gave the defendant written notice that he desired to exercise his right to purchase contained in the lease, and tendered her an accepted cheque for $2,500 and a transfer for execution. He also afterwards tendered $2,500 in notes of a chartered bank. R. Hill testified for the plaintiff that he was present when the bargain was made between A. White, deceased, and the plaintiff, and that the option was to purchase at $2,500. G. P. Thomas testified for the plaintiff that under instructions from A. White, deceased, he had drafted an option clause to be inserted in the lease, and that the option clause contained in the lease was as drafted by him. The defendant tendered in evidence the testimony of W. Carter and A. Vokes, who each swore that he had met A. White, deceased, in Winnipeg in June, 1899, when deceased had told him that he had given an option on the property in question at $3,500, and the testimony of A. Hughes, who swore that Parker, the deceased advocate, told him in April, 1899, that A. White, deceased, was turning the property in question over to the plaintiff and that if the plaintiff wanted to buy the price was to be $3,500. The defendant also tendered in evidence three letters written by A. White, deceased, to the defendant, dated respectively

April 19th, April 23rd and May 1st, 1899, containing statements indicating that the option in question was at $3,500. All this evidence was objected to on behalf of the plaintiff, and received subject to the objections. Argument.

Judgment was reserved.

[*April 29th, 1901.*]

ROULEAU, J.—The statement of claim in this action alleges that the plaintiff on the 1st May, 1899, leased for two years at $800 a year from one Alfred White a property called and known as the American Hotel situated on lot No. 17 in block No. 14 in the town of Medicine Hat, with the right, within two years, of purchasing the said land and property at the sum of $2,500.

On or about the 12th November, 1899, the said White died intestate, leaving a widow and two children. On 14th June, 1900, the defendant, Kate White, the widow of the late Alfred White, was duly appointed administratrix of the estate of her late husband, the said late Alfred White, and the said land and property went to and vested in the defendant as administratrix of the deceased.

On or about the 19th July, the plaintiff notified the defendant in writing that he accepted and claimed said right to purchase the property in question, and at the same time offered to pay the said purchase money, but the defendant refused to carry out said sale to the plaintiff.

The plaintiff, therefore, claims specific performance. There are two distinct issues in this action: the issue of law and the issue of facts. The issue of law, which I will consider first, is that the plaintiff has no right of action against the defendant as the personal representative of the deceased Alfred White or against his estate.

Our law in the Territories is different, as to the descent of land, from the law of England. In England the land goes to the heirs and the personal property goes to the personal representatives. In the Territories land goes to the personal representatives of the deceased owner thereof in

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the same manner as personal estate goes, and is dealt with and distributed as personal estate. When a lessor gives an option to his lessee to purchase within a certain time the premises leased, this option gives to the lessee an equitable interest or equitable estate in the land, and the personal representative of the lessor is bound to carry out the option, when accepted by the lessee: See *Buckland* v. *Papillon*.[1] It was contended by the defendant that the case of *Dickenson* v. *Dodds*[2] had clearly decided the point in controversy in this case, but I find that this case is quite different from the case under consideration. Mellish, L. J., in the above case said: "It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead." This case cannot be authority in the present action, because a simple offer is regarded in law only as a *nudum pactum*, while an option to buy made for a consideration, such as exists in case such an option is contained in a lease inasmuch as the lessee is considered to pay a certain rent in part consideration of the option to purchase the said property within the period of the lease, is an *unilateral contract*, which becomes effective and complete by the acceptance of the option: *Buckland* v. *Papillon*.[1] *Collingwood* v. *Row*,[3] and *Woods* v. *Hyde*.[4] It is a well established rule of law that by the death of a party to the contract the obligation to perform and the right to call for the performance of the contract devolves on the representatives of the party dying: Fry on Specific Performance, 91; Jud. Ord., C. O. 1898, c. 21, s. 33.

For the above reasons, and on the authorities cited, I am of the opinion that the plaintiff has a right to enforce specific performance for the purchase of the property under the optional clause in the lease.

As to the facts, I must admit that there was a great deal of ability displayed by the advocates of both parties in this

[1](1866) 36 L. J. Ch. 81; L. R. 2 Ch. 67; 12 Jur. (N. S.) 992; 15 L. T. 378; 15 W. R. 92. [2](1876) 2 Ch. D. 463; 45 L. J. Ch. 777; 34 L. T. 607; 24 L. T. 594. [3](1857) 26 L. J. Ch. 649; 3 Jur. (N. S.) 785; 5 W. R. 484. [4](1862)31 L. J. Ch. 295; 6 L. T. 317; 10 W. R. 339.

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Rouleau, J.

case in arguing as to the admissibility of certain evidence on the part of the defence. I do not think that under the circumstances there is any necessity to worry through all the authorities cited in order to admit or reject the evidence tendered. I am satisfied that even if that evidence is admissible, still the weight of evidence, as well as the most incontestable evidence, is in favour of the plaintiff.

On behalf of the plaintiff there is the lease under seal containing the following clause: "And the said Alfred White hereby grants to the said Harry C. Yuill at any time during the term of two years hereby granted the right of purchasing the said property at the sum of ($2,500) two thousand five hundred dollars." This clause is corroborated by the evidence of plaintiff, who swears positively that the amount of the option, for which he was to purchase the property, was definitely agreed to be $2,500, and that the lease was prepared and drawn by Mr. Parker, Mr. White's solicitor, and that the duplicate filed in Court was given to him by the said White himself: also by Mr. Thomas' evidence, who swears that he prepared the said clause himself, at the request of both parties, but that he did not draw the lease because he was not then admitted to practice his profession in the Territories; that he positively recollects the amount of the option, and that it was $2,500, and that the clause of the option that he had prepared was in the exact words, as far as he can recollect, of the clause inserted in the lease; and also the evidence of Richard Hill, the bartender.

Against this most solemn and positive evidence, there is the defendant's evidence, who says that her husband told her that he leased the property to Yuill for two years, with the option to purchase it during that time, for $3,500: the evidence of William Carter, who swears that about June, 1899, in his house in Winnipeg, when the late Alfred White was on his way to England, he told him that he had leased his hotel at Medicine Hat for two years, with the option for purchase, for $3,500, and that he had leased the place for two years at $75 per month; the evidence of Andrew Vokes, who

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says that at Carter's house in Winnipeg, the late Mr. White told him that he had leased his hotel for two years, with the option of purchase, for $3,500: that the rent was $75 per month for the two years; also a letter from White to his wife, dated the 23rd of April, 1899, where he says: "Yuill and I put in all yesterday with Parker, making our agreements, etc. He pays me $1,000 down for the contents of the house, $800 per year, or about $66. 1-2 per month rent, and if at any time within two years he tenders me $3,500 I hand him over the house complete." It is to be remarked that this letter was written several days before the lease was signed and executed; and also that the two witnesses, Carter and Vokes, may be mistaken as well in the amount of the option as they were mistaken as to the amount of rent that Yuill had to pay; or that the late Alfred White had exaggerated when he told them about the rent and the optional clause. At all events, all this is hearsay evidence, and there is no document to corroborate it.

Very likely, when Mr. White wrote to his wife on the 23rd April, he might have been under the impression that he could get $3,500 for the property, but I do not believe that at the time the optional clause was prepared that was the amount agreed to; because Mr. Thomas says in his evidence:—"I was present when the plaintiff and Alfred White, deceased, were conversing and bartering as to this lease—purchasing the hotel and furniture, liquor stock and cigars. They talked all this over and came to an agreement. Then Mr. Yuill rented the place at eight hundred dollars per year: was to take the stock at a certain figure, and was to have the 'American Hotel' for the sum of two thousand five hundred dollars. I remember this distinctly. Mr. White, Mr. Yuill, Richard Hill and I were present at the conversation. While we were there I drew up the purchasing clause as agreed upon between Mr. White and Mr. Yuill. I also saw this lease before it was signed and after it was signed. This all took place about the date of the lease, some time on or about the month of May, 1899. I heard Mr. White say he ought

to have $3,000 for the hotel, but Mr. Yuill would not consent, and it was after this they agreed to two thousand five hundred dollars." This is positive evidence, fully corroborated by the lease itself, and by two other witnesses. True there was some discrepancy in the evidence as to the exact time of this conversation and the agreement between White and Yuill, but in general when a man has a bargain in writing he does not burden his mind with many of the facts connected with it. The general rule is that where a contract has been reduced into writing by the parties, the writing is the best evidence of its contents So in point of fact and in law, the plaintiff is entitled to his judgment for specific performance under the lease by his paying the money to the defendant, and if the defendant refuses the money and to sign the transfer, direction is hereby given that the money be paid into Court and a vesting order granted to the plaintiff. I will not grant the costs of this action to the plaintiff, because I consider the defendant had reasonable grounds to think that the amount mentioned in the purchasing clause might have been put in by mistake.

Judgment.

Rouleau, J.

The defendant appealed. The appeal was heard December 2nd, 1901.

J. A. Lougheed, K.C., and *R. B. Bennett*, for appellant:—The lease containing no words extending its application to the executor or administrator of the deceased, its operation is absolutely limited to the deceased. The offer to sell contained in the lease not having been accepted in the lifetime of the deceased, no acceptance of it thereafter can constitute an enforceable contract: *Highgate Archway Co.* v. *Jeakes*,[5] *Stocker* v. *Dean*,[6] *Dickinson* v. *Dodds*,[7] *In re Adams and Kensington Vestry*,[8] *In re Ethell and Mitchell and Butler's Contract*,[8] *London & South-Western Ry. Co.* v. *Gomm*,[9] relied

[5](1871) L. R. 12 Eq. 9; 40 L. J. Ch. 408; 24 L. T. 567; 19 W. R. 692. [6](1852) 16 Beav. 161. [7](1884) 27 Ch. D. 394; 54 L. J. Ch. 87; 51 L. T. 382; 32 W. R. 883. [8](1901) 17 Times L. R. 392; (1901) 1 Ch. 945; W. N. (1901) 73; 70 L. J. Ch. 498.; 84 L. T. 459. [9](1882) 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620.

Argument.

on by the respondent, only decides that while an option to purchase may create an equitable interest in the land, yet it is not a covenant that runs with the land so as to bind successors in title. The evidence as to the terms of the alleged lease is so unsatisfactory that the Court will not decree specific performance: *Cooper* v. *Phibbs*,[10] *Torrance* v. *Bolton*,[11] *Jones* v. *Clifford*,[12] *Stewart* v. *Kennedy*,[13] *Jones* v. *Rimmer*,[14] *Preston* v. *Luck*,[15] *Chesterman* v. *Mann*.[16] There was no consideration for the option to purchase, which was *nudum pactum*: *Dickinson* v. *Dodds*.[2] No legal tender of the purchase money was ever made. The statements made and letters written by the deceased are admissible in evidence, they being statements against his proprietary interest, as the granting of the option to purchase conveyed to the plaintiff an equitable interest in the land, and thereby cut down the title of the deceased: Taylor on Evidence, sec. 684, 686, and cases cited; Roscoe's N. P. Evidence, 57, and cases cited. The entries made by Parker, the deceased advocate, are admissible in evidence: *Rawlins* v. *Rickards*,[17] *Doe* v. *Robson*.[18]

James Muir, K.C., for respondent:—In actions *ex contractu*, except when the performance of the contract depends upon some personal skill of the deceased, the obligation to perform devolves upon the personal representatives of the deceased: Smith's Equity Jurisprudence (14th ed.), 278; Fry on Specific Performance (3rd ed.), 91. A bare offer to sell without consideration, is *nudum pactum*. This is all that was decided by *Dickinson* v. *Dodds*,[2] relied on by the appellant. In the present case the option was under seal, which imports consideration. Sec. 56 of "The Land Titles Act" provides that the land mentioned in a certificate of title shall be subject by implication to a lease for a term not exceeding three years accompanied by actual possession, as in this case,

[10](1867) L. R. 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049. [11](1872) L. R. 14 Eq. 124; 42 L. J. Ch. 177; L. R. 8 Ch. 118; 27 L. T. 738; 21 W. R. 134. [12](1876) 3 Ch. D. 779; 45 L. J. Ch. 809; 35 L. T. 937; 24 W. R. 979. [13](1890) 15 App. Cas. 75. [14](1880) 14 Ch. D. 588; 49 L. J. Ch. 775; 43 L. T. 111; 29 W. R. 165. [15](1884) 27 Ch. D. 497. [16](1851) 9 Hare 206; 22 L. J. Ch. 151. [17](1860) 28 Beav. 370. [18](1812) 13 R. R. 361; 15 East. 32.

Argument.

and by sec. 67 a right to purchase may be included in the lease, and upon the lessee performing his covenants, the lessor is bound to transfer the land to the lessee. The option created in the plaintiff an equitable interest in the property—*London & South-Western Ry. Co.* v. *Gomm*[19]—the benefit of which the plaintiff could assign—*Buckland* v. *Papillon*.[1] Such an option is enforceable after the death of the person granting it: *Townley* v. *Bedwell*,[19] *Lawes* v. *Bennett*,[20] *Collingwood* v. *Row*,[21] *Weeding* v. *Weeding*,[22] *Re Pyle*, *Pyle* v. *Pyle*.[23] The statements by the deceased are inadmissible in evidence, being against neither his pecuniary or proprietary interests: Taylor on Evidence (9th ed.) 435; *Peaceable d. Uncle* v. *Watson*,[24] *Gery* v. *Redman*,[25] *Massey* v. *Allen*,[26] *Higham* v. *Ridgeway*,[27] *Price* v. *The Earl of Torrington*,[28] *Ganton* v. *Size*,[29] *Confederation Life* v. *O'Donnell*.[30] As to mistake: *Powell* v. *Smith*,[31] *Tamplin* v. *James*.[32] Inadequacy of consideration forms no defence unless it is such as shocks the conscience and amounts to conclusive evidence of fraud: *Stilwell* v. *Wilkins*,[33] *Harrison* v. *Guest*,[34] *Coles* v. *Trecothrick*,[35] *Burrowes* v. *Lock*,[36] *Lowther* v. *Lowther*.[37] If specific performance is refused, a reference as to damages should be allowed, as in *Tamplin* v. *James*.[32]

[*June 4th, 1902.*]

McGuire, C.J.—This is an appeal from the judgment for the plaintiff rendered by the late Mr. Justice Rouleau in an action brought by Harry C. Yuill against Kate White,

[19](1808) 14 Ves. 590; 9 R. R. 352. [20](1785) 1 Cox 167; 1 R. R. 10. [21](1857) 26 L. J. Ch. 649; 3 Jur. (N. S.) 785; 5 W. R. 484. [22](1860) 30 L. J. Ch. 880; 1 John & H. 424; 4 L. T. (N. S.) 616; 9 W. R. 431. [23](1895) 13 R. 396; 64 L. J. Ch. 477; (1895) 1 Ch. 724; 72 L. T. 327; 43 W. R. 420. [24](1811) 4 Taunt. 16; 13 R. R. 552. [25](1875) 1 Q. B. D. 161; 45 L. J. Q. B. 267; 24 W. R. 270. [26](1879) 49 L. J. Ch. 76; 13 Ch. D. 558; 41 L. T. 788; 28 W. R. 212. [27](1888) 2 Smith's L. C. 317; 10 East 109; 10 R. R. 235. [28](1703) 2 Smith's L. C. 310; 1 Salk. 285. [29](1864) 22 U. C. Q. B. 473; 2 E. & A. (Ont.) 368. [30](1886) 13 S. C. R. 218. [31](1872) L. R. 14 Eq. 85; 41 L. J. Ch. 734; 20 W. R. 602. [32](1880) 15 Ch. D. 215; 43 L. T. 520; 29 W. R. 311. [33](1821) Jacob 282; 23 R. R. 56. [34](1855) 25 L. J. Ch. 544; 6 DeG. M. & G. 424; 2 Jur. (N. S.) 911; 4 W. R. 585; affirmed 8 H. L. C. 481; 11 Eng. Reps. 517. [35](1804) 9 Ves. 248; 1 Smith 233; 7 R. R. 167. [36](1805) 10 Ves. 474; 3 R. R. 33, 856. [37](1803) 13 Ves. 95

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administratrix of Alfred White, deceased, to enforce specifically an agreement contained in a lease between said deceased as lessor and the plaintiff as lessee, giving the latter an option of purchasing certain hotel property in Medicine Hat, and being the premises demised by the lease. The lease is under seal, bears date the first day of May, 1899, and is executed by both parties. The term is two years, rental $800 a year, payable monthly, and the option clause relied on is as follows:—

"And the said Alfred White hereby grants to the said Harry C. Yuill at any time during the term of two years hereby granted the right of purchasing the said property at the sum of ($2,500) two thousand five hundred dollars."

The plaintiff went into possession as tenant, and paid rent, as reserved in the lease. Shortly after the execution of the lease—early in June—White left this country for England, and died there. His widow took out letters of administration here to his estate on 14th June, 1900. A notice dated 19th June, 1900, was served on defendant that plaintiff wished to exercise the option to purchase. The plaintiff says that on the 26th of June, 1900, he tendered to the said administratrix for execution a transfer of the land in question to him, and also a marked cheque for $2,500, but she refused to accept it or to execute the transfer, as it appears, on the ground that the price was to be $3,500. He says that on the 11th of October, 1900, he tendered her $2,500 in bills of the Merchants' Bank of Canada. She refused the money, and said she would not sell the place—that the money offered was not enough. On the 29th of the same month, he says he again, in company with Mr. Mitchell, his advocate, saw the defendant, and again tendered her $2,500 in same bank bills. Mr. Mitchell, he says, counted the money in her presence, at her request, and he asked her to sign the transfer and accept the money, but she again refused. From the evidence of the defendant, it appears that she claimed the amount $2,500 was not the right amount, and she tendered in evidence letters received by her from her late husband, but which were objected to by the plaintiff,

to show that the price was to be $3,500. Evidence of two men to whom White spoke about the transaction was also given subject to objection, that he told them he had leased his hotel with an option to purchase for $3,500. Judgment. McGuire, C.J.

The defendant besides asserting that there was no agreement to give an option for purchase for $2,500, denies the legality of the tender of the $2,500 on the ground that neither a marked cheque nor the bills of the Merchants Bank of Canada were legal tender. I think, on the evidence, there is no pretence for saying that her objection was as to the character of the tender. I think the evidence establishes reasonably that she was unwilling to carry out the contract if the price was to be $2,500, and that she would not have accepted $2,500 no matter in what form tendered.

"The vendor is not relieved from his obligation because of the failure of the vendee to pay the purchase price, if such failure came about through the act of the vendor." Am. & Eng. Encyclopedia, vol. 22, p. 913.

"All necessity for a formal tender disappears where the defendant denies or repudiates the contract—so if it is evident that a tender would be rejected. In such cases a simple offer to perform will meet the requirements of equity. . . . A tender of performance need not be made where it would be wholly nugatory." Am. & Eng. Ency., vol. 22, p. 1040. "Where tender is in bank bills the objection to the form of tender will be deemed to be waived if he rejects the tender on the ground of the insufficiency in amount, or on some other ground without making objection to the legality of the tender in point of form." Encyclopedia Laws of Eng., vol. 12, p. 118. I think that this ground of defence is not good on the evidence here.

Another ground is that there is no evidence of any consideration for the agreement as to the option, and therefore the offer could be retracted at any time before acceptance —that the death of the lessor, which took place and was known to the plaintiff before any acceptance by the lessee, was a revocation of the option. This is, I think, a sound

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proposition of law, provided there was no consideration for the option. The plaintiff, however, points out that the lease, of which the option clause was a part, is under seal and imports a consideration, and the option was therefore irrevocable. In the Encyclopedia of the Laws of England, vol. iv., p. 174, I find it laid down thus: "And to the present day the law remains that a promise made by deed is irrevocable even before its acceptance (*Zenos* v. *Wickham*[38]) and is enforceable without any consideration" (*Ex p. Pottinger*[39]). "A man may without consideration enter into an express covenant under hand and seal," per Lord Mansfield in *Shubrick* v. *Salmond*.[40] "If a man enter into a voluntary bond he shall not be allowed to aver want of consideration to evade the payment, for every bond from the solemnity of the instrument carries with it an internal evidence of good consideration." 2 Blackstone's Comm. 446.

But was it a promise without consideration? Apart from the fact that the instrument is a deed, and from the fact that the option clause is a part of a lease, there is no express evidence as to any consideration given for this particular promise (the option), nor is there any to show that no consideration was given—and even if, as the appellant contends, a deed is merely *prima facie* evidence of consideration, and that the fact can be disproved, the burden would appear to be on the defendant to establish the absence of consideration. Certainly, in the absence of any such proof, in view of the fact of it being part of a lease in which there are mutual engagements, I do not think it can be inferred that the option was without consideration. In vol. 22, Am. & Eng. Encyclopedia, at p. 1021, there is a note, "But if such contract is a part of a lease or made at the same time with the lease and in consideration thereof, it will be enforced."

But apart from the question of consideration, the defendant contends that an option such as this must be accepted in the lifetime of the party giving the option.

[38](1867) L. R. 2; H. L. Ca. 296; 36 L. J. C. P. 313. [39](1878) 8 Ch. D. 621; 47 L. J. Bky. 43. [40](1765) 3 Burr. 1637.

Judgment.
McGuire, C.J.

The authorities cited by the appellant's counsel do not, I think, bear out this proposition. *Dickinson* v. *Dodds* [2] was a case where there was no consideration for the option, and it was revoked before acceptance, as the other party was aware. Both James, L.J., and Mellish, J., speak of it as "a nudum pactum." Mellish, J., said: "It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he dies, and parting with the property has very much the same effect as death of the owner." The parting with the property shews that the maker of the offer has changed his mind. James, L.J., in the same case said that the "plaintiff knew as clearly that Dodds was no longer minded to sell as if Dodds had gone to him and said, 'I withdraw the offer.'" The true principle, as laid down by James, L.J., is this: "Two minds must agree at some one moment of time, i.e., that there was an offer continuing till time of acceptance; if not then no contract." By the terms of the agreement here White agreed that the offer should continue for two years; the acceptance was within two years. Had there been no time limit the case might be otherwise. I do not see how a man can avoid an engagement by death which he could not revoke by an express act of revocation.

In *London & S. W. Ry. Co.* v. *Gomm*,[3] Jessel, M.R., held that an option to purchase was an "interest in the land." He said: "In the ordinary case of a contract for purchase there is no doubt of it; and an option to purchase in its motive does not differ." In another part of his judgment he asks: "Is there any substantial distinction between a contract for purchase, an option for purchase, and a limitation on condition or a conditional limitation?"

If, then, an option to purchase does not differ from a contract for purchase, let us see what the law is as to such a contract when one of the parties dies before completion. In Addison on Contracts, vol. I., s. 451, it is said: "The personal representatives are responsible to the extent of the assets that come to their hands upon all the contracts of their testator or intestate, whether they are deeds or contracts by

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record or simple contracts, and whether the executors or administrators are named in the contract, or whether they are not." In Williams on Executors it is said: "It is clear also that in many cases a liability may accrue after the death of the testator or intestate upon a contract made in his lifetime, although the executor or administrator be not named therein, e.g., A. agrees to build a house for B., but dies before completion; his executors are bound to perform the contract," *Quick* v. *Ludborrow*,[41] and even where the 'heir' is named but 'executors' not named," *Williams* v. *Burrell*.[42] *Highgate Archway Co.* v. *Jeakes*[5] was cited as authority for the contention that on the death of White, Yuill could no longer accept. In that case it was the person who was to accept who died, and that, moreover, was not a case of contract, but an obligation imposed upon a railway company by an Act of Parliament that the first opportunity to purchase must be given to a designated person or persons, and in the particular case that person having died there was no one to whom they could make the offer, and they were held relieved. If, in the present case, the contract had stipulated that the acceptance of the option should be made to Alfred White it might be argued that the intimation of acceptance could be made to him alone, and no such intimation being made to him his death made it impossible to be performed. But there is here no such provision. White "grants . . . to Yuill . . . the right of purchasing the said property"—the only limitations being the price and the time within which he is to exercise the right. To say that one must read into it that the acceptance must be communicated to White himself is no more to be allowed than to say that the rent reserved must be paid to White only, for it is not said in express words to whom the rent is to be paid. *Townly* v. *Bedwell*[19] and *Lawes* v. *Bennett*,[20] cited in last case, are cases where the acceptance of the option to purchase was after the death of the person granting the option. In *Buckland* v. *Papilion*[1] there was no mention in the agreement of

[41] 3 Bulstr. 29. [42] (1845) 1 C. B. 402; 14 L. J. C. P. 98; 9 Jur. 282.

assigns or heirs or executors and administrators, and yet it was held that the assignee in bankruptcy of the bargainee could exercise the option. In *Church* v. *Brown*[43] the omission of "assign" did not prevent the assignee from taking. In *Lawes* v. *Bennett*[20] there was no mention of executors or administrators or assigns, and the agreement was merely a memo endorsed on the lease. The authorities cited above make it unnecessary further to deal with the contention that the omission to mention the personal representatives of the lessor had the effect of making an acceptance communicated to White's personal representative of no validity. The contract was not a personal one in the sense in which a contract with an artist to paint a picture or with an author to write a book is so considered. Judgment. McGuire, C.J.

The question of fact must now be dealt with. Was there such an option clause in the lease when executed by White, and was the price to be $2,500 or $3,500? I think it will be conceded that the evidence of the plaintiff, as it appears in the appeal book, is singularly contradictory—particularly as to dates—and is hard to reconcile in many respects with the evidence of some of his witnesses. Some facts, however, seem fairly well established, if any credence it to be given to the witnesses. First, the lease itself contains the clause, which it is sworn, by the plaintiff and several of his witnesses, that White and he agreed upon. It is shown to be in the handwriting of Mr. Parker, who drew the lease. An examination of the document affords some evidence that the written part of the body of the lease is in the same handwriting as the option clause. Albert Hughes, a witness called for the defence, says he knew well Parker's writing, and that that clause, as well as the writing in the whole document, is in his, Parker's, writing. The defendant admits in her evidence that Parker was her husband's solicitor in Medicine Hat, and the plaintiff and Thomas say that Parker drew the lease at the request of White. Unfortunately, Parker is also dead. There is an

[43](1808) 15 Ves. 264; 10 R. R. 74.

Judgment. affidavit of execution endorsed on the lease sworn to by Mr.
McGuire, C.J. Parker before Mr. Mitchell. It will be noticed that he swears it "was executed on the day of the date thereof," these words being in print, and the date appears to be the first day of May, "one thousand eight hundred and ninety ," the word "nine" being evidently not filled in (the rest of the year being in print) for, by the attestation clause it is said to have been "signed, sealed," etc., by the parties "this first day of May, 1899." The affidavit also states that he, Parker, is a "subscribing witness thereto," which appears to be incorrect as far as "subscribing" is concerned, for after the words "in the presence of" there is no name of anyone. There is an evident carelessness in the filling up of the forms, and too much stress cannot, therefore, be laid upon the statement in the affidavit that the lease was executed on the 1st May. As the lease was apparently to take effect from the first day of May it might have been so dated, even though drawn on a day subsequent. The affidavit of execution is shown to have been sworn to on the 29th May, 1899, proving that it was in his hands on that day, a fact which corroborates the plaintiff's evidence when he says that it was executed at the latter end of May.

There is a suggestion, but no evidence, that the option clause was inserted after the execution of the lease by the lessor. An inspection of the lease shows that this was by no means difficult to do, as there is a considerable blank space at that part of the printed form used for the lease—and if the option was in a different handwriting, or if there was anything in its appearance to indicate that it was written at different time from the rest of the writing in the document, the evidence for the plaintiff is not of such satisfactory character as to make such a thing improbable. But, if it were written in after execution that could only have been done by the connivance, and probably fraudulent connivance, of Parker. There is no evidence to show that Parker was other than a respectable advocate, but on the contrary, Hughes, one of defendant's witnesses, says that Parker had

the reputation of being a straight, honest, honourable man, and the fact that he was White's solicitor is a circumstance against the suggestion that he would deliberately commit a fraud against his client. It is suggested that Parker left his papers in Medicine Hat after his departure, so that they were accessible to the public, but while that would be important if the option clause was in a handwriting different from the rest of the lease, it has no bearing on the question as the fact is. It might well account, however, for the disappearance of any duplicate retained by White, who, on leaving for England, might have left it with Parker. Mrs. White says she never saw a duplicate, though she made search for it.

For the defence it was attempted to put in certain letters of the late Mr. White to his wife. These appear in the appeal book, having been admitted subject to objection. If they are evidence, then they put it beyond question that there was, in fact, an option to purchase "at any time within two years" (which is very much like the language of the option clause in the lease), but he says the price was to be $3,500. The letter which contains this statement is dated April 23rd, 1899.

The evidence under commission of William Carter and Albert Vokes, two friends of White whom he is said to have met in Winnipeg in June while on his way to England, was also put in subject to objection. They say that he told them that the option to purchase was for $3,500, and both of them say that he told them the rent was $75 a month, whereas in fact it was only $66.66. I do not see how the statements made by White to these two men in the absence of the plaintiff can be evidence, and the same remark applies to the letters written to Mrs. White. The ground on which it is sought to have them admitted is that they are statements made against White's interests, pecuniary or proprietary. They are not, in my opinion, against his interests. They merely amount to a statement "of an agreement which must be supposed to be made on fair terms, and consequently as much in favour of the maker's interest as against it." In

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Taylor on Evidence, s. 671, a case is referred to where this entry was sought to be used—"April 4th, A. came as a servant to have for the half-year £2," and it was not allowed on the ground above stated. Coleridge, J., pointed out "that this was not against the maker's interest unless the mere making of a contract be so, and if that were the case, the existence of a contract would be against the interest of both parties to it." The conversation between Parker, White's solicitor, and Albert Hughes, not in the presence of the plaintiff, is also, I think, inadmissible.

The evidence, then, is all one way, and even though the witnesses do not agree with each other in many respects, and the plaintiff's own testimony at different times is not consistent, in view of the statements of three men on oath, all agreeing with each other, that White had agreed to give an option to purchase at $2,500—thus corroborating the document itself—and there being no evidence to contradict that given for the plaintiff on this point, it seems to me that there is no reasonable course left but to say that there is evidence that White did agree as the option clause sets forth.

It is further set up that the price, $2,500, was inadequate, and that specific performance should be refused. The only evidence as to value is that the property was assessed in 1899 at $2,500 and in 1900 at $4,000, but reduced by the Court of Revision to $2,500, and the testimony of Mr. Tweed, a former owner, that he sold it in 1896 to White for $2,500. And there is, of course, the rent which Yuill agreed to pay.

I confess I find it hard to understand how a building which could bring a rental of $800 a year would be sold by the owner for a little over three years' rent, but even if the defendant's contention that the price was to be $3,500, that is, less than four and a half years' rent, that, too, seems a very small figure. Possibly the goodwill of the business was an element which may account for the relatively high rental. On the other hand, it may be said that in the absence of any evidence of an increase in value since 1896, the fact that White was getting $1,600 rent and $2,500, i.e., $4,100 in all,

payable within two years, shows that he was getting a good price for the property, which had cost him only $2,500 three years before. However that may be, it at least may be said that the evidence does not establish an "inadequacy of price such as shocks the conscience and amounts in itself to conclusive evidence of fraud in the transaction," and, therefore, "it is not itself a sufficient ground for refusing a specific performance," as was laid down by Lord Eldon in *Coles v. Trecothick*.[35] Judgment. McGuire, C.J.

As to the contention of the defence that there was a mistake in the amount mentioned in the option clause, the party seeking to establish such a mistake must produce evidence outweighing that which supports the agreement as written. In the present case the evidence is all in favour of the option clause containing just what was actually agreed upon.

I think I have dealt with all the grounds urged for the defendant, and I have come to the conclusion that the appeal must be dismissed, and with costs of the appeal.

Wetmore, J.—The learned trial Judge has found the facts in this case in favour of the plaintiff. That is, he has in effect found that the deceased, Alfred White, executed the lease in question with the full knowledge and understanding that it contained the clause giving the plaintiff the option within the term demised of two years of purchasing the demised property for $2,500. I am of opinion that the evidence fully warranted that finding, and I am not disposed to interfere with it. In fact I am rather inclined to think that I would have come to the same conclusion had I been in that learned Judge's place.

I may add that I am of the opinion that the letters from the deceased to his wife, and of his statement to the witnesses Carter and Vokes were improperly received. The only ground upon which it is claimed that this evidence was admissible is that if the plaintiff's contention is correct, that the granting of the option to purchase conveyed to Yuill an equitable interest in the land, thereby

Judgment.
Wetmore, J.

cutting down the title of the deceased Alfred White, verbal or written statements made by him as to the option would be against his proprietary interest, and, therefore, admissible. This view, no doubt, is very ingenious, but I am inclined to think somewhat far-fetched. It is conceded that the deceased intended to give to plaintiff an option; the plaintiff contends that he was to have such option, as the lease states, at $2,500; those representing the deceased, and, therefore, standing in his shoes, say he intended to give the option at $3,500, or $1,000 more. It seems to me, therefore, the statements of the deceased made or written to third persons are anything but statements against his interests. To admit such testimony would simply violate the rule that parties are not allowed to manufacture evidence for themselves. Leaving the evidence of these statements out, I cannot find that the defendant has any material of a substantial character to support her case that the option was intended to be at $3,500. But, even with this evidence, I am of the opinion that the learned trial Judge was quite justified in finding that the weight of evidence was in favour of the plaintiff.

It is urged on behalf of the defendant that the option clause was limited to the deceased White, that there were no words in the clause which bound the executor or administrator of the deceased, and therefore that the clause was merely an offer which could only be accepted in the lifetime of the deceased. It will be observed, upon looking at the lease, that the lessor in no instance by express words binds his executors or administrators. The clause in question was not nudum pactum. It was no more nudum pactum than the clause by which the lessor agreed to pay taxes. I cannot find a case where it has been held that such an optional clause in a lease was nudum pactum. No such case has been cited; on the other hand, the books are full of cases when specific performance has been decreed by the Courts in cases when the lease or agreement contained such a clause.

Judgment. Wetmore, J.

In *Collingwood* v. *Row*,[3] one Hawker agreed to sell his business to one Hartley, and to execute a lease to him for 14 years containing an option of purchase. Hawker died, and thereupon Hartley brought suit for specific performance of the agreement. The Court ordered a lease to be executed to Hartley for 14 years *containing the option to purchase*, and at the expiration of the 14 years, Hartley, claiming to exercise his option, the Court ordered a conveyance to be made to him. In *Weeding* v. *Weeding* [22] specific performance under such an option was decreed in a suit brought against the trustees of the lessor's will after his decease. In *Re Adams and The Kensington Vestry* [7] it was conceded that the option might be exercised after the death of the lessor. In *Woods* v. *Hyde* [4] and *In re Pyle, Pyle* v. *Pyle*,[23] it was never questioned. I cannot, therefore, conceive how it can be successfully urged that such a clause is nudum pactum. The fact that the executors or administrators of White were not named in the clause does not relieve White's representatives from performing what he agreed to do; the obligation to perform devolves on them. Fry on Specific Performance (3rd ed.), 91; *Highgate Archway Co.* v. *Jeakes*,[5] *Stocker* v. *Dean*,[6] *Dickinson* v. *Dodds*,[2] and *In re Adams and Kensington Vestry*,[7] and the dicta of some of the Judges made on these cases were relied on by the defendant's counsel in support of the proposition that the representatives of the deceased person who had given the option were not bound unless the option had been executed in the lifetime of the deceased. These cases do not, in my opinion, support this contention. *Highgate Archway Co.* v. *Jeakes* [5] was decided upon the question of what construction was to be put on the word "person" in an Act of Parliament. The question in *Dickinson* v. *Dodds*[2] was whether the writing in question was an offer or an agreement. The Court held it to be an offer. In *In re Adams and Kensington Vestry*,[7] the party who gave the right of option, and the one who had the right to exercise it, were both dead, and the administrator of the original lessee, who happened also to be his heir-at-law, exercised the right and obtained a deed of the property, but the question

Judgment. Wetmore, J.

raised by the proposed vendees from such administrator and heir-at-law was whether a good title could, under the circumstances, be given without the next of kin of the deceased lessee joining in the deed. *Stocker* v. *Dean*[6] turned upon the peculiar wording of the agreement then in question.

It is also urged that the tender of the $2,500, which was made in current bank notes, was not a legal tender. No objection was made to the tender at the time on that ground. I cannot believe that this objection is seriously raised.

I see no reason why the Court should in the exercise of its discretion refuse specific performance in this case. The learned trial Judge, in the exercise of his discretion, has granted it, and we should hesitate before we interfere with his discretion. No fraud has been proved. The witnesses for the plaintiff, it is true, are somewhat contradictory as to the time when the lease was executed and when certain conversations were had, and who were present at some of these conversations, but they are all agreed as to the essential matters in the case, and they are supported by the lease itself, perfectly regular on its face, with the exception of Mr. Parker's affidavit of execution, which states that the lease was executed on the day of its date, which is a clear error. It cannot, in view of the evidence of the witnesses Tweed and McCloy, be said that the property sold for a great deal under its value. The deceased sold it for what he paid for it, and does not appear to have improved it to any great extent. It is true the value of property in Medicine Hat had gone up, but it is equally true that what Tweed calls a "fine hotel" had been put up since he sold to the deceased. The rent that a property will command in this country is very often out of all proportion to its selling value, and affords no indication whatever of it.

In my opinion the appeal should be dismissed with costs.

RICHARDSON and SCOTT, JJ., concurred.

Appeal dismissed with costs.

REPORTER:

Ford Jones, Advocate, Regina.

IN RE KERR.

Municipal law—Sale of land for taxes—Corporation—Right to redeem—Construction of statutes—Retroactive legislation—Vested rights.

Sec. 80 of the Charter of the City of Calgary (Ordinance 33 of 1893†) provides that if land sold for taxes be not redeemed within one year after the date of the sale, the purchaser shall be entitled to a transfer, which shall have the effect of vesting the land in him in fee simple or otherwise, according to the nature of the estate sold; and sec. 81 provides that the transfer shall not only vest in the purchaser all rights of property which the original owner had therein, but shall purge and disencumber such land from all payments, lien charges, mortgages, and encumbrances whatever, other than existing liens of the city and the Crown.

Certain lots in the city of Calgary were sold for taxes on 16th April, 1900, and a transfer was given to the purchaser on 8th May, 1901, the owners not having offered to redeem within the year.

Held, that sec. 2 of Ordinance 12 of 1901, "an Ordinance Respecting the Confirmation of Sales of Land for Taxes," passed 12th June, 1901, giving a right to redeem at any time before the hearing of the application for confirmation, is not retrospective, and that the original owners could not take advantage of its provisions.

Held, further, that sections 80 and 81 of the Charter of the City of Calgary are not *ultra vires* as being in conflict with sections 54 and 57 of the Land Titles Act, 1894. *Wilkie* v. *Jellett*[2] applied.

[SCOTT, J., *June 16th, 1902.*

Statement.

This was an application by J. H. Kerr, the purchaser of certain lots in the city of Calgary under a tax sale, to have the sale confirmed. The owners appeared and objected to the confirmation on the ground that they were still entitled to redeem. The facts appear sufficiently from the judgment.

J. B. Smith, K.C., for the purchaser and the city of Calgary.

James Short, for the owners.

[*June 16th, 1902.*]

SCOTT, J.—The applicant seeks the confirmation of a sale to him by the treasurer of the city of Calgary for arrears of taxes. The sale took place on 16th April, 1900, and the transfer by the treasurer is dated 8th May, 1901.

†See similar provisions in the Municipal Ordinance, C. O. 1898, c. 70, ss. 201, 202.

Judgment.
Scott, J.

The materials filed on the application shew that all persons who appeared by the records of the proper Land Titles Office to have any interest in the property were duly served with notices of the application.

Three of them, viz., J. D. Lafferty, William Gillies and James Gillies, appeared by counsel, and opposed the confirmation on the ground that it was shewn that before the time for hearing the application they had tendered the applicant a sufficient sum under section 2 of Ordinance chapter 12 of 1901. They admitted the regularity of the sale, and that the applicant was entitled to have it confirmed if they were not entitled to redeem under that section.

Counsel for the applicant contended that the parties were not entitled to redeem because that Ordinance is not retrospective, and therefore does not apply to sales made before it was passed.

One of the grounds for that contention is that the effect of giving section 2 of the Ordinance a retrospective operation would be to deprive the applicant and others in his position of certain vested rights which before its passing they had acquired under Ordinance 33 of 1893 (the charter of the city of Calgary). It is, therefore, important to consider what, if any, vested rights the applicant had acquired before it was passed.

Section 80 of the charter provides that if the land be not redeemed within the period allowed by the Ordinance (one year from the date of the sale) the purchaser shall be entitled to a transfer which shall have the effect of vesting the land in him, his heirs, assigns and other legal representatives in fee simple or otherwise, according to the nature of the estate sold; and by section 81 such transfer shall not only vest in the purchaser all rights of property which the original holder had therein, but shall also purge and disencumber such lands from all payments, liens, charges, mortgages, and incumbrances of whatsoever nature and kind other than existing liens of the city and Crown.

Judgment.
Scott, J.

If full effect is given to these provisions it follows that the applicant by reason of having received his transfer before the Ordinance in question was passed, was at the time of its passing the absolute owner of the lands subject only to any liens of the city or Crown.

Such being the case, section 2 of the Ordinance, if it were given a retrospective operation, would undoubtedly have the effect of depriving him of the property if a tender were made under its provisions. In view of this effect, and of the fact that there is nothing in the Ordinance to indicate that section 2 was intended to have a retrospective operation, I would be obliged to hold that it had not such operation. See *Quilter* v. *Mapleson*,[1] and *Hickson* v. *Darlow*[2]. I see no reason why full effect should not be given to these provisions of the charter.

I was at one time in doubt whether they were not *ultra vires*, as they appeared to conflict with sections 54 and 57 of the Land Titles Act, owing to the provisions contained therein to the effect that after a certificate of title has been granted no instrument shall be effectual to pass any estate or interest in the land until the same is registered, and that the certificate of title shall, so long as it remains uncancelled, be conclusive evidence of ownership, but upon referring to the case of *Wilkie* v. *Jellett* in our own Court, which was affirmed by the Supreme Court of Canada,[3] I am led to the view that owing to the construction placed in that case upon those sections (they forming sections 59 and 62 of the Territories Real Property Act), and upon the general effect of the Act, the provisions referred to of the charter are not open to that objection. It was held in that case that the positive language of these sections was not intended to prevent a Court from giving effect to rights equitable or otherwise. Now, I think that there can be no question as to the authority of the Legislative Assembly to empower municipalities to sell lands for arrears of taxes and

[1] 52 L. J. Q. B. 44; 9 Q. B. D. 672; 31 W. R. 75. [2] 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 417. [3] 2 N. W. T. R. No. 1, p. 125; 26 S. C. R. 282.

Judgment.
Scott, J.

to transfer the land so sold to the purchasers. In fact such sales and transfers are recognized by section 97 of "The Land Titles Act," and that Act does not provide with respect to them, as it does with respect to sales under execution, that they shall not be of any effect until confirmed by a Judge. Section 97 provides that the transferee under a tax sale has the right to apply to be registered as the owner, and that implies that he must either in law or in equity be entitled as owner at the time he makes the application.

For the reasons I have stated I am of opinion that section 2 of the Ordinance in question does not apply to the sale now sought to be confirmed, and as I am satisfied from the materials before me that the sale was regular, I hold that the applicant is entitled to an order confirming it.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

REGINA v. MELLON.

Criminal law — Indian Act—Intoxicant—Sale—Indian—Halfbreed—Mens rea—Construction of Statutes.

Section 94 of the Indian Act (R. S. C. 1886 c. 43) provides that, "Every person who sells, exchanges with, barters, supplies or gives to any Indian or non-treaty Indian, any intoxicant . . . shall on summary conviction . . . be liable to imprisonment for a term not exceeding six months . . .

Held, following *Regina* v. *Howson*,[1] that a half-breed who has "taken treaty" is an Indian within the meaning of the Indian Act. A conviction of a person, licensed to sell liquor, for the sale of an intoxicant to such a half-breed was however quashed because the licensee did not know and had no means of knowing that the half-breed shared in Indian treaty payments.

Mens rea must be shown.

[ROULEAU, J., *June 18th, 1900.*

Statement.

Appeal from conviction made the 20th January, 1900. The facts sufficiently appear from the judgment.

J. C. F. Bown, for appellant.

C. de W. MacDonald, for respondent.

[*June 18th, 1900.*]

ROULEAU, J.—This is an appeal from a conviction made by William S. Edmiston and Stanislas Larue, Esquires, two justices of the peace in and for the North-West Territories, against John Mellon, of the town of Strathcona, in the said Territories, for that he the said John Mellon on the 19th January, 1900, supplied to one Charles Pepin, the said Charles Pepin then being a treaty Indian, an intoxicant.

It is admitted by Mellon that he supplied intoxicating liquor to Charles Pepin, but he says that he never knew, and had no means of knowing, that Pepin was a treaty Indian. Daignault, who was present when Pepin got the liquor, swore that he never knew that Pepin took treaty, although he knew he was a half-breed. Pepin himself was examined before me, and he swore that he never dressed like an Indian, that

[1] 1 Terr. L. R. 492.

Judgment.
Rouleau, J.

he had worked for one Donald McLeod freighting between Calgary and Edmonton for two summers, that he never wore moccasins, that he was driving a pair of horses and selling posts the day he got the liquor. As a matter of fact Pepin speaks English fluently, and dresses better than many ordinary white men, and there is no indication whatever in his appearance, in his language or in his general demeanour that he does not belong to the better class of half-breeds. It is a fact, nevertheless, that he took treaty about fifteen years ago, and according to *Regina* v. *Howson*,[1] a half-breed having taken treaty is an Indian within the meaning of the Indian Act.

In *Fowler* v. *Padget*[2] Lord Kenyon says: "It is a principle of natural justice and of our law, that the *actus non facit reum nisi mens sit rea*. The intent and act must both concur to constitute the crime." I find this principle fully discussed in all its phases in the case of the *Queen* v. *Tolson*,[3] and the conclusion, arrived at by the Court there, is that there can be no crime without a tainted mind. Although this is not an inflexible rule, as in the case of by-laws passed by municipal corporations, still an enactment must be construed with the qualifications ordinarily imported into the construction of criminal statutes, and in view of the various circumstances that may make the one construction or the other reasonable or unreasonable.

Would it be reasonable in this case to think that the licensee was guilty of an offence which he had no intention to commit, or which he had no means to ascertain? Of course if there was any evidence to show that he was not in good faith, or that he might have had some reason to think that the man was an Indian, or that he was suspicious and ran his chances, I would not then hesitate to confirm the conviction. Mellon was not doing anything morally or legally wrong when he sold the liquor to Pepin, he was doing only what he was entitled to do, in ordinary circumstances, according to the terms of his license.

[2] 7 T. R. 509, 4 R. R. 511. [3] 58 L. J. M. C. 97, 23 Q. B. D. 168, 60 L. T. 899.

Judgment.
Rouleau, J

I find a case very much *ad rem* with this case in *Sherras* v. *De Rutzen*,[a] where it was decided that in order to convict the licensee of a public house under sub-section 2 of section 16 of the Imperial Licensing Act, 1872, for serving a constable with liquor or refreshment while on duty, *mens rea*, or knowledge on the part of the defendant that the constable was on duty, must be proved.

The clause referred to in this decision is, "If any licensed person (11) supplies any liquor or refreshment whether by way of gift or sale to any constable on duty unless by authority of some superior officer of such constable, he shall be liable to a penalty not exceeding, for the first offence, ten pounds, and not exceeding for the second or any subsequent offence, twenty pounds."

In conclusion, I may add what WRIGHT, J., said in the case just referred to, "In the present case, if knowledge were unnecessary, no publican would be safe." Conviction quashed.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[a] (1895) 1 Q. B. 918; 64 L. J. M. 218; 15 R. 388; 72 L. T. 839; 43 W. R. 526; 18 Cox C. C. 157; 59 J. P. 440.

RE ESTATE HENRY STEIDEL, DECEASED.

Husband and wife — Devolution of Estates Ordinance — Married Women's Property Ordinance—Land Titles Act—Construction of Statutes—Imperial Acts in force in the Territories.

The Devolution of Estates Ordinance, c. 13 of 1901, (assented to June 12th, 1901), provides "1. The property of any man hereafter dying intestate and leaving a widow, but no issue, shall belong to such widow, absolutely and exclusively, provided that prior to his death such widow had not left him and lived in adultery after leaving him. (2) This section shall apply to the property of any person who died before the date of the coming into force of this Ordinance, in case no portion of the estate of such person has been distributed."

Held, that s.-s. 2 does not apply to a case where the widow died previously to the passing of the Ordinance, although no portion of the estate of the deceased husband had been distributed at the time of its passing.

The Ordinance respecting the personal property of married women, C. O. 1898 c. 47, provides that "a married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but shall in respect of the same have all the rights and be subject to all the liabilities of a *feme sole*."

Held, that notwithstanding this provision a husband is entitled to the whole of his deceased intestate wife's undisposed of personal property upon taking out letters of administration.

Section 3 of the Land Titles Act, 1894, 57 & 58 Vic. (Dom.) c. 28, which provides that "land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate," does not convert realty into personalty, but refers only to the manner of distribution.

The Imperial Intestates' Estates Act, 53-54 Vic. c. 29, is not in force in the Territories.

Where, therefore, S. died on the 24th December, 1899, intestate and without issue, leaving as his next of kin his father, and also his widow, who having married B., died on the 22nd April, 1901, leaving a child by B., the property of S. was directed to be distributed as follows: one-half of the personal property to the deceased's father and the other half to B. for his own benefit, on his taking out administration to his deceased wife; one-half of the real property to the deceased's father and the other half to the administrator of the widow's estate to be distributed, one-third to B. and two-thirds to her child.

[SCOTT, J., *January 21st, 1902.*

Statement. This was an application by the Public Administrator by originating summons for an order determining the persons entitled to share in the distribution of the estate. Deceased died on 24th December, 1899, without issue, and intestate, leaving a widow, who afterwards married one Englebert Buehler, and his father Franz Steidel. The widow died on the 22nd April, 1901, leaving a child by Buehler. Letters of administration were granted to the applicant on 10th June, 1901, and no portion of the estate was distributed prior to the passing of the Ordinance respecting Devolutions of Estates, c. 13 of 1901 (12th June, 1901).

N. D. Beck, K.C., Public Administrator, in person.

Wm. Short, for Franz Steidel.—The father is entitled to share as next of kin. Ordinance c. 13 of 1901 provides only for the case of a widow who survives. The widow died before the passing of the Ordinance, and therefore was never in a position to take under it. It contains no provision for the passing of shares of deceased persons.

J. C. F. Bown, for Englebert Buehler.—Widow was entitled to whole of estate of deceased by combined effect of section 11 of North-West Territories Act, section 3 of Land

Argument.

Titles Act, and section 1 of Imperial Intestates' Estates Act, 53 & 54 Vic. c. 29. Husband is entitled to whole of wife's personalty. C. O. 1898, c. 47, has not taken away husband's common law right as to property undisposed of by wife. The Statute of Distributions does not apply to property of married women. Leith's Real Property Statutes, at p. 204; Williams on Executors, 9th ed., pp. 347 and 1357.

Beck, for infant child of widow.—Ordinance c. 13 of 1901 is retroactive. It must be taken as speaking from the death of the husband, therefore widow would take the whole property. In any event she is entitled to one-half of the real estate under section 6 of the Land Titles Act. As between the present husband and child the child takes two-thirds of the wife's real estate under section 7 of the Land Titles Act and of the personalty under the Statute of Distributions. The effect of C. O. 1898, c. 47, is to make wife's property hers absolutely. It is a new departure. It is not a separate property Act, but gives her a greater interest than any other Act respecting property of married women. The idea of separate property is eliminated. The married woman is given as absolute an ownership as a *feme sole* or a man. When wife is freed from disabilities her property goes to the next of kin. Williams on Executors, 9th ed., p. 348; *In re goods of Worman*,[1] *In re goods of Farraday*,[2] *In re goods of Stephenson*,[3] *In re goods of Brighton*.[4]

If husband is entitled to whole of personal estate he is not entitled to it by his marital right, but must take out letters of administration. *Attorney-General* v. *Partington*.[5]

[*January 21st, 1902.*]

SCOTT, J.—This is an application by the administrator of the estate of deceased for an order determining certain questions arising in the administration of the estate.

Deceased died on 24th December, 1899, without issue and intestate. He left a widow who afterwards married one

[1] 1 Sw. & Tr. 513; 29 L. J. P. 164; 5 Jur. (N.S.) 687. [2] 2 Sw. & Tr. 369; 31 L. J. P. 7; 7 Jur. (N.S.) 252. [3] L. R. 1 P. & D. 289; 36 L. J. P. 20. [4] 34 L. J. P. 55. [5] 3 H. & C. 193; 33 L. J. Ex. 281; 10 Jur. (N.S.) 825; 10 L. T. 751; 13 W. R. 54.

Judgment. Scott, J.

Buehler. She died on 22nd April, 1901, leaving a child by Buehler. Letters of administration to the estate of the deceased were granted to the applicant on the 10th June, 1901. No portion of the estate was distributed by him prior to the passing of the Ordinance, c. 13, of 1901 (12th June, 1901). Franz Steidel, the father of the deceased, is his next of kin.

The first question submitted is whether Franz Steidel, the father of the deceased, is, in view of the provisions of section 1 of the Ordinance referred to, entitled to any share of the estate.

The following is the section referred to:

1. "The property of any man hereafter dying intestate and leaving a widow but no issue shall belong to the widow absolutely and exclusively, provided that prior to his death such widow has not left him and lived in adultery after leaving him.

2. "This section shall apply to the property of any person who died before the date of the coming into force of this Ordinance in case no portion of the estate of such person has been distributed."

In my opinion the effect of s.-s. 2 is to make the section applicable only to cases where the widow of the deceased was living at the time of the passing of the Ordinance.

It is apparent that the only object of the section was to make better provision for the widow than she had theretofore been entitled to, and, for that purpose, and that purpose alone, it appears to have been thought advisable that, in cases within sub-section 1, even the interest of the next of kin, which vested immediately upon the death of the husband, should be divested. It surely could not have been the intention to deprive the next of kin of such vested right in cases like the present where the sole object of the provision could not be attained nor, in my view, does any such intention appear.

Although the sub-section may be said to give the provision, to some extent, a retrospective effect by making it applicable under certain circumstances to the property of a person

Judgment.
Scott, J.

dying before it was passed, there is no provision for its taking effect, in such case, from the time of death. It takes effect only from the time it was passed and, such being the case, his widow dying before that time could not at any time have acquired any interest under it. There was nothing which could pass to her personal representatives at her death, and, in order to give to the provision the effect contended for on behalf of Buehler and the infant in this case, it appears to me that it should have provided that, in the event of the widow dying before the passing of the Ordinance, her personal representatives should be entitled.

In *Reid* v. *Reid*[6] Bowen, L.J., referring to the maxim that, except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights, says: "It seems to me that in construing a statute which is to a certain extent retrospective, and even in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant."

It was further contended on behalf of Buehler that by the combined effect of the N. W. T. Act and Imperial Act c. 53-54 Vic. c. 28, s. 1, the widow of the deceased became entitled to the whole of his estate both real and personal. The answer to this contention is that the latter Act is not one which is applicable to the Territories. In Hardcastle on Statutes, 2nd ed., at p. 447, it is stated that "theoretically the British Parliament can legislate for the whole Empire; but it is never presumed to legislate except for the United Kingdom unless apt words are inserted in the Act."

The next question is whether Buehler, the husband of the widow of the deceased, is either *jure mariti* or as her administrator with or without letters of administration to her estate,

[6] 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100; 34 W. R. 232.

Judgment. Scott, J.

entitled, to the exclusion of the infant child of his marriage, to such share of the personal estate of the deceased as his wife was entitled to.

It was conceded by counsel for the infant that under the Acts respecting the personal property of married women in force up to the time of the passing of C. O. 1898, c. 47, the husband was entitled, upon the death of his wife, to the whole of her separate personal estate in respect of which she died intestate, but it was contended by him that, by reason of that Ordinance, a different rule must now prevail, that its effect is to make her the absolute owner of her own property and to give her the same control over it as if she were a *feme sole* freed from all restrictions which were contained in the former Acts with respect to her powers in relation to her separate estate, and that the Ordinance is an entirely new departure from the former Acts respecting the separate estate of married women in that it gives her a greater interest in her property than was given by them.

It may be true that such is the effect of the Ordinance, but nevertheless, like the other Acts referred to, it is silent as to what is to become of her property, undisposed of by her prior to her decease.

In *In re Lambert, Stanton* v. *Lambert*,[7] Stirling, J., referring to the Imperial Married Women's Act of 1882, says, at p. 635, "The Act simply confers on married women the capacity to acquire, to hold and dispose, by will or otherwise, of property as if they were *feme sole*. None of these matters are in question. The acquisition and holding of the property are past and gone. The dispute is as to the devolution of the property undisposed of. Now with this the Act does not purport to deal. In this respect the language of the Act is in marked contrast with that of the 25th section of 20-21 Vic. c. 85, which provides that in case of judicial separation the wife shall from the date of the sentence and whilst the separation shall continue be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her, and such

[7] 39 Ch. D. 626; 57 L. J. Ch. 927; 59 L. T. 429.

property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead."

In my view this language is applicable to C. O. c. 47 to the same extent as it is to the Act to which it refers.

I find that in the Province of Ontario provision is made by R. S. O. c. 127, s. 5, for the devolution of the property of a married woman undisposed of by her. Under it one-third of both real and personal property goes to the husband if she leaves issue, and one-half if she leaves no issue, and subject thereto it devolves as if her husband had predeceased her. It appears to me that some such provision is required here in order to entitle her issue to share in her personal estate.

In my opinion Buehler is entitled to the whole of the share of the personal estate of deceased to which his wife became entitled, but, in order to obtain it, he must take out letters of administration.

The question last referred to having been answered in the affirmative, it becomes necessary to answer the further question whether, in view of the provisions of the Land Titles Act relating to the descent of land, and of the declaratory Act 63-64 Vic. c. 27, s. 5, the real estate of the deceased was converted into personalty thereby entitling Buehler to the share of the real estate of the deceased to which his wife became entitled.

Section 3 of the Land Titles Act is as follows:

"3. Land in the Territories shall go to the personal representatives of the deceased owner in the same manner as personal estate now goes, and shall be dealt with and distributed as personal estate."

If this section stood alone it might be open to the construction that its effect is to convert lands into personal property upon the death of the owner, but there are other provisions of the Act which point to the conclusion that such was not the intention.

Judgment.
Scott, J.

Section 6 provides that no widow whose husband died on or after 1st January, 1897, shall be entitled to dower in the lands of her deceased husband, but she shall have the same right in such lands as if it were personal property.

It follows from this that a widow whose husband died before that date is still entitled to dower in the lands he died possessed of, and in order that she may have dower therein the lands must continue as lands and not as personal property. Again, if, upon the death of her husband, his land became personal property, the latter part of the provision would be unnecessary legislation, because she would in that case be entitled to share in it as personal property, not as if it were personal property. The use of the words "as if it were personal property" is in itself a strong indication that conversion was not contemplated.

Sections 12, 13, 14, and 15 all refer to lands and interests in lands as such subsequent to the death of the owner, and thus afford a similar indication.

In view of the other provisions of the Act to which I have referred, I am of opinion that the effect of section 3 is not to convert lands into personal property upon the death of the owner, but that the proper construction to be placed upon it is that the land shall be dealt with and distributed not as personal property, but merely as if it were personal property.

I reserve the question of costs of the application, as I wish to hear the parties upon it.

[An order was subsequently drawn up to the effect stated in the head-note.]

REPORTER :

J. E. Wallbridge, Advocate, Edmonton.

ROBERTSON v. WHITE.

Practice—Counterclaim—Adding parties to.

The practice of the Supreme Court of the Territories permits a defendant to set up a counterclaim which raises questions between himself and the plaintiff, along with other persons, and to add such other persons as parties by the counterclaim; the English practice respecting counterclaims contained in Order 21, rr. 11, 12, 13, 14, and 15,* being in force in the Territories.

[SCOTT, J., *March 3rd, 1902.*

Statement.

This was an application by the plaintiff and by H. B. R. and W. S. R. to strike out the defendant's counterclaim, whereby the said H. B. R., W. S. R. and one N. W. had been joined along with plaintiff as defendants to the same, on the grounds that the practice of the Court does not authorize the delivery of a counterclaim against the plaintiff along with parties not parties to the action, nor does it authorize the adding of parties to the action by way of counterclaim.

N. D. Beck, K.C., for plaintiff and added defendants.—The defendant is right if the English practice as contained

* NOTE.—(11) Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counterclaim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver to the plaintiff.

(12) Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be endorsed in the form No. 2, in Appendix B., or to the like effect.

(13) Any person not a defendant to the action, who is served with a defence and counterclaim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

(14) Any person named in a defence as a party to a counterclaim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

(15) Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply, apply to the court or a judge for an order that such counterclaim may be excluded, and the court or a judge may, on the hearing of such application, make such order as shall be just.

Argument.

in Order 21, rr. 11, 12, 13, 14 and 15, is in force in the Territories. I contend that it is not: *Conrad* v. *Alberta Mining Co.*,[1] *Boardman* v. *Handley*.[2] Our Rule 110, Order XI., introduces counterclaim against plaintiff alone, but the rules are silent as to any other mode of counterclaim. Order XI. deals with "pleadings generally," and collects such portions of the English Orders as were intended to be in force here. The latter part of Rule 110, "and if in any case in which the defendant sets up a counterclaim, the action of the plaintiff is stayed or dismissed, the counterclaim may nevertheless be proceeded with," is taken from the English Order 21, r. 16, and that is the only portion of the Order which appears in our Ordinance, and all that was intended should apply. If this contention is not correct, then there are other provisions which would be in force here, viz., rr. 18, 19 and 21.

C. de W. MacDonald, for defendant:—Subsection 3 of section 8 of the Judicature Ordinance, which is identical with subsection 3, section 24, of the English Judicature Act, 1873, as to claims against plaintiff and other parties, shows that such counterclaim is authorized by our practice even in the absence of rules. Our Rule 110 only contains the portion of the practice respecting counterclaim which appears in English Order 19 on "pleadings generally," all the rest of the practice on counterclaims appears in English Order 21 on "Defence and Counterclaim." Rules 11 to 15 are a subject apart from the rest of the rules in that order, and might have been headed, "bringing in other parties by way of counterclaim," and we are not tied down by the headings. The subject not being touched upon by our Ordinance the English Rules are, therefore, in force under section 21.

Beck, in reply:—Subsection 3 of section 8 of the Judicature Ordinance does not affect the question. Neither the Legislature nor the Judges have made any rules to carry out the provisions in the subsection, and until rules are made, it is inoperative.

[1] 4 Terr. L. R. 412. [2] 4 Terr. L. R. 266.

[*March 3rd, 1902.*]

Judgment.

Scott, J.

SCOTT, J.—Held that the English Rules in question are in force in the Territories, and dismissed the application.

REPORTER :

J. E. Wallbridge, Advocate, Edmonton.

IMPERIAL BANK v. HULL.

Bank Act—Bill of lading—Property in goods—Passing of property—Sales of goods ordinance — Form of action — Action for price — Conversion—Measure of damages—Merchantable goods — Implied warranty—Setting up breach of warranty in diminution or extinction of price—Practice—Pleading—Claim of relief—Payment into Court—Judgment on plea of payment into Court—Costs—Appeal as to costs—Amendment of pleadings—Moulding pleadings to accord with evidence

The judgment of ROULEAU, J. (4 Terr. L. T. 498) varied by striking out the order to amend the plaintiffs' statement of claim as unnecessary, and directing that judgment be entered for the defendant, and that the amount paid into Court by the defendant be paid out to the plaintiffs; the plaintiffs to have the costs of the action up to the time of the second payment into Court; the defendants to have the general costs of the action after that date, and the plaintiffs to have the costs of the issues upon which they succeeded.

The trial Judge having reserved judgment came to the conclusion that the plaintiffs were entitled to the moneys paid into Court by the defendant. He held, however, that they were not so entitled under the form of the statement of claim (4 Terr. L. R. p. 498), but only under a claim for conversion, and accordingly in his reasons for judgment—the formal order had not been taken out before the appeal—he stated that under the authority of Rule 189 of the Judicature Ordinance, C. O. 1898, c. 21, he "amended the statement of claim so as to determine the real question at issue according to the evidence adduced," and thereupon directed judgment to be entered for the plaintiffs for the amount paid into Court, without costs.

Held (1), (MCGUIRE, C.J., doubting), that no amendment was necessary; that if, as in this case the facts alleged showed a wrongful conversion that was sufficient, although the specific words were not used, and that so far as the relief claimed was concerned the Court was entitled under English O. 20, rule 6 (introduced by J. O. 1898, s. 21), and J. O. 1898, s. 8, s.-s. 5, to give, and ought to give, any appropriate relief to which the plaintiffs were entitled, though it was not specifically claimed.

(2) That where money is paid into Court (though with a denial of liability) it is to be taken to be pleaded as an alternative defence going to the whole cause of action, and if the plaintiff fails to show himself entitled to a greater sum the *defendant* is entitled to judgment on this defence, and that the proper judgment as to costs is:—The plaintiff to have the costs of the action up to the time of payment into Court; the defendant to have the general costs of the action from that time and the plaintiff to have the costs of the issues

found in his favour. *Wagstaff* v. *Bentley*[1] (taken as interpreting *Wheeler* v. *The United Telephone Co.*,[2] *Goutard* v. *Carr*[3] and *Wood* v. *Leetham*[4]), followed and applied.

(3) That although by Rule 500 of the J. O. C. O. 1898, c. 21, no appeal lies without leave from any judgment or order as to costs only which by law are left to the discretion of the Court or Judge making the judgment or order; and although the Court will not as a rule interfere with such discretion unless it has been exercised on a wrongful principle, nevertheless when the judgment or order dealing with the question of costs is appealed from on other grounds, the Court has power under Rule 507 to make any order which ought to have been made by the Court or Judge, and this rule authorizes the Court in banc to deal with the question of the costs below in any way which may appear necessary or expedient by reason of its varying or reversing the judgment or order appealed from.

(4) That there were therefore two grounds on which to vary the trial Judge's direction as to costs:

(*a*) That the trial Judge acted on a wrong principle, and

(*b*) That his direction amending the plaintiff's statement of claim was unnecessary and improper.

The trial Judge's direction as to costs was therefore varied.

Per McGUIRE, C.J. (1) Against the contention of the plaintiffs that the measure of damages was the face value of the Bill of Exchange inasmuch as the defendants' conduct prevented them from returning the bill of lading to the consignors and demanding back the amount advanced upon its security, that the measure of damages was the value—but only the actual value having regard to their condition and quality—of the goods to the plaintiffs, not necessarily what the defendant could or did sell them for. The plaintiffs' contention was unsound, inasmuch as upon the dishonor of the draft they were entitled to look to the drawers at once and were not obliged to give credit for the amount of the collateral security until they had actually realized thereon, *Molsons Bank* v. *Cooper*.[5] The bill of lading was of no value except to give the plaintiffs the property, and the right to the possession of the goods. The damages in an action by either the bank or the consignors against either the defendant or a stranger would have been the same, viz.: the value of the goods, because now by virtue of section 51 of the Sales of Goods Ordinance any breach of warranty—here the defective quality of the goods—can be set up in diminution of extinction of the price sued for.

(2) The difference in language between the Imperial Bills of Lading Act (18-19 Vic. c. 111, s. 1), and the Bank Act (defining the position of an endorsee of a bill of lading), considered.

(3) Money paid into Court at the opening of the trial without objection, and without any terms being imposed, must be taken to have been paid in under the rules in that behalf, *Goutard* v. *Carr*.[3]

Per WETMORE, J. (RICHARDSON and SCOTT, JJ., concurring).

(1) Had the consignors as in *Shepherd* v. *Harrison*[6] sent the bill of exchange with the bill of lading attached, directly to the defendant, they might have sued for the price on the basis of the defendant's acceptance of the goods or for damages on the basis of a conversion. In the former case the defendant could have set up the defective quality of the goods in diminution of the price. In the latter case the measure of damages would have been the value of the goods to the consignors which would probably be the same as in the former case. The bank as the holders of the bill of lading were in no better position than the consignors.

[1] (1901) 71 L. J. K. B. 55; (1902) 1 K. B. 124. [2] (1884) 13 Q. B. D. 597; 53 L. J. Q. B. 466; 50 L. T. 749; 33 W. R. 295. [3] (1883) 13 Q. B. D. 598*n*; 53 L. J. Q. B. 467*n*; 33 W. R. 295*n*. [4] (1892) 61 L. J. Q. B. 215. [5] (1896) 26 S. C. R. 611. [6] (1871) L. R. 5 H. L. 116; 40 L. J. Q. B. 148; 24 L. T. 857; 20 W. R. 1; 1 Asp. M. C. 66.

(2) *Semble*, the right and title vested in the plaintiffs under s. 73 of the Bank Act by virtue of the bill of lading was only the right and title to the goods, and not contractual rights which the consignor had against the purchaser.

Circumstances raising an implied warranty that goods are merchantable considered.

[*Court in banc, June 14th, 1902.*

Statement.

The plaintiffs appealed from the judgment of ROULEAU, J., reported 4 Terr. L. R. 498.

The appeal was heard July 26th, 1901.

P. McCarthy, K.C., and *C. A. Stuart*, for appellants:—The plaintiffs took the bill of lading as security for the amount advanced by them to the Parsons Produce Co. upon the bill of exchange, which they are authorized to do by the Bank Act. The bill of lading, which was a valuable security, was handed to the defendant for the purpose of enabling him to inspect the goods only, and having parted with the bill of lading he must accept and pay the draft: *Shepherd* v. *Harrison*,[6] *Glover* v. *Southern Loan and Savings Co.*[7] The defendant's re-shipping and selling the goods constituted a conversion of them: *Rew* v. *Payne*.[8] The measure of damages is not what the goods realized, but what they were worth to the plaintiffs: *Acatos* v. *Burns*,[9] *Ewbank* v. *Nutting*,[10] and they were worth to the plaintiffs the amount of the bill of exchange. The defendant, having accepted the goods by dealing with them, must pay the plaintiffs the price he agreed to pay the Parsons Produce Co., and any liability for defect in the goods is not transferred to the plaintiffs, but remains in the Parsons Produce Co., against whom the defendant still has his recourse. There is no privity of contract between plaintiffs and defendant: *Parker* v. *Palmer*,[11] *Street* v. *Blay*,[12] *Chapman* v. *Morton*.[13] *Gurney* v. *Behrend*,[14] was decided before the Bank Act was passed. The plaintiffs are entitled to their full costs of the action. No amendment of the statement of claim was necessary.

[7](1901) 1 O. L. R. 59. [8](1886) 53 L. T. 982; 5 Asp. M. C. 515. [9](1878) 3 Ex. Div. 282; 47 L. J. Ex. 566; 26 W. R. 624. [10](1849) 7 C. B. 797. [11](1821) 23 R. R. 313; 4 B. & Ald. 387. [12](1831) 36 R. R. 626; 2 B. & Ad. 456. [13](1843) 11 M. & W. 534; 12 L. J. Ex. 292. [14](1854) 23 L. J. Q. B. 265; 3 El. & Bl. 622; 18 Jur. 856; 2 W. R. 425.

Argument.

J. A. Lougheed, K.C., and *R. B. Bennett*, for respondent: —The plaintiffs are in no better position with relation to the defendant, the buyer, than the sellers, the Parsons Produce Co., would be. By section 14 of the Sale of Goods Ordinance (*a*) there was an implied contract on the part of the sellers that the buyer should have possession of the goods free from any charge or encumbrance of any third party not known or declared to the buyer before or at the time the contract was made; by section 16 there was an implied contract that the goods were of merchantable quality and reasonably fit for human food; by section 33 the seller was bound to afford the buyer a reasonable opportunity of examining the goods; by section 51 the buyer may set up any breach of warranty by the seller in diminution of the price. By section 73 of the Bank Act the plaintiffs acquired only the rights and title of the Parsons Produce Co.: *Cox* v. *Bruce*,[15] *Gurney* v. *Behrend*,[14] *Thompson* v. *Dominy*,[16] *Sewell* v. *Burdick*,[17] *Lickbarrow* v. *Mason*,[18] *Kemp* v. *Falk*,[19] Bills of Lading Act (Imp.), 18 & 19 Vic. c. 111, s. 1. The bill of lading was worth to the plaintiffs only what the goods were worth. The plaintiffs can recover from the defendant only what the Parsons Produce Co. could have recovered, viz., the value of the goods at the contract price, less what the defendant is entitled to deduct therefrom for breach of warranty, which amount the defendant paid into Court. There was no wrongful retention of the bill of lading by the defendant to make him liable in conversion under *Shepherd* v. *Harrison*.[6] The statement of claim was insufficient. The plaintiffs are not entitled to costs, not having accepted the money paid into Court. As to the measure of damages, *Wills* v. *Wells*.[20] As to costs, *Goutard* v. *Carr*,[3] *Wheeler* v. *United Telephone Co.*,[2] and *Wood* v *Leetham*.[4]

(*a*) Cap. 39 of Consolidated Ordinances, 1898.

[15] (1886) 18 Q. B. D. 147; 56 L. J. Q. B. 121; 57 L. T. 128; 35 W. R. 207; 6 Asp. M. C. 152. [16] (1845) 14 M. & W. 403; 14 L. J. Ex. 320. [17] (1884) 10 App. Cas. 74; 54 L. J. Q. B. 156; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376. [18] (1787) 1 R. R. 425; 4 Bro. P. C. 57; 1 H. Bl. 360; 5 Term. Rep. 683; 6 Term. Rep. 131. [19] (1882) 7 App. Cas. 573; 52 L. J. Ch. 167; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1. [20] (1818) 8 Taunt. 264; 2 Moore 247.

[*June 4th, 1902*]

Judgment.
McGuire, C.J.

McGUIRE, C.J.—This is an appeal from the judgment of the late Mr. Justice ROULEAU.

The plaintiffs sued the defendant for the amount of a draft drawn upon the defendant by the Parsons Produce Co., of Winnipeg, payable to the order of the plaintiffs, but not accepted by the defendant.

The plaintiffs had for value taken the draft, and, as collateral security therefor, an assignment of a bill of lading of a quantity of poultry agreed to be supplied by the Parsons Produce Co. to the defendant for the price of which the draft had been made. On the arrival at Calgary of the car containing the poultry, defendant's manager, Mr. Gillies, wishing to examine the goods before accepting the draft, obtained the bill of lading from the plaintiffs for the expressed purpose of enabling him to so examine. At the first partial inspection the true condition of the poultry was not apparent, but on removal to the warehouse and on opening up the crates it was found that the goods were not according to contract, and that a large portion was unfit for food. The following day, on further examination, this was confirmed, and the Parsons Produce Co. were informed by telegram, and on the 20th—two days after getting the bill of lading—the bank was informed that the draft would not be paid, on account of the condition of the poultry. The defendant's manager tried to get back the bill of lading from the railway company, but was unable to do so as the practice of that company is in such cases to retain and cancel the bill. The draft was not accepted nor was it paid.

The defendant says that he sold all the poultry that was fit for food, the rest being destroyed except a quantity shipped at the request of John Parsons, to Vancouver; that an account was kept of all that was sold; and the value, at invoice price, was paid into Court. The consignment to Vancouver never realized anything to the defendant, but, as this was done without authority from the plaintiffs, the defendant on the morning of the trial, paid into Court a further sum which

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included the amount of this consignment at invoice price. The plaintiff declined to accept the money paid into Court, and proceeded with the trial.

The learned trial Judge found that when the defendant refused to accept the draft he was guilty of a conversion in dealing with the goods, and was liable to the plaintiffs for the value of the poultry, but he also found that the sums paid into Court were sufficient to satisfy the damages sustained by the plaintiffs.

The trial Judge interpreted the plaintiffs' statement of claim to be one for the amount of the unaccepted draft, and that on the pleadings as they stood, the plaintiffs could not succeed. He held, however, that the facts in evidence would entitle them to succeed as for a wrongful conversion and to recover the value of the goods. He, therefore, ordered the statement of claim to be amended accordingly. He concludes his judgment as follows:

"The plaintiffs are, therefore, entitled to receive the amount deposited in Court to the credit of this cause, to wit, the sum of $827.62 deposited with the filing of the defence, and a further sum of $376.90, $125.08 of which was for goods delivered to the Parsons Produce Co. without the consent of the plaintiffs, making in all the sum of twelve hundred and four dollars and fifty-two cents ($1,204.52) for which sum the plaintiffs are entitled to judgment without costs."

The plaintiffs, on this appeal, do not contend that they were entitled to recover upon the unaccepted draft, and say that they never so claimed, and that while the language of their statement of claim may not have set out distinctly their real cause of action, it sufficiently alleged the facts, and if so they were entitled without amendment to such remedy as the facts would justify. They say that the defendant was guilty of conversion and that they are entitled to the value of the poultry, viz., the value of the goods to them, and that such value was the amount of the draft, because, as they contend, owing to the non-return of the bill of lading and the conversion of the goods they were unable to return it to the Parsons Produce Co., and to demand back the amount paid

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by them for the draft. It is not contended that the defendant wilfully detained the bill of lading, but the plaintiffs say that he so dealt with it, by delivering it to the railway company, as to prevent him returning it to the plaintiffs. The defendant, on the other hand, says that he was entitled to inspect the goods before accepting the draft and it was plaintiffs' duty to afford him the necessary facilities for so inspecting; that plaintiffs knew and assented to the use he was going to make of the document, and that it was not the defendant's fault that he was unable to return it to the plaintiffs.

Dealing with the plaintiffs' contention, I agree that they are entitled to damages measured by the value of the goods —and the value thereof to them—not necessarily what defendant could or did sell them for—but I cannot agree that such value was the face of the draft nor is the reason offered a good one, viz., that by reason of defendant's acts they were unable to look to the Parsons Produce Co. Upon the dishonour of the draft they were entitled to look to the drawers, and were not obliged to give credit for the collateral security until they had actually realized thereon: *Molsons Bank* v. *Cooper*.[5] They were not purchasers of the poultry—by the Bank Act they could take the bill of lading as security, and plaintiffs admit that it was taken only as security. Had the defendant got possession of the draft itself and refused to return it, then the plaintiffs might have been entitled to claim its face value. A bill of lading, however, is not a bill of exchange, nor was it of any value to the plaintiffs except to give them a property in, and a right to the possession of, the goods. Had the defendant been a total stranger to the plaintiffs, and had he wrongfully got possession of the goods and converted them to his own use, what civil remedy would plaintiffs have had to recover the value of the goods? There was no contract between the plaintiffs and the defendant, and their right to sue him is either because he wrongfully converted the goods to his own use and deprived the plaintiffs of them, or because they had acquired all the right and title of the owners and could sue for the price. The damages in either case would be the value of the goods, under

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the circumstances in this case. The evidence satisfied the trial Judge that the defendant paid into Court the invoice price of all the goods that were fit for food—the poultry that was mildewed and unfit for food and thrown away was of no value to the plaintiffs or anyone else; the defendants therefore paid into Court the invoice price of (practically) all the poultry covered by the bill of lading. I think the learned trial Judge was justified in finding that the amount paid in was at least sufficient to satisfy the damages of the plaintiffs, even assuming that the measure of damages was the value, to the plaintiffs, of the poultry. It was argued that by the Bank Act, s. 73, the plaintiffs had all the rights of the Parsons Produce Co. If so, what could that company, if plaintiffs, have recovered? At one time the law was that in an action for the price they would have been entitled to the amount agreed on, the defendant not being allowed to set up any breach of warranty in reduction or extinction of the price, but being left to a cross action for damages for such breach. But that is not the law now. The defendant is entitled to set up such breach of warranty in diminution or extinction of the price (s. 51, Sales of Goods Ordinance).

A distinction was drawn between the Bills of Lading Act in England (18-19 Vic. c. 111, s. 1) and section 73 of our Bank Act, inasmuch as the former, in defining the position of an endorsee of a bill of lading uses the words, "Shall have transferred to, and vested in him, all rights of suit and be *subject to the same liabilities* as if the contract . . . had been with himself," while our Act omits mention of "liabilities." Plaintiffs contended that in England the plaintiffs would, as endorsees of the bill of lading, be liable equally with the consignors—that the omission from our Act of the provision as to "liabilities" indicates an intention that the endorsees (the bank) should have the *rights* but not the *liabilities* of the owners. The rights of the owners under the contract would have been a cause of action for the price of the goods, and in such an action the defendant could set up the breach of warranty in diminution or extinction of the price, and in addition he might have counterclaimed or

brought a cross action for any further damage he has suffered. The right of the defendant, in this action, if it be treated as one *ex contractu*, to set up the breach of warranty in diminution of the price, is not based on the "liability" of the owner, but by reason of its being a limitation on the measure of the owner's rights which plaintiffs claim to have vested in them. Had defendant attempted to counterclaim against the bank for further damage suffered by him, the question of whether the bank would be liable in respect of such further damage would arise on the contention that this is a "liability" for which our Act does not make the transferees of the bill of lading responsible. Judgment. McGuire, C.J.

But if, instead of suing on the contract the plaintiffs are proceeding for not accepting the draft and refusing to return the bill of lading, in such an action the proper measure of damages would be, not the face of the draft but, as was decided in *Rew* v. *Payne*,[8] "the value of the cargo" with the addition under the special circumstances of that case, of an allowance of 2½ per cent. for the detention.

The learned Judge found that the plaintiffs were entitled to the money paid into Court, and, following the decisions in England of *Goutard* v. *Carr*,[3] and *Wheeler* v. *United Telephone Co.*,[2] the verdict should be for the defendant, the payment into Court being an alternative defence going to the whole root of the action. It was urged for the plaintiffs that as part of the money was paid in after joinder of issue, and on the morning of the day of trial, the plaintiffs were entitled to their costs of the action. In *Goutard* v. *Carr*[3] it was held that money paid into Court must be deemed as paid in under the Rules in that behalf; for if not so paid the clerk had no authority to receive it at all. It does not appear that any objection was made by the plaintiffs to the payment made on the opening of the trial, or that any terms were imposed as the price of leave to pay in at so late a date.

Being in fact paid in and, so far as appears, without objection, I think it must be treated as if paid in with statement of defence, and if so the plaintiffs would be entitled to the money, but the verdict would be for the defendant.

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McGuire, C.J.

As to the amendment which the trial Judge thought necessary, my learned brethren are agreed that the pleadings disclosed sufficient facts to entitle the plaintiffs to succeed without any amendment, and while I entertain very serious doubts as to that, I do not feel justified in dissenting.

Concurring, then, in their view as to this point, I agree with the disposition of the costs in the Court below as set out in the judgment of my brother WETMORE. I also agree as to there being no costs of this appeal to either party, and for the reasons given by Mr. Justice WETMORE. Otherwise also I agree in the result as stated in this judgment.

WETMORE, J.—The Parsons Produce Co. on 30th November, 1899, shipped by Grand Trunk Railway at Centralia in Ontario, a quantity of poultry consigned to the Molsons Bank, Calgary, and procured a bill of lading therefor. This poultry was intended for the defendant, who was a purveyor of meat at Calgary, and was forwarded with the object of filling a contract made by the Produce Company with the defendant to supply poultry. I think it may be inferred that this poultry was to be used in the defendant's business for sale for human food, and it was not disputed that the Produce Company were dealers in poultry; consequently there was an implied condition that the goods would be of merchantable quality. The bargain of sale was made at Calgary between the agents of the Produce Company and of the defendant, and the uncontradicted evidence of Gillies, the defendant's agent, established that by the agreement the poultry was to be first class dry, picked and drawn, and the heads and wing feathers off, packed in cases, frozen, and to be delivered at Calgary frozen and in good condition. The Produce Company procured the bill of lading to be endorsed by the Molsons Bank to the plaintiffs, and thereupon drew a bill of exchange upon the defendant in favour of the plaintiffs for $2,885.89, the price of the poultry. The plaintiffs discounted this bill at their agency in Winnipeg, placing the proceeds to the credit of the Produce Company, and taking the bill of lading as collateral security. The bill of exchange with the bill of lading attached was forwarded by the plaintiffs'

agency at Winnipeg to their agency at Calgary with instructions that the bill of lading was to be delivered only on payment of the draft. About the 14th December the draft with the bill of lading attached was presented to the defendant's agent Gillies for acceptance, but he refused to accept the draft on the ground that the poultry had not arrived. The draft with the bill of lading attached was again presented on or about the 18th December, after the poultry had arrived, to Gillies, who again declined to accept, this time on the ground that he wished to have the bill of lading for the inspection of the goods. There may be some doubt under the evidence whether Gillies actually saw either the bill of exchange or the bill of lading when presented to him, but he was aware that the plaintiff held the bill of exchange, and he was also aware, before he took possession of the goods, that the bank held the bill of lading, because he got it from the bank's official, and therefore it is immaterial whether or not he saw these bills at the time the bill of exchange was presented for acceptance. All the transactions in this case were, so far as the defendant is concerned, carried on by Gillies, who was the defendant's agent for the purpose, which is not disputed. Gillies applied to plaintiffs' acting agent at Calgary and obtained the bill of lading *for the purpose of examining the poultry*. He had, previous to obtaining this document, gone to the station and asked the railway company's agent to give him access to the car containing the poultry, and had been informed by such agent that he would have to produce the bill of lading *and deliver it up* before he could get access to the poultry, but it does not appear that this fact that the bill of lading would have to be delivered up was communicated to the plaintiffs' agent by Gillies or that such agent was aware that this was necessary. Having obtained this document Gillies delivered it to the station agent, who cancelled it. Gillies then examined a few cases of the poultry at the car, and thereupon removed the whole consignment to the defendant's warehouse. Some of the poultry was delivered by the defendant to the Palace Meat Market Co., at Calgary, in which the defendant was interested; some was forwarded to the defendant's branch places of business at

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Banff, Golden and Field to be sold there, and some was shipped to the Parsons Produce Company at Vancouver. Of those delivered to the Palace Meat Market Company and those shipped to defendant's branches some was sold. A large quantity of the poultry did not answer the conditions of sale. It was not in good condition, some was not dry plucked, some not drawn, some had their heads and wing feathers on, and some were utterly unfit for human food, were not merchantable, and were condemned and thrown away. Gillies, upon discovering that the poultry was not up to the contract, refused to accept the bill of exchange and gave as his reasons for such refusal the condition in which he found the poultry. The plaintiffs' agent then asked for the bill of lading, but the railway company's agent refused to give it up, and therefore Gillies was unable to return it to the plaintiffs. It was claimed on the part of the plaintiffs that the defendant had delivered the poultry to the Palace Meat Market Company, and made the shipments to his branches at Banff, Field and Golden after he had discovered the condition of the poultry. It is not necessary to decide this question, because it is immaterial. As a matter of fact he did so deliver and ship the poultry, he never got it back or got it in a position to return it to the Parsons Company or to the plaintiffs, or so that they could take possession of it, but as a matter of fact he or his agents went on selling the poultry after he had discovered the condition of it; and this was such a dealing with the property that the Parsons Produce Company or the plaintiffs, if they desired to do so, were in a position to insist that he had accepted the goods, and that, whether he had made the delivery and done the shipping in question before he became aware of the condition of the poultry or not. The plaintiffs in their statement of claim set forth the facts substantially and in a general way as I have stated them (omitting, of course, conclusions of law and inferences of fact which I have found, and also omitting the conditions of the bargain of sale between the Produce Company and the defendant), and claim for relief payment of the amount of the bill of exchange and interest. The defendant pleaded a very lengthy defence, and, while denying

liability, paid into Court with such defence $827.62 in full satisfaction of the plaintiffs' cause of action, and counter-claimed. It is not necessary to refer any further to the statement of defence, and, as to the counterclaim, it was abandoned at the trial. The action was tried before the late Mr. Justice ROULEAU. The defendant on the opening of the case paid into Court the further sum of $576.90, making in all $1,204.52 paid into Court in satisfaction of the plaintiffs' cause of action. Judgment. Wetmore, J.

The defendant sold all the poultry that was saleable except that portion shipped to the Produce Company at Vancouver; a large portion for less than invoice prices—I presume some for more, and the moneys paid into Court represented the value of the poultry so sold, and that of the shipment to Vancouver at invoice prices. It was not disputed that this represented the fair value of the merchantable poultry.

The learned trial Judge held that the property in the poultry did not pass to the defendant, but he also held that the plaintiffs had mistaken their form of action, and that their proper form of action was one for wrongful conversion with an alternative claim for the proceeds of the goods sold and disposed of.

Acting, however, under Rule 189 of the Judicature Ordinance (C. O. 1898 c. 21) he amended the statement of claim, as he puts it in his judgment, "so as to determine the real question at issue according to the evidence," and thereupon gave judgment for the plaintiffs for $1,204.52, the amount paid into Court, without costs, and gave the defendant the costs of the action. He also gave judgment for the plaintiffs on the counterclaim with costs, such costs to be set off against the defendant's costs of the action. That part of the learned Judge's judgment awarding the costs of the action to the defendant is somewhat obscure, but I have no doubt upon reading that part of his judgment relating to the counterclaim that he intended to and did award to the defendant the costs of the action.

Judgment.
Wetmore, J.

The plaintiffs appeal from this judgment, and contend that the learned Judge should have given judgment for the amount of the bill of exchange and interest. I am of the opinion that the judgment, being in effect for the fair market value of the property taken and disposed of by the defendant, was correct. ROULEAU, J., found that the transfer of the bill of lading by the plaintiffs to the defendant did not under the circumstances pass the right of property therein to the defendant. In order to reach this conclusion he must have found, as a matter of fact, that the bill of exchange and bill of lading having been forwarded together to the plaintiffs, it was not the intention that the right of property should pass to the defendant until he had paid, or at any rate accepted, the bill of exchange, and that the defendant was aware of this, and that the delivery of the bill of lading to the defendant's agent was made not for the purpose of passing the property, but simply to enable the defendant to examine the goods. This finding was quite warranted by *Shepherd* v. *Harrison*.[6] The plaintiffs had the right of property by virtue of section 73 of the Bank Act (53 Vic. c. 31), and continued to hold such right of property, notwithstanding the delivery of the bill of lading to the defendant's agent, as it was not delivered for the purpose of passing the property but merely to enable the agent to examine it. In order to determine the rights of the plaintiffs and the relief they would be entitled to against the defendant, I think it is material to determine what would have been the rights of the Parsons Produce Company, and what relief they would have been entitled to against the defendant supposing that they had sent the bill of exchange for acceptance with the bill of lading attached directly to the defendant, as was practically done in *Shepherd* v. *Harrison*.[6] It seems to me that the Produce Company would have had two remedies. They might have relied on the acceptance by the defendant of the goods, and brought an action against him for the agreed price, or they might have treated him as a tort feasor and brought an action against him for wrongful conversion. In either case I think that the result would have been about the same. If the Produce Company brought an action for the price of the

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goods the defendant could have set up the defective quality of the poultry in diminution of the price: *Mondel* v. *Steele*.[21] If, on the other hand, they brought an action for a wrongful conversion the measure of damages would have been, I should say, the value of the converted property to them, that is, the price which the defendant agreed to pay for it, less the diminution in such price by reason of the defective quality of the poultry. Possibly, however, the measure of damages would have been the market value of the property. I presume that there would not, under the circumstances of this case, be much difference which measure of damages might be adopted. But I cannot conceive that the plaintiffs would be in a better position than the Produce Company would have been in under the circumstances I have stated, or that they could recover against the defendant a larger amount than the Produce Company could have recovered. I can find no authority for the proposition that the measure of damages should be the amount of the bill of exchange except a remark of Lord Chelmsford in *Shepherd* v. *Harrison*,[6] at p. 126, but this remark is not even a dictum; it is merely a suggestion, and in my opinion the authorities on the question of damages in actions for a wrongful conversion do not support it, and it does not strike me on principle as a fair measure of damages under the circumstances of this case. In the first place, I doubt very much if any action could have been brought by the plaintiffs against the defendant arising out of the contract between the defendant and the Produce Company, because I am inclined to think that the right and title vested in the plaintiffs under section 73 of the Bank Act by virtue of the bill of lading was the right and title to the property, not contractual rights which the previous owner had in respect to the property. However, assuming for the purposes of this case that the plaintiffs had vested in them the contractual rights of the Produce Company they could recover no more than that company could have recovered in an action upon such contractual rights.

[21] (1841) 8 M. & W. 858; 10 L. J. Ex. 426; 1 D. (N. S.) 1.

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Wetmore, J.

I am inclined to agree with ROULEAU, J., that the plaintiffs' proper remedy was an action for wrongful conversion of the property. Now, I quite agree with the contention of the learned counsel for the plaintiffs, that the proper measure of damages would be the value of the property to the plaintiffs, which might not necessarily be the market value of such property. But I do not agree that the value of the property to the plaintiffs was the amount of the bill of exchange. The bank held this bill of lading as collateral security for the bill of exchange, and as such against all persons interested, including the Produce Company. Now what was the value of that security to the plaintiffs? It was simply what the property would realize in the market. Suppose the defendant had never got possession of the bill of lading at all, and had never touched the property or dealt with it in any way, but had refused to accept the draft, what benefit would the security have been to the bank? The only value it could have been to them as a security would have been what they could have realized upon it. Having been deprived of that security by the wrongful act of the defendant all the Court can do is to put the plaintiffs in the same position as they would be in if the conversion had not taken place, that is, to compel the wrongdoer to pay them the amount the security was really worth to them as such, and that the judgment of ROULEAU, J., in awarding them the $1,204.52 has done. It was claimed, however, that the defendant by his wrongful act had prejudiced the plaintiffs' right and remedies as against the Produce Company. I fail to perceive in what way that has been done. The plaintiffs had the right to proceed upon all the securities they held. There was nothing to prevent their giving the Produce Company notice of dishonour when the defendant refused to accept the bill of exchange. It is true that the Produce Company might be in a position to say to the plaintiffs, by your act you have caused us to be deprived of our property, and you must make it good, and possibly the plaintiffs would have been bound to do so. I express no decided opinion upon this point, however; but I can see no reason why the plaintiffs could not have made the Produce Company liable by giving

them credit for the value of the security and enforced payment of the balance of action. I again put the case—suppose the defendant had not converted the goods, but had refused the acceptance. The plaintiffs, if they wished to avail themselves of the security would have had, first giving the Produce Company notice of dishonour, to have realized on the goods, credited the amount so realized, and proceeded on the bill of exchange against the Produce Company for the balance. Judgment. Wetmore, J.

I am of opinion that the amendment ordered by the learned Judge was not necessary, and that the relief he granted might have been given without it. According to the practice and procedure in force in the Territories the technicalities in pleading which prevailed in the old practice in the Courts at Westminster have been done away with. Therefore, if, as in this case, the facts alleged in the statement of claim set forth what amounts to a wrongful conversion of property, it is, I conceive, sufficient, notwithstanding the words "wrongful conversion" are not used. I do not wish to be understood as advising such a system of pleading, because it is quite likely that the practitioner adopting it might, unless he could shew sufficient reason for doing so, find his pleading, or the greater part of it, struck out with costs. But if any such pleading has not been objected to, I see no reason why the same relief might not be granted as would have been if the pleading had in express terms set up a wrongful conversion. I refrain from expressing any opinion as to whether the statement of claim in this case under the circumstances is or is not prolix; as a matter of fact, I have formed no opinion on the subject.

It may have occurred to the learned Judge that he could not as the statement of claim was drawn grant the relief he did, because no such relief was claimed. That need not have prevented him. In the first place, under Order 20, R. 6 (230) of the English Rules, which is in force in the Territories by virtue of section 21 of the Judicature Ordinance, "Every statement of claim shall state specifically the relief which the plaintiff claims either simply or in the

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alternative, and it shall not be necessary to ask for general or other relief, which may always be given as the Court or a Judge may think fit, to the same extent as if it had been asked for," and again by virtue of paragraph 5 of section 8 of the Ordinance the Court has power to "grant . . . all such remedies whatsoever as any of the parties . . . may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward . . . so that as far as possible all matters so in controversy between the . . . parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matters avoided." Under these provisions it was, I think, quite open to the trial Judge, although the statement of claim claimed payment of the whole amount of the bill of exchange and interest, without amending such statement, to have stated, I will not give you the whole amount which you claim, you are not entitled to it, but you are entitled to another relief which you have not asked for, namely, to have awarded to you a less amount than that which you have asked for. It is important to bear in mind that this amendment was apparently made at the trial Judge's own instance, and without its having been asked for by any person concerned in the case. I am of opinion that the order for amendment should be set aside.

This brings us to the question of the trial Judge's ruling on the question of costs. While we must keep in view the fact that under Rule 500 of the Judicature Ordinance no appeal lies without leave from any order of a Judge "as to the costs only which by law are left to the discretion of the Judge," and moreover that the Court will not, as a rule, interfere with such discretion unless it has been exercised on a wrong principle, we must also bear in mind that when an appeal is taken to this Court of the nature of the one now under consideration, and which is not an appeal as to costs only, the Court has power under Rule 507 of the Ordinance "to make any order which ought to have been made" in the Court below, and that in exercise of our powers under that Rule we frequently make orders as to costs in the

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Court below which are rendered necessary or expedient by reason of the judgment we have given altering or reversing, as the case may be, the judgment of the Court below. Now, if I felt clear in my mind that the learned trial Judge was not acting under a misapprehension in making the order as to costs which he did make, I might not feel at liberty to interfere with his discretion. I do not feel so clear; on the contrary, I am inclined to believe that he made that order under the impression that the action was improperly brought in form, and that, therefore, he could not give relief without amending as he did, or, in other words, that the plaintiff had utterly failed in his action as brought, and, therefore, was not entitled to any costs in respect thereof. Reading *Wheeler* v. *The United Telephone Co.*,[2] *Goutard* v. *Carr*,[3] and *Wood* v. *Leetham*,[4] without any further assistance, it would seem to have been laid down by the Courts in England that when money is paid into Court with a plea denying liability, and the plaintiff proceeds with the action and establishes the liability of the defendant, but fails to establish that he is entitled to recover more than the amount so paid into Court, the defendant is entitled to the general costs of the action, and the plaintiff is only entitled to the costs of the issues found in his favour. I am free to confess that up to a very recent date I was of the opinion that these cases did so lay down the law. A case recently reported, *Wagstaff* v. *Bentley*,[1] has induced me to change my mind. That case is exactly in point, and the form of the order is given at p. 125, and in so far as the costs are concerned, it is as follows: "That the plaintiffs have the costs of the action up to the time of payment into Court; the defendants to have the general costs of the action from that time and the plaintiffs to have the costs of the issues found in their favour." That order is exactly in accordance with what I conceive such an order ought to be under the practice, were I not constrained to hold the contrary by *Wheeler* v. *The United Telephone Co.*,[2] *Goutard* v. *Carr*[3] and *Wood* v. *Leetham*.[4] That part of the order in *Wagstaff* v. *Bentley*[1] awarding costs to the plaintiff down to the time of the payment of money into Court was not appealed from. The action was for damages by reason of the defendants' alleged

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negligence; the defendants denied that they were guilty of negligence, and averred contributory negligence, and the only question appealed was whether the plaintiffs under the order were entitled to their costs relating to the question of negligence. The case was an appeal from an order refusing a review of taxation of costs. But I cannot conceive it possible that in 1901, when the order was made in *Wagstaff* v. *Bentley*,[1] such an order could have been made if *Wheeler* v. *The United Telephone Co.*,[2] *Goutard* v. *Carr*,[3] and *Wood* v. *Leetham*[4] were interpreted in England as laying down the law as I supposed they did. The first named case was decided in 1884, and after the second named case was decided, and the last mentioned case was decided in 1892, and all were, therefore, cases of long standing in 1901, and must have been thoroughly understood. And I can only understand the order in *Wagstaff* v. *Bentley*[1] on the assumption that the other three cases are interpreted in England as merely laying down the practice that the general costs of the action *only* from the time of the payment of the money into Court go to the defendant when he succeeds on his plea of the payment into Court and fails as to his plea denying liability, and the costs down to the time of payment into Court go to the plaintiff. As this is in accordance with my views, and, to my mind, a fair rule of practice, I hold that way.

I repeat that this is not an appeal as to costs only. As stated by Wright, J., in *Wood* v. *Leetham*,[4] at p. 217, "This is an important question of law and principle, and not one relating to costs only." Moreover, the appellants are entitled to succeed on one ground of their appeal, namely, to have the order for the amendment set aside, and this necessarily involves a reconsideration of the question of costs.

There should be an order setting aside the order for the amendment, and the learned trial Judge's order should be varied, and judgment be entered for the defendant, the $1,204.52 paid into Court by the defendant to be paid to the plaintiffs; that the plaintiffs to have the costs of the action up to the time of the payment into Court of the second sum so paid in, namely, $376.90; the defendants to have the gen-

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eral costs of the action from the time that such last mentioned sum was paid into Court, and the plaintiffs to have the costs of the issues joined upon all the paragraphs of the statement of defence except the issue joined upon the 21st paragraph of such statement; the plaintiffs to have also the costs of the counterclaim.

No costs of this appeal to either party.

RICHARDSON and SCOTT, JJ., concurred with WETMORE, J.

Order accordingly.

REPORTER:

Ford Jones, Advocate, Regina.

CURREN ET AL. v. McEACHEN ET AL.

Erection of school district—School ordinance—District more than five miles long — Consent of ratepayers affected — Meaning of "affected" and of "actually resident"—Residence — Domicile—Construction of Statutes—Confirmatory Act.

The expression "all the resident ratepayers affected by such permission" as used in s. 12 of the School Ordinance, c. 75, C. O. 1898, means, not "all the resident ratepayers," but only those who are affected by the district being more than five miles long, and when the district purported to be erected is in fact over five miles long the residents in each of the tiers of sections which lie at the extremities of the district must be considered as affected, since it is impossible to say which tier should be regarded as the excess in length.

Where a ratepayer owned real property in the district and had a house with furniture in it locked up on this property, but rented a house out of the district for the use of his wife and family, while he was prospecting in the mountains and for some time also working in a coal mine, both out of the district,

Held, that he was not an "actual resident" whose consent in writing could be required under s. 12.

The meaning of "residence," "actual residence," and "domicile," considered.

[McGUIRE, C.J., *August 2nd, 1902.*

This was an action by the plaintiffs, who were ratepayers in the Grand Valley School District, No. 559, which had been erected, under the provisions of the School Ordinance, by an order of the Lieutenant-Governor in Council, dated July 4th,

Statement.

1900. They sought an injunction against the defendants, who were the trustees and treasurer of the said district, restraining them from acting as such trustees and treasurer, and from exercising any of the duties of those offices on the ground that the school district in question was more than five miles long, and that the requirements of the last two subsections of section 12 of the School Ordinance, necessary in such a case, had not been complied with.

The action was tried at Calgary before Chief Justice McGUIRE on the 12th day of July, 1902.

J. R. Costigan, K.C., for the plaintiffs.

James Short, for the defendants.

[*2nd August, 1902.*]

McGUIRE, C.J.—The evidence shows that the Grand Valley Public School District, No. 559, as erected or purporting to be erected by Order in Council of (or about) July 4, 1900, under section 41 of the School Ordinance, was five miles wide by a length of between five and six miles—the Bow River being its southern boundary, running in a crooked course through the most southerly tier of sections.

Plaintiffs by their statement of claim admit the passing of the said Order in Council; but as to the notice required to be given by the chairman of public instruction under section 12 of the Ordinance, they say that they do not know whether it was given or not—but that if given it should not have been given, because the proposed district being more than five miles long the said chairman had no authority to give permission for the erection of a school district exceeding five miles in length, unless all the resident ratepayers affected by such permission had agreed in writing thereto, and that this condition was not complied with. The case for the plaintiffs practically was narrowed down to this—to show that this condition had not been complied with.

The burden of proof was upon the plaintiffs to establish this allegation. The first question to be considered is who were the resident ratepayers so affected? Counsel for plaintiffs says that every resident ratepayer in the proposed district

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was one affected by the permission. If this contention be correct, then the words "affected by such permission" in section 12 of the Ordinance must be disregarded. The section does not say "all the resident ratepayers" must agree in writing, but only those "affected by such permission." These words must not be disregarded, and the section read as if they were not there. I think they mean only those who by reason of the district being longer than five miles are "affected." Had the northern tier of sections been omitted, then the district would have been less than five miles in either direction, but the permission to include the northerly tier would affect the ratepayers resident in such tier, because the school house might thereby be placed where their children would have farther to go to attend it than if the district were only five miles long. Similarly if the southerly broken tier of sections had been omitted then those north would not have been affected, because the area would not have exceeded the prescribed length and breadth, but the resident ratepayers in the southerly tier of sections would be affected by the proposed addition of their land. If we could say for certain which tier is to be regarded as the excess of length, it might only be necessary to ascertain who were in such excess, but as that is impossible, I think the ratepayers resident in either the southerly or northerly tiers are to be deemed "affected." Those in the four intervening would not have cause of complaint if either tier had been omitted, and it seems to me that in one view of the case it is rather to their advantage than to their detriment that the additional territory should be included, as the burden of maintaining the school would be contributed to by the residents of such additional territory. Now the only person being a resident ratepayer in the northerly tier of sections was W. D. Kerfoot—and there is not only no tittle of evidence to show that he did not agree in writing, but there is a letter from Mr. Calder that he, Kerfoot, had so agreed, though I am of opinion that that letter is not evidence of the fact.

Then who were the resident ratepayers in the southerly tier? One McPherson was such a resident ratepayer. I

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think the plaintiffs have failed to prove that he did not agree in writing. The only evidence on the point is that given by Baptie and McEachen that so far as they knew, he had not, but both added that he might have done so without their knowledge. It was a matter which could easily have been proved whether the chairman of public instruction had received any such agreement from McPherson, but there is not a tittle of proof of any search in the proper office at Regina, nor that the said chairman has been made aware of the contention that he gave permission without first having the necessary consent of those affected. I think it may fairly be assumed in the absence of proof to the contrary that the chairman acted rightly and had the necessary consents in writing. *Omnia praesumuntur rite esse acta* is a maxim applicable to the acts of public officers in the performance of their official duties.

There is evidence that Mr. Curren, one of the plaintiffs, did not so agree in writing or otherwise, but I think on the evidence he was not a resident ratepayer in the district at the time or for some time prior to the order in council for the erection of the school district. He was not living in the district. He owned property in the southerly tier of sections, but his wife and daughter were living at Banff in a house rented by Mr. Curren for a year, and Curren and his son were part of the time prospecting in British Columbia, and the rest of the time he was working in the coal mines at Anthracite. He came back for a few days in September, but went away again. His wife did not return until the following spring. Under these circumstances was Mr. Curren a resident ratepayer—that is (s. 2, s.-s. 2) a person actually residing within the proposed school district, and who had so resided therein for a period of three months immediately prior to the date of the first school meeting? I think not. The evidence at best establishes that his domicile may have been there notwithstanding the temporary residence of himself and family in British Columbia. Taking the definition of residence in Bouvier, "Residence" means "personal presence in a fixed and permanent abode." "The abode where

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one actually lives—not the legal domicile." "One may seek a place for the purposes of pleasure, of business, or of health; if his intent be to *remain* it becomes his *domicile*; if his intent be to leave as soon as his purpose is accomplished it is his residence." When Curren went to British Columbia he says it was on business and not with intent to stay—therefore the place he went to did not become his domicile, but as it was his intent to leave it as soon as his purpose was accomplished, it was his "residence." His residence was then in British Columbia and not in the Grand Valley School District, though his domicile was probably still in the latter. Taking the definition in Stroud, cited from *R.* v. *Inhabitants of N. Curry*,[1] Curren's residence at the time this district was organized was not in the Grand Valley district. So much as to "residence."

But the School Ordinance uses the words "actually resident," which must be something more limited than simply "resident." To construe the Ordinance differently would be to make it almost impossible to comply with the condition of getting the written consent of every person having a domicile in the district, but who might be at the time resident abroad. I think that Curren was not one whose consent in writing was required. Baptie was not asked if he had given his written consent, and there is no evidence that he did not so agree. McPherson, as I have pointed out, is not proved not to have agreed in writing, but there is evidence that he as well as Baptie was in favour of the organization of the district and voted for it and for trustees, and, subsequently, for the debenture by-law. McPherson and Baptie are the only resident ratepayers in the southern tier of sections. It is not unworthy of observation that the plaintiffs did not act promptly to object to the organization of the district, but waited until a school was erected and a teacher employed and debentures issued. Had they acted promptly and I had been shown that there was anything defective in the preliminaries, the matter might have been remedied before considerable sums of money had been expended and liability

[1] 4 B. C. 952; 10 E. C. L. R. 873.

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incurred. The plaintiffs and the other ratepayers who are said to be opposed to the organization of the district are, as it appears, persons not having any children of school age, and, therefore, not anxious for a school district or its consequences irrespective of its size or shape or the location of the school. It would be, I think, from considerations of public policy undesirable that the action of the plaintiffs should succeed, considering all the circumstances, unless such a course were imperatively demanded by the justice of the case. Not having established the necessary facts I think they are not entitled to success.

There is, however, another ground. Such would defeat them even had they otherwise established their case.

By the Ordinance of 1901, c. 29, s. 178, "all school districts heretofore erected or purporting so to be, are hereby confirmed as districts legally established under this Ordinance." This "school district" purported to have been erected prior to the passing of that Ordinance, and would be among those "confirmed as districts legally established."

The action will be dismissed with costs to the defendants.

REPORTER :

Chas. A. Stuart, Advocate, Calgary.

MASSEY-HARRIS CO v. SCHRAM.

Exemptions Ordinance—Sale of homestead—Mortgage taken in part payment—Receiver.

The Exemptions Ordinance, C. O. 1898, c. 27, s. 2, s.-s. 9, declares the following real property of an execution debtor and his family free from seizure by virtue of all writs of execution, namely :—

(9) "The homestead, provided the same is not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon."

Held, that mortgage moneys, forming part of the proceeds of the sale of the defendant's homestead, do not come within this provision.

This provision exempts the homestead only so long as it remains a homestead, and where the debtor has voluntarily disposed of it the language of the ordinance is not wide enough to extend the exemption to the proceeds, unless they are reinvested in other exempt property before a creditor has acquired a charge or lien upon them.

Receiver order, as equitable execution, discharged.

[SCOTT, J., *October 11th, 1901.*

Statement.

Application to vacate a portion of an order appointing a receiver. The facts sufficiently appear from the judgment.

C. W. Cross, for the plaintiffs, referred to *Conn* v. *Knott*.[1]

J. C. F. Bown, for the defendant, referred to *Re Demaurez*.[2]

[*October 11th, 1902.*]

SCOTT, J.—This is an application by the defendant to dismiss and vacate that portion of the order, made by me herein on 9th August, 1901, which appointed a receiver to receive the rents and profits, the right, title, interest and equity of redemption of the defendant in a certain mortgage, on the north-west quarter of sec. 18, twp. 52, range 27 west of 4th meridian, to secure the sum of $720, made by Valentine Kulak to the defendant, and which was, on or about the 2nd day of May, 1901, transferred to Bown & Robertson.

Plaintiffs are judgment creditors of the defendant and the order for a receiver was obtained by way of equitable execution.

The grounds upon which the application is made are that the said lands were, at the time of the sale thereof to the said Kulak and the giving of the said mortgage, the homestead of the defendant within the meaning of the Exemptions Ordinance, and, therefore, free from seizure under execution, either legal or equitable, and that said mortgage, having been given to secure part of the purchase money of such homestead, the same and all moneys due or to become due thereunder are also free from seizure under any such execution.

It was admitted that the mortgage moneys form part of the proceeds of the sale of the defendant's homestead (being the lands comprised in the mortgage) to Kulak the mortgagor; that the defendant was residing thereon until he sold same to Kulak; that the price paid by Kulak was $1,500; and that the mortgage was given by him to secure the balance of the purchase money.

[1] 19 O. R. 422, 20 O. R. 294, 10 Can. L. T. 218. [2] *Ante*, p. 84.

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Scott, J.

The exemption is claimed under s. 2 and s.-s. 9 thereof of the Exemptions Ordinance, which provides as follows:

2. "The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely:

(9) "The homestead, provided the same is not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any liens or incumbrances thereon;"

In my opinion the mortgage moneys are not, under this provision, exempt from seizure under execution by reason of the fact that they form part of the proceeds of the sale, by the defendant, of his homestead which was so exempt. The provision exempts the homestead only so long as it remains a homestead, and, where the debtor has voluntarily sold and disposed of it, the language of the provision is not wide enough to extend the exemption to the proceeds of such sale. It is true that the defendant might have applied the proceeds in the purchase of another homestead to which the exemption would doubtless attach, but the plaintiffs having acquired, under their judgment, a lien on such proceeds, before they were so applied, the exemption cannot be upheld as against them.

The decision in *Re Demaurez*,[2] in our own Court, which was relied upon by defendant's counsel, is not applicable to the present case. In that case Demaurez, the debtor, made an assignment for the benefit of his creditors of all his property, except that portion which was exempt from seizure or sale under execution. He claimed exemption in respect of a certain portion of his real estate under s.-s. 10, of s. 2 of the Ordinance referred to, which exempts the house and buildings occupied by the execution debtor and also the lot or lots on which the same are situated to the extent of $1,500. In proceedings for the administration of the trust estate he was directed to transfer the property to the assignee, who was directed to sell the same. The debtor was held entitled to $1,500 out of the proceeds of the sale.

There was therefore no voluntary alienation of the property by the debtor, but merely a sale by direction of the

Court for the purpose of realizing for the creditors the excess over any exemption to which he was entitled. Judgment. Scott, J

The application will, therefore, be dismissed with costs.

REPORTER :

J. E. Wallbridge, Advocate, Edmonton.

LEBLANC v. MALONEY (No 1).

Controverted Elections Ordinance—Election—Petition — Examination for discovery.

Section 18 of The Controverted Elections Ordinance, C. O. 1898, c. 4, provides as follows: "The said petition and all proceedings thereunder shall be deemed to be a cause in the Court in which the said petition is filed, and all the provisions of the Judicature Ordinance in so far as they are applicable and not inconsistent with the provisions of this ordinance shall be applicable to such petition and proceedings:"

Held, (1) that the provisions of the Judicature Ordinance respecting examinations for discovery come within the above section.

(2) That where particulars of the charges had been ordered the examination could not be compelled until after the delivery of the particulars.

[SCOTT, J., *October 30th, 1902.*

This was a proceeding under the Controverted Elections Ordinance, by petition, to set aside the election of the respondent.

On appointment for the examination of the respondent touching his knowledge of the matters in question, an application was made on the respondent's behalf to set the appointment aside upon the ground that

(1) The deputy clerk had no jurisdiction to grant the same, the provisions of the Judicature Ordinance in respect of examination of parties not being applicable to election cases;

(2) The appointment was made prematurely, there being no jurisdiction to make the same until after delivery of particulars of the charges (an order for which had been made).

SCOTT, J., set the appointment aside on the second ground.

Argument.

After delivery of particulars, a new appointment was taken out, whereupon an application was made on the 21st October, 1902, to set it aside upon the first ground above mentioned.

N. D. Beck, K.C., for the petitioner.—Petitioner has a right under s. 18 of Controverted Elections Ordinance to examine respondent. Discovery is not allowed in England, but that is owing to special provisions there. Parliamentary Elections Act (31 & 32 Vic. c. 125), *Wells* v. *Wren* (Wallingford Election)[1], *Moore* v. *Kennard* (Salisbury Election).[2] An election petition is not a penal action, or at least only so as to acts of personal bribery. *Stewart* v. *Macdonald* (Kingston Election).[3] The policy of the law is to give right to discovery. Dominion Controverted Elections Act, R. S. C. c. 9.

J. C. F. Bown, for respondent.—Right of discovery is not extended to cases where it did not exist before: Holmstead & Langton, pp. 608-9. Such as cases for penalties or forfeitures: *Mexborough* v. *Whitwood*,[4] *Martin* v. *Treacher*,[5] *Regina* v. *Fox*.[6] Petitioner seeks a forfeiture of respondent's seat: *Saunders* v. *Wiel*.[7] This is not an action within the meaning of rule 201. Action is a suit commenced by writ of summons. Judicature Ordinance s. 2. "Cause" does not include "action." Nor is this an issue.

Beck, in reply.

[*October 30th, 1902.*]

Scott, J.—This is an application to set aside an appointment, made by the deputy clerk at Edmonton, for the examination of the respondent touching his knowledge of the matters in question herein. It is made upon the ground that the deputy clerk had no authority to make such appointment,

[1] 5 C. P. D. 546, 49 L. J. Q. B. 681. [2] 10 Q. B. D. 290, 52 L. J. Q. B. 285, 48 L. T. 236, 31 W. R. 610, 47 J. P. 343. [3] Hodg. Elec. Cases, 625. [4] (1897) 2 Q. B. 111, 66 L. J. Q. B. 637, 76 L. T. 765, 45 W. R. 546, 13 Times Rep. 443. [5] 16 Q. B. D. 507, 53 L. J. Q. B. 209. [6] 18 P. R. 343. [7] (1892) 2 Q. B. 18, 321, 61 L. J. Q. B. 597, 66 L. T. 855, 40 W. R. 594, 8 Times Rep. 650, 62 L. J. Q. B. 37, 67 L. T. 207, 4 R. 1.

the rules under the Judicature Ordinance respecting examinations for discovery not being applicable, it was urged, to election petition matters.

Judgment.
Scott, J.

The petiton herein was filed under the provisions of the Controverted Elections Ordinance, s. 18 of which provides as follows:

"The said petition and all proceedings thereunder shall be deemed to be a cause in the Court in which the said petition is filed, and all the provisions of the Judicature Ordinance in so far as they are applicable and not inconsistent with the provisions of this Ordinance shall be applicable to such petition and proceedings."

The appointment was made under rules 201 *et seq.* of the Judicature Ordinance. Rule 201 provides that any party to an action may, without any order for the purpose, be orally examined before the trial by any party adverse in interest, touching the matters in question in any action. Section 203 provides at what stages of the action the examination, on the part of the plaintiff and defendant respectively, may be had; and further provides that the examination of a party to an issue may take place at any time after the issue has been filed. And s. 204 provides that the party entitled to examine may procure an appointment therefor from the deputy clerk in the judicial district in which the action was commenced.

It was argued on the part of the respondent that a petition under the Controverted Elections Ordinance is not an action within the meaning of rule 201.

By s.-s. 1 of s. 2 of the Judicature Ordinance the term "cause" includes "any action, suit or other original proceeding between a plaintiff and a defendant, and by s.-s. 2 the term "action" includes "suit," and means "a civil proceeding commenced by writ or in such other manner as may be prescribed by (that) Ordinance or by rules of Court."

It was contended that under these provisions, although the word "cause" may include an action, it does not necessarily follow that the term "action" includes everything that is included in the term "cause."

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Scott, J.

Under these definitions the term "action" is more comprehensive than the term "cause," because it includes all civil proceedings commenced under the Ordinance or rules of Court, whereas "cause" is apparently intended to include only original proceedings between a plaintiff and defendant; I therefore am of opinion that the term "action" includes "cause."

But even if such were not the case, the latter part of rule 203 shows that the rules respecting examinations for discovery are applicable to parties to issues, and such issues may not in themselves form what is usually known as an action, but may be merely collateral thereto, and under the Controverted Elections Ordinance the petition, at a certain stage of the proceedings under it, constitutes an issue between petitioner and the respondent, and I see no reason why in such issue the parties to it should not have the right to discovery.

It is further contended that the provisions in our rules respecting discovery do not extend the right of discovery to cases where it did not exist before; that it did not before exist in actions for penalties or for forfeiture; and that the petitioner in this case seeks a forfeiture because the respondent now occupies the seat from which he is sought to be removed.

In my opinion this proceeding cannot be considered as one either for a penalty or a forfeiture. It is simply a proceeding to set aside the respondent's election on the ground that he was not duly elected. No penalty is sought to be recovered, and if the petitioner should be successful the effect will be that it will be declared that the respondent never was legally entitled to the position. In my view a forfeiture presupposes the existence, at one time, of a legal right or title to possession, which right or title is subsequently lost. Here the claim is that the respondent never had any right to the position.

It was held in *Wells* v. *Wren*,[1] and in *Moore* v. *Kennard*,[2] that the rules under the Judicature Act in England with respect to discovery by interrogatories (which is the mode of

discovery under the rules there) are not applicable to proceedings on election petitions under the Parliamentary Elections Act (31 & 32 Vic. c. 125); but the reasons for so holding are not applicable here.

Section 2 of that Act enacts that the Court of Common Pleas, to which jurisdiction was given in such proceedings, "shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, with reference to an election petition and the proceedings thereon, as it would have if such petition were an action within their jurisdiction."

By s. 25 power was given to the judges on the rota to make general rules and orders for (among other things) the regulation of the practice and proceedings of election petitions.

Section 26 provides that until rules of Court are made in pursuance of the Act, the principles, practice and rules on which committees of the House of Commons had therefore acted, should be observed so far as may be.

It was held in those cases that, owing to the words "subject to the provisions of this Act," in s. 2, the powers given by that section were subject to the provisions of s. 26; that, as no rules had been made under s. 25, the practice and rules of the Committee of the House of Commons must be observed; and that there was no provision in their practice or rules for discovery by interrogatories.

In the first mentioned case Lord Coleridge, C.J., says, at page 683, "If those words ("subject to the provisions of this Act") were left out of the section (s. 2) there is no doubt that this Court would have power to order the delivery of interrogatories to the respondent."

By the Dominion Controverted Elections Act special provision is made for examinations for discovery after issue and before trial, as well as for other matters of procedure. In the case of the Dominion such special provisions were necessary in order to secure uniformity of procedure in the different Provinces. In the case of Provincial and Territorial Elections they would be unnecessary, because the local legislatures could adopt such portions of the practice and pro-

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Scott, J.

cedure of the Courts therein as might be found advisable. The Legislature of the Territories has followed that course by adopting all the provisions of the Judicature Ordinance in so far as they are applicable to and not inconsistent with the Controverted Elections Ordinance.

In my view the provisions respecting examinations for discovery are applicable to and not inconsistent with the provisions of that Ordinance.

I therefore dismiss the application with costs to the petitioner in any event on final taxation.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

CONN v. FITZGERALD.

Dominion Weights and Measures Act, R. S. C. c. 104, s. 21—Contract to thresh grain—Quantity threshed subsequently ascertained by cubic measurement — Effect of upon contract — Threshers' Liens Ordinance.

The defendant contracted with the plaintiff to thresh his grain at a price per bushel. The quantity threshed was not measured with a Dominion standard measure, or weighed, but was subsequently ascertained by the defendant by cubic measurement.

Held, that so measuring the grain was not a "dealing" within the meaning of s. 21 of the Weights and Measures Act, which could relate back and render the contract void, and that the defendant was not therefore disentitled to a lien under the Threshers' Lien Ordinance.

Macdonald v. *Corrigal*,[1] and *Manitoba Electric and Gas Light Co.* v. *Gerrie*,[2] considered.

Judgment of WETMORE, J., reversed.

[WETMORE, J., *April 26th, 1902.*
[*Court en banc, December 4th, 1902.*

The statement of claim alleged that the defendant broke and entered the plaintiff's granary and wrongfully removed thereform and converted to his own use 680 bushels of wheat, and claimed $100 damages for the trespass, a return of the wheat or its value, $346.80, and $100 damages for its detention. By his statement of defence the defendant denied that

[1] (1893) 9 Man. Rep. 284. [2] (1887) 4 Man. Rep. 210.

he broke into the plaintiff's granary, denied that he removed any greater quantity of wheat than 670 bushels; denied that the said removal was wrongful, alleged that the wheat was removed by him and sold to satisfy a lien to which he was entitled under c. 60 of the Consolidated Ordinances of the North-West Territories and amendments thereto for threshing which he had performed for the plaintiff at his request within thirty days prior to the removal of the grain, and denied that the wheat was of any greater value than 45c. per bushel. The reply, besides joining issue and alleging a breach by the defendant of his agreement to thresh, pleaded in the alternative that the defendant agreed to do and did the plaintiff's threshing at a set price per bushel threshed; that the grain threshed, and on account of which the defendant claimed the said lien, was not measured or weighed as required by R. S. O. c. 104, s. 21, and that therefore the plaintiff was entitled to no lien. Statement.

The action was tried before WETMORE, J., without a jury.

L. Thomson, for plaintiff.

B. P. Richardson, for defendant.

The facts established by the evidence sufficiently appear in the judgments.

[*April 26th, 1902.*]

WETMORE, J.—This action was brought for breaking and entering the plaintiff's granary on his farm and wrongfully removing therefrom and converting to the defendant's use a quantity of wheat. The defendant is a thresher, and justifies the act complained of by setting up that he was entitled to a lien upon the plaintiff's grain by virtue of the "Ordinance respecting Threshers' Liens" (c. 60 of the Con. Ord.) and the amendments thereto, and that he did the acts complained of for the purpose of satisfying such lien. The plaintiff in answer to this justification sets up that the defendant agreed to thresh his grain at a set price per bushel, and that the grain threshed on account of which the lien is claimed was not measured or weighed as required by section 21 of the

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Weights and Measures Act (Rev. Stat. c. 104), and therefore that the defendant was not entitled to any lien. There is practically no dispute as to the facts in so far as they affect this question. The defendant threshed the plaintiff's grain in the season of 1901. Such grain consisted of wheat and oats. *The agreed price was four cents a bushel for wheat* and three cents a bushel for oats. He commenced threshing on the 12th October and continued on the 14th, 15th and 16th of that month. He then went away and returned and finished the rest on the 16th, 17th and 18th November. The grain was seized and carried away by the defendant under his alleged lien on the 18th December. The defendant claims to have threshed 4,300 bushels of wheat and 1,100 bushels of oats at the first threshing, and altogether, including both threshings, 7,100 bushels of wheat and 1,100 bushels of oats. These quantities were not ascertained by any measure or other method authorized by the Weights and Measures Act. In fact no measure whatever was used in ascertaining the quantities. They were ascertained in the following manner: the defendant took the number of cubic feet in each variety of grain threshed and allowed 128 cubic feet to contain 100 bushels of such grain. The usual practice among threshers, it seems, is to allow 125 cubic feet for 100 bushels, but the defendant added three cubic feet "so as to be certain," as he expressed it. I find this to be true. Does this means of ascertaining the quantities render the *dealing* void under section 21 of the Act referred to? This question came before me in the *Pheasant Creek Threshing Co.* v. *Teece* (unreported), decided by me on the 2nd October last. The mode of ascertaining the quantities of grain threshed in that case was almost identical with that pursued in this case, the only difference was that in that case 125 cubic feet were allowed to the 100 bushels, instead of 128 as in this case. I received more information in this case, however, than I did in the case of *Pheasant Creek Threshing Co.* v. *Teece*. In that case the only material before me was the evidence of the plaintiff's manager that 8-10 of the cubic contents of the grain brought out the number of bushels in the bin. In that case the cubic contents of the grain was measured in bins, as I presume it was

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in this case. In the *Teece* case I had nothing more than the bare statement of the manager to that effect, together with the fact also testified to that that was one of the usual modes by which threshers arrived at the quantity of grain which they threshed, and also the fact that what the manager so testified to was not disputed by the other side, either by evidence or otherwise. No reason whatever was presented to me to show why or on what principle this result followed. It therefore occurred to me that it was a very arbitrary method of reaching such a conclusion. I held the dealing in that case void, and that the plaintiff was not entitled to recover the price of the threshing, and I did so largely influenced by the judgment of Taylor, C.J., in *Macdonald* v. *Corrigal*,[1] and I also referred to the *Manitoba Electric and Gas Light Co.* v. *Gerrie*.[2] In this case, however, now under discussion, the defendant testified, speaking of wheat, "that a cubic foot of loose grain is estimated to weigh 49 lbs.," and I was also referred to vol. 24 of the Encyclopedia Britannica, "Weights and Measures," which contains a table wherein a cubic foot of loose wheat is alleged to contain 49 lbs. Wheat measured in a bin would, I assume, be called loose wheat. Now, putting the weight of a bushel of wheat at 60 lbs., as provided by s. 1 of c. 26 of 1 Edw. VII. (1901), the section now substituted for section 16 of the Weights and Measures Act, 49 lbs., or the contents of the cube, would be very nearly 8-10, or 4-5 of a bushel; 4-5 of 60 lbs. would be exactly 48 lbs. The table I refer to gives the weight of a cubic foot of several varieties of grain and it will be found that on giving the number of pounds to the bushel to each such variety of grain as provided by the section of the Act of 1 Edw. VII., referred to, the contents of the cube very closely approximates in weight to 4-5 of the bushel. Now, allowing 125 cubic feet of grain to 100 bushels would be just exactly tantamount to allowing 4-5 of the cubic contents of a bin in order to get at the number of bushels it contained, and I assume that it was because this was not exactly right, inasmuch as the cube was alleged to contain 49 instead of 48 lbs. that the defendant added the three cubic feet in order to arrive at the 100

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bushels. All these figures, however, in this table giving the contents in weight of a cubic foot of grain must be approximations, possibly very near, but nevertheless approximations; they cannot be anything else. It is evident, however, that the proportion will always stand because if the grain measured is light in weight, say the wheat does not weigh 60 lbs. to the bushel, the weight of a cubic foot of such grain will be proportionately lighter. There is another table in the Encyclopedia under the same heading, which, I presume, is more accurate, that lays it down that an English bushel, which is the same as a Canadian bushel (see section 15 of the Weights and Measures Act and section 15 of the Imp. Weights and Measures Act, 1878) contains 2218.19 cubic inches. Figuring it out on this basis 125 cubic feet would make 97.37 bushels, and 128 cubic feet would make 99.70 bushels. It would appear, therefore, if what is laid down in the Encyclopedia is correct, allowing 128 cubic feet for 100 bushels is an exceedingly close approximation. Nevertheless it is a trifle short of the 100 bushels. Now, I have no means of testing the accuracy of what is laid down in the Encyclopedia. No evidence was presented to me to prove its correctness, and I am, to say the least, very doubtful whether I ought, under such circumstances, to give any weight to it, and in this connection I would draw attention to the fact, testified to by the plaintiff and his witnesses and uncontradicted, that taking the whole quantity of that season's crop of wheat marketed the quantity taken away by the defendant and what remained on hand in the plaintiff's possession, which altogether represented the wheat defendant threshed, there were only 6,400 bushels, or, in other words, it fell 700 bushels short of what the defendant claims he threshed, and yet the plaintiff admits that there was no dispute as to the quantity of grain threshed. This is not explained by the evidence. Possibly it might be explained on the theory that the defendant's allowances and results were according to measures of capacity, and the grain marketed was according to measures of weight, 60 lbs. to the bushel, and also to dockages for dirt, etc., etc. The contention on behalf of the defendant is that the agreement or bargain in this case which was verbal was merely to thresh the

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plaintiff's grain at so much per bushel, wheat at 4c. and oats at 3c., and that as nothing was stated or agreed to the contrary it must, under section 21 of the Dominion Act, *be deemed* that the price for the work was to be paid for by the standard bushel, and that the method adopted for getting at the number of bushels was merely for getting at the number of standard bushels that no other bushel was ever contemplated. This argument appealed to me with very considerable force, and caused me some doubts whether my decision in the *Pheasant Creek Threshing Co.* v. *Teece* was correct. The *Manitoba Electric and Gas Light Co.* v. *Gerrie*[2] is not conclusive as to the question I am now discussing, but it certainly affords great assistance in reaching a conclusion upon another question arising in this case and which arose in the *Teece* case. But the *Gerrie*[2] case was decided on the ground that there was a penalty provided for fixing for use the gas meter then in question, which had not been verified or stamped as the law provided, and therefore the plaintiffs could not recover the price of the gas supplied through such a meter. I cannot find, on looking through the Weights and Measures Act, that the defendant has, by reason of his act in question, rendered himself liable to any penalty, but *Macdonald* v. *Corrigal*,[1] it seems to me, is directly in point. The plaintiff in that case had not, as I can discover, done anything to render himself liable to a penalty unless the bags in which the grain was measured could be called a weighing machine, and so rendered him liable to a penalty under s. 29 of the Act. It is true the judgment of Taylor, C.J., in that case is not very elaborate, but giving the subject the best consideration I can, I have come to the conclusion that it is good law, and I am therefore unable to change the decision I reached in the *Teece* case. The agreement or bargain in this case respecting the threshing was one in respect of work, which was to be done by measure not by weight, and I call attention to the fact that s. 1, of the Act of Edward VII. referred to, is not applicable because the contract or agreement was not one for the sale and delivery of the grain. The agreement then being one in respect of work which was to be done by measurement, the measuring for the purpose of ascertaining the quantities was

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a dealing had with respect to such work, which had been so done, and such dealing was not made or had according to any of the Dominion Measures ascertained by the Act in several respects. In the first place, no measure was used based on the unit or standard of capacity as provided by s. 15 of the Act, or stamped as required by s. 28, or dealt with as provided by s. 19. Section 21 provides that when the dealing is not in accordance with its provisions, it shall be void. This clause of the Act was not passed for revenue purposes, but for the protection of the public, but whether it was or not is immaterial, because the section expressly declares that the dealing shall be void, if not in accordance with its provisions, and it comes within the rule laid down by Benjamin on Sales s. 702, "that where a contract is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only or for any other object. It is enough that Parliament has prohibited it and it is therefore void." In this case Parliament has not left the question to matter of inference, it has expressly declared the dealing to be void. It is respecting this branch of the case that the *Manitoba Electric and Gas Light Co.* v. *Gerrie*[2] is of assistance, because the learned Judge, who delivered the judgment of the Court in that case, has very ably marshalled authorities bearing on the question. I construe the word "dealing" in s. 21 of the Act as more comprehensive than the preceding words "contract," "bargain" or "sale" as by embracing these words the section therefore, in providing that the "dealing" shall be void, voids and vitiates the whole transaction.

The defendant, however, sets up other contentions, namely:

(*a*) That the plaintiff accepted and agreed to the defendant's measurement of the grain at first threshing.

(*b*) That he testified at the trial that there was no dispute as to the quantities of any of the grain threshed, and therefore, I must reach the conclusion that the quantities as stated are correct and according to the standard.

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There is no doubt that the defendant is correct as to the facts thus alleged. At the first threshing the plaintiff procured one Howe to ascertain for him the quantities of grain threshed at the first threshing, and Howe, adopting the same or a similar method as the defendant had, made them slightly more than the defendant did as regards both the wheat and the oats. The oats were all threshed at the first threshing, and the plaintiff admitted that he agreed to accept the defendant's measurements for the first threshing. It is equally true that the plaintiff testified that there was no dispute as to the quantities of the grain threshed. As a matter of fact the real trouble between these parties seems to have been that the plaintiff claimed that he was damnified by some action of the defendant in and about the threshing which is not in question in this suit, and which the defendant declined to recognize, and the plaintiff seems to have resisted the defendant's claim to be paid for his work in order to get even with him. That, however, cannot affect my decision. The parties are entitled in this case, according to the law and the evidence, quite irrespective of their motives. The defendant's contention cannot be allowed to prevail. The Act has declared the dealing void and no amount of agreement or consent can give it validity. Any consent or agreement which attempted to do so would be against the policy of the law and could not be given effect to in the Courts.

It is further urged that the quantities of a portion of the grain threshed had been ascertained in the manner as directed by the Act, namely: of such portions as had been marketed by the plaintiff, and of the portion taken away by the defendant, which are as follows:

Sold by plaintiff to James McCowan	1,092½	bs	of	wheat.
" " The Grenfell Mil'g Co..	3,332½	"	"	
" " Faulkner	707	"	"	
	5,132			
Taken and sold by defendant	670			
Making in all	5,802	bs.	of	wheat,

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and that the defendant had a right to recover for threshing that amount, and, therefore, had a right of lien in respect to the price for threshing that amount. This question was also raised in the *Teece* case so far as the right of recovery was concerned, but I held against the thresher. I am still of the same opinion.

I do not wish to be understood as holding that because a thresher has made a mistake and endeavoured to ascertain the quantities threshed in a manner contrary to the Act, that he is precluded from correcting it; but I hold that if he can correct it he must do so by his own act, and he cannot avail himself of the act of a third person; as for instance in this case, the ascertaining the quantities of grain threshed in the manner attempted was in a dealing between the defendant and the plaintiff, and the defendant cannot correct that by taking advantage of a measurement in a dealing between the plaintiff and third persons to whom he sold the grain, or of a measurement in a dealing between the defendant and the person to whom he sold some of the grain. To allow this would also be against the policy of the law. The policy of the Act is to protect the public by educating persons contracting for services or otherwise by weights or measures, etc., to use weights, measures, etc. properly tested and certified to, and by insisting that they shall do so, by voiding their dealings if they do not do so. To allow persons who do not comply with its provisions to escape the consequences intended to be visited upon them by the Act by adopting the act of third persons would defeat the intention of the Act.

Another object the Act has in view is to provide at hand and ready for use weights and measures which, being tested and properly certified to, can be relied upon as correct without further inquiring, and that persons would not be driven to consult authorities in books of a somewhat complicated nature, and resort to abstruse calculations to verify the correctness of the method of measurement adopted. Moreover, the method adopted for the purpose of ascertaining the quantities for the purpose of these sales by the plaintiff

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and defendant would, I assume, in the absence of evidence to the contrary, be by weight under s. 1 of the Act 1 Edw. VII. before referred to, because there was no evidence that "a bushel by measure" was especially agreed upon. As already pointed out, that section only applies to sales and delivery and does not apply to services by work. The quantities of grain threshed should, therefore, to comply with the Act, have been ascertained by measure and not by weight.

There is another objection to the defendant's contention which has occurred to me, and I think is worthy of notice. This is an action for breaking and entering and an asportavit; the defendant justifies under a lien. If his transaction has been rendered void, his lien is gone; that I am quite clear about. His transaction being voided, therefore, assuming that it would be restored by a correct measurement, must not the correct measurement be had before he could be justified in seizing under the lien? There was no evidence before me to show when the grain was marketed by the plaintiff, whether before or after the seizure complained of, and the burthen of establishing the justification was on the defendant. I do not consider it necessary to decide this question. I have decided sufficient for the purposes of the case without it. I merely throw the suggestion out. Of course if the defendant had done anything to void the transaction and had seized under his lien before he had ascertained the quantities, an entirely different question would be raised. I must, therefore, find for the plaintiff on the issue joined upon the 3rd paragraph of the plaintiff's replication.

The plaintiff by the second paragraph of his replication set up that the defendant was not entitled to the alleged lien, because he agreed to thresh all the plaintiff's grain, and the plaintiff agreed to pay for it when it was completed, and that the defendant threshed only part of such grain, and neglected and refused without justification or excuse to complete the threshing. Upon the issue joined as to that paragraph, I find for the defendant. It was conclusively proved, in fact it was not questioned, that the defendant did complete the threshing before he made the seizure complained of. I am

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not disposed under the circumstances of the case to award the plaintiff any more damages than I am actually obliged to under the law. The opening of the door of the granary, which was fastened by a lock, for the purpose of taking away the grain was in law a breaking and entering. I will allow as damages the price at which the wheat taken was sold, that being admitted to be the market price.

670 bushels at 50c.		$335 00
Less the cost of marketing, admitted at	$16 75	
Less the amount paid to plaintiff's advocate	1 25	18 00
Amounting to		$317 00
And for breaking and entering		1 00
		$318 00

Judgment for the plaintiff on the issue joined upon the 3rd paragraph of the plaintiff's replication for $318 damages with the general costs of the action: judgment for the defendant on the issue joined upon the 2nd paragraph of such replication with such costs as are exclusively applicable to such last named issue.

The costs taxed to the defendant to be set off against the costs taxed to the plaintiff and the plaintiff to have execution for the balance.

The defendant appealed. The appeal was heard December 1st, 1902.

H. Harvey, Deputy Attorney-General, for appellant.—The point involved being one of importance to the public generally, the Attorney-General has undertaken to prosecute the appeal and agrees that, in the event of the appellant succeeding, no costs of the appeal are to be awarded against the respondent.

There is no evidence to support the breach of agreement alleged in paragraph 2 of the reply.

Section 21 of the Weights and Measures Act has no reference to the use of inspected and stamped weights and measures. The words "weights" and "measures" have two distinct meanings, viz.: (*a*) a system or standard, and (*b*) an

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instrument or vessel, of weight or measurement. As used in s. 21, the words mean the system or standard, while the judgment appealed from ascribes to them the other meaning. The object of s. 21 is to require persons in their contracts and dealings, which have reference to weights and measures, to have in view the system of weights and measures specified in the Act. The contract in question was to thresh at a price per bushel, and, the bushel being one of the measures specified in the Act, the contract is unobjectionable.

There was no dispute as to the quantity threshed. Even if there had been, the bushel, as established by 36 Vic. c. 47, and 42 Vic. c. 16, contains 2217.08 cubic inches, so that the method of measurement adopted by the defendant produced the correct result.

The measuring of the grain by the defendant was not a "dealing" within the meaning of s. 21, but a unilateral act subsequent to and independent of the contract and the performance of it by the defendant. If the measurement were void it could not vitiate the preceding contract, of which it formed no part, but the only effect would be to leave the quantity unascertained, and the onus is on the plaintiff of showing that the defendant took more grain than he was entitled to.

The respondent having acquiesced in and accepted the manner and result of the measuring, and having, by subsequent removal of the grain, prevented the appellant from measuring it in any other manner, is estopped from pleading the statute.

Even if the whole contract were void the appellant is entitled to compensation under the agreement on *quantum meruit: Rose* v. *Winters*,[3] *Giles* v. *McEwan*,[4] *Tress* v. *Savage*.[5]

L. Thompson, for respondent.—The transaction, including the measurement, was a "dealing" within the meaning of s. 21 of the Act, and therefore void: *Manitoba Electric and Gas Light Co.* v. *Gerrie*,[2] *Macdonald* v. *Corrigal*.[1] A

[3] (1900) 4 Terr. L. R. 353. [4] (1896) 11 Man. Rep. 150. [5] (1854) 4 E. & B. 36; 2 C. L. R. 1315; 23 L. J. Q. B. 339; 18 Jur. 680; 2 W. R. 564.

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void transaction cannot be afterwards validated by the parties: *Brook* v. *Hook*,[6] *Merchants Bank of Canada* v. *Lucas*,[7] *Cannon* v. *Bryce*,[8] *Cockshott* v. *Bennett*.[9] Any subsequent agreement by the plaintiff to accept the illegal measurement would be void: *Cooke* v. *Stratford*[10]. The dealing being void, no right of lien could arise therefrom. Any legal measurement of the wheat subsequently made by a third party can not effect the dealing between the plaintiff and the defendant. The parties never contemplated the legal mode of measurement. Only the measurement of the grain threshed on the first occasion was admitted. The amount for which a lien was claimed was never threshed.

[*December 4th, 1902.*]

McGuire, C.J.—This is an appeal against certain portions of the judgment of the Honorable Mr. Justice Wetmore. The plaintiff is a farmer and the defendant a thresher. The plaintiff employed the defendant to thresh his grain at a set price per bushel. After the threshing was complete the plaintiff refused to pay for the threshing. The learned Judge in his judgment, which was for the plaintiff, held that—because the grain had not been measured in a stamped bushel as provided by the Weights and Measures Act, but the amount had been arrived at by the defendant by measuring the cubical contents and allowing 128 cubic feet to contain 100 bushels—this mode of estimating the number of bushels threshed was not in accordance with the said Act, and that it was a dealing within the meaning of s. 21 of that Act; and he found in favour of the plaintiff on the third paragraph of the plaintiff's replication, which is as follows: "3. As a further alternative reply to paragraph 3 of the said statement of defence, the plaintiff says that the defendant agreed to do and did the plaintiff's threshing at a set price per bushel threshed; that the grain threshed, and on account of which the defendant claims the said lien, was

[6] (1871) 40 L. J. Ex. 50; L. R. 6 Ex. 89; 24 L. T. 39; 19 W. R. 508. [7] (1890) 18 S. C. R. 704. [8] (1819) 3 B. & Ald. 179; 22 R. R. 342. [9] (1788) 2 Term Rep. 765; 1 R. R. 617. [10] (1844) 13 M. & W. 379.

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not measured or weighed as required by the statute in that behalf, viz.: s. 21, c. 104, R. S. C., and relying on the provisions of the said statute, the plaintiff claims that the defendant is and was not entitled to any lien as set out in paragraph 3 of the defence or at all."

Section 21, c. 104, R. S. C. is this: "Every contract, bargain, sale or dealing made or had in Canada in respect of any work, goods, wares or merchandise or other thing which has been done, sold, delivered, carried or agreed for by weight or measurement shall be deemed to be made and had according to one of the Dominion weights or measures ascertained by this Act, . . . and if not so made or had shall be void. . . ."

The plaintiff, it will be seen, does not allege that the contract or bargain under which the "work," i.e., the threshing in this case was "done," was "made" or "had" otherwise than in accordance with s. 21. In fact one cannot see how it could have reasonably been so alleged, for the breach as set out by himself in said paragraph 3 was to thresh "at a set price per bushel threshed." A "bushel" is one of the measures authorized by ss. 15 and 16 of the Act, and there is no suggestion that any bushel other than the standard or legal bushel was meant; the replication further alleges that defendant not only "agreed to do" but also "did the plaintiff's threshing," which would appear to admit that he completed his contract, as the learned Judge has found to be the fact.

That being so, the defendant having performed his part of the contract was surely entitled to call upon the plaintiff to perform his part of the bargain, namely, to pay. It seems to me that he could have brought an action for the sum to which he was then entitled on the amount of grain threshed at the rate stipulated, the "set price per bushel." Under these circumstances it seems to me that the thresher would have a right to a sufficient quantity of grain for the purpose of securing payment of the said price or remuneration.

By s. 1, of c. 60, Consol. Ords. "In every case in which any person threshes . . . grain . . . for another

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person at, or for a fixed price or rate of remuneration, he shall have a right to a sufficient quantity," etc.; that is to say, he will be entitled to a lien—to use the language employed throughout the case.

But it is argued that defendant could not have recovered in an action for the threshing, because he had not ascertained the number of bushels threshed in accordance with s. 21. The same difficulty must meet any plaintiff seeking payment for a number of things at so much each, he must in some way satisfy the Court or jury of the number he is entitled to be paid for, but because for some reason he cannot show the exact number—a not unusual occurrence—it does not follow that he is entitled to nothing. In the present case, as the learned Judge has found in effect, there was no dispute between the parties as to the quantity of grain threshed. The plaintiff himself says in his evidence: "The only point between Fitzgerald and I was that he went away without finishing his job and on account of the loss to me was the reason I would not settle. There was no dispute as to the quantity of grain threshed." The learned Judge has further found against the plaintiff as to the reason above given by him for "not settling," finding that the defendant did not go away without finishing his job. The result is that the defendant completed his contract and the plaintiff for a reason which did not exist refused to pay, there being no dispute as to the quantity of grain threshed, and therefore no question as to the amount the defendant was entitled to be paid.

Under these circumstances would not defendant have been entitled to succeed in an action; and if so, I think there can be no question that he was entitled to proceed under the Threshers' Liens Ordinance. It appears from the judgment delivered by the learnd Judge that he was by no means clear that the defendant was not right in his contention, but he seems to have been influenced by the judgment of Taylor, C.J., in *Macdonald* v. *Corrigal*,[1] who held that where a thresher sued for payment for threshing grain, and it appeared that the grain as it was threshed

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was measured by being filled into bags supposed to contain two bushels, he could not succeed. Unfortunately, the judgment is very meagre, and gives no reason for the conclusions arrived at. It may be observed that in the Manitoba case there was an act of measurement by means of an unauthorized vessel or measure not stamped, as required by the Weights and Measures Act, and that it was done before the thresher had completed his contract. Whereas all that is alleged in the pleadings in the present case is that the "grain threshed . . . was not measured or weighed as required by s. 21," not saying that there was any kind of weighing or measuring whatever, still less that it was measured in an improper manner. I do not feel called upon to say whether the Manitoba case can be distinguished or not for this reason; it is sufficient to say that the facts are not the same—but if necessary, I would feel bound, though with reluctance, to decline to accept *Macdonald* v. *Corrigal*[1] as good law, unless the case turns on the weighing in an unauthorized measure while the plaintiff was carrying out his contract.

In the argument before this Court it was urged that the defendant did not attempt to ascertain the number of bushels threshed by finding the cubic contents of the grain, and converting into bushels at the rate of 100 bushels to 128 cubic feet, and that it is alleged that this was the dealing within the meaning of the words of s. 21: "every contract, bargain, sale or dealing made or had . . . in respect of any work, goods, etc.;" and if so, that such dealing being not in accordance with the section was void. Now, it may be that measuring the cubic contents of the grain piles was in some sense a dealing with the grain; and if so it might follow that such dealing, that is the attempt to ascertain the quantity, would be void, that is to say, nugatory or of no effect, and in effect as if such ascertainment had never taken place; but it would not effect the defendant's right to be paid, unless such act was a dealing within the meaning of s. 21, where it appears. The words contract, bargain, sale, dealing, are but, as it seems to me, different words to express the arrangement made between the parties; it might not be quite easy to say just

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what is the exact distinction between say a contract and a bargain, but one word might more fitly describe one kind of an arrangement, and the other another; sale might be a more apt word in another case, and dealing in another, but no one can, I think, seriously doubt that the four words all were intended to describe the arrangement between the parties in respect of the "work, goods, etc." Now the bargain or contract here did not say anything about the mode of ascertaining the number of bushels threshed, nor that it was any part of the defendant's duty. His contract was completed when he finished the threshing of the plaintiff's grain, and he did so finish. The act relied on as being contrary to s. 21 was no part of the contract or dealing between the parties—was done after that contract or dealing had been completed on the defendant's part—and nothing remained but for the plaintiff to pay, as was his duty to do, at the rate he himself alleges on a quantity regarding which he admits there was no dispute. Can it be urged that the effect of attempting to ascertain the quantity in a way not authorized by the Weights and Measures Act, as shown was done in this case, is to relate back and operate to make void the contract as to the threshing, or to invalidate and take away the defendant's right of action—in effect to punish him by a fine of over $300? Whereas had he violated s.-s. 4 of s. 21, the penalty could not have exceeded $20.00, and had he been guilty of using false weights and measures he could at most, under s. 25, have been fined $25.00. But it is clear that, as the learned Judge has expressly found, the defendant has not "by reason of his act in question rendered himself liable to any penalty," which also distinguishes this case from the *Manitoba Electric Light and Gas Co.* v. *Gerrie*.[2]

To hold that after a contractor has finished his contract he should forfeit the fruits of his labour because he has subsequently, by some means not authorized by the Act, attempted to ascertain the quantity of bushels or other units, would be to make an Act framed to protect the public a means by which a scheming and crafty debtor could evade payment of an indisputable claim. In the present case, we

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may suppose that defendant used a tape line, in some other case the party may be guilty of "stepping it," or he may merely measure it with his eye. If the other party happens to detect him in the act will that be a ground for refusing to pay? For that is the logical result it seems to me of the plaintiff's contention—one unauthorized mode of measuring would be as bad as the other. I cannot believe that any such thing was meant by the Act, and I cannot agree that the words of s. 21 bear any such meaning.

I conclude, therefore, that the appeal should be allowed but without costs of this appeal, pursuant to the suggestion of counsel for the appellant. The judgment in the Court below should be for the defendant with costs of the Court below.

RICHARDSON, SCOTT, and PRENDERGAST, JJ., concurred.

Appeal allowed.

REPORTER:
Ford Jones, Regina, Advocate.

THE KING v. HOSTETTER.

Criminal law—Trial by jury, right to—Assault, occasioning actual bodily harm—Criminal Code, s. 262—N. W. T. Act, s. 6[illegible] 67—Construction of statutes.

A person charged with assault occasioning actual bodily harm contrary to s. 262 of the Criminal Code is not entitled, under s. 67 of the North-West Territories Act, to be tried with the intervention of a jury.

Section 66 extends to all minor offences included in the several offences specifically enumerated therein.

[*Court en banc, December 4th, 1902.*

This was a Crown case reserved by WETMORE, J., under s. 743 of the Criminal Code. The accused was charged before him "for that he did . . . make an assault upon and did beat and occasion actual bodily harm to John Ede, contrary to the provisions of s. 262 of the Criminal Code, 1892." The accused pleaded "not guilty," and claimed to be

Statement.

entitled to be tried with the intervention of a jury of six, and requested to be so tried. This was refused and he was tried in a summary way and convicted, sentence being postponed, and the following question of law being reserved for the opinion of the Court, viz.: "Was the accused entitled to be tried by a Judge with the intervention of a jury of six?"

The case was heard December 2nd, 1902.

L. Thompson, for the Crown. No one *contra.*

[*December 4th, 1902.*]

The judgment of the Court (McGUIRE, C.J., RICHARDSON, SCOTT and PRENDERGAST, JJ.) was delivered by

PRENDERGAST, J.—This is a case reserved for the opinion of this Court under s. 743 of the Criminal Code, by Hon. Mr. Justice WETMORE.

The accused, Charles Hostetter, was charged before the learned Judge "for that he did on or about the 11th day of August, 1902, at Gainsborough . . . make an assault upon and did beat and occasion actual bodily harm to John Ede, contrary to the provisions of s. 262 of the Criminal Code, 1892;" and the question submitted is whether he was entitled to be tried by a Judge with the intervention of a jury of six.

It seems clear that the offence as charged, is the same as provided for in s. 262 therein referred to. It is true that there is nothing in the said section expressly referring to beating, while the charge reads "did . . . make an assault and did beat and occasion actual bodily harm," etc. But as under s. 258, assault may be taken to mean either a common law assault in the sense of a mere attempt, or to include also battery, and as occasioning bodily harm necessarily implies beating, the offence as charged and that provided for in s. 262 are substantially the same. The reference made to the said section in the body of the charge, of course removes all doubts as to intention in this respect.

The question was raised as to whether the offence charged also comes under s. 242 of the Code. It surely does not come

under the first part of the section dealing with wounding, for wound means a breaking of the skin, which is in no way necessarily implied by the words "actual bodily harm" used in the charge. Neither do I think that the charge comes under the second part of said section 242. The words "actual bodily harm" in the charge, as I take it, would be fully covered by the least bodily harm, whilst the offence provided in s. 242 has added to it an aggravating element which makes the bodily harm grievous. Judgment. Prendergast, J

Now s. 66 of the North-West Territories Act specially enumerates what offences shall be tried in a summary way and without the intervention of a jury, and the next section provides that "when a person is charged with any other criminal offence, the same shall be tried, heard and determined by a Judge with the intervention of a jury of six."

The offence in the said charge and as provided for in said s. 262 of the Code, is not expressly mentioned in said s. 66.

Does it follow as a consequence then, that the offence as charged, not being mentioned in said s. 66, falls amongst those other criminal offences which under s. 67 may be tried with the intervention of a jury? There is this which seems somewhat to support this contention, that the right to be tried by a jury is a common law right which must be supposed to subsist, unless and until unequivocally taken away by statute; and it is argued that such right is not taken away—not expressly at all events—by said s. 66 as to the offence which is herein in question.

Another view of the matter, however, and one which seems to be a more reasonable one, is that those offences which must be tried in a summary way and specifically enumerated in s. 66, should be taken to cover all offences included therein, upon the principle, as it was said, that the greater includes the less. In this view the offence charged and coming under s. 262 of the Code, would come under and be included in the offence mentioned in s.-s. (*b*) of s. 66.

The principle is, moreover, recognized, although in another aspect, by s. 68 of the N.-W. T. Act, under which a Judge may, under certain circumstances, find the accused

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guilty of an offence other than that charged; and also by s. 711 of the Criminal Code, under which the accused may be convicted of an attempt when the full offence charged is not proved, and s. 713, which says, generally, that "if the commission of the offence charged, as described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved."

It may be said, of course, that it was not necessarily the intention of Parliament that minor offences should be tried summarily and the more grievous ones with the intervention of a jury; and that it may have had regard, less to the gravity of the offence, than to certain traits or characteristics in them which make either a Judge alone, or a Judge and jury, more competent to deal appropriately with the same. But it does seem indeed that if the Act deems that a graver offence can be properly tried by a Judge alone, all other offences included therein can be as appropriately dealt with by him—not only on the ground that they are less grievous, but also on the ground that they must be of the same nature and character.

Moreover, the contrary would seem to lead to rather anomalous circumstances, as was pointed out. For instance, an assault upon a female or upon a male child under 14 years, being mentioned in s. 66, must be tried in a summary way; but a simple assault upon a full grown man, not being therein specified, would call for the intervention of a jury.

In conclusion, I am of the opinion, which is concurred in by the other Judges of this Court, that the offence charged, although not expressly mentioned in s. 66 of the North-West Territories Act, is included in the offence specified in s.-s. (*c*) thereof,—that the accused could be, and was properly tried in a summary manner, and that he was not entitled to be tried by a Judge with the intervention of a jury.

The conviction is affirmed.

REPORTER :

Ford Jones, Regina, Advocate.

THE KING v. RAPAY.

Criminal law—Obstructing school trustee in making distress — Criminal Code, s. 144 (2)—Mailing of notice of assessment and tax notice, and of posting of tax roll, sufficiency of evidence of—Entries on tax and assessment rolls initialled by official trustee—"Proceeding"—"Canada Evidence Act, 1893," s. 2.

Held, that on the trial of an accused on a charge of having unlawfully resisted and wilfully obstructed an official trustee of a school district in making a lawful distress and seizure, the production of the tax and assessment rolls of such school district with entries thereon of the dates of the mailing of the notice of assessment, and of the tax notice to the accused, and of the posting of such tax roll, initialled with what purports to be the initials of the official trustee of such school district, is evidence of the mailing of such notices and of the posting of such tax roll.

Held, that such prosecution was a "proceeding" within the meaning of s. 2 of "The Canada Evidence Act, 1893."

[*Court en banc, December 4th, 1902.*

Statement.

This was a question of law reserved for the opinion of the Court *en banc* by WETMORE, J.

The accused was charged before him under s. 144 (2) of the Criminal Code, 1892, with having unlawfully resisted and wilfully obstructed the official trustee of a school district in making a lawful distress and seizure. The only evidence that the notice of assessment provided for by s. 10 (2) of the School Assessment Ordinance was ever mailed to the accused was the production of the assessment roll of the school district having thereon what purported to be the entry of the date of the mailing of such notice, initialed with what purported to be the initials of the official trustee of the district. The only evidence that the tax roll was posted as required by s. 14 (1) of the said Ordinance was the production of the tax roll, having thereon what purported to be the entry of the date of such posting, initialed with what purported to be the initials of such official trustee. The only evidence that the tax notice provided for by s. 14 (3) of the said Ordinance was ever mailed to the accused was the production of the said tax roll, having thereon what purported to be the entry of the date of mailing of such tax notice, initialed with what purported to be the initials of such official trustee.

There was no evidence to verify these entries or initials, and no evidence that the accused ever actually received either

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of such notices, or that the tax roll was actually posted. The accused was convicted, sentence being postponed, and the following question of law was reserved for the opinion of the Court *en banc*: "Were these entries on the respective rolls of the dates of mailing and posting, with what purported to be the initials of the official trustee, evidence in this criminal case of the mailing of the respective notices and of the posting of the tax roll as required by the Ordinance."

The case was heard December 2nd, 1902.

J. C. Brown, for the Crown.

No one for the accused.

[*December 4th, 1902.*]

The judgment of the Court (McGUIRE, C.J., SCOTT and PRENDERGAST, JJ.) was delivered by

McGUIRE, C.J.—This is a reference to this Court by Hon. Mr. Justice WETMORE. The question which he refers in short is whether the evidence set out in the reference and which would have been sufficient in any civil proceedings in the Territories to prove the facts alleged, is admissible and sufficient in this case, it being one of a criminal character and under a Dominion statute.

By s. 2, Canada Evidence Act, "In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the Province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpœna or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings."

This prosecution is a proceeding within the meaning of this section, and the laws of proof of service of documents in force in the Territories are made applicable to such a proceeding. The question submitted by the reference should, therefore, in the opinion of the Court, be answered in the affirmative. The conviction should be affirmed and sentence be given on such conviction.

REPORTER:

Ford Jones, Regina, Advocate.

KING (IN THE INF. OF FYFFE) v. BROOK.

Criminal law—Gambling—Plea of guilty—Appeal, right of—Criminal Code, s. 879—Estoppel.

A person who has pleaded "guilty" to a charge, and has been summarily convicted, may raise a question of law in an appeal under s. 897 of the Criminal Code, but on such appeal his former plea of "guilty" estops him from calling upon the respondent to prove his guilt. So far as his guilt or innocence is concerned he is not a "party aggrieved" within the meaning of s. 879 of The Criminal Code.

[*Court en banc, December 4th, 1902.*

Statement.

This was a reference to the Court *en banc* by WETMORE, J. The appellant was charged before a Justice of the Peace with gambling contrary to s. 199 of the Criminal Code. In answer to such charge he appeared before two Justices of the Peace and pleaded "guilty," and was thereupon convicted for that he did "gamble in a common gaming house contrary to s. 199 of the Criminal Code," and was adjudged to pay a fine and costs. He thereupon duly entered an appeal under s. 879 of the Criminal Code. Upon the matter coming on for hearing before WETMORE, J., counsel for the appellant claimed that the respondent should be called upon, and that it was incumbent upon him to prove the appellant guilty of the offence charged. WETMORE, J., thereupon referred to the Court *en banc* the question: "Whether, under such circumstances, an appeal lies under s. 879 of the Criminal Code."

The reference was heard December 2nd, 1902.

L. Thompson, for the respondent.

No one *contra*.

[*December 4th, 1902.*]

WETMORE, J.—I am of opinion that the question submitted by this reference must be answered in the affirmative.

Section 879 of the Criminal Code, 1892, provides "unless it is otherwise provided in any special Act under which a conviction takes place or an order is made . . . any

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Wetmore, J.

person who thinks himself aggrieved by any such conviction or order . . . may appeal." The appellant in this case was convicted upon his own admission before the Justices by reason of pleading "guilty" to the information. I was inclined to the opinion when the question was argued before me that under the circumstances no appeal would lie under s. 879, that the only questions that the appellant could raise under the circumstances were questions of law as to the validity of the information of the conviction, and that, therefore, the only right of appeal or review that he had must be taken either under s. 900 of the Code or by *certiorari*. I have no doubt that a person may plead guilty to an information under the Summary Convictions Procedure and be convicted upon such plea, and yet the conviction be had in law and liable to be quashed. On more careful consideration, I have come to the conclusion that a person convicted under such procedure may raise a question of law in an appeal under s. 879. I am very much influenced in reaching this conclusion by reading s. 882 of the Code. The provisions of that section have reference to an appeal under s. 879, and it is quite evident that it contemplates an appeal being taken based on an objection in point of law. It provides that "no judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint or summons, or to any warrant to apprehend a defendant issued upon any such information, complaint or summons for any alleged defect therein in substance or in form . . . unless it is proved before the Court hearing the appeal that such objection was made before the Justice." Therefore the appeal may be taken based on such objection, but the appellant cannot get judgment in his favour thereon if the objection was not raised before the Justice. An appeal based on such an objection would be an appeal based on an objection in point of law. The section is silent as to appeals based on other objections in point of law, and therefore appeals based on such other objections lie and are not subject to limitations respecting the judgment to be pronounced as provided for as to the cases specially mentioned in the section.

Judgment.
Wetmore, J.

But while I am of the opinion that the abstract question submitted by the reference must be answered in the affirmative, I am of the opinion that the appellant is not, under the circumstances of this case, entitled to call upon the respondent to produce evidence to establish that he is guilty of the offence of which he is charged. His plea of guilty before the Justices estops him from taking that ground. So far as the facts relating to his guilt or innocence are concerned he is not a person aggrieved within the meaning of s. 879. *Harrop* v. *Bayley*[1] puts this question beyond doubt.

McGUIRE, C.J., SCOTT and PRENDERGAST, JJ., concurred.

REPORTER:

Ford Jones, Advocate, Regina.

[1] (1856) 6 El. & Bl. 217; 25 L. J. M. C. 107; 2 Jur. (N.S.) 882; 4 W. R. 461.

THE COLONIAL INVESTMENT & LOAN CO. v. KING ET AL.

Mortgage—Action on the covenant—Foreclosure under Torrens System Re-opening foreclosure—Consolidation—Building Society—Lien on shares—Adding parties.

On 27th December, 1893, the defendant K. gave a mortgage to a Loan Co., to secure repayment of $400 and interest. On the 10th March, 1894, K. entered into an agreement to sell the mortgaged property to the defendant L., and the defendant L. paid the purchase price and became entitled to a conveyance from K. On the 4th June, 1895, the defendant K. gave a mortgage to the same company on certain other property to secure repayment of $2,600 and interest. At the time of executing these two mortgages the defendant K. subscribed for certain shares in the Loan Company, which he thereupon assigned to the Company as security for repayment of the loans, and the mortgages on the respective pieces of land were given as collateral. Each mortgage contained a proviso that the Company should have a lien upon all stock then or thereafter held in the Company by the defendant, as security for repayment of the sum secured by the mortgage. The defendant K. allowed the payments on both mortgages to fall into arrear. The Loan Company took proceedings against K. upon the second mortgage for $2,600, and on the 24th day of August, 1899, obtained an order vesting the title in the property covered by it in themselves and debarring K. from all right to redeem.

Subsequently by an assignment executed by the mortgagees under the authority of the Act incorporating the plaintiff Company, the latter

Company became the owners of the assets of the mortgagees, including the two mortgages given by K., and the land included in the second mortgage. On the 10th January, 1901, the plaintiff Company brought action against K. upon his covenant to pay contained in the mortgage for $2,600, and in their statement of claim offered to "re-open the foreclosure," and claimed the right to consolidate the two mortgages but did not add L. as a party.

L. applied by counsel at the opening of the trial to be added as a party defendant, upon an affidavit setting forth the facts of his agreement with K. to purchase the property covered by the mortgage, of his having paid the price in full and K.'s inability to give title owing to the refusal of the mortgagees to discharge the $400 mortgage until the $2,600 mortgage was paid.

Held, that L. was entitled to be added as a party defendant under s. 36 of the J. O. (1898).

Held, also, that as L. had bought prior to the mortgage for $2,600 he was entitled to all the equities of the mortgagor existing at the date of his purchase, and that his rights were subject only to the equities of the mortgagees existing at that date, and that since the mortgagees had no right of consolidation at that date, the second mortgage not having yet been executed, they had no right at all to consolidate the mortgages as against the defendant L.

The word "foreclosure" as applied to proceedings to enforce a mortgage under the Land Titles Act in the Territories, is apt to mislead if it is sought to treat those proceedings as identical with "foreclosure" proceedings, where the mortgage conveys an estate in the land to the mortgagee with a defeasance clause in case payments are made as provided. In the Territories the mortgagee has merely a lien until payment, and in case of default he can proceed to get an order either to sell the land or to have the title thereto vested in himself, and care must therefore be taken when endeavouring to apply to mortgages in the Territories the rules and principles laid down in other jurisdictions.

Held, therefore, that the plaintiffs having obtained an order vesting in themselves the absolute title to the property covered by the mortgage for $2,600, they were in the same position as a mortgagee who has taken from the mortgagor a transfer of the mortgaged property where nothing appears showing any intention to reserve the right to sue; that, as there was no evidence to show that the plaintiffs intended when they obtained the vesting order to reserve the right to sue upon the covenant, the proper presumption was that the plaintiffs intended to take the land in full satisfaction and to abandon that right.

Held, further, that the fact that the plaintiffs had elected to take a vesting order rather than an order for sale, and the fact that they had waited sixteen months before beginning action were circumstances tending to show affirmatively an intention to abandon their right to sue.

Held, therefore, that the action should be dismissed with costs as against both defendants.

The question of the right of mortgagees to re-open a foreclosure considered.

[McGUIRE, C.J., *December 26th, 1902.*

Statement. This was an action upon the covenant contained in a certain mortgage deed executed by the defendant King in favour of the assignors of the plaintiffs. By deed dated the 4th June, 1895, the defendant King mortgaged to the Canadian Mutual Loan and Investment Company lot number 22 in block 2, plan D, of the city of Calgary, to secure repayment of a loan of $2,600, and by the said deed the defendant King

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covenanted to repay the said sum of $2,600, together with interest at 15 per cent. per annum. The mortgage contained a proviso that if the defendant should make certain monthly payments upon certain stock held by him in the said Canadian Mutual Loan and Investment Company until the maturity of the said stock, such payments would be accepted in full of principal and interest, and that the mortgage should thereupon be null and void. By another clause it was provided that if default were made in the payment of any of the said monthly instalments the whole principal sum should immediately become due and payable. By a prior mortgage dated the 27th day of December, 1893, the defendant King and one James Walker mortgaged to the same mortgagees certain other property in the city of Calgary to secure repayment of the sum of $400 and interest. At the time of executing each of the said mortgages the defendant King subscribed for certain shares in the capital stock of the mortgagees, the Canadian Mutual Loan and Investment Company, and each of the said mortgages contained an agreement to the effect that the mortgagees should have a lien upon all the shares of the capital stock of the mortgagees then held or thereafter subscribed for by the mortgagor until the principal and interest should be fully paid, and the mortgagor, the defendant King, agreed to assign and did assign in each case the shares so subscribed for by him to the mortgagees as security for the repayment of the sums above mentioned. Each of the mortgages also contained a covenant by the defendant King to "observe and obey the rules and by-laws for the time being of the mortgagees."

On the 10th of March, 1894, the defendant King entered into an agreement to sell the property contained in the mortgage of the 27th December, 1893, to one Lewis.

Subsequently the mortgagees, the Canadian Mutual Loan and Investment Company under the provisions of a special Act of Parliament incorporating the plaintiff company, assigned to the plaintiff company all their interest in both the mortgages and in the shares of stock above referred to. The defendant King allowed the payments on both mortgages

Statement.

to fall into arrear and the plaintiff company took proceedings upon the mortgage of the 4th June, 1895, to enforce their claim against the land covered by it, and on the 24th day of August, 1899, the plaintiff company obtained an order vesting the title to the land in themselves and debarring the defendant King from all right to redeem. The shares held by King in the original company were thereupon cancelled by the plaintiffs in accordance with the by-laws of the original company.

On the 10th January, 1901, the plaintiffs commenced this action and sought to recover judgment against the defendant King for the amount of the mortgage money and interest due upon the mortgage of 4th June, 1895, less certain allowances. By their statement of claim they alleged that they still held good title in fee simple to the land covered by the mortgage and were willing to "reopen the foreclosure."

The defendant King pleaded general denials of the allegations contained in the statement of claim, and also set up the defence that the plaintiffs having obtained an order vesting the property in themselves, had thereby elected to take the property in full satisfaction of their claim, and were precluded from "reopening the foreclosure," and therefore from suing upon the covenant to pay.

The action was tried at Calgary at the May sittings of 1902, before McGuire, C.J., without a jury.

At the opening of the trial *H. W. H. Knott*, acting as counsel for Charles Lewis, applied to have the said Lewis added as a party defendant, and in support of his application read an affidavit of the said Lewis in which the agreement for the sale of the mortgaged premises covered by the prior mortgage of 27th December, 1893, entered into on 10th March, 1894, between the mortgagor, the defendant King, and the said Lewis, was set forth, and by which it was alleged that Lewis had fully completed his part of the agreement, that he had had no notice of any other encumbrance than the mortgage of the 27th December, 1893, covering the lands which he had agreed to buy, that he was entitled to a conveyance of the same free of all encumbrances, and that the defen-

dant King had been unable to give the said conveyance because the plaintiff company had refused to discharge the mortgage of 27th December, 1893, until the moneys secured by the subsequent mortgage of 4th June, 1895, which were the subject of the action, had been fully paid. Statement.

Norman McKenzie, for the plaintiffs, opposed the application to add Lewis as a defendant.

The learned Judge held that s. 36 of the Judicature Ordinance covered the case, and directed Lewis to be added as a defendant. A defence was forthwith filed on behalf of Lewis in which the matters set forth in the affidavit were pleaded and in which Lewis claimed that the plaintiffs were not entitled to consolidate the two mortgages and the shares of stock as against him, and asked for a declaration to that effect.

The trial was then proceeded with and evidence taken.

Norman McKenzie, for the plaintiffs, referred to *Ex parte Bath, re Phillips*,[1] *Burbidge* v. *Cotton*,[2] *Freehold Permanent* v. *Choate*,[3] *Western Canada Loan and Savings Co.* v. *Hodges*,[4] *Crone* v. *Crone*,[5] *Sheriff* v. *Glenton*,[6] Wurtzburg on Building Societies, 3rd ed., p. 185. The plaintiffs are entitled under these authorities to consolidate both loans, and the liens created by the mortgages themselves and by the incorporation of the by-laws act as consolidation of the stock. See *Scottish American I. Co.* v. *Tennant*,[7] *Societe Canadienne Francaise* v. *Darveluy*.[8] The plaintiffs are also entitled to open the foreclosure: *Chatfield* v. *Cunningham*,[9] *Dashwood* v. *Blythway*,[10] *Lockhart* v. *Hardy*.[11]

Clifford Jones, for the defendant King. The lower security given by the mortgage was merged in the higher security,—the judgment of foreclosure: Pollock on Contracts, 5th ed., 143-4, Anson on Contracts, pp. 46, 322. The plaintiffs cannot now open the foreclosure, having once elected. Besides the rule allowing a reopening of a fore-

[1] 27 Ch. 509; 51 L. T. 520; 32 W. R. 808. [2] 5 De Gex & Sm. 17; 21 L. J. Ch. 201; 15 Jur. 1070. [3] 18 Grant, 412. [4] 22 Grant, 566. [5] 26 Grant, 459. [6] 28 L. T. 65. [7] 19 Ont. R. 263. [8] 20 S. C. R. 449. [9] 23 Ont. R. 153. [10] 1 Eq. Abr. 317. [11] 9 Beav. 349; 15 L. J. Ch. 347; 10 Jur. 532.

Argument.

closure cannot be made applicable in a jurisdiction in which the Torrens system of land titles prevails. Even if applicable in the Territories, the rule was never allowed to operate where the land had been sold, and here the transfer of assets from the original company to the plaintiffs was in fact a sale. Before a foreclosure can be reopened the mortgagee must be in a position to return the property unimpaired. This cannot be done in this case as the mortgagor's stock in the company has been cancelled. He referred to *North of Scotland Mortgage Company* v. *German*,[12] *Trinity College* v. *Hill*,[13] *Perry* v. *Barker*,[14] *McKenzie* v. *Thuresson*.[15]

H. W. H. Knott, for the defendant Lewis. The plaintiffs cannot consolidate their stock and mortgages as against Lewis: Fisher on Mortgages, 5th ed., pp. 577, 578-9; *Pilkie* v. *White*,[16] Robbins on Mortgages, vol. II., pp. 859-60. Lewis purchased before the second mortgage by King was executed at all and is subject only to equities existing at the date of his purchase: *Harter* v. *Colman*.[17]

[*December 26th, 1902.*]

McGuire, C.J.—In this action the plaintiffs are suing the defendant King upon the covenants in a mortgage given by him to the Canadian Mutual Loan and Investment Company on the 4th June, 1895, for the sum of $2,600 and interest and certain charges in connection therewith. The plaintiffs claim to be the assignees of or otherwise well entitled to the said mortgage security. In the plaintiffs' statement of claim reference is made to a prior mortgage on a different parcel of land given by the defendant King to secure $400 and interest, and it was urged that King was not entitled to pay off and receive a discharge of this prior mortgage without also paying off the $2,600 mortgage. This question doubtless arose because of an effort of King to pay off this $400 mortgage, he having sold the land covered by it to one Charles Lewis. Lewis applied during the trial for

[12] 31 C. P. 349. [13] 2 O. R. 348. [14] 8 Ves. 527; 9 R. R. 171. [15] 10 W. R. 4. [16] 65 L. J. Ch. 449; (1896) A. C. 787; 74 L. T. 323; 44 W. R. 589. [17] 51 L. J. Ch. 481, 19 Ch. D. 629, 46 L. T. 154; 30 W. R. 484.

Judgment.
McGuire, C.J.

leave to come in and defend this action so far as the land covered by the $400 mortgage is concerned, on the ground that he had bought the land prior to the giving of the $2,600 mortgage, and has paid the full sale price thereof, and is entitled to a conveyance thereof from King free from the mortgage referred to. I allowed Lewis to come in and to put in a statement of defence which he did, and counsel appeared for him at the trial and evidence was gone into on his behalf, which satisfied me that he had under an agreement for sale in March, 1894, bought the land and has paid the full consideration mentioned in the said agreement of sale, and he is now entitled as against the defendant King to a transfer free from said mortgage. The plaintiffs' claim that in said $400 mortgage there is a clause whereby King agreed that the mortgagees should have a lien upon all shares of the capital stock of the mortgagees *then held* or *thereafter subscribed* for by the mortgagor King and whereby further he agreed to assign the shares he then held to the mortgagees forthwith, and there is a similar clause in the $2,600 mortgage. There is nothing, however, in either mortgage giving the mortgagees a lien on any *land*, except the lands respectively mentioned in such mortgage. The defendant Lewis was not a holder or subscriber for any stock of the mortgagees, and is not concerned in the question of how far the stock held by King mentioned in the $400 mortgage may be subject to a lien for the payment of the $2,600 mortgage. He bought the land with knowledge of only one mortgage thereon, viz., for $400. The $2,600 mortgage was not then in existence, and did not come into existence for over a year after the purchase by Lewis. It may be taken that the plaintiffs' claim that he is affected by the term in the $2,600 mortgage which they say gives them a lien, as against King, on the four shares of stock mentioned in the $400 mortgage, but I cannot see in what way he can be affected by an agreement to which he is not a party in any way, which was not entered into by anyone till long after his purchase and which was not made in pursuance of any covenant in the $400 mortgage of which alone he had any knowledge. There is, as already mentioned, a proviso in that mortgage that the mortgagees

Judgment.
McGuire C. J.

shall have a lien on any subsequent stock which King might subscribe for, but there is nothing to the effect that either the land or stock, mentioned in the $400 mortgage, shall be deemed security for the payment of any subsequent mortgage King might see fit to give to the mortgagees, and the subsequent mortgage when looked at does not in any way give the mortgagees a lien on any *land* but the land mentioned therein, which does not include the land bought by Lewis.

By the terms of the $400 mortgage King was to repay the loan $400 with interest at 15 per cent., but by a subsequent clause it was "expressly understood and agreed" that if King paid certain monthly sums until the maturity of the four shares mentioned therein, such payment "shall be taken in full payment of the principal and interest above reserved." It is not said that on such payments and at maturity the mortgagor shall be entitled to four shares of a par value of $400, and that he may therewith pay off the mortgage. However, so far as Lewis is concerned, any question affecting King's stock does not affect him. The mortgagor was not bound to pay as in this proviso. He might pay the $400 with 15 per cent. interest monthly on the first Tuesday in February, 1901, or he might pay it off at any time after the expiration of two years from the date of the mortgage by giving 30 days notice or paying interest for an additional 30 days. It seems to me that is Lewis' position. The most he can be called on to pay is the $400 and interest less any payments made thereon by King which he may be found entitled to apply in reduction thereof. In case the plaintiffs should claim a right to consolidate their two mortgages it was contended by counsel for Lewis that as against him at least the plaintiffs have no such right, whatever their rights may be as against King. The law, as stated by Mr. Justice Street at the trial of *Stark* v. *Reid*,[18] which will be found in a foot note to the report of that case in 26 Ont. Rep. at pp. 262-3-4-5, seems to be as contended for by counsel for Lewis. In the present case the plaintiffs had no right to consolidate

[18] 26 O. R. 257.

when Lewis purchased and when, some years after, both mortgages being in default, they elected to "foreclose," or more correctly speaking, to enforce their security under the $2,600 mortgage alone as against the land mentioned therein only.

They did not comply with any of the conditions laid down by Mr. Justice Street as essential to the right to consolidate. I may observe, en passant, that the word "foreclose" as applied to proceedings to enforce a mortgage under the Land Titles Act in the Territories, is apt to mislead if it is sought to treat those proceedings as identical with "foreclosure" proceedings where the mortgage conveys an estate in the land to the mortgagee with a defeasance clause in case payments are made as provided. In such a mortgage the mortgagee has only an "equity of redemption" after the time for payment has expired without payment, that is, he is held in equity entitled to come in and redeem after default upon certain terms, but no particular time has been fixed within which he must exercise that right. In order, therefore, that the mortgagee may not be kept indefinitely in suspense he is allowed to call upon the mortgagor to exercise his right within a limited time. The amount the mortgagor must pay to redeem is ascertained by the Court. He is notified that unless he pays that amount by the day named his right to redeem will be barred, and in the event of his not availing himself of this final opportunity, the Court declares that his right to redeem is gone—the mortgage is foreclosed. But under our Land Titles Act the mortgage does not operate as a transfer of title, but only as security. The mortgagor remains the owner of the legal estate. The mortgagee merely has a lien until payment, and in case of default he can proceed to get an order either to sell the land or to have the title thereto vested in himself. Upon getting a final order vesting the title in him he can obtain from the registrar of land titles a certificate which gives him an absolute title freed from all claim by the mortgagor. Under these circumstances one must be careful when endeavoring to apply to mortgages here the rules and principles laid down, say in England or

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Ontario, as governing the rights of parties to a mortgage there.

To turn now to the rights of the plaintiffs as against the defendant King. It appears that the mortgagees took proceedings to enforce their security under the $2,600 mortgage as against the land mentioned therein, and, as set out in their statement of claim, "upon the 24th day of August, 1899, recovered judgment for foreclosure, foreclosing the defendant's interest in the property described in the said first mentioned mortgage, and a certificate of title showing the said property to be vested in the plaintiffs was issued on the 24th day of August, 1899, to them." A certified copy of that judgment was put in by the defendant King, from which it appears that "It is ordered that the defendant do stand absolutely debarred and foreclosed of and from all right and title, interest or estate, or right in equity of redemption of, in or to the above described lands.

"And it is further ordered that all the estate and interest of said George Clift King, or of anyone claiming through or under him in the said lands (describing the land in the $2,600 mortgage) be and the same is vested in the said plaintiffs (the mortgagees) free from all right or equity of redemption on the part of the defendant King or anyone claiming through or under him."

This judgment or order was registered in the proper Land Titles office, and a certificate of title thereon issued vesting the title in the land in the mortgagees.

It will be noticed that while the person who drafted the judgment has used the word "foreclosed," he has also used words apt and necessary to vest the title in the mortgagees. The ordinary judgment in a foreclosure action under a mortgage which passes the legal estate to the mortgagee is usually in this form (Seton):—

"It is ordered that the defendant A. B. do from henceforth stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises;" that is, the relief given by the equity courts is now taken away from him. There is nothing here as to vest-

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McGuire, C.J

ing in the plaintiff the defendant's title in the land, because the mortgage had already passed the legal estate. In the Territories it was necessary to do more than bar the defendant. An order in the terms of a foreclosure order in the form taken from Seton would not have satisfied the registrar or warranted him in issuing a certificate of title. The judgment had to vest the title to the land in the plaintiffs, and that is the material and indispensable portion of the judgment. The "debarring and foreclosing" paragraph is probably not at all essential, however prudent it may have been deemed to insert it.

This then was a judgment that the land formerly the defendant's and against which the plaintiffs merely had a lien by way of security is now transferred from the defendant to the plaintiffs. The plaintiffs obtained that judgment by virtue of having satisfied the Judge that the value of the land was not in excess of their claim, otherwise, according to the well-known practice in such cases, had the property been of considerably greater value than the plaintiffs' claim a sale would first have been ordered. The plaintiffs, however, put in a statutory declaration of value made by one "G. Tempest," who describes himself as the plaintiffs' "agent," that the land did not exceed in value three thousand dollars.

It was, therefore, by their own deliberate acts that a judgment was obtained vesting the title in them, instead of having the property sold. The result was the same as if the mortgagor had given them a transfer. Now had he given them a conveyance they could not have sued him on his covenant "in the absence of evidence to show a contrary intent or result:" *North of Scotland Mortgage Co.* v. *Udell*.[19] On the same page the learned Chief Justice says: "I am strongly of opinion that the burden is thrown upon the plaintiff to satisfy a jury that a different effect was intended to be given to the transaction." In the present case there is no evidence to show that the plaintiffs intended to reserve the right to sue on the covenant. There are some circumstances tending to establish the opposite, such as their intentionally elect-

[19] 46 U. C. Q. B. 511.

Judgment. McGuire, C.J.

ing to take a vesting order rather than an order for sale, and the fact that they waited over sixteen months after getting their vesting order before beginning the present action. In the case just referred to the plaintiffs had taken a deed in fee, but the cases relied upon by Hagarty, C.J., show that a conveyance of the equity of redemption have the same effect. It seems to me that if anything the conveyance by a mortgagor in the Territories to the mortgagee of his legal estate is when unexplained even stronger evidence that the mortgagee did not intend to reserve a right to sue on the covenant. To use again the language of the judgment of Hagarty, C.J., in such a case, "the natural presumption must be that the charge is merged in the complete ownership of the inheritance." Now there was, it is true, no conveyance executed by King to the mortgagees, but there is what is its equivalent,—a conveyance by order of the Court, and whatever reasons apply in the one case seem to me equally applicable in the other, for presuming a merger of the charge in the title thus vested in the mortgagees. It may often be a very distinct advantage to a mortgagee to get the property itself in preference to receiving his money, especially in the West here where land values are rapidly increasing. At any rate, where he chooses to take the title without reserving his right to sue on the covenant, it seems only reasonable that the presumption should be as laid down in the case just cited. I think that a jury would reasonably find in the present case that the mortgagees did not intend to reserve a right to sue upon the covenant, and that is the conclusion I have arrived at on the facts. As to the merger of a claim in a judgment, see *Toronto Dental Mfg. Co.* v. *McLaren*.[20] The head note of a decision taken from a digest of Australian cases under the Torrens Land System, *Campbell* v. *Bank of N. S. Wales*,[21] was cited on the argument by counsel for the defendant King, "Where the formalities provided by the Real Property Act for the foreclosure of a mortgage under the Act have been complied with and there has been no fraud, the Court has no power to reopen the foreclosure." Unfortunately I have been

[20] 14 P. R. (Ont.) 89. [21] 16 N. S. W. L. R. 235; 11 A. C. 192.

unable to see the reasons given in the judgments in the case and one is left to conjecture what were the grounds of the decision. Judgment. McGuire, C.J.

There were other points which I may refer to; for example, the plaintiffs' offer to reopen the foreclosure. I am not convinced that the judgment in the present case was a "foreclosure" in the sense in which the word is used where the law as to reopening a foreclosure is dealt with. It seems to me it is a judgment, and the evil of allowing the plaintiffs to reopen it would be the same as allowing a plaintiff to get a new trial in any other case in which he has proceeded to judgment and has got all he asked for. See case last cited from 14 P. R. But it is not necessary to express any decided judgment on the point. But assuming it to be a case governed by the practice as to reopening foreclosures, the defendant urges that while it is true a plaintiff who has foreclosed (using that word in its correct sense), may nevertheless sue on the covenant if the property proves of less value than the amount due on the mortgage, yet he cannot do so in the absence of fraud unless he is prepared to restore the security, and the defendant says that the plaintiffs are not in a position to do so here. The security mentioned in the mortgage consists of the land and 26 shares of stock on which the mortgagor had made a considerable number of payments. In fact the plaintiffs contend that the stock was the principal security, the land being merely collateral to the shares. The defendant says the mortgagees cancelled the 26 shares of stock, and I think the evidence of Mr. Mitchell has established that fact in the affirmative. See particularly his answers to Q. 256, 261, 262, 276, 277, 278, 284. From these answers it clearly appears that the 26 shares were "absolutely forfeited" before the present action was commenced. His answers to Q. 296-7-8 confirm this. These acts of forfeiture and "writing off" of these shares were done by the Canadian Mutual Loan and Investment Co., the predecessors of the present plaintiffs, and so far as appears from the evidence nothing has been done either by the old company or by the present plaintiffs to reinstate King as a

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shareholder or to revive his forfeited stock. Such being the case it is urged that the plaintiffs are unable to deliver over to him that which they contend is the principal security mentioned in the mortgage, and which, in whatever view is taken of the mortgage, was clearly a portion of the security. The law is quite clear, as claimed by the defendant, that if the plaintiffs after foreclosing attempt to recover upon the covenant to pay, they cannot succeed unless they are in a position to deliver back the mortgaged property. The law is so laid down by the Master of the Rolls in *Palmer* v. *Hendrie*.[22] "The question is whether the mortgagee has made it impossible to restore the property mortgaged; he can undoubtedly at law sue upon the covenant . . . but the mortgagee must perform his reciprocal obligation. He is bound on payment to restore the property to the mortgagor, and if it appear . . . that by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate upon payment . . . this Court will interfere and prevent the mortgagee suing the mortgagor at law." That decision was where there were separate Courts of law and equity in existence; but the law is the same now where the same Court exercises the functions of a Court of Equity as well as of law. See also *Walker* v. *Jones*,[23] *Kinnaird* v. *Trollope*.[24] In the view I have taken upon the other ground it is not necessary to say anything further on this ground of defence.

On the whole I am of opinion that the plaintiffs are not entitled to succeed in the present action and that the action should be dismissed with costs of both defendants to be paid by the plaintiffs.

Judgment accordingly.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

[22] 27 Beav. 349. [23] 35 L. J. P. C. 30; L. R. 1 P. C. 50; 12 Jur. (n.s.) 381; 14 L. T. 686; 14 W. R. 484. [24] 39 C. D. 636; 57 L. J. Ch. 905; 37 W. R. 234.

CORTICELLI SILK CO. v. BALFOUR & CO.

Interpleader—Property liable to seizure—Seizure of books of account —Debtor and creditor—Assignment of debts.

A ledger or account book containing a list of debts which have been assigned in writing and which are described in the writing as "All the debts in a certain ledger marked A," is a mere incident to the debts, and is no longer a chattel as it was before the entries were made in it. It is, therefore, not seizable in execution against a judgment debtor, the former owner of the debts, as against the person to whom they have been so assigned by him.

[McGUIRE, C.J., *December 29th, 1902.*

Statement.

The Corticelli Silk Company obtained judgment against the People's Supply Company, Limited, and issued execution. The deputy sheriff seized a number of books of account belonging to the debtors, which contained entries showing the names of various persons indebted to the debtors and the amounts of their several debts. On making the seizure he declared that he was seizing not only the books but the debts referred to therein. The debtors, the People's Supply Company, had previously assigned the debts referred to to Balfour & Co., and the latter company by their advocates served a notice on the deputy sheriff notifying him of their claim under the assignment, and requiring him not to sell, deal with or dispose of the said debts in any way.

The deputy sheriff thereupon applied for and obtained from Chief Justice McGUIRE a summons calling upon all parties concerned to appear and state the nature and particulars of their respective claims to the goods and chattels seized by him, and to maintain or relinquish their said claims.

Under the return of the summons,

R. B. Bennett, for the execution creditors, stated that they abandoned their claim to the debts, but claimed the right to seize the books of account themselves, and asked that an issue be directed to be tried.

James Muir, K.C., for the claimants.

[*December 29th, 1902.*]

McGUIRE, C.J.—The question submitted for decision in this case is whether the sheriff can seize a "Ledger A." which

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belonged to an execution debtor, but who had previously to the attempt to seize made an assignment of "All the debts in a certain ledger marked A."

It is conceded that the sheriff could not seize the choses in action—the book debts—themselves. By our Ordinance the assignment of a chose in action by an instrument in writing is allowed. Therefore the assignment of the book debts was a good assignment of these choses in action. Now as the sheriff could not seize the debts in the ledger A, his only possible claim to seize the book is that it represents a certain amount of paper, etc. But I think when a piece of paper is converted into evidence of something, as by making of it a promissory note, a deed, etc., it ceases to be mere paper, as it originally was. A liquor license has been held to be not a mere piece of paper: *Walsh* v. *Walper*.[1]

In Freeman on Executions, p. 1474, it is said: "Books of account, while they may contain correct statements of the accounts between parties, are not choses in action. They are mere evidence of the existence of such choses. A levy upon and taking possession of them would be entirely inoperative unless as a levy upon the paper and other materials of which they are composed." At p. 432 this is said: "These books of accounts and trial balances are not property of such tangible character that they can be made subject to such levies." This is cited from an American judgment.

At p. 426 it is said that "private books and papers having little or no market value, but containing accounts, etc., etc., are not subject to a levy on an execution against him. For this *Oystead* v. *Shed*[2] is given as authority.

In Broom's Legal Maxims will be found one, the translation of which is, "The incident shall pass by the grant of the principal, but not the principal by the grant of the incident." "All that belongs to a principal thing or is in connection with it is called an accessory thing"—an "accessorium"—an incident. It has been held in the United States that an assignment of a judgment for a debt carries the debt, and if the latter be secured by a mortgage carries the mortgage interest.

[1] 3 O. L. R. (1902) 158. [2] 12 Mass. 505.

Judgment.

The whole interest of the assignor passes—also the security for the debt though not specially named. This is because in equity the mortgage is regarded as a mere incident of the debt secured, and hence a transfer of the principal thing—the debt—passes also the incident conformably to the maxim referred to. Now it seems to me that a list of the debts contained or intended by an assignment thereof, though made on a piece of paper, is an "incident" to the "principal thing"—the debts—and passes with the principal thing. In what is the "ledger A." in this case different in substance or in principal from a list of debts? True, it is some kind of evidence—or may only be an aid to some witness's memory of the amount, particulars of the debts and name of debtor, but these are mere incidents of the debts themselves.

McGuire, C.J.

The law allows the assignee to be the owner of the debt assigned by a writing; it does not allow the sheriff to seize the debts. Will it allow him to do that indirectly which he cannot do directly? To seize the book which is an incident to a principal thing, legally the property of the assignee, would be to allow him to interfere with the rights recognized by law of the assignee, for without this incident the assignee cannot identify the debts assigned, for it is only "the debts in ledger A." that are assigned.

I think the ledger A. is the property of the assignee passing as an incident to the debts assigned, and is not seizable by the sheriff. It is not a chattel, as it was before any entries were made in it.

As to the objection that it is a chattel and that the assignment is bad for non-compliance with the Ordinance as to Bills of Sale and Chattel Mortgages, I think this objection fails for the book ceased to be a chattel within the meaning of that Ordinance.

I, of course, express no opinion on the question raised whether the assignment is not bad as being a fraudulent preference. That was not before me, though mentioned incidentally.

REPORTER :

Chas. A. Stuart, Advocate, Calgary.

MACPHERSON FRUIT CO. v. ENGLAND.

Security for costs—Judgment dismissing action for default of security—Assignment by defendant for benefit of creditors during currency of order—Payment of dividend by assignee.

An order was made for security for costs to be given within 3 months. During this period defendant made an assignment for the benefit of his creditors. Plaintiffs filed their claim with the assignee and understood, apparently wrongly, that the claim was admitted. Judgment was afterwards signed by the defendant dismissing the action for non-compliance with the order for security. On motion by plaintiffs the judgment was set aside on terms.

[RICHARDSON, J., *December 30th, 1902.*

Statement. Motion to set aside a judgment entered by defendant dismissing the action.

Ford Jones, for plaintiffs.

T. Johnstone, for defendant.

The plaintiffs commenced their action on December 8th, 1901, and on 21st January, 1902, while an application for security for costs was pending, defendant assigned for the benefit of his creditors. On 24th January an order was granted requiring plaintiffs to give security for costs within three months, in default of which the action was to stand dismissed with costs. Security not having been given judgment was entered accordingly on July 3rd, 1902.

On November 22nd, 1902, plaintiffs obtained a summons to show cause why the judgment should not be set aside for irregularity, and as void because it was entered after defendant had assigned and without the assignee being made a party to the action. The summons was granted on affidavit showing that on 28th January, 1902, plaintiffs' claim, including their costs of suit to that date, was sent to the assignee, who, on July 4th, one day after entry of judgment, paid a dividend thereon.

On the hearing of the application defendant filed an affidavit of the assignee which admitted the filing of plaintiffs' claim with him, but asserted that he had not inquired into its validity, and had paid the dividend with the consent of the principal creditors and to prevent delay.

[*December 30th, 1902.*] Judgment. Richardson, J.

RICHARDSON, J.—The plaintiffs apply to have a judgment entered against them by defendant for costs in the action, set aside by order, on the ground of irregularity, and as void because it was entered after defendant had assigned his estate and without the assignee being made a party to the proceedings and on other grounds disclosed in the proceedings and pleadings, or for such other order as may be proper and just.

The application is based upon Mr. Jones' affidavit stating that, as plaintiffs' advocate, on 28th January, 1902, he sent to Peter McAra, jr., assignee in trust of defendant's estate, plaintiffs' claim against the said estate for $109.80 due plaintiffs by defendant, and $33.20 their costs of suit incurred up to that date; and on 4th July, 1902, he received a dividend on the estate as realized of $5.18 from the assignee, who later informed Mr. Jones that plaintiffs' claim had been allowed in full.

When the application came on for hearing defendant opposed it and produced an affidavit of the assignee admitting the filing of plaintiffs' claim as above stated, but alleging that he had never investigated the legality of the claim, and paid the dividend with the consent of the principal creditors and to prevent delay.

The position of the matter on the Court records is—

1. Plaintiffs, residing ex juris, sued defendant, 8th December, 1901.

2. Defendant entered appearance 7th January, 1902.

3. On 9th January, 1902, on defendant's affidavit denying any indebtedness to plaintiffs, a summons to show cause why plaintiffs should not be ordered to give security for costs was granted.

4. Defendant having been cross-examined on his affidavit, the application was heard in Chambers 20th January, 1902, and followed by an order on 24th January for the security applied for to be given by plaintiffs within three months, otherwise, on failure to give it, the action to stand dismissed.

Judgment.

Richardson, J.

5. No security having been given, and the order of 24th January not having been varied, defendant on 3rd July, 1902, entered up judgment dismissing plaintiffs' action with costs.

It transpired that on 21st January, 1902, defendant assigned his estate for the benefit of his creditors. Nowhere is there anything on record or otherwise before me to show that defendant ever admitted owing plaintiffs their claim or assented to the assignee allowing it to rank on the assigned estate; but it is claimed that because the assignee admitted it and paid over a dividend the suit then ended, or could not be continued without making the assignee a party, consequently the entry of judgment is irregular and should be set aside.

In support of this contention I have been referred to *Barter* v. *Dubeux*,[1] from which, however, I can derive no support for plaintiffs' contention—rather the contrary—while *Martin* v. *King*[2] seems directly adverse.

Looking at the record, I fail to notice any irregularity in defendant's proceedings, authorized as they were by the order of 24th January, and I, therefore, decline to set aside the judgment on that score.

But as it seems that plaintiffs' advocate had some reason to suppose when receiving the dividend from the assignee that their claim was admitted by defendant, and for the reason that if the judgment as entered be allowed to remain it may be the plaintiffs' claim against defendant personally is adjudicated out of existence, and Mr. Jones having at the close of his argument suggested such a course—if plaintiffs pay defendant's costs of entering the judgment and this application and furnish the security required by the order of 24th January, 1902, within two weeks, an order will go setting aside the judgment and allowing defendant to enter his defence within eight days thereafter. If these terms be not complied with, on defendant's application in Chambers an order will go dismissing plaintiffs application with costs.

REPORTER :

C. H. Bell, Advocate, Regina.

[1] 7 Q. B. D. 413; 50 L. J. Q. B. 527; 44 L. T. 596; 29 W. R. 622. [2] 23 W. R. 92.

PLISSON ET AL. v. SKINNER.

Liquor License Ordinance—Partners—License to one member of vendor firm—Illegal sale—Bill of exchange—Judgment for legal part of consideration—Debtor and Creditor—Composition arrangement—Misrepresentation.

Where a firm sold intoxicating liquors in quantities for which, under s. 78 of the Liquor License Ordinance (C. O. 1898 c. 89) action may be brought, but the only license under which the firm purported to sell was one issued to one of the members of the firm in his own name.

Held, that the plaintiffs could not recover in respect of the liquors; but the action being upon a bill of exchange, and an additional open account, judgment was given for the portions of each which were not for intoxicating liquors.

A composition arrangement made with a creditor induced by a misstatement by the debtor to the creditor of the amount of assets and liabilities, will be set aside if repudiated on the discovery of the falsity of the statement, and before any benefit has been taken under the arrangement, even though the misstatement be not shewn to have been fraudulently made.

Derry v. *Peek*,[1] applied.

[RICHARDSON, J., *December 30th 1902.*

Statement.

Trial of an action before RICHARDSON, J., without a jury.

T. C. Johnstone and *D. H. Cole*, for plaintiffs.

H. G. W. Wilson, for defendant.

The plaintiffs, a firm trading under the style of The Indian Head Wine and Liquor Co., sued to recover the amount of a bill of exchange accepted by defendant, and also for the price of goods sold and delivered. Most of the goods so sold were intoxicants, and the bill of exchange covered the price of goods sold by plaintiffs to defendant, the greater part of which were also intoxicating liquors. No license to sell intoxicants had been issued to plaintiffs as a firm, but one of the partners, who was also the manager of the business, held a wholesale license in his own name.

Prior to the commencement of this action, defendant became unable to meet his liabilities as they fell due. A meeting of his creditors was held at which both he and plaintiffs' manager were present, and it was then agreed that defendant should transfer his assets at a valuation to a third

[1] 14 App. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 488—C. A.

Statement.

party, the purchase price to be divided *pro rata* among the creditors, who agreed thereupon to discharge defendant from all liability. A memorandum in writing to this effect was drawn up, but during the discussion, and prior to the signing of this document, defendant had stated his liabilities to be $6,037 and his assets to exceed this amount by $1,000. Plaintiffs subsequently discovered that these figures were incorrect; that defendants' liabilities exceeded $9,000; while his assets amounted to less than $7,000. They at once repudiated the arrangement and brought this action.

[*December 30th, 1902.*]

RICHARDSON, J.—One Plisson and several other persons named carrying on business at Indian Head under the name and style as above, sued defendant 25th January, 1902, to recover:

1. The amount of an overdue bill of exchange drawn by plaintiffs on and accepted by defendant for $411.34 and interest thereon from its maturity;

2. $269.06 for goods sold and delivered by plaintiffs to defendant as shown by an itemized account forming part of the plaintiffs' statement of claim.

In defence the defendant:

1. Denies accepting the bill of exchange as also the sale of any goods;

2. Says that if defendant accepted the bill of exchange sued for, the consideration therefor was intoxicants for selling which the plaintiffs had no license as required by the Liquor License Ordinance and the sale was in contravention of the said Ordinance, and was illegal;

3. Sets out a similar defence quoad the plaintiffs' claim for goods sold;

4. Alternatively alleges that on or about 22nd January, 1902, and after his debt to plaintiffs had matured, the defendant, the plaintiffs, and certain other creditors of defendant, together with one A. Dundas, mutually agreed that defendant should assign to Dundas certain property in Indian

Head at the valuation of G. S. Davidson and H. H. Campkin, and that the amount of such valuation should be paid by Dundas to the creditors of defendant *pro rata* by fixed instalments, viz.: 25 per cent. cash and the balance in three equal instalments at three, six, and nine months respectively; that the plaintiffs and the said other creditors of defendant agreed to accept the Dundas payments in full satisfaction of their respective claims and release defendant therefrom; and that defendant assigned to Dundas, the valuation having been made, by which defendant was discharged from plaintiffs' claim; Judgment. Richardson, J.

5. As a further alternative, alleges that in January, 1902, upon one Dundas agreeing with the plaintiffs to pay to plaintiffs a proportion of their claim in consideration of the conveyance by defendant of certain property, and in consideration of plaintiffs releasing defendant from his debt to them, plaintiffs agreed with defendant and Dundas to release defendant from all liability for their claim and look to Dundas solely in respect thereof; the property was so conveyed and Dundas became liable to pay plaintiffs their said proportion and defendant was discharged.

To these defences the plaintiffs say:

1. They join issue;

2. As to paragraphs 2 and 3 of the defence, plaintiffs are co-partners, and from them as such, defendant purchased the goods (the consideration for the bill and the other goods sued for) a license for the sale of which, under an arrangement among themselves, was granted and taken out in the name of one of themselves, Pierre Remy Plisson, under the provisions of the Liquor License Ordinance;

3. As to the fourth and fifth paragraphs, the only arrangement was that set out in paragraph 4, into which plaintiffs were induced to enter by fraud of defendant in falsely representing to plaintiffs that his total indebtedness was $6,000, whereas, in truth and fact, it was then double that amount; discovering which within a reasonable time after entering into the arrangement and before plaintiffs had re-

Judgment.
Richardson, J.

ceived any benefit thereunder, plaintiffs repudiated the arrangement.

There being no rejoinder or subsequent pleading by defendant, the 2nd and 3rd paragraphs of plaintiffs' reply are in issue.

At the hearing the acceptance by defendant of the bill of exchange sued for, as also the sale and delivery of the goods detailed in the statement of claim were proven. It further appeared that the consideration for the bill of exchange was for goods sold, $411.34, of which items aggregating $387.34 were intoxicants; and in the account for goods set out in the statement of claim $245.06 were intoxicants.

To meet this the plaintiffs established the existence of the license to sell, under the arrangement between plaintiffs as set out in the 2nd paragraph of the reply.

An objection was then raised that inasmuch as the license was granted to Plisson, the authority to sell liquor conferred by it would not enure to plaintiffs as a firm, and ss. 13, 19, and 81 of the Liquor License Ordinance were referred to by defendant's counsel in support of this contention.

Section 13 provides that licenses may be issued in the name of a copartnership; s. 19 . . . Every license for the sale of liquor shall be held to be a license only to the person named therein, and for the premises therein mentioned, and shall remain valid only as long as such person continues to be the occupant of the said premises and the true owner of the business there carried on. Section 81: No person shall sell . . . any liquor . . . without first having obtained a license authorizing him to do so. . . .

In *Brown* v. *Moore*[2] it is determined, and thus binding on this Court, that where by law sales of liquor without license are prohibited, recovery for such sales cannot be enforced.

Partial illegality of consideration in a bill or note is a good answer to a suit thereon as between the original parties *pro tanto*: Byles on Bills, p. 150.

[2] 32 S. C. R. 93.

Judgment.
Richardson, J

The plaintiffs in this, held no license to sell in their own names or in their firm name. The person who did hold a license to sell was Plisson, who, while the sales were going on was neither the sole occupant of the premises nor the true owner of the business there carried on.

This being so, the plaintiffs, in my opinion, were prohibited under s. 81 from recovering in this Court for liquors sold.

While, however, the sales of liquor claimed for cannot be supported or enforced in this suit, the prohibition will not extend beyond liquor sold, so that of the bill of exchange, the other sales included in it, $26.10, and of the open account, $24, not liquors, are enforceable; and for these plaintiffs are entitled, if not shut out by other defences raised, to succeed in the suit.

The remaining question to be determined is whether or not the debt due by defendant to plaintiffs was discharged.

I find as facts the following:

On 22nd January, 1902, the defendant being unable to meet his financial engagements a meeting of his creditors who resided in Indian Head was held, at which defendant was present, as also plaintiffs, represented by Plisson, and several others.

On being asked what his liabilities were, defendant made out a statement in pencil, which, being corrected with the assistance of some of his creditors then present, showed liabilities $6,037.

An offer was made by A. Dundas to purchase defendant's estate at a value to be shown by outside independent valuation, but estimated to reach about $7,000.

Induced by defendant's representation that his liabilities were as stated in the pencil memorandum, and that the value of his assets to be transferred to Dundas exceeded these liabilities by $1,000, plaintiffs, through Plisson, signed an instrument worded thus:

"Indian Head, 22 Jan., 1902.

"In consideration of A. Dundas purchasing the stock in "trade, furniture, etc., of the Royal Hotel, and the horses,

Judgment.
Richardson,J.

"lots, etc., from H. W. Skinner, at the valuation as agreed "upon between G. S. Davidson and H. H. Campkin, we, the "undersigned, agree with the said Dundas to *pro rata* on "our respective accounts in proportion to the relative values "of the assets and liabilities at the present time, and to give "said Skinner a receipt in full of his account—Dundas "agreeing to pay the amounts as follows: 25 per cent. down, "balance in three equal payments in three, six, and nine "months.

"Geo. Thomson,	"E. J. Brooks & Co.,
"F. L. MacKay & Co.,	"G. S. Davidson,
"P. R. Plisson,	"J. Dundas,
"Man. I. H. W. & L. Co.,	"A. V. Gerry."

Across this instrument appears this:—

"I accept the said proposal on the said terms,

"Andrew Dundas."

"In consideration of the arrangement entered into be- "tween my creditors and A. Dundas, I hereby agree to hand "over to H. H. Campkin for the benefit of my creditors all "my book debts and other accounts.

"H. W. Skinner."

Treating the agreement as a sale to him of the property, Dundas at once entered into possession on the night of 22nd January, and to the sale to him by Skinner the plaintiffs never objected. This creditors' meeting was adjourned over for the preparation of legal documents by Mr. Wilson to carry into effect the agreement, and resumed on 24th January in Mr. Wilson's office. Plisson having discovered that the statement of liabilities furnished on the evening of 22nd (and after signing the instrument I have referred to), was untrue, being considerably under the true amount; and instead of the Dundas purchase price (it having by this time being fixed at $6,915.50) being sufficient to pay off the liabilities, which then exceeded $9,000, it was in fact more than $2,000 less; plaintiffs, through Plisson, notified Mr. Wilson in the presence of other creditors and before any money had been actually passed from Dundas on the purchase, that plaintiffs would have nothing more to do with the

agreement of 22nd January, and repudiated it for the reason that defendant's statement of assets was far from true. On the following day, 25th January, before anything further had been actually done, plaintiffs having received no benefit whatever under the agreement, they issued their writ in this action. Judgment. Richardson, J

Summarized, the following questions of fact are presented:

1. Did Skinner on 22nd January, 1902, at the meeting of his creditors on that day, make the statement of fact in Plisson's presence that his total indebtedness to his creditors was only $6,037, and less than his assets by $1,000?

2. Was this statement of fact untrue?

3. Did this statement of fact form the basis and material for the plaintiffs agreeing to discharge defendant from further liability to them for his said debt?

My answer to these questions being in the affirmative.

4. Had the plaintiffs, before they repudiated the agreement of 22nd January, 1902, received any material benefit under it?

To this my finding is in the negative.

The learned counsel for the defendant in support of the defence set up of discharge of the debt sued for, referred me to the principles laid down in *Derry* v. *Peek*.[1]

Referring, however, to *Derry* v. *Peek*,[1] it is to be observed that that action was to recover damages for deceit, while what is claimed in this action by plaintiffs' pleadings is rescission, and at page 359 Lord Hershell, in delivering the main judgment is thus reported:

"An action of deceit differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact.

Where rescission is claimed it is only necessary to prove there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract having been obtained by misrepresen-

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tation cannot stand;" unless of course the party seeking relief has, as Lord Bowen indicates at p. 347, "rendered himself incapable of such rescission," which had not happened here.

My judgment on this branch of the case is that the plaintiffs have established that they became parties to the discharge of their debt set up by the defendant, by misrepresentation to the plaintiffs of a material fact, on discovering which to be untrue before receiving any benefit, the plaintiffs repudiated and the discharge therefore cannot stand.

The plaintiffs therefore are to have judgment for $50.10.

The question of costs is reserved to be dealt with on a Chamber application.

An application for costs was subsequently made on behalf of plaintiffs, but no order was made.

REPORTER:

C. H. Bell, Advocate, Regina.

RE CRAWFORD AND ALLEN.

Arbitration Ordinance — Remission for reconsideration refused — No authority to appoint new arbitrator.

Section 11 of "The Arbitration Ordinance" provides that "In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire." Remission was refused because after the submission was entered into one of the arbitrators commenced an action against the party who had nominated him to recover an amount agreed to be paid for procuring settlement of the matters in dispute.

Where the instrument of submission names the arbitrators the court or judge has no power to appoint a new arbitrator in lieu of one who has become incompetent.

[SCOTT, J., *February 27th, 1903.*

This was an application on behalf of Crawford to enforce an award of arbitrators under section 13 of the Arbitration Ordinance. On the hearing of the application it was admitted that the award could not stand, but it was asked that the matters in question be remitted to the arbitrators to make

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a proper award under section 11. This was refused upon the ground that one of the arbitrators, Leonard, had commenced an action against Allen, who had nominated him, to obtain payment of $125.00 which he claimed Allen agreed to pay him to procure a settlement of the matters in dispute. He had arranged the arbitration between the parties, and claimed that the matters in dispute were thus settled.

The applicant then asked that the parties be directed to appoint new arbitrators.

N. D. Mills, for Crawford, referred to *Re Frankenberg and the Security Co.*[1]

F. C. Jamieson, for Allen, referred to *Re Baring Bros. & Co.* and *Doulton & Co.*[2]

[*February 28th, 1903.*]

SCOTT, J.—After considering the authorities submitted by Mr. Mills, I hold that I have no authority to direct either of the parties to appoint a new arbitrator in lieu of the one named in the submission, who has been shown to be an interested party. It was contended that, as section 12 of the Arbitration Ordinance gives the Court or a Judge power to remove an arbitrator for misconduct, the power to direct the appointment of another in lieu of the arbitrator so removed must be implied, but, in my view, that can be done only in cases where the arbitrators are not—as they are here—named in the submission, that is, where by the terms of the submission arbitrators are to be afterwards appointed by the parties. In such a case where an arbitrator so appointed by one of the parties is removed for misconduct the parties are in the same position as if no such arbitrator had been appointed. The case of *Re Frankenberg* v. *The Security Co.*,[1] cited by Mr. Mills was a decision upon the effect of a submission of that description.

The fact that it is the parties who nominated the arbitrator who are now objecting to him is not material, as it is

[1] 10 Times R. 393. [2] 61 L. J. Q. B. 704; 8 Times R. 701.

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Scott, J

shown that the objection in respect of matters which arose after the submission was entered into.

Application refused with costs.

REPORTER:
J. E. Wallbridge, Advocate, Edmonton.

HAMREN v. MOTT.

Lord's Day Ordinance—Appeal from conviction—Farmer—Construction of statutes—Ejusdem generis.

The Ordinance to Prevent the Profanation of the Lord's Day, C. O. 1898 c. 91, provides:

(1) No merchant, tradesman, artificer, mechanic, workman, labourer or other person whatsoever shall on the Lord's day sell or publicly shew forth or expose or offer for sale or purchase any goods, chattels or other personal property, or any real estate whatsoever, or do or exercise any worldly labour, business or trade of his ordinary calling, travelling or conveying travellers or Her Majesty's mails, selling drugs and medicines and other works of necessity and works of charity only excepted.

Held, that the words "or other persons whatsoever" are applicable only to persons who are *ejusdem generis* with those specifically named and do not include a farmer engaged in farm work.

[SCOTT, J., *February 28th, 1903.*

Appeal from conviction by a justice of the peace.

Geo. B. Henwood, for the appellant, Joseph L. Hamren.

The respondent, Louis E. Mott, in person.

[*February 27th, 1903.*]

SCOTT, J.—This is an appeal from a conviction made by J. A. O'Neill Hayes, a justice of the peace, on 4th November, 1902, whereby the appellant was convicted of having on the 5th day of October, 1902, near Wetaskiwin, in the North-West Territories, "engaged in farm work on the Lord's day contrary to s. 1 of c. 91 of the Consolidated Ordinances."

The appeal was heard by me at the Wetaskiwin sittings on 19th inst., and it was there agreed between the parties that the depositions taken by the convicting justice on the

hearing before him should constitute the evidence upon the hearing of the appeal.

Judgment.
Scott, J.

A number of objections to the conviction were taken by counsel for the appellant, only one of which it is necessary for me to consider, viz., that the appellant is a farmer, and that the work he is shown to have been engaged in was farm work, and that therefore he has not been brought within the provisions of the Ordinance.

Upon referring to the depositions, I find that the appellant is therein stated to be a farmer, and it is also shown that the work in respect of which he was convicted was driving pegs on his farm for a fence.

I must hold upon the authority of *Reg.* v. *Silvester*,[1] that a farmer engaged in farm work is not within the provisions of the Ordinance referred to. That was a decision upon the effect of the Stat. 29 Car. II., s. 1, which is as follows:—

"No tradesman, artificer, workman, labourer or other person whatsoever shall exercise any worldly labour or business of his ordinary calling upon the Lord's day."

It was held that the words "or other persons whatsoever" are applicable only to persons who are *ejusdem generis* with those specifically named in the preceding part of the sentence.

The words of section 1 of the Ordinance referred to, so far as material, are

"No merchant, tradesman, artificer, mechanic, workman, labourer or other person whatsoever shall on the Lord's Day sell or publicly show forth or expose or offer for sale or purchase any goods, chattels or other personal property or any real estate whatsoever, do or exercise any worldly labour, business or trade of his ordinary calling." . . .

It will be seen that the only material distinction between the two provisions are the insertion in the latter of the words, "merchant" and "mechanic."

In my view the judgment in that case is applicable to the provisions of the Ordinance to the same extent as it was to those of the statute then under consideration.

[1] Reg. v. Silvester, 33 L. J. M. C. 79; 10 Jur. (N.S.), 360.

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Scott, J.

I direct that the conviction be quashed but without costs. The prosecutor is a constable of the North-West Mounted Police, and the information appears to have been laid by him in the discharge of what he considered to be his duty as such. He had no pecuniary interest in the result, and I am bound to say that to a person not thoroughly conversant with the rules respecting the interpretation of statutes, the appellant would appear to be within the provisions of the Ordinance.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

LEBLANC v. MALONEY (No. 2).

Controverted elections—Corrupt practices—Intoxicating liquor in vicinity of polls—Treating—Treating habit—Corrupt intent—Agency—Evidence of return.

Where a person who was held to be an agent gave two bottles of whiskey to an elector the day before polling day, the inference of fact was drawn that they were given with the corrupt intent of influencing the voter, although there was no direct evidence to shew the object for which they were given.

Where a quantity of whiskey was obtained from one agent of the respondent and taken to the home of another in the vicinity of one of the polling places, where it was drunk freely on election day by the electors generally, the inference of fact was drawn that it was provided by both these agents for the purpose of influencing the electors, though there was not direct evidence to that effect, and it was *held* to be a corrupt practice notwithstanding that apparently it did not have that effect.

The evidence also shewed that a quantity of whiskey was taken to a place in the vicinity of another polling place by an agent, where it was consumed by the agent and others on polling day.

Held, that this shewed a scheme on the part of the respondent's agents to influence the voters generally, and procure the election of the respondent by providing whiskey at each of the polling places.

The following were *held* to be agents:

One who accompanied the respondent on a canvassing trip during which he spent a day canvassing for the respodent and spoke on his behalf at an election meeting at which the respondent was also present and spoke.

One who accompanied the respondent on a canvassing trip, acting as interpreter (the respondent being under the impression that he was one of his supporters), and actually worked and canvassed for him with his authority.

The son of the respondent, who took an active interest in the election on behalf of the respondent with his knowledge, acted as scrutineer and was furnished with a sum of money by the respondent when leaving for the polling place at which he was to act.

Quære: whether an agent accustomed to carry about with him a bottle of whiskey to treat those whom he should happen to meet, should not, if following this custom while actually engaged in canvassing, be held to have treated with a corrupt intent.

It is not necessary that proof should be given that the respondent had been returned as member.

[SCOTT, J., *April 21st, 1903.*

Statement.

The election complained of was held on the 21st day of May, A.D. 1903, for the Electoral District of St. Albert. The candidates were Daniel Maloney, the above named respondent, and Louis Joseph Alphonse Lambert, and the respondent was certified to be the person elected at such election. The petition contained the usual charges of bribery and corrupt practices, and particulars were delivered. The only charges necessary to refer to for the purposes of the report, are the following:—

(2) Alfred Arcand, an agent of the respondent, between the day of nomination and the day of polling gave two bottles of whiskey to Dolphis Majeau, of Lac la Nonne, at or near St. Albert, in order to induce him to vote at the election for the respondent, and in order to induce him to procure or endeavour to procure the return of the respondent.

(9) The respondent provided and procured to be provided or was accessory to the providing of large quantities of whiskey for the purpose of the same being (as it was in fact) taken by his agents to a place in the vicinity of each of the polling places of the electoral district for the purpose of being given and provided (as it was in fact) by the respondent's agents to the electors generally at such polling places in order that respondent might be elected, and for the purpose of inducing such electors to vote for the respondent, and for the purpose of influencing such electors to procure or endeavour to procure the return of the respondent. Such whiskey was for the purposes aforesaid, taken by the under-mentioned agents in the behalf of the respondent to the vicinity of the following polling places, namely: At St. Emile Legal by Jules Chave (the deputy returning officer), of St. Albert, and by Ulderic L'Abbe (poll clerk), of Morinville; at Morinville by Louis Legasse, of Morinville, and one Couture, of Morinville, etc. The said acts were begun a few days before

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the day of polling, and were continued up to and including the day of polling.

(21) Ulric Marcotte, of St. Emile Legal, another agent of the respondent, on the day of polling at St. Emile Legal, gave whiskey to the electors there generally in order that the respondent might be elected, and for the purpose of influencing such electors to give their votes to the respondent at the election.

N. D. Beck, K.C., for petitioner referred to Rogers on Elections, 17th ed., vol. 11, c. 14; Am. & Eng. Enc. Law, 2nd ed., vol. 10, p. 795; *Haldimand Election*,[1] *South Grey Election*,[2] *East Peterborough Election*,[3] *West Simcoe Election*,[4] *Muskoka & Parry Sound Election*,[5] *East Northumberland Election*,[6] *North Ontario Election*,[7] *London Election*,[8] *South Norfolk Election*,[9] *East Northumberland Election*,[10] *North Ontario Election*,[11] *Cornwall Election*,[12] *West Prince Election*,[13] *Haldimand Election*,[14] *Lennox Election*,[15] *Levis Election*.[16]

J. C. F. Bown, for respondent, referred to Rogers on Elections, 17th ed., vol. 2, pp. 219, 295, 363; *East Elgin Election*,[17] *Selkirk Election*,[18] *Jacques Cartier Election*,[19] *West Prince Election*,[13] Am. and Eng. Enc. Law, 2nd ed., vol. 10, p. 828; *Stormont Election*.[20]

[*April 21st, 1903.*]

SCOTT, J.—I hold that charges Nos. 2 and 21 have been sustained, also so much of charge No. 9 as relates to the providing and use by respondent's agents of whiskey at the polling places, at St. Emile Legal and Morinville.

I also hold that the following persons have been shown to have been the agents of the respondent, viz., Alfred Arcand, Louis Legasse, Joseph Maloney, and Ulric Marcotte.

The charges which I have held to have been sustained being sufficient in themselves to avoid the election, I do not give any decision upon the other charges.

[1] 17 S. C. R. 170. [2] Hodg. Elec. Cas. 52. [3] Hodg. Elec. Cas. 245. [4] 1 Elec. Cas. 128. [5] 1 Elec. Cas. 197. [6] 1 Elec. Cas. 134. [7] Hodg. Elec. Cas. 304. [8] Hodg. Elec. Cas. 560. [9] Hodg. Elec. Cas. 660. [10] Hodg. Elec. Cas. 577. [11] Hodg. Elec. Cas. 785. [12] Hodg. Elec. Cas. 803. [13] 27 S. C. R. 241. [14] 15 S. C. R. 495. [15] 1 Elec. Cas. 41. [16] 11 S. C. R. 133. [17] 2 Elec. Cas. 100. [18] 39 Can. L. J. 44. [19] 2 S. C. R. 216. [20] Hodg. Elec. Cas. 21.

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I also hold that the respondent was unduly returned as member at the election referred to in the petition, and I so declare. I give the petitioner his costs of the petition.

My reasons for so holding are as follows:—

As to charge No. 2, Arcand himself admitted that on the day before nomination day he gave Majeau two bottles of whiskey. There is no evidence to show what his object was in giving it, but considering the time at which it was given, viz., on the eve of the election, and that Arcand was an active supporter of the respondent, and had been canvassing for him, I think I must assume that it was given with the corrupt intent of influencing Majeau in respondent's favour.

My reasons for holding that Arcand was an agent of the respondent are that he (Arcand) accompanied the respondent on a canvassing trip to Morinville, and the German and French settlements in that neighbourhood; that on that trip they spent a whole day in canvassing in the French and German settlements, and that on Ascension Day, when they were at Morinville, a meeting was held after Mass at which both he and the respondent spoke. These facts are, in my opinion, sufficient to establish the agency.

In the *East Elgin Case*,[17] Osler, J., says, at p. 115

"What the decisions do establish, as I read them, is that there must be circumstances proved from which the authority of the person acting is shown or may be implied—circumstances which show knowledge on the part of the candidate or some authorized agent of his—knowledge which he has, or would have unless he closed his eyes to it—of the part which the person, whose agency is sought to be established, is taking in the election."

As to charge No. 21. One Chave, a supporter of the respondent, who had been appointed deputy returning officer for St. Emile Legal polling sub-division, left St. Albert for that place, on the day before polling day, accompanied by one Ulderic L'Abbe, another supporter of the respondent, who he (Chave) had requested to act as his poll clerk, and who afterwards acted

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in that capacity. They took some liquor with them. L'Abbe states that it consisted of about a dozen small bottles of whiskey and a few bottles of beer, and that he obtained it on the day they left St. Albert, from Joseph Maloney, a son of the respondent, who I have held to be an agent of the respondent. They called at several places on their way, treating at every place they called at. They reached Marcotte's house near St. Emile Legal polling station on the evening before polling day, and spent the night there. The remainder of their supply of liquor was carried into Marcotte's house, and that night, and the next day during polling hours, a number of the electors had drinks from it there. Marcotte admits that the remainder of the whiskey brought by Chave and L'Abbe, was drunk there on polling day by about a dozen people, and that he himself took several people to his house that day. Cassavant, a witness, states, and it is not denied, that there was plenty of whiskey at Marcotte's that day, that there was a bottle on the table, and people would help themselves; that more than one bottle was consumed, and that in some cases one man would drink nearly a whole bottle. It appears, however, that this liberal distribution of liquor did not create the intended effect, as he states that when he was present everyone was talking about respondent's opponent, and saying that they would vote for him and drink the respondent's whiskey.

There can be no question as to Marcotte having been an agent of the respondent. When Chave and L'Abbe went to his house on that occasion, Chave carried a letter to him from respondent, asking the latter to act as his agent at the polling station. Marcotte appears to have at first refused to act in that capacity, but yielding to the repeated requests and solicitations of Chave, he finally consented to do so, and did act apparently under a written authority from the respondent, which was handed to him by Chave.

As to that portion of charge No. 9, which I have held to have been proved, I have already shown that Marcotte assisted in the distribution of whiskey at St. Emile Legal on polling day for the purposes referred to in the charge, and that the whiskey distributed there was obtained from Joseph Maloney.

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Scott, J.

It is only reasonable to assume that when the latter gave the whiskey to L'Abbe he intended it for those purposes.

A quantity of whiskey was provided for the same purposes at Morinville on polling day. Joseph Couture, a blacksmith residing there, states that he had in his shop there that day about eight or ten bottles of whiskey, which he received the day before from Louis Legasse, a hotel-keeper at Morinville, who, when giving it to him, said, "Here is some whiskey; you had better take it to your shop for to-morrow," that on polling day people who came into the shop would help themselves; that Louis Legasse was in there during the day, and that on one occasion eight or ten came in together. Legasse states that the reason he gave Couture the whiskey was because he thought he would want some during the day, and as he could not keep his bar open that day, he thought he would put it where he (Legasse) could get it.

My reasons for holding that Legasse was an agent of the respondent are that he accompanied the latter on a four or five days' canvassing trip from Morinville, during which he acted as his interpreter. It is true he states that he had not made up his mind to vote for the respondent, and did not decide to do so until nomination day, but he admits that at the time of the trip he intended to vote for him, except as against a local man, and that in his belief, the respondent was then under the impression that he would vote for him. I find that not only was the respondent under the impression at that time, but also that Legasse was then, with his authority, actually working and canvassing for him. Legasse continued to work actively for him up to and including polling day. He appears to have possessed considerable influence in that locality, and to have been one of the respondent's most prominent supporters. The evidence shows that Legasse carried a bottle or more of whiskey with him during that trip, and with it he treated a number of those whom he and the respondent canvassed. He states that it is his usual custom to carry whiskey with him when travelling, and with it to treat those whom he meets, and that in carrying and using it as he did on that occasion, he was merely following his usual custom. The

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evidence shows that the custom is not an unusual one in that part of the country, but even if it is the usual custom, I entertain serious doubts whether the person following it, while actually engaged in canvassing a voter, should not be held to have treated with a corrupt intent.

My reasons for holding that Joseph Maloney was an agent of the respondent are that the respondent admits that he was aware that Joseph was taking an active interest in the election in his behalf. Considering the relationship between them, it is not unreasonable that such should have been the case. He acted as scrutineer for the respondent at Lac St. Anne polling station, and it appears that when leaving for that place, respondent gave him a sum of money, the amount of which is left in doubt. Joseph states that he thinks that it was a sum of ten dollars, but respondent is unable to state whether or not it was a sum of $75.

The evidence shows that large quantities of whiskey, other than those I have mentioned, were provided and used during the campaign for the purpose of influencing electors, and that not all of it was provided and used in the interests of the respondent. Some of it, and perhaps no inconsiderable portion, was provided and used in the interests of his opponent. At this as well as at prior elections in that district, its free use on behalf of both candidates appears to have been considered as a necessary part of the election proceedings, and it also appears to have been considered that the provisions of the Ordinance which are intended to restrict its use during the elections, were not applicable to that district.

It may be that the unseating of the candidate for the contravention by his agents of these provisions, may have a salutary effect upon future elections in the district.

It was contended on behalf of the respondent that proof should have been given by the petitioner that the respondent had been returned as member. I hold, following the *Stormont Case*,[20] that the proof is unnecessary.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

RE MORTON.

Administration—Application for letters of administration by stranger —Public administrator.

In the absence of an application by a party entitled by reason of relationship to the deceased, it is necessary, in order to justify the grant of letters of administration to a creditor or a person without interest, to shew by special circumstances that such grant is in the interests of the estate, otherwise the grant should be made to the public administrator for the district.

[WETMORE, J., *February 22nd, 1900.*

Statement. Application for letters of administration to the nominee of a creditor of the estate of a deceased.

Argument. *E. L. Elwood,* for applicant.

[*February 23rd, 1900.*]

Judgment. WETMORE, J.—Mr. Elwood, on behalf of Sheriff Murphy, applied for letters of administration to be issued to him herein. The sheriff is not in any way personally interested in the estate; he is merely the nominee of the North of Scotland Canadian Mortgage Company.

The deceased died in British Columbia on the 1st of January, 1895, intestate and unmarried; the only property he owned in the North-West Territories was a quarter section of land valued at $300. It does not appear who his next of kin are. It seems, however, that there is a brother living in Vancouver, B.C., as he made one of the affidavits used on this application.

No other application has been before made for letters of administration to issue. The North of Scotland Canadian Mortgage Company hold a mortgage on this quarter section, upon which there appears to be more due than what the property is valued at. I assume that the company is anxious to have some person appointed to represent the estate so as

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Wetmore, J.

to enable it to proceed upon the mortgage for sale or foreclosure. In view of the small value of the property, I was asked to grant letters of administration on this application, without citing persons interested in the estate or issuing a summons. I am opinion that I have not, under the practice of the Court, authority to do so. Moreover, I am of opinion that under the circumstances disclosed I ought not to issue letters to the sheriff.

Up to the passing of Ordinance No. 6 of 1897, a Judge had power under section 463 of the Judicature Ordinance, 1893, if no application for administration was made within twenty days after the decease of any person leaving personal estate, to grant letters to any person possessing the necessary qualifications to execute the trust and considered suitable by the Judge. It was quite usual to make a grant under that section without citing or summoning the persons interested in the estate. I always had grave doubts, however, if that was in accordance with strict practice. For some reason it was considered advisable to make further legislation with respect to cases when prompt application for administration was not made, and the Legislative Assembly by Ordinance No. 7 of 1895, section 5, enacted the following, as a sub-section to section 464 of The Judicature Ordinance, 1893: "If in any case it is in the interests of the estate of the deceased person that the same be forthwith administered, or that some one other than the personal representative be appointed to administer the estate, the Judge may on application, with such notice, if any, as he may direct, appoint as administrator such person as he deems proper." Section 463 of the Judicature Ordinance, 1893, was, however, left standing when this provision just cited was passed. In 1897, however, Ordinance No. 6 of that year was passed, and by section 20 thereof Public Administrators were provided for, and by section 22 thereof section 463 of the Judicature Ordinance, 1893, was repealed (and see

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Ordinance No. 12, 1898, section 30), and by section 23 it was provided that in the absence of application for letters of administration within a month after the death of the deceased, letters might be granted to the Public Administrator. But the Legislature went further than that, because it so amended section 469 of the principal Ordinance that the Court or Judge had only power in the case then provided to appoint the Public Administrator administrator *ad litem*, instead of appointing any person in his discretion (see Ordinance No. 6 of 1897, section 32, and 12 of 1898, section 30). Ordinance No. 6 of 1897 did not, in so far as the question I am now discussing, interfere with section 5 of Ordinance No. 7 of 1895. But in 1898 that section was so amended by Ordinance No. 12 of that year, section 21, as to provide that a Judge might in the case therein provided for appoint as administrator the Public Administrator, or "such other person as he deems proper." Section 5 of Ordinance No. 7 of 1895 is very similar to section 73 of the Imperial Court of Probate Act, 1857 (20 & 21 Vic. 77). The English Court will not, however, under that section make a grant unless there are special circumstances to justify it. See Williams on Executors (9th ed., 384, notes and cases cited there.) The state of the law just before the Consolidated Ordinances came into force was in my opinion as follows:—

If no application for administration or to prove a will was made before the expiration of a month after the death of a person by any person ordinarily entitled to administration or probate, the Judge could grant letters to the Public Administrator, but to no other person ordinarily entitled to administration. *But if in the interests of the estate* it might appear advisable that it should be forthwith administered, although the month had not elapsed, or *if in the interests of the estate* it might appear advisable to appoint some other person than the personal representative to administer the estate, the Judge might appoint the Public Administrator or such other person as he deems proper.

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Wetmore, J.

Now, this is the only case in which the Judge may appoint a person, a stranger to the estate or to the rights of administration, other than the Public Administrator, and it will be borne in mind that this is only to be done in the interests of the estate. All these provisions have been carried forward unaltered into the Judicature Ordinance (Con. Ordinance, c. 21). Section 23 of Ordinance No. 6 of 1897 is section 16 of the Judicature Ordinance. Section 5 of Ordinance No. 7 of 1895, amended as I have stated, is embraced by Rule 588, sub-section 2 of the Judicature Ordinance. Now, I can discover nothing in the circumstances of this case as disclosed which renders it advisable *in the interests of the estate*, that a stranger to the estate, such as the sheriff is, should be appointed. It may possibly be in the interest of the creditors of the estate, namely, the mortgage company, to have him appointed; but that is not the case that the Ordinance provides for. I think that the proper person to apply for letters of administration in this case is the Public Administrator, and that to grant letters to the sheriff would practically deprive the Public Administrator of his rights and perquisites, which, in my opinion, the Legislature intended he should have.

The company will be by no means prejudiced by this holding. Section 18 of the Judicature Ordinance provides for it, and if the course thereby prescribed is taken the administrator is bound to make application.

It is a matter of regret perhaps, in view of the fact that the estate in question is of such small value, that the application cannot be granted.

It is, however, I think, just as well that the practice in this respect should be settled and the rights of the Public Administrator determined. Application refused.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

REYNOLDS v. URQUHART.

Interim injunction—Receiver—Probability of plaintiff being entitled to relief asked — Balance of convenience — Incorporated company.

An application to continue until trial an interim injunction granted *ex parte*, and to appoint a permanent receiver, was dismissed, where the plaintiff's right of action was not entirely free from doubt, and it appeared that the injury that would be occasioned to the defendants by the granting of the injunction and the appointment of a receiver, if the plaintiff ultimately failed, would be very great, while that which would result to the plaintiff by its refusal, if he ultimately succeeded, would be comparatively small.

Application of this principle to an incorporated company.

[SCOTT, J., *March 7th, 1902.*

Statement. An application to continue till the trial an injunction and for the appointment of a receiver of the business, property and effects of the Lacombe Co-operative Association. The facts sufficiently appear from the judgment.

Argument. *Jas. Short*, for plaintiff.

R. B. Bennett, for the defendant.

[*March 7th, 1902.*]

Judgment. SCOTT, J.—This is an application to continue until after the trial the injunction granted by me herein, on the 30th February last, and for the appointment of a receiver of the business, property and effects of the Lacombe Co-operative Association.

The action is brought by the plaintiff on behalf of himself and all the other shareholders of said corporation, except the defendant shareholders, against the defendant Urquhart, who is the General Manager of the Association, the defendants Tolman, Hayden, Green, Lockhart and Flewelling, who are directors thereof, and H. R. Foulger & Company.

Plaintiff by his statement of claim alleges that said Association was incorporated as a trading corporation on the

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Scott, J.

23rd of February, 1899, under the C. O. cap. 61, and consists of about 130 shareholders, the capital stock consisting of 150 shares of $20 each, plaintiff being one of the shareholders; that the Association owns certain lands in the Village of Lacombe, upon which, prior to the 29th January last, it carried on its trading business; that about said date the defendants, other than Foulger & Co., without submitting the same for or receiving the consent of the shareholders, and in excess of their powers, purported to sell the business of the association to Foulger & Co., a firm composed of H. R. Foulger, the defendant Urquhart and one Gibson; that Foulger & Co., upon and after said sale, entered into the said premises of said association and took possession of the assets and business thereof and brought thereon and mingled with the goods and merchandise of said association certain other goods and merchandise, and have since continued to carry on business therein under the firm name and style of H. R. Foulger & Co., thereby causing said association to wholly cease to carry on business.

The statement of claim also alleges that on or about the 1st February, 1900, defendant Urquhart, without submitting the same for or receiving the assent of the shareholders of said association purporting to borrow from said H. R. Foulger the sum of $5,000, the same being an amount in excess of the borrowing powers of said association; that the defendants' manager and directors refuse and neglect to furnish the plaintiff and other shareholders of said association with any information concerning the said alleged sale, and the affairs of the association; and that a large body of the shareholders are wholly opposed to the said alleged sale and are desirous of continuing the business of the said association.

The plaintiff claims, 1st, the appointment of a receiver of the assets, profits and moneys of the association and of a manager of the business thereof; 2nd, an injunction re-

straining said sale, and the defendants from in any way interfering with or retaining possession of the business of the association; 3rd, an order setting same aside; 4th, damages; 5th, an enquiry as to what (if any) charge said loan of $5,000 forms against the association; 6th, accounts; 7th, costs; 8th, general relief. Judgment. Scott, J.

Upon the *ex parte* application of the plaintiff I granted the injunction now sought to be continued restraining the defendants until the 5th of March instant, from proceeding with said alleged sale to Foulger & Co., or any sale thereof, and from selling and in any way dealing with the assets of said association as the same stood prior to said alleged sale, and from in any way interfering with the management or control of the business assets or affairs of said association.

Also at the same time upon the application of the plaintiff I appointed one Milne receiver until the said 5th day of March instant, without security, to take possession of and manage the said business and the stock in trade and property thereof, and to carry on said business as nearly as possible in the same manner as the same had theretofore been carried on, and gave him certain powers with respect to the carrying on of the same. I also at the same time granted to the plaintiff a summons for the present application, returnable on the 4th March instant.

The application was heard by me on the last mentioned date, when I reserved judgment. I continued the injunction and the present receiver until the 8th day of March inst., at noon.

If the plaintiff is entitled to an injunction or to the appointment of a receiver he is entitled solely on the ground of his claim that the directors exceeded their powers as such in selling to Foulger & Co., without first receiving the assent of the shareholders, and on the ground that the injunction and receiver are necessary to protect the interests of the

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Scott, J.

shareholders until the question can be decided. It is true that by the statement of claim other relief is sought such as the appointment of a manager of the association, and an inquiry as to whether the $5,000 borrowed forms a charge against the association, but in respect of neither of those claims is an injunction or a receiver necessary to protect such interest.

This fact seems to have been lost sight of by the plaintiff in making his application. He has filed a large number of affidavits which deal almost entirely with charges of acts of misconduct on the part of the directors and of Urquhart, the manager, which are in no way connected with the sale complained of, and therefore entirely foreign to this application.

It might possibly be inferred from certain allegations in the statement of claim that the plaintiff suspects that there may have been collusion or misconduct, or of any fraud connected with the sale. The only charge is as I have already stated, that the directors exceeded their powers in making it. It is also charged that Urquhart, the manager, is a member of Foulger & Co., which is denied by him, but it is not charged that he is a director, or that he exercised any undue influence over the directors to induce them to make a sale to him.

Since hearing the argument on this application I entertain some doubt as to whether the sale complained of was not within the directors' authority.

In *Wilson* v. *Miers*,[1] it appears to be held that such a sale by them is authorized, and that case is still recognized as an authority upon the question. It is also open to question whether an action to prevent or set aside such a sale should not either be brought in the name of the association or the association added as a defendant. I mention these doubts because, though I am not now called upon to decide

[1] 10 C. B. (N. S.), 348; 3 L. T. 780.

these questions, the fact that there may exist a doubt as to whether the plaintiff will succeed in the action may be a matter to be considered in disposing of the application. Judgment. Scott, J.

In Kerr on Receivers, 4th edition, at page 4, the following is stated:—

"But where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant—in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant the Court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases therefore where the Court interferes by appointing a receiver of property in the possession of the defendant, before the title of the plaintiff is established by decree, it exercises a discretion to be governed by all the circumstances of the case. Where the evidence on which the Court is to act is very clear in favor of the plaintiff, there the risk of eventual injury to the defendant is very small, and the Court does not hesitate to interfere. Where there is more of doubt, there is of course more of difficulty."

In my view this language is applicable as well to questions of law affecting the plaintiff's right to recover as to the evidence adduced in support of his claim.

It may plainly be seen that if the sale complained of is held to be one which the directors were authorized to make and that Foulger & Co. are entitled to the property under it, the damage which will be caused to them by placing the business in the hands of a receiver until the trial of the action will be incalculable. I doubt whether any damage which the Court can award could compensate them for their loss. I can find no authority for conferring upon a receiver in a

Judgment.
Scott, J.

case like this authority to carry on the business as it has heretofore been carried on by selling goods on credit and by expending the proceeds of sales in the purchase of other goods to keep up the stock.

In Kerr on Receivers it is stated on page 246: "The Court will in no case assume the management of a business or undertaking except with a view to the winding up and sale of the business or undertaking. The management is an interim management; its necessity and its justification spring out of the jurisdiction to liquidate and sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends."

The receiver's duty would therefore be either to hold the property intact until the rights of the parties are determined, or he might be authorized to sell off the stock in trade gradually. In either case the business would in a short time be greatly injured if not entirely destroyed.

I think I should consider also what on the other hand would be the damage to the shareholders if the plaintiff's claim should be upheld and Foulger & Co. were left in possession until the trial.

It is apparent from the statement of claim that Foulger & Co. bought the property with the intention of carrying on the business. They were carrying it on from the date of the sale until after this action commenced, and the statement of claim alleges that they had brought new goods into the premises and mingled them with the goods purchased from the association.

I assume that if the sale were held invalid the association would be entitled to a return of the property or its value, although no such claim is made in this action. The claim is merely that the sale be held invalid. There is no claim for damages for the loss the association has sustained by Foulger & Co. taking possession. It is true that the plaintiff claims

damages, but he does not state for what or against whom they are claimed. It appears from the affidavits filed that the value of the stock in question is $17,800.50, and that the purchase price was 70 cts. on the dollar. The association will therefore receive seventy per cent. of that amount, and if the business is carried on in the ordinary way, until the trial, as there is every reason to expect that it will be, it is reasonable to suppose that at least thirty per cent. of a stock of that magnitude will remain unsold at that time. The business would then be taken over by the association as a going concern, and it would hold the purchase money paid by Foulger & Co. as security for the portion of the property disposed of by him. I cannot therefore see what loss would be sustained by the association except perhaps the loss of the profit which might be earned by carrying on the business in the meantime. Judgment. Scott, J.

In view of the fact that the plaintiff's right of action is not entirely free from doubt in my mind and of the further fact that the damage which Foulger & Co. would sustain in case the sale should be upheld, and they were deprived of possession of the property until the trial, would be very great, while that which would accrue to the shareholders in case the sale should be held invalid, and Foulger & Co. should remain in possession until that time, would be comparatively small, I cannot see my way clear to grant the application.

I therefore dismiss the application with costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

KENNY v. CANADIAN PACIFIC RY. CO.

Damages for injury on railway—Motion for non-suit—Evidence for jury—Negligence—Railway mail clerk as passenger—Passenger for reward—Contractor—Principal and agent—Master and servant—Independent contractor — Respondeat superior — Misfeasance and non-feasance.

The action for damages for injury caused by negligence of a common carrier of passengers is in tort. A duty is imposed by law upon a common carrier of passengers to carry them safely and securely so that no damage or injury shall happen to them by the negligence or default of the carrier. A breach of this duty is one for which an action lies which is founded on the common law, and requires not the aid of contract to support it.

It is now settled law that corporations are liable for negligence whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed on them.

If the passenger be carried in performance of a contract, it is immaterial whether he himself negotiated the contract or paid the fare, or whether any fare were paid, or if paid whether it went into the pocket of the defendants.

The C. & E. Railway Company were the owners of a line of railway between the City of Calgary and the Town of Edmonton, but owned no rolling stock and employed no staff for the operation of the road. They entered into an agreement with the C. P. R. Co., the defendants, "for the regulation and interchange of traffic and the working of traffic over the railways of the said companies, and for the division and apportionment of tolls, rates and charges, and generally in relation to the management and working of the railways" of the two companies, whereby the defendant company agreed to operate the railway line on behalf of the C. & E. Company "with a staff and organization appointed by the C. P. R. Co. (the defendants), and to provide a service of such efficiency and speed and operate the property of the C. & E. Co. as agents for and on account of the C. & E. Co., as may be required or directed by that company or its officer." The contract also provided that the defendant company should not be required to maintain the road "below a point of efficiency necessary to the safe and proper handling of such train service, as may be required for the proper operation of the railway." All the expenses of operating the road were to be paid in the first instance by the defendant company, but were to be charged against the C. & E. Co. under a special clause in the agreement for the apportionment of the tolls and receipts. The rolling stock used in operating the road bore the name of the defendant company. The officials employed in operating it wore caps indicating that they were servants of the defendant company. The defendant company sold tickets entitling the holder to travel over the C. & E. line, and issued a "Time Bill" giving the time tables of the western division of the defendant company, in which the line between Calgary and Edmonton was referred to as the "Edmonton Section," and this time bill was endorsed with the names of the leading officials of the defendant company. The plaintiff was

a railway mail clerk in the employ of the Government of Canada, whose duty it was to handle and attend to the Government mail matter being carried on the C. & E. line between Calgary and Edmonton. This mail matter and the plaintiff were both carried under a contract between the Postmaster-General of Canada and the C. & E. Co., and the C. & E. Co. received from the Government of Canada the moneys paid for carrying the mail matter, and no part of such money was received by the defendant company. While being carried on a train on the C. & E. line towards Edmonton, the plaintiff was injured by the derailment of the train, which fell into a ravine, and he brought action for damages against the defendants.

Held, that plaintiff being lawfully in the mail car with the knowledge and consent of the defendants, and a passenger under the charge and care of the defendants, of which there was evidence to go to the jury, a duty was imposed upon the defendants to carry him safely and securely, so that by their negligence or default no injury should happen to him; that for a breach of this duty an action would lie independently of any contract, and that the question whether or not the defendant company received a reward for carrying the plaintiff did not affect the rights of the parties.

Held, also, against the contention that the defendant company were merely agents for the C. & E. Co., and that the officials and workmen operating the road were the servants, not of the defendants, but of the C. & E. Co., and that the latter company, if anyone, were responsible; that there was evidence to shew that the officials and workmen were the servants of the defendant company, and that the defendant company were not merely agents but were independent contractors.

Held, also, against the contention that the defendants were the agents of the C. & E. Co. in operating the road, and were, therefore, liable only for a misfeasance but not for a nonfeasance; that the omission to take proper care in respect to the condition of the bridge, and the track, and the running a train over the track and bridge while in an unsafe condition, would be a misfeasance and not a nonfeasance, and that, therefore, even if the defendants were merely agents of the C. & E. Co. they would still be liable.

[McGUIRE, C.J., *April 19th 1902.*

Statement.

The plaintiff's statement of claim was as follows:

1. On the 29th day of May, A.D. 1899, the plaintiff became and was a passenger to be safely and securely carried by the defendants on their railway to the town of Edmonton, in the North-West Territories of Canada, from the City of Calgary, in said Territories, for reward paid to the defendants.

2. The defendants did not safely and securely carry the plaintiff to the town of Edmonton from the City of Calgary aforesaid; but so negligently and unskilfully conducted themselves in carrying the plaintiff on the journey aforesaid,

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and in managing the said railway, and the carriage and train in which the plaintiff was then being carried by the defendants, and by reason of the unfit and unsafe condition and the want of repair of the road bed and the bridge over Black Mud Creek, and the ties and rails thereon of the said railway, through the negligence of the defendants in making and keeping said road bed, bridge, ties and rails in a fit, safe and proper condition and state of repair, the said carriage and train about ten miles south from the said town of Edmonton was derailed and fell into a ravine, and the carriage in which the plaintiff was then being carried was wrecked and shattered.

3. The plaintiff was thereby thrown down with great violence, and he suffered severe injuries to his legs and other parts of his body, and his whole nervous system received a severe shock.

4. The plaintiff has in consequence suffered great pain, and is permanently injured, and has been put to great expenses, and incurred liabilities for medical attendance, nursing and otherwise, and for hotel and lodging accommodation, and extra food and nourishment, and will be put to further expenses in endeavouring to cure himself of his said injuries, and has been and is still prevented from pursuing his occupation, and has lost and will lose the salary which he otherwise would have earned, and the plaintiff claims $10,000 damages.

The defendants after denying generally all the allegations contained in the statement of claim, pleaded also that they did not contract to carry the plaintiff safely and securely or at all, and that the railway was not the railway of the defendants. Their sixth plea was as follows:

"While still denying that the plaintiff was injured and subject also to the several denials of fact set out and contained in the preceding paragraph hereof, the defendants say that

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if the plaintiff was injured it was while he was being carried on the railway of the Calgary and Edmonton Railway Company, and on one of its regular trains as a mail clerk or officer employed by Her Majesty in the Canada Post Office, and under the terms of a certain contract dated the 21st day of June, 1890, made between Her Majesty the Queen and the Calgary and Edmonton Railway Company, whereby it was for the consideration to be paid the Calgary and Edmonton Railway Company therein mentioned, amongst other things, stipulated and agreed that the said the Calgary and Edmonton Railway Company should carry by their regular trains for Her Majesty, all mails, men, supplies, and materials required for the public service, in both directions, between the town of Calgary and a point on the North Saskatchewan River, to said Territories, at or near Edmonton, aforesaid, and if the defendants were at the time of the matters complained of, managing or running the said train, it was only as agents of and for and on behalf of the said the Calgary and Edmonton Railway Company, and not otherwise.

The action was tried at Calgary before McGuire, C.J., and a jury, on the 21st, 22nd, 23rd and 24th days of December, 1901, and the 25th, 26th and 27th days of January, 1902.

The further facts appear sufficiently in the judgment.

Argument.

J. R. Costigan, K.C., and *J. B. Smith*, K.C., for the plaintiff.

J. A. M. Aitkins, K.C., and *J. A. Lougheed*, K.C., for the defendants.

At the close of the plaintiff's evidence counsel for the defendants moved to enter a nonsuit on the ground, first, that there was no evidence to show that the plaintiff was a passenger for reward to the defendants; second, that there was no evidence of negligence on the part of the defendants,

Argument. and third, that the defendants were only agents of the Calgary and Edmonton Railway Company, and were not liable at any rate for nonfeasance and that there was no evidence of misfeasance or active negligence. McGUIRE, C.J., reserved judgment on the motion for a nonsuit, and directed the defendants to proceed with their evidence, and at the close of the evidence a number of questions were submitted to the jury which the jury answered and counsel for the plaintiff then moved to enter judgment for the plaintiff. Judgment was then reserved on the whole case. Upon the application for a nonsuit the following judgment was delivered by

[*April 19th, 1902.*]

Judgment. McGUIRE, C.J.—The first ground urged was that plaintiff has not proved he was a passenger for reward to the defendants.

There was evidence to go to the jury that the plaintiff was lawfully in the mail car with the knowledge and consent of the defendants, and that he was a passenger under the charge and care of the defendants.

There was evidence that the defendants were operating the train for consideration and that the carrying of the mails and of the plaintiff was part of what they had agreed to do and that they were carrying the plaintiff for reward.

The contract of the 6th of April, 1896, between the defendants and the Calgary and Edmonton Ry. Co., recites that it is entered into "for the purpose of mutually benefiting the traffic of their lines," that is the lines of the two contracting parties, and the defendants "more or less directly or indirectly derived an advantage" (remark of Lord Thesiger in *Foulkes* v. *Metropolitan Ry. Co.*[1]), from the carrying of the mails and the plaintiff. It was not seriously contended

[1] 49 L. J. C. P. 361; 5 C. P. D. 157; 42 L. T. 348; 28 W. R. 526.

contended that the defendants were working gratuitously, and the recital in the contract shows they were not. Judgment. McGuire, C.J.

But the allegation as to reward is not essential to the plaintiff's case. The action for damages for injury caused by negligence of a common carrier of passengers is in tort. A duty is imposed upon such common carriers in respect of a passenger to carry him safely and securely so that by their negligence or default no damage or injury happen to him. A breach of this duty is one for which an action lies founded on the common law, and which requires not the aid of a contract to support it, as laid down by Dallas, C.J., in *Bretherton* v. *Wood*,[2] *Collett* v. *London & N. W. R. Co.*[3]

The payment of any money is not an essential part of the contract to carry out of which the duty arises. Smith on Negligence, at p. 183, citing *Marshall* v. *York*,[3] *G N. Ry.* v. *Harrison*,[4] *Austin* v. *G. W. Ry.*,[5] and see also *Mersey Docks Trustees* v. *Gibbs*,[6] and *Foulkes* v. *Metropolitan Ry. Co.*[1]

The defendants say that the plaintiff was carried under a contract between the Postmaster General and the Calgary and Edmonton Ry. Co., and this company received the moneys paid for carrying the mails, the defendants receiving no part of such moneys. Assuming that to be true the defendants would still not be relieved. *Dalyell* v. *Tyrer*,[7] (cited with approval in *Foulkes* v. *Metropolitan Ry. Co.*[1]), and *Mersey Docks* and *Foulkes* cases cited above.

"The contract seems to be made by the fact of the passenger being lawfully within the carriage, and it is immaterial whether he himself negotiated the contract or paid the

[2] 6 Moore, 141; 3 Br. & B. 54; 9 Price, 408; 23 R. R. 556. [3] 11 C. B. 655; 21 L. J. C. P. 34; 16 Jur. 124. [4] 10 Ex. 376; 2 C. L. R. 1136; 23 L. J. Ex. 308; 2 W. R. 626. [5] 36 L. J. Q. B. 201; L. R. 2 Q. B. 442; 16 L. T. 320; 15 W. R. 863. [6] 11 H. L. Cas. 686; 35 L. J. Ex. 225; L. R. 1 H. L. 93; 12 Jurist (N. S.) 571; 14 L. T. 677; 14 W. R. 872. [7] El. Bl. & El. 899; 28 L. J. Q. B. 52; 5 Jur. (N. S.) 335; 6 W. R. 684.

Judgment. McGuire, C.J.

fare." Smith on Negligence, p. 180;* also *Collett* v. *London & N. W. Ry.*[8] "It has been held after many conflicting decisions, and is now settled law that corporations are liable for negligence whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed upon them." Smith on Negligence, p. 156.*

I think the result of the cases is that every person on the railroad in the care of the carrier is a passenger, although no fare has been paid. Ray on Negligence, pp. 5, 19, 20, citing *Marshall* v. *York*,[3] *G. N. Ry.* v. *Harrison*,[4] *Great Western* v. *Braid*,[9] *Collett* v. *London & N. W. Ry.*[8]

There was therefore evidence, indeed the facts are not disputed, from which it follows that the plaintiff was lawfully a passenger on the railway train, and there was also evidence that he was a passenger for reward to the defendants. The connection of the defendants with the train and railway will be dealt with more conveniently later on.

2. The second ground urged was that there was no evidence of the negligence charged in the statement of claim.

I think there was. There was ample evidence to go to the jury of the unsafe condition of the bridge, and if it was in the state described by the witnesses for the plaintiff, it was at least negligence, if not wilful misconduct, to attempt to run the train across it.

The mail car, in which the plaintiff was, went down while on the bridge, and it was a question for the jury whether or not the injury arose through the defective condition of the bridge.

The evidence was conflicting as to the point at which the first derailment took place, and, if a car first left the rails before reaching the bridge, as to whether that was due

[8] 16 Q. B. 984; 20 L. J. Q. B. 411; 15 Jur. 1053. [9] 1 Moore, P. C. (N. S.) 101; 9 Jur. (N. S.) 339; 8 L. T. 31; 11 W. R. 444; 1 N. R. 527.

to any want of repair or defective condition of the track south of the bridge. Judgment. McGuire, C.J.

3. The third ground was that defendants were only agents of the Calgary and Edmonton Ry. Co., and were not liable at any rate for nonfeasance, and that there was no evidence of misfeasance or active negligence.

This raises the question of who was responsible for the injury to the plaintiff, assuming it to be due to the negligence or breach of duty of the persons responsible for his safe carriage, whoever they were.

In the first place there was evidence that the defendants held themselves out as the persons who were in possession of and operating the road as principals, such as, that the defendants are a railway corporation — their apparent possession and operation of the road as principals—the use of defendants' rolling stock with their name on the cars—that the conductor wore a cap indicating that he was a servant of the defendants—that the defendants sold tickets entitling the holder to travel over said road and in said cars—and what is, I think, very strong evidence, that the defendants were holding themselves out as operating the road between Calgary and Edmonton, is contained in a "Time Bill No. 37," which was "To take effect at 24.01 o'clock Monday, December 12th, 1898," and which was the time bill in force at the time of the accident. This "Bill" purports to be issued by "The Canadian Pacific Railway," has on its outside cover the names of "W. Whyte, Manager," "F. W. Jones, Assistant-Manager," and that it is issued "for the government of employees only." It shows the time tables of the Western Division of the C. P. R., including the main line. The line between Gleichen and Canmore, for example, is called the "Calgary section," that between Calgary and Edmonton is called the "Edmonton section," and the pages dealing with these two portions of the line have the name "J. Niblock, Superintendent, Medicine Hat." It would

Judgment. McGuire, C.J.

be difficult for anyone reading this document to suppose there was any difference between the "Calgary section" and the "Edmonton section," as to ownership or operation. The employees on this section were engaged apparently just as similar employees were hired on the main line of the C. P. R., and were paid by C. P. R. cheques in the same way.

As to holding themselves out as principals, see observations of Lord Campbell in *Powles* v. *Hider*,[10] also *Oldfield* v. *Furness*,[11] *Stables* v. *Ely*.[12]

We come, then, to the agreement of April 6th, 1896, between the defendants and the Calgary and Edmonton Ry. Co. It was urged for the defendants that the effect of this contract is that defendants were merely agents of the Calgary Co., and that the employees on the line between Calgary and Edmonton, and in running the trains, were not the servants of the defendants, but of the Calgary Co., and, that being so, the defendants are not answerable, but if any one is liable it is the superior—the Calgary Co. I think this would be a good ground if the evidence showed that the defendants are to be regarded merely as a sort of foreman or servant of the Calgary Co. The mere statement of the proposition rather startles one. The magnificent Canadian Pacific Railway Company, with its iron bands crossing the continent, and branching out on each side of its trunk line, only the hired servant of the little Calgary and Edmonton Ry. Co.! The contract recites that the agreement is entered into "for the purpose of eventually benefiting the traffic of their line," and that it is an "agreement for the regulation and interchange of traffic, and the working of traffic over the railways of the said companies, and for the division and apportionment of tolls, rates and charges, and generally in relation to the management and working of the railways." It then sets forth the covenants on the part of the

[10] 6 El. & Bl. 207; 25 L. J. Q. B. 331; 2 Jur. (N. S.) 472. [11] 58 J. P. 102; 9 Times L. R. 515. [12] 1 C. & P. 614.

defendants. They are to operate the railway on behalf of the Calgary Co., in the manner thereinafter provided — they are to do so "with a staff and organization *appointed by the defendants*, charging therefor the actual working expenditures as defined by the Railway Act," etc., etc. The definition of "working expenditures" includes all salaries and wages of employees, and also "compensation for accident and losses, so that it would seem that the defendants could charge up to the Calgary Co. compensation for accident and losses." The agreement continues "and to provide a service of such efficiency and speed and operate the property of the Calgary Co. as agents, for and on account of the Calgary Co., and as may be required or directed by that company, or its officer;" but it is provided that they shall not be required to maintain the road "below a point of efficiency necessary to the safe and proper handling of such train service as may be required for the proper operation of the railway." It seems to me, a fair interpretation of that covenant is, that the "staff and organization," so to be "appointed by the" defendants, were to be the servants of the defendants rather than that the defendants' sole duty in that respect was to hire men for the Calgary Co.—for it is *with this staff*, etc., that they are to "operate . . . the said railway." A corporation cannot, from its very nature, operate a railway except by means of servants, or in fact do anything except through its employees ("A body corporate never can either take care or neglect to take care except through its servants," *Mersey Docks Trustees* v. *Gibbs*.[6]) If they had no servants how were they to operate the road and otherwise carry out the contract? If the servants actually doing the work were the servants of another company then it would be their master, that other company, that would be operating the road. But it was not disputed that the defendants, in some capacity, were in fact operating the road. Therefore it seems to me that the men actually doing the work must, from

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the very terms of the contract and the nature of the work, and the character of the corporation, be the servants of the corporation that was in fact operating the railway. But to apply other tests: First, these men were to be "appointed," that is, "selected" by the defendants. "The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders should be responsible, etc., etc." *Reedie* v. *London & N. W. Ry. Co.*[13] "Selection and power of removal" is another test. "That person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had *selected* him . . and who could *remove* him, etc., etc." *Quarman* v. *Burnett.*[14] Who could "*remove*" the persons so "appointed"? Surely not the Calgary Co., for that would be inconsistent with the power of appointment. Even though the Calgary Co. had expressly retained the power to dismiss servants for incompetency, that, it seems, would not have affected the case, the "workmen would still be the workmen of the contractor." *Reedie* v. *L. & N. W. Co.*[13] Or even if the servants were the servants of the Calgary Co., and were loaned to the defendants, and under the control of the latter they would become the servants of the defendants. *Fenton* v. *The Dublin Steam Packet Co.*[15] There was evidence that the defendants had sole control of these servants. It is said that the wages, though paid in the first instance by the defendants by their own cheques, were to be charged against the Calgary Co. In the case last cited the owners of the vessel chartered it to one Dails who was to pay "all disbursements . . . seamen's and captain's wages." Dails moreover was himself on board when this vessel ran down a keel of the plaintiff. It was held that the crew being appointed by the owners, though paid by Dails, were the servants of the owners. Coleridge, J., said,

[13] 6 Railway Cas. 184; 4 Ex. 244; 20 L. J. Ex. 65. [14] 6 M. & W. 499; 4 Jur. 969; 9 L. J. Ex. 308. [15] 1 P. & D. 103; 8 Ad. & El. 835; 8 L. J. Q. B. 28.

"Now, when the accident happened, she is found to be navi- Judgment.
gated by a captain and crew *appointed* by the defendants McGuire, C.J.
(the owners). They would, therefore, *prima facie*, be liable."
In *Murray* v. *Currie*,[16] Willis, J., says, "In ascertaining who is liable for the act of a wrongdoer you must look to the wrongdoer himself or the first person in the ascending line who is employer and *has control* over the work. You cannot go further and make the employer of that person liable." In *Rourke* v. *The Whitemoss Colliery Co.*,[17] Cockburn, C.J., says, "The engineers were still the defendants' servants, but were placed as completely at the disposal of Whittle as if they had been lent to him. Now, where a man lends his servant to another . . . and an accident happens during the time he is working for the man to whom he is lent, he must be held in reference to that employment, and that accident, to be the servant of the person to whom he was lent, and for whom he was actually working."

But the agreement, it may be said, provides for control by the Calgary Co., over (not the workmen, but) the defendants. The Pacific Co. is to operate, etc., "as may be required and directed by the Calgary Co., or an officer duly appointed" by the latter company, but the Calgary Co., or its officer "shall not require the railway to be maintained below a point of efficiency necessary to the safe and proper handling of such train service, etc.," so that if the railway was not maintained up to that "point of efficiency" the defendants cannot lay the blame on the Calgary Co. But did the control so reserved deprive the defendants of the position of being independent contractors, and reduce them to the position of a mere servant or manager? When one employs a contractor to erect a house the contract usually requires him to follow certain "plans and specifications," and there is generally an architect to watch the execution of the work in

[16] 40 L. J. C. P. 26; L. R. 6 C. P. 24; 23 L. T. 557; 19 W. R. 104.
[17] 2 C. P. D. 205; 46 L. J. C. P. 283; 36 L. T. 49; 25 W. R. 263.

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the interest of the owner, and to whose directions the contractor is required to conform, yet such power to "require and direct" does not make the contractor a servant of the owner. If any authority is required for this proposition, see *Fletcher* v. *Braddick*,[18] *Reedie* v. *London & N. W. Ry.*,[13] *Cuthbertson* v. *Parsons*,[19] *Steel* v. *The S. E. Ry. Co.*,[20] *Jones* v. *The Corporation of Liverpool*,[21] *Allan* v. *Hayward*,[22] *Cameron* v. *Nystrom*.[23] In some of these cases the power of control retained was greater than in the present case. The principle laid down in *Steel* v. *The S. E. Ry. Co.*,[20] is this, "where work is done for a railway company under a contract, parol or otherwise, the company are not responsible for the injury resulting to a third person from the negligent manner of doing it, though they employ their own surveyor to superintend and direct what shall be done." Crowder, J., there says, "The circumstances of the work being done under a contract negatives his being a servant of the corporation."

A "contractor" is defined to be one "who as an independent business undertakes to do specific jobs of work without submitting himself to control as to the petty details." 3 Amer. & Eng. Encyc. 822.

"He represents the will of his employer only as to the result, and not as to the means." Shearman & Redfield on Negligence.

"No liability attaches to the employer where he simply reserves the right to prescribe *what* shall be done, not *how* it shall be done." 14 Amer. & Eng. Encyc. 829, 830-1.

He is a person "recognized by the law as exercising a distinct calling." *Milligan* v. *Wedge*,[24] and in this case it

[18] 2 Pos. & P. (N. R.) 182; 9 R. R. 633. [19] 12 C. B. 304; 21 L. J. C. P. 165; 16 Jur. 860. [20] 16 C. B. 550. [21] 54 L. J. Q. B. 345; 14 Q. B. D. 890; 33 W. R. 551; 49 J. P. 311. [22] 7 Q. B. 960; 15 L. J. Q. B. 99; 4 Rail. Cas. 104; 10 Jur. 92. [23] 62 L. J. P. C. 85; (1893) A. C. 308; 1 R. 362; 68 L. T. 772; Asp. M. C. 320; 57 J. P. 550. [24] 4 P. & D. 714; 1 Q. B. 714; 12 Ad. & El. 737; 10 L. J. Q. B. 19.

was the rather humble calling of a licensed drover. In *Murray* v. *Currie*,[16] the calling was that of a stevedore. Judgment McGuire, C.J.

In the well known case of *Langher* v. *Pointer*,[25] fully reported in 29 R. R., a contention similar to that here raised by the defendants was considered. The Court there was divided, but the judgment of Littledale, J., has been followed in *Quarman* v. *Burnett*,[14] and in *The Quickstep*.[26] The facts shortly were these: Defendant owned a carriage, but no horses. These he hired from a job-master, who sent a driver, who was not paid by anyone, relying on getting a voluntary "tip" from the person driven. Through the negligence of this driver an injury was done to the plaintiff. Was defendant liable? Littledale, J., thought not, unless this principle was good in law: "If a man either for his benefit or pleasure employs an agent to conduct any business, such agent is to be looked upon in the same light as if he was the immediate servant of the employer, and that the owner of the property by employing such agent to transact his business, confides to him the choice of the under workmen; and then the principle must go on to this that such agent and under workmen are to be considered in the same light as the foreman or manager of a person in conducting his business, and as the workmen selected by such foreman or manager, and that it makes no difference to persons who receive an injury, in what light the offending party stands to the principal, whether as under workmen employed by an agent or an under workman employed by a foreman of the principal, and that the only thing to be looked to is whether in the end the principal pays for the employment in the course of which the injury is occasioned."

"But I think," says Littledale, J., "this rule can not be carried so far."

[25] 5 B. & C. 547; 8 D. & R. 550; 4 L. J. Q. B. (O. S.) 309; 29 R. R. 319. [26] 59 L. J. Ad. 65; 15 P. D. 196; 63 L. T. 713; 6 Asp. M. C. 603.

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Further on he says, "Suppose a man has a ship or carriage * * * to repair, and he, instead of having the repairs done on his own premises and by his own servants, sends it out to be repaired by a person who exercises the public employment under which it would be repaired, and any damage happens in the course of the repair by the negligence of the persons employed, these are employed by a person who may be considered *the agent of the principal*, and yet the law would not hold the principal liable."

Apply that to the present case. Here is a company (C. & E.) having a railroad and a franchise, but no rolling stock or "staff" to operate it; but they know of a corporation—a public chartered body—exercising a public and recognized employment under which this road can be operated—and having all the rolling stock, employees and experience necessary. Instead then of buying rolling stock and hiring men to operate the road, they contract with this other corporation to do the work for them as their agents, such corporation to employ its own staff, etc. While this corporation is in the act of carrying out the work, an injury is done through the negligence of such staff, etc. According to the law, as laid down by Mr. Justice Littledale, the Calgary Co. would not be liable.

For the defendants it was contended that, as agents, they would be liable, not for nonfeasance, but only for misfeasance. In the view I have taken that there was evidence that the defendants were independent contractors and not mere managers for the Calgary Co., this contention has no application. But if I am wrong in considering them "contractors," and if they are to be regarded as servants, or agents in the nature of servants, then I shall consider, as briefly as possible, this ground. Dicey on Parties to Actions, at p. 463, is referred to. He there says, "A servant or other agent is liable for acts of misfeasance or positive wrong in the course of his employment, but not for acts of nonfeasance

or mere omission," and he cites Storey on Agency, ss. 308-9. At p. 465, however, he says, "In determining the liability of a servant towards a third party the question to be answered is, it is conceived, has the act of the servant merely violated a duty he owes to his master, or is it also an infringement of the rights of the third party? In the former case he cannot, in the latter he can, be sued by such party." And Evans on Principal and Agent, at p. 386, says: "The rule is that an agent is personally liable to third parties for doing something which he ought not to have done, but not for doing something which he ought to have done." This involves the consideration whether there is evidence that the defendants were guilty of a misfeasance. Judgment. McGuire, C.J.

First, what is a "misfeasance"? In Amer. & Eng. Encyc. vol. 15, p. 621, it is defined as "strictly a default in not doing a lawful act in a proper manner, omitting to do it as it should be done."

Wharton defines it as "a misdeed or trespass," also the "improper performing of some lawful act."

At the place just cited from Amer. & Encyc., it is said (the authority being an American decision), "Misfeasance may involve to some extent the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, as, *e.g.*, where he does not exercise that care which a due regard for the rights of others would require. This is not 'doing,' but it is the 'not doing' of that which is not imposed merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation and is actionable."

While there was evidence that went to show negligence or want of skill or care on the part of the employees in respect to the condition of the bridge and track, there was

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also evidence which indicated want of care or skill on the part of the defendants in the design of the bridge and the mode of repair which might be due to no fault of the workmen. They might have done their work strictly according to the plans and specifications, and exactly as ordered, and yet the result might produce a bridge not reasonably safe. This would seem rather the negligence of the master than of the servant. Mr. Aikins said the defendants could not be guilty of a misfeasance unless they personally meddled in the matter, and, being a corporation, they could not personally do so. But that brings us back to what we were considering before. Being a corporation "they could not take care or neglect to take care—except through servants;" and if he is right as to misfeasance, his argument would also go to this, that they could not be guilty of negligence of any kind except through servants, and if they had no servants, of course they could not be guilty. But how were they maintaining and operating the railway unless they had servants, and it was the defendants themselves who set up the contract with the Calgary Co. as that under which they were operating the road, but only as agents. If they were not carrying out that agreement, then we may leave that agreement out of consideration as if it never existed, and then the evidence before the jury as to who were visibly operating the road, etc., as already referred to, would be the only evidence by which they would be governed. It is quite clear that if the defendants had no servants they were not in any sense on the railway between Calgary and Edmonton at all.

It seems to me there was evidence that the defendants were in possession of and operating the railway in question, and invited persons, and the plaintiff as one, to travel on the railway; and whether they did so as principals, as independent contractors, or as agents, they would be liable even if only for misfeasance. To run a train over an unsafe bridge would be surely misfeasance. They would be liable if they

knew the bridge to be unsafe; and also if by their servants they had the means of knowing and were negligently ignorant of it. *Mersey Docks Trustees* v. *Gibbs*.[6] Suppose the bridge had fallen down several days before the 29th May, 1899, and on the 29th they ran their train, or attempted to run it, across Blackmud Creek? Would they not be liable no matter in what character they were acting? That, of course, would be a very gross case, but the principle is the same.

Judgment. McGuire, C.J.

In *Kelly* v. *Metropolitan Ry.*,[27] Rigby, J., said, "This case seems to me to be an attempt to dissect the act of the defendants' servants, and to say that the omission of the engine driver to shut off steam was a mere nonfeasance. It is impossible to say that such omission was a mere nonfeasance within the meaning of the cases which have been relied on by the defendants. The plaintiff here was a passenger in the train with the permission of the defendants and independently of any contract, and was injured by reason of the train being negligently run into the dead-head. The act was one act, viz., the act of omitting to shut off steam and so allowing the train to come into collision with the dead-head. The cause of the accident was the negligent management of the train. It was a case in which the company neglected a duty which they owed to the plaintiff."

In *Foulkes* v. *The Metropolitan Ry.*,[1] Lord Bramwell, referring to the contention that the fare of the passenger was not paid to the defendants, but to another company, said, "Even though the contract was with the South-Western, the defendants would still be liable. In that case there would be no duty of *contract* and consequently no cause of action for nonfeasance . . . But there would be that duty which the law imposes on all, viz., to do no act to injure another." He points out that if defendants' servants

[27] 64 L. J. Q. B. 568; (1895) 1 Q. B. 944; 14 R. 417; 72 L. T. 531; 43 W. R. 497; 59 J. P. 437.

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ran a truck against the plaintiff there would be no doubt of their liability. "These are clear cases; but the law is the same in cases that are not so clear, *e.g.*, if the carriage he was put in was dangerous, if the step he had to tread on was rotten." In the opinion of Lord Bramwell these would not be mere nonfeasance. Would a rotten bridge or rotten ties not be in the same category as a rotten step?

Baggally, J., in the same case said: "To carry their passengers in carriages which were in any respect or for any purpose dangerous, was, in my opinion, a misfeasance rather than a nonfeasance." To carry passengers over a track or a bridge that was "in any respect or for any purpose dangerous," would, it seems to me, be also a "misfeasance rather than a nonfeasance."

After carefully considering all the grounds relied on by the defendants I am of opinion that I ought not to dismiss the action, but allow it to go to the jury. I therefore dismiss the motion.

His Lordship then delivered a written judgment dealing with the answers given by the jury to the questions submitted to them and directed judgment to be entered for the plaintiff for $4,000, the amount at which the jury assessed the damages and costs.

Judgment accordingly.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

GRAY & SMITH v. GUERNSEY.

Detinue—Conversion—Demand and refusal—Evidence.

In an action of detinue as distinguished from an action for conversion, a proof of demand and refusal is essential, if the detention be denied.

[RICHARDSON, J., *October 1st, 1902.*

Statement. Trial of an action before RICHARDSON, J., without a jury.

T. C. Johnstone, for plaintiffs.

Ford Jones, for defendant.

The plaintiffs, who were dealers in agricultural implements, agreed to sell to one B. H. Brown, a waggon and a buggy. The agreement was in writing, in the form of three "lien notes," which provided that the ownership of the goods should remain in plaintiffs until the price was paid, and that in default of payment they should have full power to retake the property. These notes were not registered under the Hire Receipts Ordinance. Brown, having become insolvent, assigned all his property "save and except what is exempt from seizure and sale under execution," to defendant in trust for the benefit of his creditors, and delivered to him the goods in question, along with a quantity of other goods. Defendant thereupon caused notices of intention to sell the goods by public auction to be posted up. On seeing these, one of the plaintiffs went to Brown and demanded a return of the goods, but was informed that the property was in defendant's hands. They then commenced this action of detinue and issued a writ of replevin for recovery of the goods in question, but without making any demand upon the defendant, and without any further attempt to retake the goods.

[*October 1st, 1902.*]

Judgment. RICHARDSON, J.—This action is brought by plaintiffs to recover from defendant a waggon and buggy, their property,

Judgment.
Richardson, J.

which plaintiffs allege that defendant on 10th February, 1902, the date on which the writ was issued, had unjustly detained and then unjustly detained from them, and of which they claimed a return or their value.

The defendant set up in defence a denial of the detention alleged, and nothing more.

The ownership of the property in question not being raised by these pleadings, it is, by operation of Rule 114, admitted; and I have thus only to determine whether or not plaintiffs have established that, when the writ issued, defendant was unjustly withholding from the plaintiffs their property and preventing them from having possession of it. In my judgment, in order to succeed the plaintiffs must bring themselves within the rule laid down in *Clements* v. *Flight*,[1] approved in *Bryant* v. *Herbert*,[2] by convincing the Court that the detention complained of was an adverse detention when the writ issued, by proof of request and refusal; this being the point in an action of detinue, as distinguished from an action of conversion, wherein request and refusal are evidence only.

This case followed *Jones* v. *Dowle*.[3] The plaintiff in an action of detinue under the plea of *non detinet* is entitled to a verdict on proof that the defendant has not returned the chattel to the plaintiff on demand.

Now what are the facts here? These plaintiffs agreed to sell to one Brown, the waggon and buggy in question, on credit, the agreement appearing by the terms of three lien notes, in each of which appears a condition worded thus: "The title, ownership and right of possession of the property for which this note is given shall remain in Gray & Smith" (the plaintiffs) "until the price is paid, and if default is made in payment * * * they have full power to * * * take * * * the said property."

[1] 16 M. & W. 42; 4 D. & L. 261; 16 L. J. Ex. 11 S. P. [2] 47 L. J. C. P. 670; 3 C. P. D. 389; 39 L. T. 17; 26 W. R. 898—C. A. [3] 1 D. (N. S.) 391; 9 M. & W. 19; 11 L. J. Ex. 52.

Judgment.
Richardson, J.

Following the agreement and subject to its terms, the purchaser Brown, with plaintiffs' assent, took possession of the waggon and buggy now sued for. But failing to pay therefor as he had agreed, the right to exercise the power to take the property as provided for became vested in plaintiffs.

It then appears that Brown, having become financially embarrassed, made on 23rd January, 1902, an assignment of all his property seizable under execution, to defendant, and delivered over with other articles, the waggon and buggy sued for, to defendant, who, on 31st January, posted notices of his intention to sell the same by public auction on 12th February, 1902.

On the plaintiffs having observed this notice of sale, the plaintiff Gray started on 4th or 5th February to Brown's place for the purpose of taking, on plaintiffs' behalf, the property, when, meeting Brown on the way, he was informed that the articles were in defendant's possession. Gray then returned to plaintiffs' residence and nothing further appears to have been done by the plaintiffs until 10th February, when this action was commenced by writ of summons; and the claim being one provided for by Rule 426, they obtained a writ of replevin, under which the waggon and buggy were taken by the sheriff and delivered to the plaintiffs.

It is beyond question that before suing out their writ, no request was made by plaintiffs or any one authorized by them, upon defendant for delivery up of their said property, or any attempt made to take the same; consequently the opportunity for refusing the request which by law, as I hold, defendant was entitled to, was not given, and therefore plaintiffs' right to bring detinue had not, when the writ issued, arisen.

The action must therefore be dismissed with costs.

REPORTER:

C. H. Bell.

KING v. BENOIT.

Manitoba Grain Act—Application for cars—Order book—Distribution of cars—Elevators—Loading platforms.

The Dominion Statute, 63-64 Vic. 1899, c. 25, amending the General Inspection Act, R. S. C. 1886, c. 99, enacts (schedule) that the whole of Manitoba and the North-West Territories, and that portion of Ontario west of and including the then existing District of Port Arthur, should be known as the Inspection District of Manitoba. The Manitoba Grain Act (the short title of 63-64 Vic. 1900, c. 39, intituled "an Act respecting the grain trade in the Inspection District of Manitoba"), contains, as indicated by subheadings, provisions respecting a warehouse commissioner—elevators and terminal warehouses—country elevators, flat warehouses and loading platforms—commission merchants—general provisions. This Act is amended by 2 Edw. VII., 1902, c. 19.

Held (1), on admission of counsel, where a farmer who is not an elevator owner, lessee or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped, and has also grain stored in another elevator at the same point in common with other grain, for which he holds storage tickets; that it is *not* a violation of the Manitoba Grain Act for the station agent to refuse to recognize such farmer as an applicant, or to recognize his order in the order book for a car or cars to ship his said grain.

(2) Where a farmer has made order for cars in the order book at the station, and all applicants for cars who had made order prior to his order in such book, had each obtained one car, but the cars so distributed were not sufficient to fill the orders of such prior applicants, while the farmer had not yet been allotted a car by reason of the shortage; and the agent, out of the next lot of cars which arrived, refused to award the farmer a car, but there being a sufficient number of prior applicants, whose orders had not been entirely filled to exhaust the such next lot of cars, awarded out of such cars one to each such prior applicants, who had already received one car—that this *was* a violation to the Act.

(3) If each of the prior applicants as above mentioned had been supplied with one car at the time when the farmer gave his order, but on the day previous to the farmer's application there had been a surplus of cars after each prior applicant had been given one car, and the agent, in the distribution of the surplus cars had begun with the first applicant and distributed the cars so far as they would go, giving two or three to each of the prior applicants, but their order nevertheless remained unfilled, and if on the day of the farmer's application additional cars arrived to be loaded, and the agent declined to allot a car to the farmer, but allotted a car to each of the prior applicants, thus exhausting the supply—that this was *not* a violation of the Act.

(4) Where a farmer having grain to ship made order for one car in the order book, requiring it to be placed at the loading platform for the purpose of being loaded, and the agent allotted a car to each of the elevator companies having elevators at the same station, but whose orders were subsequent to those of the farmer—that this *was* a violation of the Act.

[RICHARDSON, J., *March 9th, 1903.*

Statement.

This was an appeal from a conviction before a Justice of the Peace, by which a station agent of the Canadian Pacific Railway Company was found guilty of certain violations of the Manitoba Grain Act and amendments. The appeal took the form of a case stated under section 900 of the Criminal Code, and the argument was heard on the 19th of February, 1903. All the facts were admitted, as appears by the stated case.

The case is as follows:—

1. A. V. Benoit, of the village of Sintaluta, who was convicted before me on the 6th December, 1902, as hereinafter mentioned, for a violation of the Manitoba Grain Act and amendment thereto, and, in the manner required by the Criminal Code and the Consolidated Rules of the Supreme Court of the North-west Territories, made application to have a case stated and signed under the provisions of section 900 of the said Code, and entered into a recognizance and duly paid all fees as provided by sub-section 4 of said section 900 of the Code, and stated the grounds upon which the conviction was questioned, which grounds he set forth as hereinafter mentioned, and also stated that he wished the appeal to be to the presiding Judge of the Judicial District of Western Assiniboia at Regina; in pursuance of the said application and of the said Rules, I state the following case:—

(*a*) The substance of the information or complaint:—

That A. V. Benoit, of the village of Sintaluta, in the Western Judicial District in the North-west Territories, where there was a station on the line of the Canadian Pacific Railway where grain is shipped, and where there was then a loading platform and several elevators, on or about the 25th day of November, 1902, being then and for some time previous thereto and thereafter the railway agent at the said Sintaluta station, did unlawfully refuse to permit a farmer, residing near said village, to load direct from the siding a car, not at the loading platform, but that had been

Statement.

awarded to him, pursuant to his order in the order book kept by the said A. V. Benoit for that purpose, to be loaded at said loading platform, there being then no room to load said car at said loading platform, nor within twenty-four hours after said car was allotted to him as aforesaid; and the said A. V. Benoit did also unlawfully refuse to allow the said farmer to retain after the said twenty-four hours the said car until he should have an opportunity of loading the same at the said loading platform, but in disregard of his duty in that behalf the said A. V. Benoit awarded the said car to another applicant in said order book not entitled to it at the time the same was awarded to the said farmer, and that the said A. V. Benoit being then the railway agent at Sintaluta aforesaid, did refuse to award to a farmer, an applicant who had made order therefor in the said order and who had grain stored in a special bin in an elevator at the said station, a car to be loaded with said specially binned grain at said elevator.

And that the said A. V. Benoit, being then the railway agent at Sintaluta aforesaid, did unlawfully refuse to award to a farmer, an applicant who had made order therefor in the book kept by the said agent for that purpose, he then being the holder of storage tickets for grain stored in common with other grain in an elevator at said station, a car to be loaded with the grain represented by said storage tickets at said elevator.

And that the said A. V. Benoit, on the day and year aforesaid, being then the railway agent at Sintaluta aforesaid, unlawfully neglected and refused to award to the said farmer, an applicant who had duly made order for one car in the order book kept by the said agent for that purpose for the purpose of loading the same at said loading platform, and there having arrived on such day cars available for distribution, although all the applicants for cars who had applied for cars prior to the said farmer had each been

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awarded one car out of the cars which had arrived on the preceding day and the said farmer had not been awarded any cars, but the said agent awarded all of the said last mentioned cars so available on that day to applicants for cars who had prior unfilled orders, but each of whom had at least received one car as aforesaid.

And that the said A. V. Benoit, being then the railway agent at Sintaluta aforesaid, did refuse to award to said farmer, an applicant for cars who had duly made order therefor and whose order stood in said order book as the first order upon which no cars had been awarded, all previous applicants having been each awarded one car and in the last distribution of cars prior to the order of the said farmer there being a surplus of cars which were awarded to the applicants in order of application, commencing with the first unfilled order, yet the said agent refused to award the first available car to arrive after his order to him, but went back and awarded the same to the prior applicants who had already received one or more cars.

That said Benoit at the said Village of Sintaluta on or about the 24th day of October, 1902, being then the railway agent at Sintaluta station on the line of the Canadian Pacific Railway where grain is shipped, did unlawfully neglect and refuse to award to a farmer residing near said village, an applicant, who had on the 20th day of October, 1902, made order for one car in the order book kept by the said A. V. Benoit at said station for that purpose, a car in the order of application as appearing in said order book, but in disregard of the provisions of the law in that behalf, did award cars to other applicants who had made order therefor in the said order book subsequent to the order of the said farmer.

(*b*) The names of the prosecutor and the defendant:

Charles C. Castle, Warehouse Commissioner, prosecutor; and A. V. Benoit, defendant.

Statement.

(*c*) The date of the proceeding questioned:

The 6th day of December, 1902.

(*d*) A copy of the evidence, if any, in full, as taken before the Justice of the Peace:

The defendant pleaded not guilty, but admissions were made as follows:—

1. That Sintaluta is a point on the line of the Canadian Pacific Railway in the North-West Territories where grain is shipped, and that there is at said point a loading platform, a farmers' elevator and five other elevators. That the said A. V. Benoit is the station agent of the Canadian Pacific Railway, under whom the said grain is shipped, and that he kept an order book as such agent in which applicants for cars made order according to their requirements pursuant to the Manitoba Grain Act and amendments thereto.

2. A farmer residing near Sintaluta had made order for a car to be delivered at the said loading platform, and, although the said car had arrived and was awarded to the said farmer and although he had not an opportunity of loading the said car at the loading platform by reason of the fact that other cars were being loaded at the said platform and the said farmer could not be accommodated thereat, by reason whereof he applied to the said Benoit to be permitted to load the said car direct from the siding where the same then was, but the said Benoit refused to permit him to do so as he considered that it would be unlawful for him to permit the said car to be loaded direct from the waggon at any place other than at the loading platform and that in any event he was not compelled to permit it to be so loaded.

3. The said Benoit further refused after 24 hours to hold the said car until the said farmer could have an opportunity of loading the same at the loading platform on the ground that he, the said Benoit, was not required to hold

Statement.

it longer than 24 hours, within which time the said farmer could not load it and the said Benoit therefore delivered the said car to another applicant who was not entitled to the same when it was awarded to the said farmer.

4. That the said farmer had grain stored in a special bin in the farmers' elevator and that he had also grain stored in another elevator of which he held storage tickets, the said latter grain having been graded and mixed with grain of like quality in said elevator.

For the purpose of having both said lots of grain shipped he applied for cars, but the said Benoit refused to allot to him a car for the purpose of shipping either the grain in the said farmers' elevator or the stored grain in the other elevator on the ground that only the elevator manager or operator, and not the said farmer, could be an applicant for a car for grain so stored in such elevators.

5. That the farmer had made order for cars in the said order book, that all the applicants for cars who had made order prior to his order had each obtained one car, but the said farmer had not yet been awarded a car. When the next batch of cars arrived for distribution he claimed the right of having the first car, but the said A. V. Benoit refused to award him a car as there were a number of applicants who had made application prior to his application whose orders had not been entirely filled and he consequently awarded of the said cars, one to each of those who had ordered before the said farmer, each of whom had received one car, but on whose respective orders there was a balance still unfilled.

6. Also that each of the applicants who had made order in said book had been supplied with one car at the time when the said farmer made his orders. That the day previous to the application of the said farmer there had been a surplus of cars after each prior applicant had been given one and the agent in the distribution of said surplus

Statement.

had begun with first applicant and distributed said cars as far as they would go, but there remained unfilled orders of several of the prior applicants to whom the second car was not awarded; on this condition of affairs the said farmer claimed the right to get the first car distributed of the next batch to arrive, but the said agent declined to award him the car but claimed the right to allot the car to a prior applicant who had already received one or more cars.

7. That the farmer residing near Sintaluta who had grain to ship on the 20th day of October last made order for one car in the said order book, which he required at once to be placed at the said loading platform for the purpose of being loaded. That the agent of the Dominion Elevator Company and McLaughlin & Ellis, owners of two elevators at the said shipping point, made order for cars on the same day but subsequent to the order of the said farmer. That the said agent awarded to the Dominion Elevator and McLaughlin & Ellis several cars, but did not award a car to the said farmer, although his order was prior in point of time to the orders of the said Dominion Elevator Company and McLaughlin & Ellis.

(*e*) Substance of the conviction:

Upon the said admissions, which were duly made, I convicted the defendant for having violated the Manitoba Grain Act and amendments thereto and duly fined him and ordered him to pay the costs, and in default of payment of the fine and costs imprisonment for one month.

(*f*) The grounds upon which the said conviction is questioned:

That the facts admitted do not show any offence or violation of the Manitoba Grain Act or amendments, but show that the Agent conformed to the provisions of the said Act.

That the admitted facts do not show any offence or violation of law. Statement.

That the conviction is erroneous in point of law.

And the following questions by consent of Counsel for both prosecutor and defendant are submitted for the judgment of the Judge or Judges of the Court of Appeal on the basis of the facts admitted.

1. Assuming that a farmer desires to load direct from his waggon into a car at a station where there is a loading platform and has made order for such car to be placed at the loading platform and out of the batch of cars next arriving one car has been allotted to said farmer for such purpose, but by reason of there being other cars of prior applicants at the loading platform and to be loaded at such platform the car allotted to said farmer could not be accommodated or placed thereat, whereupon he applies to the station agent to be permitted to load the car direct from the waggon to the car at a point on the siding other than where the loading platform was:

Is it a violation of the said Grain Act for the agent to refuse such permission?

2. Is the station agent obliged to permit such loading?

3. Assuming that by reason of other cars being loaded at the loading platform and to be loaded at such platform in priority of the car allotted to such farmer, such last mentioned car could not be placed at the leading platform within 24 hours after it was so allotted to the said farmer:

(*a*) Is it a violation of the Grain Act for the station agent to refuse to hold the car for said farmer longer than 24 hours after it was so allotted?

(*b*) Is the station agent bound to hold the car even for the 24 hours for the farmer when he knows that by reason of preceding cars to be loaded at the said platform the said car cannot be loaded within 24 hours?

Statement.

4. Assuming that a farmer who is not an elevator owner, lessee or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped, and that he has also grain stored in another elevator at the same point in common with other grain for which he holds storage tickets:

Is it a violation of the said Grain Act and amendments for the station agent to refuse to recognize such farmer as an applicant and to recognize his order in the order book for a car or cars to ship out the said grain?

5. Assuming that a farmer has made order for cars in the order book at the station and that all applicants for cars who had made order prior to his order in such book had each obtained one car, but not sufficient cars to fill the orders of each of the prior applicants, while the said farmer had not yet been allotted a car by reason of the shortage and that the agent out of the next cars which arrived refused to award him a car, as there were a sufficient number of prior applicants whose orders had not been entirely filled and that he consequently awarded of the said cars, one to each of those who had ordered before the said farmer, but each of whom had already received one car:

Was the action of the agent a violation of the provisions of the Grain Act and amendments?

6. Assuming that each of the prior applicants as above mentioned had been supplied with one car at the time when the said farmer gave his order as aforesaid, but the day previous to the application of the farmer there had been a surplus of cars after each prior applicant had been given one and the agent in the distribution of said surplus had begun with the first applicant and distributed said cars as far as they would go, giving 2 or 3 to each of such prior applicants, but the orders of the said prior applicants still remained unfilled; that on the day of the farmer's application additional cars arrived to be loaded and the agent

declined to allot a car to the said farmer but allotted a car to each of the prior applicants, thus exhausting the said supply: Statement.

Did the agent by doing so make a breach of the provisions of the said Grain Act and amendments?

7. Assuming that a farmer residing near Sintaluta, who had grain to ship on the 20th day of October, made an order for one car in the order book, requiring it to be placed at the loading platform for the purpose of being loaded; that the agent allotted a car each to the elevator companies, having elevators at the said point, but whose orders were subsequent to those of the said farmer:

Would this necessarily be a violation of the Grain Act?

Assuming the facts admitted, do any of them show a violation of the Manitoba Grain Act or amendments?

Sgd. H. O. PARTRIDGE, J.P.

H. M. Howell, K.C., and *T. C. Johnstone*, for the Crown. Argument.

J. A. M. Aikens, K.C., and *N. Mackenzie*, for the appellant.

Questions 1, 2 and 3. *Aikens.*—When it is impossible, by reason of other cars being at the loading platform, for the farmer to use the platform, is the agent obliged to permit him to load direct from the vehicle? The statute does not say so. The statute only says that where there is no platform, direct loading shall be allowed. If the agent is not required to allow such direct loading, is he obliged to hold a car more than 24 hours, or even so long, if there is no chance of its being used within that time by reason of prior cars being at the platform? Suppose 20 farmers each apply for a car, and the 20 cars arrive. The loading platform will usually accommodate only 2 cars at one time, but as each farmer has 24 hours in which to load, the last car would not be loaded until the eleventh day. In the meantime the cars would be standing idle while urgently needed

Argument.

at other points. The agent is in a difficult position. If a car were not loaded within 24 hours, an elevator operator might demand it and threaten prosecution if it were refused, while the farmer would be equally menacing if the car were withdrawn from him.

Howell.—The Grain Act does not supersede the common law, but places additional obligations on the railway companies. They must provide reasonable facilities for hauling and shipping the freight they are bound to carry. Though it is their duty generally to load cars, this may be changed in the nature of the goods. The Canadian Pacific Railway Company advertise themselves as wheat carriers, and must therefore give reasonable facilities for loading it. The amended statute does not do away with this, but stipulates that one of these reasonable facilities shall be a loading platform at such points as the Warehouse Commissioner may direct.

Aikens in reply.—By the common law all goods must be put into carriageable condition before shipment. The Act is special legislation and takes the place of the common law. Where farmers have applied for and obtained through the Commissioner, a loading platform, they deprive themselves of the right to load direct.

Question 4. *Howell* admitted that the conviction on this point could not be sustained.

Question 5. *Aikens.*—Suppose at a place there are five elevators containing specially binned grain of farmers. The operators of these elevators then represent themselves and a number of farmers who are ticket holders. The 5 elevators each apply for 10 cars, and 25 farmers apply afterwards for 1 car each. Then 10 cars arrive and are allotted, 1 to each elevator, and 1 each to the first five farmers. Next day 10 more cars arrive. Should the agent commence the distribution where he left off the day before, or should he

begin again at the top of the list? If the latter, then the vigilant man who threshed his grain and took it to the elevators early, gets the benefit and no injustice is done. Argument.

Howell.—The farmer who takes his grain to an elevator can insure or sell it, while the man who is late, probably through no fault of his own, when he brings his grain to the elevator finds it full and has no protection for it whatever. The elevators, instead of asking for 10 cars, would most likely ask for 100. They are amply protected because, when there is a surplus of cars after each applicant has got one, it is to be divided rateably among them according to their requirements. Cars usually arrive by twos, threes and fours, instead of tens. Under Mr. Aikens' interpretation the farmer would never get a car.

Question 6. *Aikens.*—It would be unjust to hold that the agent has violated the Act. Prior applicants ought not to be placed in any worse position than if they had signed the order book prior to the farmer, but on the same day. The farmer had no interest in the prior cars when he signed the order book. They had come and gone when he was not an applicant. If this were not correct, farmers could continue to get cars while the elevators would get none.

Howell admitted that by his contention the first applicants might never get a second car, but stated that the Crown asked for an affirmative answer.

Question 7. *Aikens.*—The agent appears to have considered he should treat the loading platform in the same way as he treated the elevators, allotting one car to it for every car given to each elevator; instead of treating each individual farmer as an applicant. Perhaps he was wrong.

Howell.—A loading platform cannot make an application; but an elevator, through its operator, can.

Judgment.
Richardson, J.

RICHARDSON, J.—Mr. T. O. Partridge, a Justice of the Peace in and for the North-west Territories, under the provisions of section 900 of the Criminal Code, on the application of A. V. Benoit, a station agent of the Canadian Pacific Railway Company, who on 6th December, 1902, on the prosecution of Charles C. Castle, was convicted before him, the said Justice, of violating the provisions of The Manitoba Grain Act and amendments thereto, and who, alleging he was aggrieved by such conviction, desired to have the question of its validity, on the ground that it is erroneous in point of law, submitted to a Judge of the Supreme Court of the North-west Territories by means of a case stated and signed under the provisions of section 900 of the Criminal Code, the seven questions hereinafter referred to.

The hearing was had before me in Chambers at Regina on 19th February, 1903, when Messrs. Aikens, K.C., and Mackenzie appeared for Benoit, the person convicted, and appellant, and Messrs. Howell, K.C., and Johnstone represented Castle, the prosecutor and respondent.

As to questions 1, 2, and 3 argued together, they are as follows:—

"1. Assuming that a farmer desires to load direct from his waggon into a car at a station where there is a loading platform and has made order for such car to be placed at the loading platform and out of the batch of cars next arriving one car has been allotted to said farmer for such purpose, but by reason of there being other cars of prior applicants at the loading platform and to be loaded at such platform, the car allotted to said farmer could not be accommodated or placed thereat, whereupon he applies to the station agent to be permitted to load the car direct from the waggon to the car at a point on the siding other than where the loading platform was:

"Is it a violation of the said Grain Act for the agent to refuse such permission?

"2. Is the station agent obliged to permit such loading?

"3. Assuming that by reason of other cars being loaded at the loading platform and to be loaded at such platform in priority of the car allotted to such farmer, such last mentioned car could not be placed at the loading platform within 24 hours after it was so allotted to the said farmer. Judgment. Richardson, J.

"(*a*) Is it a violation of the Grain Act for the station agent to refuse to hold the car for said farmer longer than 24 hours after it was so allotted?

"(*b*) Is the station agent bound to hold the car even for the 24 hours for the farmer when he knows that by reason of preceding cars to be loaded at the said platform the said car cannot be loaded within 24 hours?"

After giving the subject matter of these my best consideration, I am unable to hold that the Act clearly provides for the points raised in these three questions, and as the conviction in my judgment is sustainable upon others of the questions submitted, it becomes unnecessary and I decline to make any decided answer to these questions 1, 2, and 3.

As to question 4, which is as follows:—

"4. Assuming that a farmer who is not an elevator owner, lessee or operator has grain stored in a special bin in a farmer's elevator at a railway station where grain is shipped and that he has also grain stored in another elevator at the same point in common with other grain for which he holds storage tickets:

"Is it a violation of the said Grain Act and amendments for the station agent to refuse to recognize such farmer as an applicant and to recognize his order in the order book for a car or cars to ship out the said grain?"

As Mr. Howell admitted that as the operator of an elevator is the only person who controls its working as to receiving in and passing out grain, he is the only person capable of making order for cars for shipment of grain in the elevator, I hold that the station agent, by refusing the farmer's application as stated, did not contravene the law created by the Act.

Judgment.

Richardson, J.

Question No. 5 is as follows:—

"5. Assuming that a farmer has made order for cars in the order book at the station and that all applicants for cars who had made order prior to his order in such book had each obtained one car, but not sufficient cars to fill the orders of each of the prior applicants, while the said farmer had not yet been allotted a car by reason of the shortage, and that the agent, out of the next cars which arrived, refused to award him a car as there were a sufficient number of prior applicants, whose orders had not been entirely filled, and that he consequently awarded of the said cars, one to each of those who had ordered before the said farmer, but each of whom had already received one car:

"Was the action of the agent a violation of the provisions of the Grain Act and amendments?"

This presents, as Mr. Aikens stated, on the argument, a conundrum. He endeavoured to convince me that the station agent in refusing to allot a car to a farmer, and preferring the elevator as stated, was not transgressing the law, although the effect of such action might result in barring the farmer entirely from having a car allotted to him, while on the other hand the effect of Mr. Howell's contention would bar out the elevators entirely.

While entertaining great doubts, I am inclined to agree with Mr. Howell's construction of section 58 as the only one it can have, and answer this affirmatively.

Question 6 is as follows:—

"6. Assuming that each of the prior applicants, as above mentioned, had been supplied with one car at the time when the said farmer gave his order as aforesaid, but the day previous to the application of the farmer there had been a surplus of cars, after each prior applicant had been given one, and the agent in the distribution of said surplus had begun with the first applicant and distributed said cars as far as they would go, giving 2 or 3 to each of such prior applicants,

but the orders of the said prior applicants still remained unfilled; that on the day of the farmer's application additional cars arrived to be loaded, and the agent declined to allot a car to the said farmer, but allotted a car to each of the prior applicants, thus exhausting the said supply:

Judgment.
Richardson, J.

Did the agent by doing so make a breach of the provisions of the said Grain Act and amendments?"

I fail from the argument and reading of the Act to be convinced that the course adopted by the station agent formed a breach of any of its provisions, and answer this question in the negative.

Question 7 is as follows:

"7. Assuming that a farmer residing near Sintaluta who had grain to ship on the 20th day of October made order for one car in the order book requiring it to be placed at the loading platform for the purpose of being loaded; that the agent allotted a car each to the elevator companies having elevators at the said point, but whose orders were subsequent to those of the said farmer:

"Would this necessarily be a violation of the Grain Act?"

The action of the station agent as set out in this question was in my judgment a clear violation of the Act.

As a result, my judgment is that the conviction appealed from must be affirmed.

REPORTER:

C. H. Bell.

LASSEN v. BAUER.

Practice—Chambers—Affidavits—Exhibits not filed.

It is not necessary to file exhibits referred to in an affidavit filed on an application in chambers.

[SCOTT, J., *28th May, 1903.*

Statement. This was an application by the plaintiff for an order for the filing of a further account pursuant to order for accounts granted herein. On the return of the summons, the counsel for the defendant objected to the exhibits, referred to in the affidavit in support of the motion, being read, upon the ground that they had not been filed with the affidavit.

Argument. *J. E. Wallbridge*, for the plaintiff.

I. S. Cowan, for the defendant.

[*May 29th, 1903.*]

Judgment SCOTT, J.—On the hearing of the application, counsel for the defendant took the preliminary objection that the exhibits referred to in the affidavit filed on the application, had not been filed. So far as I can ascertain, there is no rule requiring exhibits to be filed with the affidavits. *Re Hincheliffe*[1] leads to the view that such is not the practice.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[1](1895) 1 Chy. 117; 64 L. J. Ch. 76; 12 R. 33; 71 L. T. 532; 43 W. R. 82.

RE P. HEIMINCK v. THE TOWN OF EDMONTON.

Assessment and taxation—Appeal against whole assessment—Notice of.

The provisions of the Municipal Ordinance* respecting appeals against the assessment of third parties do not authorize a ratepayer to appeal generally against the assessment of every person on the assessment roll without designating the names of all the ratepayers in a written request to the secretary-treasurer to notify them of the appeal.

[SCOTT, J., *17th August, 1903.*

Statement. Appeal from the Court of Revision for the Municipality of the Town of Edmonton.

Argument. *G. F. Downes*, for appellant.

N. D. Beck, K.C., for respondent.

[*Edmonton, 17th August, 1903.*

Judgment. SCOTT, J.—This an appeal from the Court of Revision of the municipality for the present year.

The following is the notice of appeal to the Court of Revision given by the respondent:—

"Take notice that I appeal to the Court of Revision against the assessment of every person entered upon the assessment roll for the current year as owner or occupant of any real estate for the following reasons:—

1. That the value placed by the assessor upon all of said lands is excessive.

* Sec. 135 of the Municipal Ordinance (C. O. 1898, cap. 70)—

"(2) If any ratepayer within the Municipality thinks that any person has been assessed too high or too low, or has been wrongfully inserted in or omitted from the assessment roll, or that the property of any person has been misdescribed or omitted from the roll, or that the assessment has not been performed in accordance with the provisions and requirements of this Ordinance, the secretary-treasurer shall on his request in writing give notice to such person and the assessor of the time when the matter will be tried by the Court, and the matter shall be decided in the same manner as complaints by a person assessed."

Judgment Scott, J.

2. That the said lands are assessed for an amount in excess of their fair market values."

The Court of Revision dismissed the appeal.

Upon the appeal coming before me, counsel for the municipality took the objection that the appeal, being one against the whole assessment roll, was unauthorized, and that the names of the persons appealed against should appear in the notice.

The appeal was taken under sub-section 2 of section 135 of "The Municipality Ordinance," which provides as follows:—

2. "If any ratepayer within the municipality thinks that any person has been assessed too high or too low, or has been wrongfully inserted in or omitted from the assessment roll, or that the property of any person has been misdescribed or omitted from the roll, or that the assessment has not been performed in accordance with the provisions and requirements of this ordinance, the secretary-treasurer shall on his request in writing give notice to such person and to the assessor of the time when the matter will be tried by the Court, and the matter shall be tried in the same manner as complaints by a person assessed."

I doubt whether this provision authorizes a ratepayer by a general notice, such as that given by the appellant, to appeal against the assessment of all the other ratepayers on the roll. If such is its effect, the result would be that any ratepayer is placed in a position to call upon a Judge to make a new assessment roll, and this would be a much more formidable task than that imposed upon the assessor in making up the original roll. The assessment of each ratepayer constitutes a separate and distinct issue to be tried, and if a general appeal were authorized the number of issues to be tried would equal the number of ratepayers on the roll. The trial of such a multitude of issues might be a matter not of days, but of months. In addition to this the suc-

cessful party in each issue would under ordinary circumstances be entitled to the costs of each issue, and the aggregate of costs on all issues would be enormous.

It is unnecessary for me to decide the question because I think the appellant must fail upon another ground, which I will now state.

A person whose assessment is appealed against, even if the appeal is against an assessment claimed to be excessive, should have notice of the appeal in order that he may have an opportunity to appeal and oppose it. It may be said that a ratepayer would not be inclined to oppose a reduction of his assessment, but there may be reasons why he should be opposed to a reduction. One reason that occurs to me at the present moment is that in some cases the reduction might have the effect of depriving him of his vote.

At all events, he having had notice that he was assessed for a certain amount, should not have his assessment altered without notice. Sub-section 2 provides that the secretary-treasurer shall on request in writing of the person appealing give notice to the assessor, and the person whose assessment is appealed against, of the time and place where the matter will be tried by the Court. It was admitted before me that no such request was made by the appellant, and that no such notice had been given to any of the ratepayers on the roll.

For the reasons I have stated, I dismiss the appeal, but in view of the fact that the point involved appears to be a new one, I do not award any costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

RE ISABELLA HEIMINCK AND THE TOWN OF EDMONTON.

Assessment and taxation — Municipal Ordinance — Construction — Appeal—Onus of proof.

The onus is on the appellant to shew that vacant land in towns comes within the exceptions mentioned in sub-sec. 1 of sec. 127* of the Municipal Ordinance (C. O. 1898, cap. 70), otherwise it is properly assessed under sub-sec. 2.

Where vacant land is shewn to be "*bona fide* enclosed," as mentioned in sub-sec. 1, and used in connection with a residence as a garden, "position and local advantage" are to be considered in addition to an annual rental in fixing the value for assessment purposes, and persons making use of valuable lands for the purposes of a garden, park, etc., should be assessed for it in the same proportion of value as other lands in the vicinity.

[SCOTT, J., *18th August, 1903.*

Statement. Appeal from the Court of Revision of the Municipality of the Town of Edmonton.

Argument. *G. F. Downes*, for appellant.

N. D. Beck, K.C., for respondent.

[*Edmonton, 18th August, 1903.*]

Judgment. SCOTT, J.—This is an appeal from the decision of the Court of Revision for the present year, dismissing respon-

* 127. In assessing vacant ground, or ground used as a farm, garden or nursery, and not in immediate demand for building purposes in towns, the value of each parcel of vacant ground shall be that at which sales of it can be reasonably expected during the current year; the assessor shall value it as if held for farming or gardening purposes, with such percentage added as the situation of the land may reasonably call for, and such vacant land, whether surveyed into lots or not, if unsold as such, may be entered on the assessment roll as so much of the original lot or section as the case may be; and where ground is not held for purposes of sale, but *bona fide* inclosed and used in connection with a residence or building as a paddock, garden, park or lawn, it shall be assessed at a sum which at six per centum would yield a sum equal to the annual rental which, in the judgment of the assessor, it is reasonably worth, reference being always had to its position and local advantages.

(2) Except in the case of mineral lands hereinafter provided for, land shall be estimated at its relative value as compared with the balance of the land in the municipality.

dent's appeal, the ground of her appeal being that her assessment was excessive. The appeal was dismissed by the Court of Revision. Judgment. Scott, J.

Except as to Lot 6 in River Lot 8, which I will hereafter refer to, the relative value of appellant's lands at the time of the assessment, as compared with the value of the other lands in the municipality, should govern, because although some of the parcels are shown to be vacant, they have not been shown to come within any of the exceptions mentioned in sub-section 1 of section 127 of The Municipal Ordinance, viz., that they are not in immediate demand for building purposes or that they are "*bona fide* enclosed, and used in connection with a residence, or building, as a paddock, garden, park or lawn."

No evidence was given as to the value of any of these lands at the time of the assessment, and therefore it has not been shown that the assessment was in excess of their actual value at that time, or in excess of their relative value at that time as compared with the other lands in the municipality.

Lot 36, River Lot 8, has been shown to be within the last mentioned exception, viz., *bona fide* enclosed, and used in connection with a residence as a garden. It should therefore be assessed at "a sum which at 6 per cent. per annum would yield a sum equal to the annual rental which it is reasonably worth, reference being always had to its position and local advantages."

One difficulty I encounter is in ascertaining what the annual rental is worth. My notes of the evidence do not contain any reference to that question, beyond the statement of Philip Heiminck to the effect that it would not rent for very much. Another is as to the construction to be placed upon the words "reference being always had to its position and local advantage." The rental value of any lot for any purpose is but small, and for many purposes a lot at the outskirts of the municipality will command as high a rent

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as one near the centre, where lots are the most valuable. If position and local advantage make any difference in the rental value they must, in any event, be considered in ascertaining that value, and if that were all that was intended by the words quoted, these words would be entirely unnecessary. I therefore think that the intention was that position and local advantage should be considered in addition to the rental value in fixing the value for assessment purposes, and I see no reason why a person who makes use of valuable lands for the purposes of a garden, park, etc., should not be assessed for it in the same proportion of value as other lands in its vicinity are assessed. Such a basis of assessment would be merely taking position and local advantage into consideration. Any other basis I think would be unfair, and it would also open the door to fraud. For instance, the owner of a valuable lot desiring to hold for a rise in values, could materially reduce the taxes upon it by enclosing it, and using it, and causing it to be used, as a garden for an adjoining dwelling or building. Of course the question of *bona fides* would arise in such a case, but in many cases it would be difficult to prove the absence of it.

For the reasons stated I dismiss the appeal. No costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

RE McDOUGALL AND THE TOWN OF EDMONTON

RE CARRUTHERS AND THE TOWN OF EDMONTON.

Assessment and taxation—Appeal—Onus of proof.

In assessment appeals, the onus is upon the appellants who claim their property is assessed too high to prove it affirmatively.

[SCOTT, J., *18th August, 1903.*

Statement. Appeal from the Court of Revision of the Municipality of the Town of Edmonton.

Argument. *G. F. Downes,* for appellants.

N. D. Beck, K.C., for respondents.

[*Edmonton, 18th August, 1903.*]

Judgment. SCOTT, J.—These are appeals from the Court of Revision of the municipality for the present year, the grounds of appeal to that Court being that the property of the appellant was assessed too high. The Court of Revision dismissed the appeal.

No part of the appellant's property has been shown to be within sub-section 1 of section 127 of The Municipal Ordinance (cited in preceding case). The vacant lands are not shown "not to be in immediate demand for building purposes," and no part of them is shown to be enclosed and used in connection with a residence. Their assessable value is therefore their relative value at the time of the assessment as compared with the value at the time of the other lands in the municipality (sub-section 2).

There is nothing in the evidence to lead to the conclusion that they are assessed in excess of that value, and I therefore dismiss the appeal, but without costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

IN RE SONG LEE AND THE TOWN OF EDMONTON.

Municipal Ordinance — Licensing By-law — Laundry — Quashing — Ejusdem generis—Oppressive and unreasonable.

By sub-sec. 33 of sec. 95 of the Municipal Ordinance, municipalities may pass by-laws for "controlling, regulating and licensing livery, feed and sale stables, telegraph and telephone companies, telegraph and telephone offices, insurance companies offices and agents, real estate dealers and agents, intelligence offices, or employment offices or agents, butcher shops or stalls, skating, roller or curling rinks, and *all other business industries or callings carried on or to be carried on within the municipality.*"

Held, that a by-law imposing a license of $25 per annum on every person carrying on a laundry business could not be supported under the foregoing provision, inasmuch as it was unreasonable and oppressive, as many women in destitute circumstances who earn a meagre support by taking in washing would be included within its terms.

The application of the *ejusdem generis* rule discussed.

[SCOTT, J., *21st August, 1903.*

Statement. Application to quash sub-section (*t*) of section 5 of By-law No. 245 of the Town of Edmonton, set out in the judgment.

Argument. *J. E. Wallbridge*, for applicant.

N. D. Beck, K.C., for respondents.

[*21st August, 1903.*]

Judgment. SCOTT, J.—This is an application to quash sub-section (*t*) of section 5 of By-law No. 245 of the Town of Edmonton intituled "A By-law to amend By-law number 187 intituled a By-law for licensing, controlling, regulating and governing certain businesses, callings, trades and occupations."

Section 1 of By-law 187 provides as follows:—

"No person shall carry on within the limits of the town, any of the businesses, callings, trades or occupations hereinafter specified, unless and until he shall have procured, as hereinafter provided, a license so to do, and the fees payable for such licenses shall be as hereinafter specified after each such business, calling, trade or occupation respectively, and every person so licensed shall be subject to the provisions

of this By-law." Here follow a number of sub-sections specifying the several callings, etc., intended to be included in the section and the license fees payable in respect thereof.

Sub-section 5 of By-law 245 is as follows:—

5. "The following sub-sections are hereby added to section 1 of said By-law (No. 187)."

Sub-section (*t*) added by this section is as follows:—

(*t*) "Every person carrying on a laundry business, and the license fee shall be $25.00 per annum."

The grounds of the application are:—

1. That the said By-law is not within the express or necessarily implied powers of the municipality, and is not authorized by the Municipal Ordinance.

2. That it is inconsistent with and repugnant to the general law of the land.

3. That it is unequal in its operation and unreasonable.

It was admitted by counsel for the municipality that the only authority for licensing persons carrying on a laundry business, is contained in sub-section 33 of section 95 of the Municipal Ordinance, which provides that "The council of every municipality may pass by-laws for controlling, regulating and licensing livery, feed and sale stables, telegraph and telephone companies, telegraph and telephone offices, insurance companies offices and agents, real estate dealers and agents, intelligence offices or employment offices, or agents, butcher's shops or stalls, skating, roller or curling rinks and all other business industries or callings carried on, or to be carried on within the municipality."

The first question for consideration is whether a laundry business is within this provision.

If the words, "all other business industries or callings" were given their plain and ordinary signification, I would have no difficulty in arriving at the conclusion that they are

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Scott, J.

wide enough to include a laundry business, as such a business is undoubtedly an industry or calling. There are, however, numerous authorities which show that general words following, as they do in this provision, specific words, may be restricted in their meaning by the preceding specific words. The rule is stated by Lord Tenterden in *Sandiman* v. *Beach*, as follows:

"Where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*."

In that case the rule was applied to a provision of The Lord's Day Act enacting that "no tradesman, artificer, workman, laborer *or other person whatsoever*, shall do or exercise any worldly labor, business or work of their ordinary labor on the Lord's Day," and it was held that a driver of a stage coach was not within it.

In *Reg.* v. *Silvester*,[2] the same rule was applied to the same provisions, and it was held that a farmer was not within it.

In *Kitchen* v. *Shaw*,[3] it was held that a domestic servant was not included in the words "Any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer or other person."

Having stated the rule of construction and given instances of its application, it is important to consider of what genus are the particular industries and callings specified in the provision under consideration.

Counsel for the municipality contended that they constituted a genus in that they are confined to industries and callings in which little or no stock liable to assessment is carried, and in support of this contention, he instanced the callings specified in sub-section 34 of the same section, which

[1] 7 B. & C. 96; 9 D. & R. 796; 5 L. J. (O. S.) K. B. 298; 3 R. R. 169. [2] 33 L. J. M. C. 79; 10 Jur. N. S. 360. [3] 1 N. & P. 791; 6 A. & E. 729; W. W. & D. 278; 7 L. J. M. C. 14.

constitute another genus, viz., callings in which the business is carried on upon the street or at the houses of customers. Judgment. Scott, J.

I cannot accept this view, nor can I see that the diversity of industries and callings specified in sub-section 33 can be classed as of the same genus in any other respect than that they are all industries or callings. In that respect and, so far as I can see, in that respect only, can a laundry business be classed as of the same genus. Take for instance a telephone company. Can it be said that it carries little or no stock liable to taxation when all its lines, plant and property within the municipality, which are usually of no small value, are so liable. Can such a company be classed as of the same genus as a person who takes in washing in any other respect than that which I have mentioned?

I doubt whether it was the intention of the Legislature that the general words referred to should make sub-section 33 applicable to all industries and callings of whatsoever nature or description. Had such been the intention, it would not have been necessary to specify, as it has done, those of a particular description. Sub-section 34 indicates that such was not the intention. That sub-section authorizes the licensing of porters, water dealers and persons carrying on certain other specified industries and callings and regulating the same. If sub-section 33 authorizes the controlling, regulating and licensing of all industries and callings, it would include all those specified in sub-section 34, and, therefore, the latter section would be unnecessary.

For the reason I have stated, I entertain some doubt as to whether a laundry business is within the provisions of sub-section 33; but I do not decide that question, because I am of opinion that the by-law in question, if given the effect that must necessarily be given to it, is oppressive and unreasonable.

In Worcester's Dictionary a laundry is defined as "a room or place for washing clothes." A laundry business may

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therefore be defined as "the business of washing clothes." Now there are doubtless many women in Edmonton in perhaps almost destitute circumstances who take in washing, that is, carry on the laundry business in a small way, to enable them to earn a meagre support for themselves and their families.

It may reasonably be supposed that the payment of the license fee imposed by the by-law would be beyond the resources of many of them, and the by-law would therefore practically put beyond their reach that means of earning a living, because if any laundry business is liable for its payment, they also would be liable because there is no specification in the by-law of the nature or extent of the laundry business intended to be included in it. In fact, I doubt whether a by-law could be framed which would exact a fee from any description of laundry without exacting it from all. Such a by-law if attacked would doubtless be held void for discrimination.

In Dillon on Municipal Corporations, it is stated that "in order to be valid, a Municipal Ordinance must not exceed the powers conferred by the charter or statute on which it is based, it must be reasonable and lawful, it must not be oppressive, it may regulate and not restrain trade, it must not contravene common right." See *City of Montreal* v. *Fortier*.[4]

In *Kruse* v. *Johnson*,[5] Lord Russell says, "If by-laws are found to be partial or unequal in their operation, as between different classes, if they are manifestly unjust, if they disclose bad faith, if they involve such oppression or gratuitous interference with the rights of those subject to them, as can find no justification in the minds of reasonable men, the Court may well say, parliament never intended to give

[4] 6 Can. Crim. Cas. 340. [5] (1898) 2 Q. B. 91; 67 L. J. Q. B. 782; 78 L. T. 647; 46 W. R 636; 62 J. P. 469; 14 Times Rep. 416; 19 Cox C. C. 103.

authority to make any such rules; they are unreasonable and *ultra vires.*" Judgment. Scott, J.

I doubt whether the council in passing sub-sec. (*t*) of the by-law, contemplated that it would have the effect I have shown that it has. As it has that effect, I can come to no other conclusion than that it is oppressive and unreasonable. The order will therefore go to quash that sub-section. The applicant to have the costs of the application.

McCALLUM v. SCHWAN.

GOULD v. SCHWAN.

Interpleader—Sheriff—Delay—Indemnity.

A delay of three weeks after receipt of claimant's notice before making interpleader application will not disentitle sheriff to relief unless the party objecting has been prejudiced.

Quære, whether a sheriff who has taken indemnity from one of the parties after seizure would now be held by that fact alone to have lost his right to interplead.

Held, that in any event it is not open to the party giving the indemnity to take such objection.

[SCOTT, J., *22nd August, 1903.*

An application by the deputy-sheriff of the Northern Alberta Judicial District at Edmonton for an interpleader order in respect of certain goods and chattels seized under writs of execution against the defendant. On the 3rd of June, 1903, after the seizure, Mina Schwan, wife of the defendant, and one Ernest Frankhannel, served notice claiming to be the owners of the goods seized under a bill of sale and chattel mortgage respectively made by the defendant. The execution creditors disputed the claims, and on demand gave the deputy sheriff, on the 11th and 12th days of June following, bonds of indemnity indemnifying him against all actions, losses, charges, damages and proceedings Statement.

Statement. which might be brought against him on account of the seizure or selling of the said goods and chattels. The application was made on the 18th of July following, and was opposed by the execution creditors on the grounds, among others, that the sheriff by his delay and in taking indemnity from them had forfeited his right to relief.

Argument. *J. R. Boyle*, for the sheriff, referred to *Thompson* v. *Wright*,[1] *MacDonald* v. *G. N. W. C. Ry. Company*.[2]

J. E. Wallbridge, for the execution creditors, referred to *Cook* v. *Allan*,[3] *Devereux* v. *John*,[4] *Ostler* v. *Brown*,[5] *Crump* v. *Day*.[6]

G. F. Downes, for the claimants, supported the application.

Judgment. SCOTT, J.—This is an application by the deputy-sheriff at Edmonton for an order that the plaintiffs and the claimants appear and state the nature and particulars of their respective claims to the goods and chattels seized by him under writs of execution in the above actions, and maintain or reliquish same and abide by such order as may be made.

By the affidavit of the deputy-sheriff, filed on the application, it appears that on 3rd June, 1903, he received notice from the advocate for the claimants, that they claimed the goods seized, that he thereupon gave the advocates for the plaintiffs notice of such claims, and that by notice dated 24th June, 1903, which was probably received by him within a day or two thereafter, they informed him that they disputed the claimant's claims. This application was made on 18th July last.

It also appears from an affidavit filed on behalf of the plaintiffs, and it was also admitted by counsel for the applicant, that after receipt by him of notice of these claims, he had accepted indemnity from the plaintiffs.

[1] 13 Q. B. D. 632; 54 L. J. Q. B. 32; 51 L. T. 634; 33 W. R. 96. [2] 10 Man. R. 6. [3] 2 Dowl. 11; 1 C. & M. 542. [4] 1 Dowl. 548. [5] 4 Dowl. 605; 1 H. & W. 653. [6] 4 C. B. 760.

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Scott, J.

Counsel for the plaintiffs contended that the applicant has forfeited his right to interpleader by reason of his delay in making the application.

The applicant was not in a position to make his application until after the receipt by him of the notice of 24th June. He delayed making it for a period of about three weeks thereafter. I cannot, however, find any case in which a delay of that length of time was held to disentitle him to the relief claimed. In *Cook* v. *Allan*,[3] it was held that a delay of five weeks was fatal, but there is no case where a delay of a shorter period was so held.

In *Macdonald* v. *G. N. W. C. Ry. Co.*[2] Taylor, C.J., says:—"No doubt all the authorities show that a sheriff must apply promptly, and that unless he does no relief will be refused. But the Courts seem to deal more leniently with the sheriffs now than they did some years ago. They seem now more inclined than formerly to consider the question, "Has the party been prejudiced?"

As it is not contended that the plaintiffs have been in any way prejudiced by it, I hold that the applicant has not by his delay forfeited his right to the relief applied for.

Another objection raised by plaintiffs' counsel is that the applicant, by reason of his having accepted indemnity from the plaintiffs, is not entitled to interplead.

The ground upon which an applicant was refused the relief by reason of his having accepted indemnity from one of the claimants, was that the fact of the indemnity having been given, indicated collusion between the claimant giving it and the applicant. It seems, however, that collusion will not now be implied from that fact alone. At all events it is not now open to the claimant who gave the indemnity to take the objection. See *Thompson* v. *Wright*.[1]

It was further contended by counsel for plaintiffs, that, as it appears by the affidavit of the claimant Nina Schwan

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the bill of sale, under which she claims, was given by the defendant to her after the receipt by the deputy-sheriff of the writs of execution under which the seizure was made, her claim was obviously bad, and therefore the deputy-sheriff cannot interplead in respect of it.

The affidavit referred to shows that Nina Schwan claims under a purchase from the defendant, after the executions were placed in the hands of the deputy-sheriff, but before seizure thereunder. She alleges that at the time of the purchase, she was not aware that the executions were in the hands of the deputy-sheriff, and that since her purchase, the goods claimed by her have been in her possession. If these facts can be substantiated by her, I am not prepared to say that her claim is untenable, and I entertain serious doubt whether the deputy-sheriff would be justified in so treating it.

Applicant is entitled to the usual interpleader order directing the trial of issues between the plaintiffs and the respective claimants, and in such issues, the claimants respectively shall be plaintiffs, and the execution creditors, defendants. I will hear the parties further as to the question of the terms of the order, the cost of the application and the payment of the deputy-sheriff's fees and expenses, as I am in doubt as to the proper disposition to make of these matters.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

COX v. CHRISTIE.

Judicature Ordinance—Small debt procedure—Counterclaim for large debt—Costs.

In an action under the small debt procedure, the defendant may under Rule 612,* set up a counterclaim, the amount of which exceeds the small debt jurisdiction.

Where such a counterclaim is dismissed with costs, the plaintiff is entitled to tax a fee of ten per cent. on the amount under Rule 617,† which extends to counterclaims.

[SCOTT, J., *22nd August, 1903.*

Review of taxation by the Deputy Clerk at Edmonton. Statement.

J. R. Boyle, for plaintiff. Argument.

C. de W. MacDonald, for defendant.

[*August 22nd, 1903.*]

SCOTT, J.—This is a review of the taxation by the deputy clerk of plaintiff's costs of defendant's counterclaim. Judgment

The action was brought by the plaintiff under the small debt procedure to recover from the defendant $37.84. The disputed note filed by the defendant is as follows:

"I have a counterclaim against the plaintiff for $960 for commission and profits on the sale of certain real estate sold

* 612. A defendant in any action may set off or set up by way of counterclaim against the claim of the plaintiff any right or claim whether such set-off or counterclaim sound in damages or not; such set-off or counterclaim shall have the same effect as if such relief were sought in a cross-action so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. No. 5 of 1894, s. 39.

† 617. In every case where an action is defended and an advocate is employed by the successful party, the clerk in addition to all other costs shall, unless otherwise ordered by the Judge, tax to the successful party an advocate's fee equal to ten per cent. of the amount of the judgment recovered if such fee is taxable to the plaintiff; or equal to ten per cent. of the amount claimed by the plaintiff in the action if such fee is taxable to the defendant.

Provided that in no case shall the fee so taxable be less than $1, and except as herein provided no other counsel or advocate fee shall be taxable or payable as between party and party. No. 5 of 1894, s. 46.

Judgment.
Scott, J.

by him for the joint benefit of him and myself, particulars of which counterclaim have been already rendered to plaintiff."

The action and counterclaim were tried before me at Wetaskiwin on 15th May last. At the conclusion of the trial, I gave judgment for plaintiff for the amount of his claim and costs. I also gave judgment for the plaintiff on defendant's counterclaim with costs.

The sole question in dispute is whether the plaintiff is entitled under Rule 617 to tax against the defendant in respect of his counterclaim an advocate's fee equal to ten per cent. of the amount thereof.

Rule 612 provides that "a defendant in any action may set off or set up by way of counterclaim against the claim of the plaintiff any right or claim whether such set off or counterclaim sound in damages or not; such set off or counterclaim shall have the same effect as if such relief were sought in a cross action to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim."

It was contended on behalf of the defendant, that notwithstanding this provision, I could not in any event have directed a judgment to be entered for the defendant for the full amount of the counterclaim as it exceeded the amount contemplated by the rules respecting small debt procedure, that my only possible judgment in the event of defendant proving his counterclaim would be "defendant having proved a counterclaim greater in amount than plaintiff's claim, plaintiff cannot recover, and I dismiss his action with costs."

Rule 612 is the same, word for word, as the first part of Rule 110, which authorizes the setting up of a set-off or counterclaim in an action brought under the general procedure, and if the Court can in the one case fully and finally dispose of the matter of a counterclaim, I see no reason why

Judgment.
Scott, J.

it cannot do so in the other. A defendant in an action brought under the small debt procedure undoubtedly has the right to set up a counterclaim even though the amount involved exceeds the amount for which the plaintiff could bring his action under that procedure.

It would be unfair and unjust if he were not permitted to do so (see the judgment of Thesiger, L.J., in *Davis* v. *Flagstaff Mining Co.*[1] (at p. 241). Such being the case how is the Court to pronounce a final judgment on the counterclaim if it is authorized to deal only with the portion thereof which does not exceed the plaintiff's claim? Although actions under the small debt procedure are limited to claims and demands, not exceeding $100, if effect is given to rule 612, I think it must follow that when such an action is brought and a counterclaim exceeding that amount is set up, the whole counterclaim may be tried and disposed of and judgment given for the full amount thereof. There is no such restriction upon that power as is contained in sec. 90 of the Imperial Judicature Act of 1893, relating to counterclaims in County Court cases, which provides that no relief exceeding that which the Court has jurisdiction to administer, shall be given to the defendant upon such counterclaim.

For the reasons stated, I hold that under Rule 617, the plaintiff is entitled to tax against the defendant a fee of ten per cent. upon the amount of defendant's counterclaim, and I direct the deputy clerk to tax and allow same to him.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[1] 33 C. P. D. 241; 47 L. J. C. P. 503; 38 L. T. 796; 26 W. R. 59.

THE KING v. RONDEAU.

Motion to quash conviction—Practice—Duty of justice to return depositions—Certiorari—Medical Professions Ordinance — Practising midwifery.

Section 888 of the Criminal Code provides for the return of convictions by Justices into the Court to which the appeal is given.

Semble, apart from this provision it is the duty of Justices to make return also of the depositions upon which the conviction is founded.

Held, that papers purporting to be the depositions relating to the conviction having been returned therewith, they should be assumed to be such depositions; that they were properly before the Court, and a writ of *certiorari* was unnecessary.

Section 60 of the Medical Profession Ordinance (C. O. 1898, cap. 52), provides: "No unregistered person shall practise medicine or surgery for hire or hope of reward; and if any person not registered pursuant to this Ordinance, for hire, gain, or hope of reward, practises or professes to practise medicine or surgery, he shall be guilty of an offence, and upon summary conviction thereof be liable to a penalty not exceeding $100."

Held, that midwifery is not included within the terms "medicine and surgery," and therefore no penalty can be imposed for the practice of it by an unlicensed person.

[SCOTT, J., *October 2nd, 1903.*

Statement. Application to quash a conviction under the Medical Profession Ordinance. The facts sufficiently appear from the judgment.

Argument. *Wilfred Gariepy*, for the defendant, referred to *Reg.* v. *Frawly*,[1] and *Queen* v. *Ashcroft*.[2]

A. F. Ewing, for the prosecutor, referred to *Queen* v. *Coulson*,[3] and *Queen* v. *Monaghan*.[4]

[*October 2nd, 1903.*]

Judgment. SCOTT, J.—This is an application to quash a conviction made by R. Belcher, a Justice of the Peace, on 5th May, 1903, whereby the defendant was convicted: "For that she the said Sarah Rondeau, being an unregistered person pursuant to the Medical Profession Ordinance of the said Terri-

[1] 45 U. C. Q. B. 227. [2] 2 Can. Crim. Cas. 385; 4 Terr. L. R. 119.
[3] 1 Can. Crim. Cas. 117; 24 O. R. 246. [4] 2 Can. Crim. Cas. 488.

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Scott, J.

tories, for gain and hope of reward, did practise medicine and surgery contrary to the said Ordinance, by attending and operating upon Mrs. Napoleon Ponton, on or about the 17th day of April, 1903, and by attending and operating upon Mrs. Edmund L'Abbé on or about the 2nd day of March, 1903."

Before the application was made the convicting justice had returned to the deputy clerk of the Supreme Court at Edmonton, the conviction and information, and also what purported to be the depositions and evidence taken by him on the hearing of the charge.

Upon the hearing of the application, counsel for the prosecutor took the objection that the defendant should have proceeded by *certiorari* to bring up the depositions and evidence, that there was nothing before me to show that the depositions returned by the convicting justice with the conviction were the depositions taken by him on the hearing of the charge, or that they contained all the evidence adduced before him.

The ground of this objection is that sec. 888 of The Criminal Code requires the convicting justice to transmit merely the formal record of conviction, and that it does not require him to transmit the depositions or evidence upon which it is founded. It would appear, however, that apart from this provision, it is his duty to return not only the record of conviction but also the depositions and all the proceedings. In Paley on Convictions, at p. 367, it is stated that the writ of *certiorari* is directed to the justices by whom the conviction was made, or, if it has been returned to the sessions, it is directed generally to "The Justices assigned to keep the peace," etc., etc. (*i.e.*, the Sessions), and that, upon a conviction which ought to be returned to the Sessions, the writ may be directed to and the return made by the Sessions, "for the justices out of Sessions are supposed to return their proceedings there." The form of writ given

Judgment. Scott, J.

at p. 577 directs the return not only of the conviction or order, but also of "all things touching the same."

In the Territories the Clerk of the Supreme Court is by virtue of sec. 132 of the N. W. T. Act, the clerk of the peace, and a return to him is therefore equivalent to a return to the Sessions in England. In *Reg.* v. *Frawley*,[1] it was held that, where the conviction, information and depositions had been returned by the convicting justice to the clerk of the peace, the latter was the proper custodian of them, and, having been returned by him under a writ of *certiorari* to the High Court, they were held to have been properly returned.

In Seager's Magistrates Manual, at p. 11, there is given a form of return by the convicting Justice to a writ of *certiorari* directed to him, the form certifying to the return of the conviction, depositions, evidence and all proceedings taken before him. It is then stated that, if the conviction has been returned to the clerk of the peace, a return *in the same form* must be made by the latter; also on same page, that the convicting Justice, upon being served with a certiorari, must make a return to it even if the papers have been returned to the clerk of the peace. The form of the return to be made in such case is shewn on p. 12. It sets out that before service of the writ the information *and depositions* were delivered by the convicting justice to the clerk of the peace, and that they are no longer in the custody or control of the former.

Section 888 provides that the convicting justice shall transmit the conviction to the Court to which the appeal is given before the time when an appeal from such conviction may be heard. The object of this provision appears to be merely to secure the production of the formal record of conviction before the Court, on the hearing of the appeal, in order that it may then be dealt with. For the purposes of the appeal, the production of the depositions and evidence is unnecessary, and that may be the reason that

their return is not provided for. Further, in some cases in Ontario the appeal is not to the Sessions, but to the County Court Judge, and it may be that in such cases, a return to the clerk of the peace would not be a return to the Court to which an appeal is given. Judgment. Scott, J.

In the present case the convicting Justice has followed what appears to be the proper as well as the usual course, and has returned not only the conviction but also the information, and what purport to be the depositions taken by him. In view of what I have stated, I think that in the absence of anything to indicate the contrary, I am justified in assuming that the depositions so returned contain all the evidence given at the hearing of the charge.

In her notice of motion the defendant states a number of objections to the sufficiency of the conviction, only one of which it is necessary for me to refer to, viz., "That there was no evidence before the convicting justice to show that the said Sarah Rondeau unlawfully practiced medicine and surgery for gain or hope of reward as alleged in the said conviction."

It may be open to question whether this objection is not confined to the absence of evidence of practising for gain or hope of reward, but upon the argument before me counsel for both parties, viz., the prosecutor and defendant, treated it as an objection, pointing to the absence of evidence of practising medicine and surgery, and I therefore assume that they intended me to dispose of that question.

The evidence given upon the hearing of the charge is to the effect that the defendant in May last attended Mrs. Ponton during her confinement, remaining in attendance upon her for about a week; also that she was present during the confinement of Mrs. L'Abbé in March last, having been sent for by the latter on the day her child was born, and reaching there when the child was being delivered. There is no evidence that the defendant administered any drugs or

Judgment. Scott, J.

medicines, or performed any operation in either case. It might be inferred that she was in attendance in the capacity of a midwife, but there is no direct evidence that she acted in any way as such, or that she performed any duties other than those of a nurse or attendant.

The conviction is made under sec. 60 of The Medical Profession Ordinance, which provides as follows: "60. No unregistered person shall practise medicine or surgery for hire or hope of reward, and if any person not registered pursuant to this Ordinance, for hire, gain or hope of reward, practises or professes to practise medicine or surgery, he shall be guilty of an offence and upon summary conviction thereof shall be liable to a penalty not exceeding $100."

There is no reference to midwifery in this section. Therefore unless it can be held to be included in either medicine or surgery, no penalty can be imposed for the practise of it by an unlicensed person.

Section 51 of the Ordinance provides that every person registered under the Ordinance, shall be entitled to practise medicine and surgery, *including midwifery*, or any of them in the Territories, and it was contended that this indicated the intention that wherever the terms "medicine," or "surgery," are used elsewhere in the Ordinance, they should include midwifery. I cannot accept the view that upon that ground alone those terms should be so interpreted. It appears to me that such interpretation could be given only by an express enactment to that effect. In the Ontario Act respecting Medicine and Surgery (R. S. O. 1887, cap. 148), from which the provisions of the Ordinance appear to be largely taken, the terms "Medicine," "Surgery" and "Midwifery," are used to denote separate and distinct branches, and there is nothing to indicate that the last mentioned branch is included in either of the others. Section 45 of that Act, which corresponds with sec. 60 of the Ordinance, provides that it shall not be lawful for any person not re-

Judgment.
Scott, J.

gistered to practise medicine, surgery or midwifery, for gain or hope of reward. If it is the case that the Ordinance is largely taken from that Act, and the similarity in the wording leads to that view, the omission of midwifery from sec. 60 of the Ordinance points strongly to the conclusion that it was the intention that no penalty should be imposed for the practise of it by an unlicensed person.

In an earlier Act in Ontario (Con. Stat. U. C. cap. 40), it was provided by sec. 13, that nothing in the Act contained should prevent any female from practising midwifery in the province or require such female to take out a license. The reason of this provision doubtless was that in some of the then sparsely settled parts of the province, it would be difficult and in some cases impossible to procure the services of a licensed physician as a midwife. There are many parts of the Territories at the present time where the circumstances in that respect are not unlike those in some parts of that province at the time that provision was enacted.

I hold that even if the evidence in the present case could be so construed as to show that the defendant had practised midwifery for hire, gain or hope of reward (though I doubt whether it is open to that construction), the conviction cannot be upheld.

I therefore quash the conviction; I do not award any costs as I doubt whether I have jurisdiction to do so: See *Queen* v. *Banks*.[5]

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[5] 1 Can. Crim. Cases, 370.

LEADLEY v. GAETZ.

Practice—Order for discovery of documents—Non-compliance—Application to dismiss action—Failure to indorse notice on order—Rule 330.

Rule 330* applies to orders for discovery of documents, not only where the remedy sought for non-compliance is attachment, but also where the remedy sought is dismissal of the action or striking out of the defence.

Where therefore a copy of such an order served was not endorsed, as provided, an application to dismiss the action for non-compliance with the order was refused.

[SCOTT, J., *November 21st, 1903.*

Statement. This is an application by the defendant to dismiss the plaintiffs' action for non-compliance by them with an order for discovery of documents.

Upon the hearing of the application counsel for the plaintiffs took the preliminary objection that the application must fail by reason of the fact that the copy of the order served was not indorsed with the notice prescribed by Rule 330. Counsel for the defendant admitted that the copy was not so indorsed.

Argument. *John E. Crawford*, for the plaintiffs.

N. D. Beck, K.C., for the defendant.

[*November 21st, 1903.*]

Judgment. SCOTT, J.—(After referring to the facts) the objection must be sustained. Rule 330 is applicable to such an order

* Rule 330. Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following, namely:

"If you, the within named A. B., neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order)."

as this, and it is not, as was contended by the defendant's counsel, confined to cases where attachment is sought for non-compliance. See *Hampden* v. *Wallis*.[1] See also *Doige* v. *Regina*.[2] Application dismissed with costs to the plaintiffs in any event on final taxation. Judgment. Scott, J.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[1] 29 Ch. D. 746; 54 L. J. Ch. 83; 50 L. T. 515; 32 W. R. 808.
[2] 18 C. L. T. 163.

STIMPSON v. ROSS.

Practice — Application for security for costs — Agent — Affidavit of advocate insufficient — Rule 520.

Rule 520 provides: "When the plaintiff in an action resides out of the Territories . . . and the defendant by affidavit of himself or his agent alleges that he has a good defence on the merits to the action, the defendant shall be entitled to a summons to shew cause why an order should not issue requiring the plaintiff within three months . . . to give security for the defendant's costs. . . ."

Held, that the agent must be some one having personal knowledge of the facts constituting the defence, and the allegation of the existence of a good defence must be positive. An affidavit by the defendant's advocate that he verily believes the defendants to have a good defence is insufficient on both grounds.

[SCOTT, J., *Nov. 21st, 1903.*

Statement.

Application by the defendants for an order for security for costs, the plaintiffs carrying on business, as it appeared by the statement of claim, in the State of Indiana, U.S.A. The application was supported by the affidavit of one of the defendants' advocates, paragraphs 1 and 2 of which were as follows:

"1. That I am one of the advocates for the above named defendants.

"2. I verily believe that the defendants have a good defence to this action upon the merits."

Argument.

C. F. Newell, for the plaintiffs.—Defendants are not entitled to order upon the affidavit filed as Rule 520 has not been complied with; agent does not include advocate: *Bank of Montreal* v. *Cameron*,[1] *Martin* v. *Consolidated Bank*;[2] *Frederici* v. *Vanderzee*,[3] *Tiffany* v. *Bullen*,[4] Cordery on Solicitors, 2nd ed., p. 94. Allegations must be positive, belief is not sufficient, or in any event the grounds of belief should be stated under Rule 295*: *Clark* v. *Hamilton* (No. 1).[5] Plaintiff should have right of cross-examination upon the affidavit, but cross-examination of the advocate would be useless.

O. M. Biggar, for the defendants.—The advocate is the only person who can state that the defendant has a good defence upon the merits, as the sufficiency is a question of law. He cannot make a positive statement as he must rely upon the defendant's statement of the nature of the defence, neither is the defendant in a position to make a positive statement.

[*Nov. 21st, 1903.*]

Judgment.

SCOTT, J.—*Clark* v. *Hamilton* (No. 1),[5] shows that Rule 520, as originally enacted by section 429 of the Civil Justice Ordinance of 1886, provided that where the plaintiff in any action resided out of the Territories, and the defendant, by affidavit of himself or his agent, alleged that he had a good defence upon the merits, the defendant should be entitled to an order for security for costs. Rule 520, however, provides that, upon such an affidavit, the defendant shall be entitled merely to a summons to show cause why such an order should not be made.

[1] 2 Q. B. D. 536; 46 L. J. Q. B. 425; 36 L. T. 415, 25 W. R. 593. [2] 45 U. C. Q. B. 163. [3] 2 C. P. D. 70; 46 L. J. C. P. 194; 35 L. T. 889; 25 W. R. 389. [4] 18 U. C. C. P. 91. [5] 5 Terr. L. R. 110.

* Rule 295. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted. . . .

Judgment.
Scott, J.

I doubt whether under the earlier provision a defendant would have been entitled to an order for security upon the affidavit of the advocate alleging merely his belief that the defendant had a good defence. It surely must have been intended that there should be a positive allegation as to the existence of a good defence, or at least something stronger than the advocate's belief in its existence, which belief would under ordinary circumstances be founded merely upon statements made to him by his client.

The fact that it is provided that the affidavit must be that of the defendant or his agent, points to the view that it was intended that it should be made by some person having personal knowledge of the facts constituting the defence. Rule 384 provides for the issue of a garnishee summons upon the filing of an affidavit of the plaintiff or of his advocate or agent. Where the plaintiff's claim is a judgment, his advocate is usually in a position to make the positive affidavit of indebtedness which is required, and that may be the reason why provision is made in that case authorizing an affidavit by him.

I may here point out that this rule provides for a positive allegation as to the indebtedness of the defendant, and an allegation founded upon information and belief as to the indebtedness of the garnishee; also that Rule 417 provides for an affidavit as to the deponent's belief as to certain matters. These provisions would seem to imply that, where an affidavit founded upon belief is sufficient, it is so stated.

If Mr. Cross (the deponent) had complied with Rule 295 and stated the ground of his belief, it might appear that such belief was founded upon statements made to him by his client. In effect it would therefore be merely an allegation by him that his clients had made certain statements to him which he believed to be true, and, believing them to be true, he believed that they constituted a good defence. Such an affidavit would not have entitled the defendants to

Judgment. Scott, J.

an order for security under section 429 referred to; nor, in my opinion, would it entitle them to a summons under Rule 520.

I hold that the affidavit is insufficient, and I dismiss the application with costs to the plaintiffs in any event on final taxation.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

KAULITZKI v. TELFORD.

Justice of the Peace—Collection of fine and costs—Presumption of proper disposition—Duty, where conviction quashed.

Held, in an action against a Justice of the Peace to recover the sum of $15 paid to him as fine and costs, upon a conviction under a Territorial Ordinance, which was afterwards quashed, that it must be presumed in the absence of evidence that the moneys were properly applied, *i.e.*, the fine transmitted to the Attorney-General, and the costs paid over to the complainant for whom they were received as agent.

There is no duty imposed on the Justice in such case to obtain a refund.

The Justice's personal fees when retained by him are in effect paid to him by the complainant against whom he had the right to retain them.

[SCOTT, J., *December 23rd, 1903.*

Statement. Trial of an action under the small debt procedure.

Argument. *C. de W. MacDonald*, for plaintiff.

O. M. Biggar, for defendant.

[*December 23rd, 1903.*]

Judgment. SCOTT, J.—This is an action to recover $15 cash alleged to have been paid by the plaintiff to the defendant, being the fine and costs imposed upon the plaintiff by the defendant in his capacity of Justice of the Peace, upon the information of one Black, for unlawfully neglecting to promptly advertise an estray animal, the defendant's conviction having been

afterwards quashed by my order of 14th July, 1903. The plaintiff claims that, by reason of the quashing of the conviction, the defendant has lost the right to retain the moneys so paid. Judgment. Scott, J.

The only evidence offered was the order referred to which was put in by the plaintiff. It was stated by counsel and confirmed by the deputy clerk, that the conviction referred to and the information and depositions, together with the papers relating to the application to quash, had been mislaid in the clerk's office and could not be found.

Counsel for defendant contended that plaintiff had not made out a case:

1st. Because the form of conviction given in The Criminal Code, which, presumably, was followed in this conviction, provides that the fine imposed shall be paid and applied according to law, and that the sum imposed for costs shall be paid to the complainant, that in the absence of evidence it must be presumed that the costs were paid to the complainant and not to the defendant; that section 11 of the Magistrates' Ordinance, provides that every Justice, upon receiving any fine payable to the government of the Territories, shall forthwith transmit the same to the Attorney-General, and that it cannot be presumed that the defendant improperly retained the fine in his hands until after the conviction was quashed.

2nd. That, as the order referred to provides that no action shall be brought against the defendant upon any matter or thing growing out of or incidental to the matter of said conviction by reason of the quashing thereof, this action cannot be maintained.

3rd. Because no notice of action has been given as required by Rule 536.

Counsel for plaintiff contended that it was the duty of the defendant, upon the conviction being quashed, to obtain a

Judgment. Scott, J.

refund of the fine from the Attorney-General and pay it over to the plaintiff, together with at least his (defendant's) own personal costs which were paid to him, also to notify the officer commanding the N. W. M. P. that certain moneys payable to a constable of the force for fees had been improperly paid and should be returned, and also to notify the complainant that the moneys received by himself and his witnesses would have to be returned.

In my opinion this contention cannot be upheld in any particular.

There is no evidence that any moneys were paid by the plaintiff to the defendant, but, if the fine and costs imposed were so paid, the plaintiff must be presumed to have known that the costs so paid were paid to him as agent for the complainant to whom they were payable under the conviction. The defendant may have deducted his own personal fees from them, but they would thus be paid him by the complainant, and as against the complainant he, I think, is entitled to retain them. As to the fine, there is nothing to show the amount of it, and, even if I found that plaintiff was entitled to recover it, I have no means of ascertaining or fixing it. I think, however, I should assume that if paid to the defendant, it was paid over by him to the Attorney-General in due course.

I doubt whether the plaintiff has been in any way prejudiced by the loss of the papers, as I think that if defendant's counsel had been applied to he would have admitted their contents so far as material to the issues.

Judgment for the defendant.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

SMITH v. MACFARLANE (No. 1).

Practice — Chamber application — Insufficient affidavit — Amendment refused.

On an application by a landlord against his tenant for an order for possession, the applicant was refused leave to amend the allegations of his affidavit upon which the originating summons was issued.

[SCOTT, J., *December 29th, 1903.*

Statement. Application by landlord by originating summons for an order for possession of part of lot 216 in block 1, Edmonton, which the tenant had leased from the landlord's predecessor in title under the terms of a written lease made in respect of part of lot 214, and subsequently by verbal arrangement made to apply to the former. The application was supported by an affidavit of the landlord which identified the lease and alleged that the tenant claimed to continue in possession of the lands therein described, but there was nothing to show that the tenant was in possession of any part of lot 216, or that the landlord was the owner or entitled to possession thereof.

The objection was raised that no case had been made out. Leave to amend was applied for.

Argument. *O. M. Biggar*, for landlord.

W. S. Deacon, for tenant.

[*December 29th, 1903.*]

Judgment. SCOTT, J.—I must refuse this application on the ground that the material is insufficient. Mr. Biggar, for the applicant, contended that the mistake was merely a clerical one, and that he should be permitted to amend. Had the application been one in respect of lot 214, and by mistake the property had been improperly described in the summons as lot 216, I think that I should have allowed the amendment unless it was shown that the tenant would be prejudiced

Judgment.
Scott, J.

thereby; but the application is and is intended to be in respect of lot 216, and I therefore cannot see how any amendment of the proceedings that I would be justified in allowing would cure the defect, viz., the insufficiency of the material. I think that I ought not to permit the amendment of an affidavit filed by the substitution of other allegations for those contained in it.

Application refused with costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

KING v. AMES.

Criminal law — Motion to quash conviction — Jurisdiction of single Judge—Certiorari—Disorderly house—Inmate—Pleading guilty—Form of conviction—Like effect—Summary conviction or summary trial—Penalty imposed under Part LV., Cr. Code—Conviction in form under Part LVIII.—Construction favoring conviction—Cr. Code, secs. 207 (j), 208, 783 (f), 788—Forms WW, QQ.

A single Judge in the Territories has jurisdiction under 54-55 Vic. (1891) c. 22, s. 7, ss. 2, to hear and determine applications to quash summary convictions, whether the convictions have been brought into Court by *certiorari* or not. If the conviction has been returned to the Clerk of the Supreme Court, by virtue of s. 102 of the N. W. T. Act, the issue of a writ of *certiorari* is unnecessary.

The defendant pleaded guilty before a magistrate of being an inmate of a disorderly house, an offence punishable either under Part XV. of the Criminal Code (Vagrancy), where the fine on summary conviction is limited to $50, or under Part LV. (Summary Trials of Indictable Offences), where the fine and costs together must not exceed $100. A fine of $90, with $6.25 costs, was imposed, but the conviction was in the Form WW prescribed under Part LVIII. relating to summary convictions, and not the form QQ prescribed under part LV., and did not contain the words "being charged before me the undersigned," which appear in the latter form.

On an application to quash,

The conviction was sustained a good conviction under part LV., as being of like effect to the form therein prescribed; the amount of the fine and the fact that the accused was not charged with or convicted of being a loose, idle or disorderly person, indicating the procedure adopted by the magistrate.

The omission to recite that the accused had been charged with the offence before him, a fact which appeared from the proceedings, is a matter of form only and not sufficient to void the conviction.

King v. *Keeping*,[1] *Queen* v. *Stafford*,[2] *King* v. *Carter*,[3] and *Regina* v. *Spooner*,[4] discussed.

[SCOTT, J., *December 30th, 1903.*

Statement.

Application by the defendant to quash a certain conviction made against her upon the ground that the penalty imposed is greater than the magistrate could impose by law. The conviction was as follows:

"Be it remembered that on the thirteenth day of May in the year 1903, at Edmonton, in the said North-West Territories, on the information of John H. Dean, Grace Ames is convicted before the undersigned Isaac Sidney Cowan, a Police Magistrate in and for the North-West Territories, for that she the said Grace Ames in the Municipality of the Town of Edmonton, in the said Territories, on the 13th day of May, 1903, was unlawfully an inmate of a disorderly house, to wit, a common bawdy house.

"And I adjudge the said Grace Ames to forfeit and pay the sum of ninety dollars, to be paid and applied according to law, and also to pay the said John H. Dean the sum of six dollars and twenty-five cents for his costs in this behalf, and if the said several sums are not paid forthwith, I adjudge the said Grace Ames to be imprisoned in the North-West Mounted Police Guard Room at Fort Saskatchewan for the term of six months unless the said sums are sooner paid.

"Given under my hand and seal the day and year first above mentioned at Edmonton in the Territories aforesaid."

(Sgd.) I. S. COWAN, (Seal)
Police Magistrate,
North-West Territories.

[1] 34 N. S. R. 442; 4 Can. Crim. Cas. 401. [2] 1 Can. Crim. Cas. 239.
[3] 5 Can. Crim. Cas. 401. [4] 32 O. L. R. 451; 4 Can. Crim. Cas. 209.

Statement. On the return of the motion, *N. D. Beck*, K.C., for the prosecutor, took the preliminary objection that a single Judge had not jurisdiction to entertain or determine an application to quash a conviction except in cases where such conviction has been brought into Court by *certiorari*, and referred to *Reg.* v. *Smith*,[5] and 54 & 55 Vic. c. 22, s. 7, amending the North-West Territories Act. The conviction in question had not been so brought in. The matter was then argued subject to the objection.

Argument. *J. C. F. Bown*, for the defendant.—The conviction is under Part XV. (Vagrancy), sec. 207 (j) of the Code as shown by the form which is in the form WW prescribed under Part LVIII. (Summary Convictions), sec. 859 (see *King* v. *Carter*,[3] and *Regina* v. *Spooner*[4]), and must be quashed as the penalty imposed is greater than the magistrate could lawfully impose under sec. 208, which limits the fine to $50. See *Reg.* v. *Horton*,[6] *Reg.* v. *Lynch*,[7] and *Reg.* v. *Crowell*.[8] Had the charge been tried under Part LV. (Summary Trials), sec. 782, *et seq.*, the form QQ (sec. 807) would have been used.

Beck.—The magistrate had jurisdiction to try under Part LV. without consent: *King* v. *Roberts*.[9] The amount of the fine imposed shows that he intended to proceed under that part, and the defendant was not charged with being a loose, idle and disorderly person, which is necessary under Part XV: *King* v. *Keeping*.[1] The form of the conviction used is the same in effect as the form prescribed under Part LV, differing only in the omission of the words "being charged before me the undersigned," which are only material where consent is necessary: *King* v. *Carter*.[3] See judgment of Ritchie, J., which is the more reasonable one. The omission is a matter of form only.

[5] 1 Terr. L. R. 189. [6] 3 Can. Crim. Cas. 84; 34 C. L. J. 42. [7] 12 O. R. 372. [8] 2 Can. Crim. Cas. 34. [9] 4 Can. Crim. Cas. 253.

[*December 30th, 1903.*] Judgment.

Scott, J.

SCOTT, J.—Upon the hearing of the application, Mr. Beck, K.C., who supported the conviction, raised the preliminary objection that a single Judge has not jurisdiction to entertain or determine an application to quash a conviction except in cases where such conviction has been brought into Court by certiorari, and that the conviction in question has not been so brought in.

It was held by the Court *in banc* in *Regina* v. *Smith*,[5] that a single Judge had not jurisdiction to hear and determine an application to quash a conviction upon certiorari, but that jurisdiction was subsequently conferred upon a single Judge by 54 & 55 Vic. c. 22, s. 7, s.-s. 2, which is as follows: 2. "Subject to any statute prohibiting or restraining proceedings by way of certiorari, a single Judge shall, in addition to his other powers, have all the powers of the Court as to proceedings by way of certiorari over the proceedings, orders, convictions and adjudications had, taken and made by Justices of the Peace; and, in addition thereto, shall have the power of revising, amending, modifying or otherwise dealing with the same; and writs of certiorari may, upon the order of a Judge, be issued by the clerk of the Court mentioned in such order returnable as therein directed."

In *Regina* v. *Monaghan*,[10] the Court *in banc* as then constituted was equally divided upon the question whether in cases where a conviction had been returned to the clerk of the Supreme Court, who is the Clerk of the Peace by virtue of sec. 102 of the N. W. T. Act, the issue of a writ of certiorari was necessary before an application could be made to quash it. In that case, I expressed the opinion that where a conviction has been so returned, it is already in Court, and that therefore the issue of a writ of certiorari to bring it into

[10] 2 N. W. T. Rep. 186.

Judgment. Court was unnecessary, and I still entertain the opinion I
Scott, J. then expressed.

In passing sub-sec. 7, Parliament may have contemplated that, as in England and in the several provinces of the Dominion the issue of a certiorari was necessary to bring a conviction before the Court having jurisdiction to quash it, it was necessary in the Territories also. The same may be said with respect to those provisions of the Criminal Code relating to the powers of the Court possessing such jurisdiction. But, notwithstanding that such may have been contemplated, I am of opinion that the view I expressed in *Regina* v. *Monaghan*[10] is the correct view, and that sub-sec. 7 above quoted confers upon a single Judge the jurisdiction to hear and determine applications to quash summary convictions irrespective of whether they have been brought up by certiorari or not. The words used are wide enough to include convictions which are not brought up by certiorari, as the additional powers there given of revising, amending, modifying or otherwise dealing with convictions are not confined to the preceding powers given with respect to proceedings by way of certiorari.

The grounds of the application are:

1st. That the penalty imposed by the conviction is greater than the said magistrate could impose by law.

2nd. That the Magistrate had no lawful authority to make said conviction by imposing the penalty therein set out.

The offence stated in the conviction is punishable either under Part XV of the Criminal Code, or under Part LV, which relates to the summary trials of indictable offences. If under the former, the fine that may be imposed is limited to $50; if under the latter, a fine and costs which do not go together exceed $100 may be imposed. If the conviction in question must be treated as one under Part XV, the fine imposed is therefore in excess of that which could be imposed; but, contra, if it is treated as one under Part LV.

Judgment
Scott, J.

It appears to me, therefore, that the only question to be considered is whether it is a good conviction under the latter part. If it can be so treated, I think that it should not be quashed or amended by reducing the penalty in order to make it a good conviction under Part XV.

The fact that the Magistrate imposed a fine in excess of that which he was authorized to impose under Part XV leads to the conclusion that he intended to proceed and did proceed under Part LV. Another fact leading to the same conclusion is that the defendant was not charged with or convicted of being a loose, idle or disorderly person, and this appears to be necessary if the procedure was under Part XV. See *King* v. *Keeping*.[1] The only circumstance which tends to show that he did not so intend is the fact that the form of the conviction appears to be that prescribed for convictions under Part LVIII, relating to summary convictions (form WW). That form differs from the form prescribed for convictions under Part LV (form QQ), in that it does not contain the words "being charged before me the undersigned," which appear in the latter, and it contains an adjudication with respect to costs which does not appear in the latter.

So far as the adjudication with respect to costs is concerned, although form QQ contains no reference to them, it appears that under sec. 788 the magistrate is authorized to impose costs under Part LV, and in *Regina* v. *Cyr*[11] it was held that the conviction should state whether or not costs were imposed by it.

Upon referring to the proceedings before the magistrate, I find that as a matter of fact the defendant was charged before him with the offence stated in the conviction, and that she pleaded "guilty" thereto.

In the *Queen* v. *Stafford*,[2] and in *King* v. *Carter*,[3] Townshend, J. (Nova Scotia), held that a conviction for a like offence and in the same form, could not be held to be a

Judgment.
Scott, J.

good conviction under Part LV, owing to the fact that it omitted to state that the defendant had been charged before the magistrate. Ritchie, J., however, in the latter case, held that, notwithstanding such omission, it was a good conviction under that part.

In *Regina* v. *Spooner*[4] it was held by the Divisional Court that a conviction for a similar offence by a police magistrate might be treated as one either under Part XV, or as one under Part LV. The Court elected to treat it as one under the former part in order that it might be amended as the offence was not properly stated, there being no authority to amend, if it were treated as one under Part LV. The report, however, does not set out the form of conviction, and it contains no reference to it beyond the statement in the judgment that there was nothing on the face of the conviction requiring the Court to hold either that the magistrate was trying the prisoner under the summary trials clauses or under the summary convictions clauses, and that in all essential parts, except that the fine was in excess of that which could be imposed under the latter, the conviction stood as well under one procedure as the other.

The defendant having been charged with the offence before the magistrate, the omission of a statement to that effect in the conviction is not in my opinion a defect which would render it void as a conviction under Part LV. The charge is of course a material part of the proceedings leading up to the conviction, but there are other parts of the proceedings of equal if not greater importance which are not prescribed to be stated, and I therefore cannot see that the fact of the charge having been made is one the omission of which should void the conviction. It is not required that the form QQ shall be strictly adhered to. Section 807 provides that convictions under Part LV may be in the forms prescribed therefor "or to the like effect." Section 800 provides that no conviction under that part shall be quashed for want of form and sub-sec. 44 of sec. 7 of The Interpretation Act (R. S.

C. c. 1) provides that wherever forms are prescribed by any Act, slight deviation therefrom, not affecting the substance or calculated to mislead, shall not vitiate them. Judgment Scott, J.

For the reasons I have stated, I dismiss the application with costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

EWING v. LATIMER.

Practice—Judgment by default—Debt—Interest—Setting aside—Rule 90.

Where in an action for a debt or liquidated demand, there is also a claim for interest as accruing prior to the issue of the writ, but no allegation in the statement of claim of any contract, express or implied, to pay it, it cannot, being an unliquidated demand, be included in a judgment signed by default under Rule 90 (†). Such judgment will be set aside as irregular.

[SCOTT, J., *December 30th, 1903.*

Application to set aside judgment signed on default of appearance under Rule 90. The facts sufficiently appear from the judgment. Statement.

J. D. Hyndman, for plaintiff. Argument.

F. C. Jamieson, for defendant.

[*December 30th, 1903.*]

SCOTT, J.—This is an application to set aside the judgment entered herein for the plaintiffs on default of appearance upon the ground that no facts are disclosed in the state- Judgment.

(†) Rule 90. Where the plaintiff's claim is for a debt or liquidated demand only, and the defendant fails, or all the defendants—if more than one—fail to appear thereto, the plaintiff may after the time limited for appearance has elapsed enter final judgment for any sum not exceeding the sum claimed in the action, together with legal interest and costs of suit.

Judgment.
Scott, J.

ment of claim which justify the inclusion in the judgment of the sum of $4.66 for interest.

The action was commenced on 21st September, 1903. The plaintiff's claim is $108.07, the price of certain goods sold and delivered by them to the defendant, and for interest on same from 1st January, 1903. It is alleged that the time for payment has elapsed, but it does not appear at what time the goods were sold and delivered, or when the price was to be paid, nor is there anything to show upon what the claim for interest is founded. Judgment was entered on 17th November, 1903, for $108.07, $4.66 interest and the costs of suit.

It appears to be clear that there is no implied contract on the part of the purchaser to pay interest on the price of goods sold and delivered, even after the time fixed for payment (see Ker & Pearson-Gee's Sales of Goods Act, p. 290, and cases there cited). Therefore in the absence of an express contract to pay such interest, a claim for it is an unliquidated demand and one which, under the English Practice cannot form the subject of a special endorsement under Order 3, Rule 16 (see Annual Practice 1903, p. 17, and cases there cited, particularly *Ryley* v. *Master*,[1] and *Sheba Gold Mining Co.* v. *Trubshawe*,[2] and *Wilks* v. *Wood*[3]).

Rule 90 of our Judicature Ordinance under which the judgment in this case appears to have been entered, is confined to cases where the plaintiff's case is for a debt or liquidated demand only, and as the plaintiff's claim in this case is partially liquidated and partially unliquidated, I must hold that the judgment was irregularly entered.

Rodway v. *Lucas*,[4] cited by plaintiff's counsel on the argument, appears to me to support the view I have expressed, as

[1](1892) 1 Q. B. 674; 61 L. J. Q. B. 219; 66 L. T. 228; 40 W. R. 381; 8 Times Rep. 369. [2](1892) 1 Q. B. 674; 61 L. J. Q. B. 219; 66 L. T. 228; 40 W.R. 381; 8 Times Rep. 369. [3](1892) 1 Q. B. 684; 61 L. J. Q. B. 516; 66 L. T. 520; 40 W. R. 418; 8 Times Rep. 465. [4]10 Ex. 667; 24 L. J. Ex. 155; 1 Jur. N. S. 311.

it was intimated by Pollock, C.B., that if any party not entitled to interest under an express or implied contract should make a claim for it by special endorsement, and should sign judgment for more than he was entitled to, the judgment would be set aside. I may refer also to *British Columbia Land & Investment Co.* v. *Thain*,[5] in which all the later English authorities upon the point are reviewed. Judgment. Scott, J.

The order will go to set aside the judgment with costs to the defendant in any event on final taxation.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[5] 4 B. C. Rep. 321.

GRIGGS v. GRAIS.

Practice—Security for costs—Summons to shew cause—Onus.

On an application for security for costs under Rule 520, the plaintiff, to have the summons discharged, must shew affirmatively that the defendant is not entitled to the order.

Where, therefore, the defendant by his affidavit alleged a good defence to the action on the merits, which the plaintiffs sought to rebut by cross-examination, he was held entitled to the order, because his answers, though alleging certain facts not within his personal knowledge, showed that it was not unreasonable to suppose that the plaintiff's claim might have been satisfied.

[SCOTT, J., *January 25th, 1904.*

This was an application by the defendant, by summons under Rule 520, for an order for security for costs, the plaintiffs, as it appeared by the statement of claim, being resident and carrying on business at St. Paul in the State of Minnesota, U.S.A. The action was commenced on 21st November, 1903, and was for goods sold and delivered to the defendant, who formerly carried on business at Ponsford in the same State. The defendant filed the usual affidavit, sworn the 3rd December, 1903, alleging a good defence to the action on the merits and was cross-examined thereon. From his answers Statement.

Statement. it appeared that he came to the North-West Territories in the fall of 1903, on a visit, leaving his store in charge of his sister; that he was informed by her, that about three weeks after his departure, viz., on 27th October, 1903, his property had been seized at the instance of the plaintiffs and other creditors, and a receiver appointed therefor, and that after the seizure, on an inventory being taken, the value of the stock in the store was shown to be $10,000. He stated that his total liabilities amounted to a little over $6,000, and he believed the plaintiffs and his other creditors had been satisfied with the proceeds of his stock in trade. No other ground of defence was disclosed.

Argument. *C. F. Newell*, for plaintiffs.

J. E. Wallbridge, for defendant.

[*January 25th, 1904.*]

Judgment. SCOTT, J. (after stating the facts)—To entitle the plaintiffs to have the application dismissed, I think they must show that the defendant has no reasonable ground of defence to the action, and in my opinion they have failed to do this. If the statements made by the defendant are true, it is not unreasonable to suppose that the plaintiffs' claim may have been paid out of the proceeds of the stock in trade before the date upon which the affidavit was sworn.

I hold that the defendant is entitled to the usual order for security for costs. Costs of the application to be costs in the cause to the successful party. Costs of the cross-examination of the defendant to be costs to him in any event on final taxation.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

EGGLESTON v. C. P. R.

Examination for discovery—Officer of corporation—Railway company — Station agent — Section foreman — Chief clerk in office of General Superintendent—Rule 201.

A station agent is an officer of a railway company within the meaning of Rule 201* and liable to be examined for discovery.

A section foreman is not such an officer, nor is the chief clerk in the office of a general superintendent.

[SCOTT, J., *January 28th, 1904.*

Statement. This was an application to examine for discovery George McMannus and Frederick T. English, defendant company's station agents at Wetaskiwin and Strathcona respectively, E. Bye, its section foreman at Wetaskiwin, and Frank M. Wilkes, chief clerk in the offices of its general superintendent at Calgary. The action was to recover the value of horses killed by a train on the defendants' railway.

Argument. *C. de W. MacDonald*, for the plaintiff, referred to *Morrison* v. *G. T. R.*[1]

C. F. Newell, for defendant company, referred to *Leitch* v. *G. T. R.*,[2] *Fowle* v. *C. P. R.*,[3] *Knight* v. *G. T. R.*,[4] *Ramsay* v. *Midland*.[5] As the examination of the officer can now be used against the company the term should receive a narrower construction than formerly: *Morrison* v. *G. T. R.*,[1] in appeal. See Judgment of Moss, J.A., at p. 43.

[*28th January, 1904*].

Judgment. SCOTT, J.—Under the provisions respecting examinations for discovery contained in the Ontario Judicature Act, from

* Rule 201. Any party to an action whether plaintiff or defendant, or in the case of a body corporate, any one who is or has been one of the officers of such body corporate, may without any special order for the purpose be orally examined before the trial touching the matters in question in any action by any party adverse in point of interest. . . .

[1] 4 O. L. R. 43; 5 O. L. R. 38. [2] 12 P. R. 541, 671; 13 P. R. 369; 9 C. L. T. 2; 10 C. L. T. 56. [3] 13 P. R. 413; 10 C. L. T. 108. [4] 13 P. R. 386; 10 C. L. T. 68. [5] 10 P. R. 48; 3 C. L. T. 503.

Judgment.
Scott, J.

which the provisions in our Judicature Ordinance relating to such examinations are taken, it was held in *Ramsay* v. *Midland Ry. Co.*[5] that a station agent of a railway company is an officer thereof, within the meaning of the rule corresponding to our Rule 201, and in *Knight* v. *Grand Trunk Ry. Co.*,[6] it was held that a track foreman is not such an officer.

Reference to the Ontario decisions as to what officers of a railway company are within the meaning of that rule leads me to the conclusion that the chief clerk of a general superintendent is not within it.

Counsel for defendant company contended that, as the cases to which I have referred were decided before the amendment to the Ontario rules, providing that the examinations of officers within the rule may be given in evidence against the company and as a similar amendment has been made here, the term "officer" in that rule should now receive a narrower construction.

The effect of this amendment was referred to by the Judges of the Court of Appeal in Ontario in *Morrison* v. *Grand Trunk Ry. Co.*,[1] but there is nothing in that judgment from which it may be inferred that, even if a different construction were placed upon the rule by reason of the amendment, a station agent of a railway company would not be within it.

The order will go for the examination of the station agents at Strathcona and Wetaskiwin before the persons and at the places named in the summons. The application is refused as to the others.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

GOODE v. DOWNING.

Master and Servants Ordinance — Improper dismissal of servant — Additional wages for—Jurisdiction of J. P.

A bar-tender employed by an hotel-keeper at a monthly salary from the 1st of December, became temporarily incapacitated through illness on the 5th of June, and, procuring a substitute, left the hotel, returning to work again on the 10th, whereupon he was discharged by his employer, being paid $10 for wages up to the time he left. He claimed the balance of two months' wages for improper dismissal, and on an information before a J. P. under the Master and Servants Ordinance (C. O. 1898, c. 50, s. 30),* was awarded five days' further wages from the 5th to the 10th, the date of dismissal, and an additional month's wages expressed to be in lieu of notice.

Held, on appeal from this order, that the hotel-keeper was not entitled to discharge the bar-tender, under the circumstances, without notice: also that the latter was entitled to be paid wages up to the time of his dismissal.

But *held* further, that the Justice had no jurisdiction under the Ordinance to order payment of the additional month's wages, which could not be said to be wages due, but damages for improper dismissal.

[SCOTT, J., *February 9th, 1904.*

Statement. An appeal by the Master from order of a Justice of the Peace under the Master and Servants Ordinance. The facts sufficiently appear from the judgment.

Argument. *J. C. F. Bown*, for the appellant.

O. M. Biggar, for the respondent.

[*9th February, 1904.*]

Judgment. SCOTT, J.—This is an appeal from an order made by John F. Forbes, a Justice of the Peace, on 25th June, 1903

*3. Any justice, upon oath of any employee, servant or labourer, complaining against his or her master or employer concerning any non-payment of wages (not exceeding two months wages, the same having been first demanded), ill-usage or improper dismissal by such master or employer, may summons the master or employer to appear . . . and upon due proof of the cause of complaint the justice may discharge the servant or labourer from the service or employment of the master, and may direct the payment to him or her of any wages found to be due (not exceeding two months' wages as aforesaid), and the justice shall make such order for the payment of the said wages as to him seems just and reasonable with costs.

Judgment.
Scott, J.

under the provisions of the Ordinance respecting Masters and Servants (C. O. 1898, cap. 50), upon the information of the respondent, "that F. E. Goode, of Edmonton, did, on or about the 10th day of June, 1903, improperly dismiss him, the said John Downing, from the service of him, the said F. E. Goode, and did not pay him, the said John Downing, two months' wages thereupon due him, except the sum of ten dollars." By the order appealed from the appellant was adjudged to pay the respondent the sum of $70 forthwith, and the sum of $2.95 for costs. The minute made by the Justice on the hearing being as follows: "The finding of the Court is that the plaintiff is entitled to five days wages, from the 5th to the 10th June, and to one month's wages in lieu of notice, in all $70, with costs of this action, $2.95."

The appellant, who is a hotel-keeper, employed the respondent as a barkeeper from 1st December, 1902, at $50 per month, with the proviso that, if the business warranted, the wages were to be increased. Wages at the rate of $60 per month were paid up to 1st June, 1903. On 5th June the respondent became physically incapacitated from performing his work. He left the hotel that morning, having first procured one Clement to act as his substitute. He returned to the hotel on the 10th June, whereupon the appellant discharged him. He afterwards sent the respondent a cheque for $10 in payment of his wages up to 5th June. The incapacity of the respondent was merely of a temporary nature.

I hold upon the evidence that the appellant was not entitled to discharge the respondent without notice. I also hold, following *Cuckson* v. *Stones*,[1] that the respondent was entitled to wages up to the time of his dismissal.

Section 3 of the Ordinance referred to, provides that a Justice may, on the complaint of a servant against his

[1] 1 El. & El. 248; 28 L. J. Q. B. 25; 5 Jur. (N. S.) 357; 7 W. R. 134.

master, for nonpayment of wages (not exceeding two months' wages), ill usage, or improper dismissal, discharge the servant from the service of the master and may direct the payment of any wages found to be due (not exceeding two months' wages as aforesaid).

The complaint in this case contains two distinct charges, viz., improper dismissal and nonpayment of wages. Under the first it would be unnecessary for the Justice to order the discharge of the servant as he would already be discharged by the act of the master, but, under the last mentioned charge, such an order would be necessary in order to authorize the Justice to order the payment of wages up to the time of the hearing of the complaint, for, if the service continued, he could order payment only up to the time they last became due and payable.

I am of opinion that, under section 3, a Justice has no jurisdiction to order payment of wages for any period after the discharge of the servant. No wages can be earned by a servant after his discharge and therefore it cannot be found that any wages, for any period after it, are due by the master. It is true that, in an action by a servant for wrongful dismissal, the damages allowed are based upon the amount of wages which he would have earned had he not been dismissed, but such damages are not wages and cannot be considered as such. The gist of such an action is that the master has, by dismissing the servant, prevented him earning any wages after the dismissal. (See Smith's Master and Servant, 5th ed., pp. 157, *et seq.*)

Under the Ordinance respecting masters and servants, contained in the Revised Ordinances of 1888 (cap. 36), a Justice, upon a complaint similar to the complaint in this case, was authorized to order the master to pay one month's wages in addition to the wages then actually due the servant, but, by a subsequent amendment (Ord. No. 26 of 1895) that power was taken away. The fact that the Legislature at

Judgment. Scott, J.

one time conferred that power and afterwards withdrew it affords a strong indication of intention that it should no longer be exercised.

For the reasons I have stated I order that the order appealed against be amended by reducing the sum of $70 mentioned therein to the sum of $10.

As to the costs of the appeal, the respondent, on the one hand, has succeeded in upholding the order as to a portion of the amount awarded to him by the Justice, while, on the other hand, the appellant has obtained a substantial reduction in the amount so awarded. I think that, under these circumstances, it will be reasonable to direct that there shall be no costs to either party and I therefore so direct.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

SMITH v. MACFARLANE (No. 2.)

Landlord and tenant—Notice to quit—Waiver.

A lease at a yearly rent payable in even portions, in advance, on the first day of each and every month, contained a provision entitling the landlord to give the tenant three months' notice to quit in case the landlord received an offer to purchase which he was willing to accept. On the 22nd August the landlord gave the tenant notice to quit three months' thereafter. On the 2nd of November the applicant, the original landlord's successor in title, accepted the rent due in advance the previous day, for the whole of the month of November, though the time limited by the notice to quit would expire on the 22nd November.

Held, that the notice to quit was waived.

Held, also, that the acceptance on December 3rd of a cheque for that month's rent, although it was not presented for payment, would also be a waiver.

A notice to quit in pursuance of such a special provision may be given for any broken period of the term, and need not expire at the end of a month of the tenancy.

[SCOTT, J., *February 9th, 1904.*

Application by originating summons by a landlord for possession of premises occupied by tenant. The applicant was the purchaser of the premises from the original lessor. The facts sufficiently appear from the judgment. Statement.

W. S. Deacon, for the tenant. Argument.

The notice has been waived by the acceptance, since the service, of rent for the whole of November and for December. See *Goodwright* v. *Cordwent*,[1] and *Croft* v. *Lumley*.[2]

O. M. Biggar, for the landlord.—Cheque for November rent is dated November 2nd, and was paid on November 4th, when there was no overholding. The receipt of rent before notice had expired is not a waiver. There must have been some act which cannot be reconciled with the intention to take advantage of the notice. The intention to waive must be unequivocal. See *Manning* v. *Deerer*.[3] The tenant was bound to pay the thirty dollars on November 1st in any event, as there is no provision here for apportionment as in England: *Bridges* v. *Potts*.[4] December rent was not received, as the cheque was not presented for payment and the landlord is ready to return it.

[*February 9th, 1904.*]

SCOTT, J.—This is an application by the landlord for an order that the tenant do quit and deliver up possession of certain premises in the Town of Edmonton, occupied by him as tenant. Judgment.

The tenant went into possession of certain other premises under a lease thereof, from Bishopric and Grierson, for one year, from 1st June, 1903, at a rental of $360 per annum, payable in even portions of $30 in advance on the first day of each month. This lease was subject to the following proviso, contained therein, viz., "And it is hereby agreed be-

[1] 6 T. R. 219; 3 R. R. 161. [2] 5 E. & B. 667; 6 H. L. Cas. 672; 27 L. J. Q. B. 321. [3] 35 U. C. R. 294. [4] 33 L. J. C. P. 338; 17 C. B. N. S. 314.

Judgment. Scott, J.

tween the lessors and the lessee that in case the lessors receive an offer to purchase the said lands hereby demised at any time during the term hereby granted, which the lessors are willing to accept, the said lessors shall have the right and privilege to determine the lease upon giving to the lessee three months' previous notice in writing of their intention in that behalf."

By a subsequent agreement between him and Bishopric and Grierson, the tenant in or about the month of July last entered into possession of the premises now in question, as tenant thereof, upon the same terms as those contained in the lease referred to.

On 22nd of August last Bishopric and Grierson gave the tenant notice that they had received an offer to purchase the premises in question, which offer they were willing to accept, and that in accordance with the proviso referred to they required him to deliver up possession of the premises to them at the expiration of three months from the delivery of the notice.

It was contended on behalf of the tenant that the notice was ineffective to determine the tenancy because it sought to determine it at a time other than at the end of some month of the term. In *Bridges* v. *Potts*[4] it appears to have been held, that in a special provision for the determination of a tenancy by notice, such notice may, unless otherwise specified, be given for any broken period of the year. The objection therefore cannot be sustained.

It appears from the affidavit filed that on 2nd November last the tenant paid the landlord $30, being the payment due the previous day, under the lease, for the rent up to 1st December last, being eight days beyond the time the tenancy would expire under the notice to quit. It also appears that about 3rd December last the tenant gave the landlord a cheque for $30 in payment for that month. This cheque the latter received and still retains, though he

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Scott, J.

has not yet presented it for payment. He states that when he received it he understood from the tenant that he expected to find a house within a short time, into which he could move, and it was not cashed because, before he (the landlord) had occasion to use it, it appeared that the tenant was not going to move.

In Foa's Landlord and Tenant, at page 572, it is stated that, if the tenant pay money as rent accrued after the expiration of the notice to quit and the landlord accept as such, it is conclusive evidence of the waiver of the notice.

In my opinion the landlord by accepting the rent up to the end of November, intended that the tenant should be permitted to occupy the premises up to that time, and his acceptance was therefore a waiver of the notice.

I am also of opinion that, even if the acceptance of the November rent was not a waiver, the acceptance of the cheque for the rent for December under the circumstances stated by him was in itself such a waiver.

I therefore dismiss the application with costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

HENRY v. MAGEAU.

Practice—Small debt procedure — Conversion — Tort waived—Goods sold—Debt—Rule 602.

A claim for the value of goods converted by the defendant, the plaintiff expressly waiving the tort and suing as for goods sold and delivered, may be sued under the small debt procedure.

The plaintiff in his statement of claim under the small debt procedure, alleged that the defendant had wrongfully taken possession of a horse and converted it to his own use, and expressly waived the tort and sued for goods sold and delivered, claiming $75, the value of the horse. An application to set aside the writ and service upon the ground that the claim was not for one debt within the meaning of Rule 602,* which brings "all claims and demands for debt whether payable in money or otherwise where the amount claimed does not exceed $100," within the small debt procedure, was refused.

The word "debt" is not restricted to "a sum certain or capable of being reduced to a certainty by calculation," but includes claim for value of goods sold where no price is mentioned.

[SCOTT, J., *April 27th, 1904.*

Statement. Application by the defendant to set aside the writ of summons and statement of claim and the service thereof on the ground that the claim was not one for debt, and therefore did not come within the rules respecting small debt procedure under which the action was brought.

The plaintiff in his statement of claim alleged that the defendant wrongfully took possession of a horse, the property of the plaintiff, and converted the same to his own use. Plaintiff stated therein that he waived the tort and sued the defendant as for goods sold and delivered, claiming $75, the value of the animal.

Argument. *C. F. Newell,* for plaintiff.

Wilfrid Gariepy, for defendant.

Judgment. SCOTT, J.—It appears to be well settled that in certain cases where a defendant has wrongfully obtained possession

* 602. In all claims and demands for debt, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100, the procedure shall, unless otherwise ordered or allowed by a Judge, be as follows: (J. O. 1898, C. O. 1898, c. 21).

of plaintiff's goods, the latter may waive the tort and sue as for goods sold and delivered. It does not appear by the statement of claim or otherwise upon this application that the circumstances of this case are such as to entitle the plaintiff to take that course, nor does the contrary appear, and therefore I am not in a position to decide the question. It will probably have to be considered at a later stage of the action. Judgment. Scott, J.

It was contended on behalf of the defendant, that even if the plaintiff were entitled to waive the tort and sue upon contract, he cannot sue under the small debt procedure as the action is not one of debt, the value of the animal being unascertained.

Rule 602 provides that that procedure shall apply to "all claims and demands for debt whether payable in money or otherwise where the amount claimed does not exceed $100." It is apparent from these words that the word "debt" is not intended to be restricted to the meaning formerly applied to it, viz.: "a sum certain or capable of being reduced to a certainty by calculation." (See Ency. Laws of Eng., vol. 4, p. 153.)

The words "payable in money or otherwise" show that it is intended to have a much wider application. This is shown also by Rule 610, and it there appears that merchants' accounts, the price of goods sold and delivered and claims for work and services, are included in the term.

In my opinion it is not necessary in order to entitle a person to sue under this procedure for the price of goods sold, that the price must have been agreed upon between the parties or definitely ascertained in some manner. If the price has not been fixed the buyer is bound to pay a reasonable price. In merchants' accounts there will usually be found articles charged for, the price of which has never been settled or ascertained by the parties. The merchant is entitled to recover for their reasonable price. It would be unreasonable to hold that, by reason of the price not having been ascertained he could not sue for it under the small debt procedure.

Judgment.
Scott, J.

Counsel for the defendant cited my judgment in *McNeilly* v. *Beattie*[1] in support of his contention that plaintiff could not sue under small debt procedure. That case is in my view clearly distinguishable from the present. It was an action by a servant against his master for improper dismissal. The plaintiff claimed one month's wages in lieu of notice. I held that although one month's wages might be the proper measure of damages for the wrongful dismissal, the claim was nevertheless one for unliquidated damages, and therefore was not within the rules respecting small debt procedure.

The application will be dismissed with costs to the plaintiff in any event on final taxation.

REPORTER:
J. E. Wallbridge, Advocate, Edmonton.

[1] 4 Terr. L. R. 360.

DIGEST OF CASES REPORTED IN THIS VOLUME

ACCOUNT.

Account stated—*Open account.*

See BILLS, NOTES AND CHEQUES, 1.

ADMINISTRATION.

Administrator — *Responsibility in Paying Claims—Corroborative Proof of Claims—Declaration Proving Claims.*]—A Judge sitting on the Probate side of the Court passing accounts is not bound by the rule of procedure requiring claimants against the estate to give corroborative proof of their claims. This rule of procedure is applicable only when the claim comes to be contested in Court. Semble, a Judge sitting without a jury is not bound any more than is a jury to apply it under all circumstances. Dictum of Jesse, M.R., in Re Finch, Finch v. Finch, or Wynn-Finch, 23 Ch. D. 267; 48 L. T. 129; 31 W. R. 526, contra disapproved. The responsibility of paying claims falls upon the administrator; he must use care and judgment in considering them, and if he does so fairly and honestly and in the interest of the estate, he will on passing his accounts be allowed such as he has thought fit to pay. Remarks on the usual form of statutory declaration proving claims. *Re Blank Estate* (Wetmore, J., 1901), p. 230.

Administration — *Application for Letters of Administration by Stranger—Public Administrator.*]—In the absence of an application by a party entitled by reason of relationship to the deceased, it is necessary, in order to justify the grant of letters of administration to a creditor or a person without interest, to shew by special circumstances that such grant is in the interests of the estate, otherwise the grant should be made to the public administrator for the district. *Re Morton.* (Wetmore, J., 1900), p. 409.

AFFIDAVIT.

See COSTS—PRACTICE.

AGENCY.

See CONTROVERTED ELECTONS — COSTS —NEGLIGENCE.

ALIEN.

See EXEMPTIONS UNDER EXECUTION.

AMENDMENT OF PLEADINGS.

See BILLS, NOTES AND CHEQUES — BANK ACT — WHERE STATUTE OF LIMITATIONS INTERVENES: *See* RAILWAYS.

APPEAL.

Practice—*Motion to Court en banc, Sufficiency of Notice of — Tax Sale—Land Titles Act, secs. 95 and 97—Time for Registration of Tax Sale Transfer, Extension of — Non-prosecution of Appeal, Excuse for.*]—Rule 460 of The Judicature Ordinance, C. O. 1898, c. 21, providing for two clear days' notice of motion, excepting special leave, applies to motions to the Court en banc. An order stopping the registration of a tax sale transfer and Judge's order confirming the sale, as provided for by s. 97 of The Land Titles Act, also acts as an order extending the time for registration of the transfer, as provided for by s. 95 of the Act. An appellant is excused for not having proceeded with the appeal by the fact that the original documents from which the appeal book is to be prepared have remained in the respondent's possession, he having neglected to file them in a Land Titles Office, as directed by the order appealed from. *Re Donnelly Tax Sale.* (Ct. 1902), p. 270.

See ASSESSMENT AND TAXATION — CRIMINAL LAW—LIQUOR LICENSES.

As to Costs: *See* BANK ACT.

ARBITRATION AND AWARD.

Arbitration Ordinance—*Remission for Reconsideration Refused—No Authority to Appoint New Arbitrator.*]—Section 11 of "The Arbitration Ordinance" provides that "In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire." Remission was refused because after the submission was entered into one of the arbitrators commenced an action against the party who had nominated him to recover an amount agreed to be paid for procuring settlement of the matters in dispute. Where the instrument of submission names the arbitrators the Court or Judge has no power to appoint a new arbitrator in lieu of one who has become incompetent. *Re Crawford and Allen.* (Scott, J., 1903), p. 398.

ASSESSMENT AND TAXATION.

Separate Schools—*Assessment and Taxation — N.-W. T. Act, s. 14, and School Ordinance.*]—A ratepayer to a Separate School District is not liable to taxation to meet debenture indebtedness of the Public School District incurred prior to the establishment of the Separate School District. *McCarthy* v. *The Municipality of the Town of Regina.* (Ct. 1901), p. 71.

Taxation by School District—*Unpatented Land Set Apart for C. P.R. Land Grant, but not Sold or Occupied by Company—44 Vic. c. 1, Schedule — Exemption from Taxation.*]—Crown lands which have been set apart for the land grant of the C. P. R. Co., and earned by that company as part of its land grant under the Schedule to 44 Vic. (1881), c. 1, "An Act respecting the Canadian Pacific Railway," but which have never been sold or occupied by the company, are exempt from taxation by school districts in the Territories by virtue of s. 16 of the Schedule. Per Richardson, J. — On the ground that a school district is a "municipal corporation." Per Wetmore, J.—On the ground that the Territorial Legislative Assembly — and consequently a territorial school district—acts merely by authority delegated by the Dominion Parliament, and, therefore, that taxation by a territorial school district is taxation "by the Dominion." Per McGuire, J.—On the ground that the Territorial School Ordinance exempts from taxation lands held by Her Majesty, and does not authorize the taxation of any interest therein, and that as to the lands in question the company is at best in the position of purchasers who had paid their purchase money, but had not yet actually received a conveyance, and, until conveyed, the lands are held by Her Majesty. Semble, per Wetmore, J.—Territorial school districts are not "municipal corporations." Semble, per McGuire, J.—Taxation by a school district is not taxation "by the Dominion," which latter means taxation direct by the Dominion. A school district is not a "municipal corporation." The effect of the Act was not to make ipso facto a grant to the company, nor to operate as a grant to the company as each 20 miles of railway was completed, but to entitle the company as each 20 miles was completed to ask for and receive a grant of the land subsidy applicable thereto. Construction of statutes discussed. *The Trustees of Balgonie Protestant Public School District* v. *The Canadian Pacific Railway Co.* (Ct. 1901), p. 123.

Assessment and Taxation—*Local Improvement District—Error in Formation — Assessment of Corporation by other than Corporate Name — Assessment for Whole or Portion of Year—Exceptional Tax—Hudson's Bay Co.—Construction of Statutes.*] — The construction of statutes generally and of the Ordinances relating to local improvements in particular discussed. The construction of taxing statutes discussed. The effect of non-fulfilment of statutory conditions subsequent discussed:—Held, per Curiam, affirming the judgment of Richardson, J.—1. That the designation of a local improvement district by an incorrect number, while its name was otherwise correctly stated in the notice in the Gazette constituting the district, did not invalidate the notice. 2. That the assessment of the defendants was not invalid by reason of their being assessed under the name of "The Hudson's Bay Company" — a name by which they were commonly designated by themselves and the public. 3. That, though the district in question was not constituted until July, 1899, and the appellants not assessed till August, 1899, they were liable for the whole amount for which they were assessed, the rate of assessment being a fixed rate per acre, irrespective of time, and the assessor being expressly

authorized to assess at any time during the year. 4. That the assessment of the defendants under the Ordinances in question is not an exceptional tax upon them within the meaning of the Imperial Order in Council of June 23rd, 1870, inasmuch as it was equal and uniform throughout the district. *Henry McGowan, Overseer of the Weyburn Local Improvement District, No. 518, v. The Governor and Company of Adventurers of England Trading into Hudson's Bay.* (Richardson, J., 1900, Ct. 1901), p. 147.

Local Improvement Ordinance, C. O. c. 73—*Assessment—Lands held under Lease but not Enclosed—Assessment of Occupant—Personal Liability of Person Assessed.*]—Where lands are held under lease from the Crown, and, though they are not enclosed or fenced, the lessee uses them as pasture for his sheep, the lessee is an "occupant" of the lands within the meaning of The Local Improvement Ordinance, C. O. 1898, c. 73, s. 15. Notwithstanding the wording of s. 16, s.-s. 2, and of s. 17 of the said Ordinance, the effect of the provisions of ss. 15, 20 and 23 is to create a personal liability to pay for which the occupant may be sued. *Walter Crosskill, Overseer Local Improvement District No. 507, v. The Sarnia Ranching Company.* (Scott, J., 1901), p. 181.

Appeal from Assessment—*General Plan—Onus of Proof—Land and Buildings.*] — Under ordinary circumstances, it is incumbent upon an appellant who complains that he is assessed too high to shew that the property is not worth the amount for which he is assessed, but where, although this is not shewn, it appears that under the general scheme of assessment, lands of a particular description are assessed generally at a certain fixed sum per acre, and that the appellants' lands of that description, which are of no greater value either by reason of their situation or otherwise, are assessed at a larger amount, the assessment should be reduced to accord with the general scheme of assessment. A school district assessor assessed certain of the appellants' lands at $800, and the dwelling houses thereon at $2,000:—Held, that the assessment should stand, although the more correct course would have been to assess the whole as "land" and place a single value upon both soil and buildings as "land." *In re Canadian Pacific Railway Co. and the MacLeod Public School District.* (Scott, J., 1901), p. 187.

Municipal Assessment—*Real Estate and Buildings Thereon—Occupation of one storey by the Crown.*]—The fact that a portion of a building assessed for taxes under the Municipal Ordinance, is occupied by the Crown under lease, and is therefore exempt under s. 121, s.-s. 1 of that Ordinance, does not prevent the remaining portion being assessed for a proportionate part of the value of the whole. *The MacLeod Improvement Co. v. Town of MacLeod.* (Scott, J., 1901), p. 190.

Assessment and Taxation—*Canadian Pacific Railway — Exemption from Taxation—Crow's Nest Pass Railway Branch Lines — Municipal Ordinance — "Superstructure" — Value of Round-houses, Freight Sheds, and other Buildings.*]—Clause 16 (relating to exemption from taxation) of the agreement between the Canadian Pacific Railway Company and the Government of Canada, as embodied in the Act, 44 Vic. (1881), c. 1, is not applicable to the Crow's Nest Pass Railway, but is applicable only to the main line of the Canadian Pacific Railway Company, and to such branches thereof as the company was authorized by clause 14 of the agreement to construct from points on the main line, and does not extend to other distinct lines of railway which the company may have been subsequently authorized to construct. Under the Ordinance respecting the Assessment of Railways, C. O. 1898, c. 71, s. 3, the round-houses, stations or office buildings, section houses, employees' dwellings, freight sheds, and other buildings of like nature belonging to a railway company and situated upon it, are not included in the term "superstructure," but may be assessed separately as personal property under the Municipal Ordinance. Such buildings should not be valued as part of the railway as a going concern, and as having a special value as such, but merely at what they are worth separate and distinct from other portions of the railway. When only two and a half stalls of a round-house were situated within the municipality, and the round-house was shewn to be worth $900 a stall, the assessment was fixed at $2,250. *In re Canadian Pacific Railway Co. and Town of MacLeod.* (Scott, J., 1901), p. 192.

Municipal Assessment—*Income Tax—Basis of Assessment — Previous*

Year's Income.] — Although a person assessed for income tax under the Municipal Ordinance was not during the previous year a resident of the municipality, the previous year's income, wherever earned, may be taken as a basis for determining the amount for which he should be assessed. Income to the extent of $600 exempt. *Lamontaigne and Becker* v. *Town of MacLeod.* (Scott, J., 1901), p. 199.

Assessment and Taxation—*Appeal against Whole Assessment—Notice of.*]—The provisions of the Municipal Ordinance respecting appeals against the assessment of third parties do not authorize a ratepayer to appeal generally against the assessment of every person on the assessment roll without designating the names of all the ratepayers in a written request to the secretary-treasurer to notify them of the appeal. *Re P. Heiminck* v. *The Town of Edmonton.* (Scott, J., 1903), p. 459.

Assessment and Taxation — *Municipal Ordinance—Construction—Appeal—Onus of Proof.*]—The onus is on the appellant to shew that vacant land in towns comes within the exceptions mentioned in s.-s. 1 of s. 127 of the Municipal Ordinance (C. O. 1898, c. 70), otherwise it is properly assessed under s.-s. 2. Where vacant land is shewn to be "bona fide enclosed," as mentioned in s.-s. 1, and used in connection with a residence as a garden, "position and local advantage" are to be considered in addition to an annual rental in fixing the value for assessment purposes, and persons making use of valuable lands for the purposes of a garden, park, etc., should be assessed for it in the same proportion of value as other lands in the vicinity. *Re Isabella Heiminck and the Town of Edmonton.* (Scott, J., 1903), p. 462.

Assessment and Taxation—*Appeal—Onus of Proof.*]—In assessment appeals, the onus is upon the appellants who claim their property is assessed too high to prove it affirmatively. *Re McDougall and the Town of Edmonton, Re Carruthers and the Town of Edmonton.* (Scott, J., 1903), p. 465.

See APPEAL—LAND TITLES ACT—TAX SALES—CRIMINAL LAW.

ASSIGNMENT FOR CREDITORS.

See EXEMPTIONS UNDER EXECUTION —COSTS.

BANK ACT.

Bank Act — *Bill of Lading—Property in Goods—Passing of Property—Sales of Goods Ordinance — Form of Action—Action for Price—Conversion —Measure of Damages—Merchantable Goods—Implied Warranty—Setting up Breach of Warranty in Diminution or Extinction of Price—Practice—Pleading—Payment into Court—Judgment on Plea of Payment into Court—Costs —Appeal as to Costs—Amendment of Pleadings—Moulding Pleadings to Accord with Evidence.*]—The judgment of Rouleau, J. (4 Terr. L. T. 498) varied by striking out the order to amend the plaintiffs' statement of claim as unnecessary, and directing that judgment be entered for the defendant, and that the amount paid into Court by the defendant be paid out to the plaintiffs; the plaintiffs to have the costs of the action up to the time of the second payment into Court; the defendants to have the general costs of the action after that date, and the plaintiffs to have the costs of the issues upon which they succeeded. The trial Judge having reserved judgment came to the conclusion that the plaintiffs were entitled to the moneys paid into Court by the defendant. He held, however, that they were not so entitled under the form of the statement of claim (4 Terr. L. R. p. 498), but only under a claim for conversion, and accordingly in his reasons for judgment—the formal order had not been taken out before the appeal—he stated that under the authority of Rule 189 of the Judicature Ordinance, C. O. 1898, c. 21, he "amended the statement of claim so as to determine the real question at issue according to the evidence adduced," and thereupon directed judgment to be entered for the plaintiffs for the amount paid into Court, without costs:—Held (1), (McGuire, C.J., doubting), that no amendment was necessary; that if, as in this case the facts alleged shewed a wrongful conversion that was sufficient, although the specific words were not used, and that so far as the relief claimed was concerned the Court was

entitled under English O. 20, rule 6 (introduced by J. O. 1898, s. 21), and J. O. 1898, s. 8, s.-s. 5, to give, and ought to give, any appropriate relief to which the plaintiffs were entitled, though it was not specifically claimed. (2) That where money is paid into Court (though with a denial of liability) it is to be taken to be pleaded as an alternative defence going to the whole cause of action, and if the plaintiff fails to shew himself entitled to a greater sum the defendant is entitled to judgment on this defence, and that the proper judgment as to costs is:—The plaintiff to have the costs of the action up to the time of payment into Court; the defendant to have the general costs of the action from that time and the plaintiff to have the costs of the issues found in his favour. Wagstaff v. Bentley (1901), 71 L. J. K. B. 55; (1902), 1 K. B. 124 (taken as interpreting Wheeler v. The United Telephone Co. (1884), 13 Q. B. D. 597; 53 L. J. Q. B. 466; 50 L. T. 749; 33 W. R. 295; Goutard v. Carr (1883), 13 Q. B. D. 598n.; 53 L. J. Q. B. 467n; 33 W. R. 295n; and Wood v. Leetham (1892), 61 L. J. Q. B. 215), followed and applied. (3) That although by Rule 500 of the J. O. C. O. 1898, c. 21, no appeal lies without leave from any judgment or order as to costs only which by law are left to the discretion of the Court or Judge making the judgment or order; and although the Court will not as a rule interfere with such discretion unless it has been exercised on a wrongful principle, nevertheless when the judgment or order dealing with the question of costs is appealed from on other grounds, the Court has power under Rule 507 to make any order which ought to have been made by the Court or Judge, and this rule authorizes the Court in banc to deal with the question of the costs below in any way which may appear necessary or expedient by reason of its varying or reversing the judgment or order appealed from. (4) That there were, therefore, two grounds on which to vary the trial Judge's direction as to costs: (1) That the trial Judge acted on a wrong principle, and (2) That his direction amending the plaintiff's statement of claim was unnecessary and improper. The trial Judge's direction as to costs was therefore varied. Per McGuire, C.J. (1) Against the contention of the plaintiffs that the measure of damages was the face value of the bill of exchange inasmuch as the defendant's conduct prevented them from returning the bill of lading to the consignors and demanding back the amount advanced upon its security; that the measure of damages was the value—but only the actual value having regard to their condition and quality—of the goods to the plaintiffs, not necessarily what the defendant could or did sell them for. The plaintiffs' contention was unsound, inasmuch as upon the dishonour of the draft they were entitled to look to the drawers at once and were not obliged to give credit for the amount of the collateral security until they had actually realized thereon. Molsons Bank v. Cooper (1886), 26 S. C. R. 611. The bill of lading was of no value except to give the plaintiffs the property, and the right to the possession of the goods. The damages in an action by either the bank or the consignors against either the defendant or a stranger would have been the same, viz.: the value of the goods, because now by virtue of s. 51 of the Sales of Goods Ordinance any breach of warranty—here the defective quality of the goods—can be set up in diminution or extinction of the price sued for. (2) The difference in language between the Imperial Bills of Lading Act (18-19 Vic. c. 111, s. 1), and the Bank Act (defining the position of an indorsee of a bill of lading), considered. (3) Money paid into Court at the opening of the trial without objection, and without any terms being imposed, must be taken to have been paid in under the rules in that behalf, Goutard v. Carr, supra. Per Wetmore, J. (Richardson and Scott, JJ., concurring). (1) Had the consignors as in Sheppard v. Harrison (1871), L. R. 5 H. L. 116; 40 L. J. Q. B. 148; 24 L. T. 857; 20 W. R. 1; 1 Asp. M. C. 66, sent the bill of exchange with the bill of lading attached, directly to the defendant, they might have sued for the price on the basis of the defendant's acceptance of the goods or for damages on the basis of a conversion. In the former case the defendant could have set up the defective quality of the goods in diminution of the price. In the latter case the measure of damages would have been the value of the goods to the consignors, which would probably be the same as in the former case. The bank as the holders of the bill of lading were in no better position than the consignors. (2) Semble, the right and title vested in the plaintiffs under s. 73 of the Bank Act by virtue of the bill of lading was only the right and title to the

goods, and not contractual rights which the consignor had against the purchaser. Circumstances raising an implied warranty that goods are merchantable considered. *Imperial Bank v. Hull.* (Ct. 1902), p. 313.

BANKRUPTCY AND INSOLVENCY.

See LIQUOR LICENSES.

BILL OF LADING.

See BANK ACT.

BILLS, NOTES AND CHEQUES.

Bill of Exchange — *Acceptance—Stated Account—Open Account—Mistake—Pleading — Amendment.*] — Acceptance of a bill of exchange is evidence of an account stated to the amount of the bill. In order to open a settled account it is necessary to particularize specific errors in the account. In an action by the drawer of bills of exchange against the acceptor, the defendant pleaded generally that he accepted the bills under a mistake as to the state of the account. This defence was struck out, with leave to the defendant to amend on terms of filing an affidavit verifying the facts to be set out in the proposed amended defence. The proposed amended defence alleged that when the defendant accepted the bills he did so under the mistaken idea that he was indebted to the plaintiff in the amount whereof; that such mistaken belief was occasioned by the plaintiff having represented to him, by statements of account in writing and by drawing the bills, that he justly owed the plaintiff that amount, whereas, in fact, he was not indebted to him in any amount; that the defendant had dealt extensively with plaintiff for over six years; that in course of such dealings plaintiff had, without defendant's knowledge or consent, made many exorbitant and illegal charges, and that if accounts were taken it would be found that the defendant was not indebted to the plaintiff in any amount. This proposed defence and a counterclaim based on the same allegations, for an account, were held bad; and were not allowed to be filed, and there being therefore no defence on file, judgment was given for the plaintiff. *Clark v. Hamilton (No. 2).* (Richardson, J., 1901), p. 178.

See LIQUOR LICENSES.

BY-LAW.

See MUNICIPAL LAW.

CANADIAN PACIFIC RY. CO.

C. P. R. Co.—*Service upon—Judicature Ordinance, s.* 14 (3) *and Dominion Statutes of* 1881, *c.* 1, *Schedule A. s.* 9.]—44 Vic. (1881) c. 1, entitled "An Act respecting the Canadian Pacific Railway Company," Schedule A. s. (a), providing for a place of service in each province or Territory, is special legislation, and is mandatory and not merely permissive, and, therefore, quoad the C. P. R. Co., overrides the general provisions as to service of s. 14 (3) of the Judicature Ordinance. *Lamont v. The Canadian Pacific Railway Co.* (McGuire, J., 1900, Ct. 1901), p. 60.

See ASSESSMENT AND TAXATION.

CASES SPECIALLY CONSIDERED.

Attwood v. Moringer, (1653) Sty. 378, considered; Powell v. Hiltgen, 16.

Cornwall v. New Missouri, 25 U. C. L. R. 9, considered; Pease v. Town of Moosomin, 207.

Derry v. Peek, 14 App. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 488, applied; Plisson v. Skinner, 391.

Dicks v. Yates, 50 L. J. Ch. 809; 18 C. D. 76; 44 L. T. 660, followed; In re Demautez, 84.

Re Finch, Finch v. Finch or Wynne-Finch, 23 C. D. 267; 48 L. T. 129; 31 W. R. 526, dictum of Tessell, M. R., disapproved: Re Blank Estate, 230.

Fitsjohn v. MacKinder, 9 C. B. N. S. 505; 30 L. J. C. P. 257; 7 Jur. N. S. 283; 4 L. T. 149; 9 W. R. 477, considered; Powell v. Hiltgen, 16.

Goutard v. Carr, (1883) 13 Q. B. D. 598n; 53 L. J. Q. B. 467n; 33 W. R. 295n; followed and applied; Imperial Bank v. Hull.

Jones v. Gwynn, (1713) 10 Mod. R. 148; Gilb. K. B. 185, considered; Powell v. Hiltgen, 16.

Kelly v. Ottawa R. Co., 3 O. A. R. 616, considered: Findlay v. C. P. R., 143.

Kelly v. Barton, 28 O. R. 608, referred to; Pease v. Town of Moosomin, 207.

King v. Carter, 5 Can. Crim. Cas. 401, discussed; King v. Ames, 492.

King v. Keeping, 34 N. S. R. 442; 4 Can. Crim. Cas. 401, discussed; King v. Ames, 492.

Manitoba Electric & Gas Co. v. Gerrie, (1887) 4 Man. R. 210, considered; Conn v. Fitzgerald, 346.

Molsons Bank v. Cooper, (1896) 26 S. C. R. 611, followed; Imperial Bank v. Hall, 313.

MacDonald v. Corrigal, (1893) 9 Man. R. 284, considered; Conn v. Fitzgerald, 346.

McSorley v. Mayor of St. John, 6 S. C. R. 531, considered; Pease v. Town of Moosomin, 207.

McWillie v. N. S. R. Co., 17 S. C. R. [illegible], considered: Findlay v. C. P. R., 143.

Oliver v. Hunting, 44 C. D. 205; 59 L. J. Ch. 255; 62 L. T. 108; 38 W. R. 618, referred to: Calder v. Hallett.

Ontario Bank v. McMicken, 7 Man. R. 203; 11 C. L. T. 18, followed; In re Demaurez, 7. 84.

Quartz Hill Mining Co. v. Eyre, 52 L. J. Q. B. 488; 11 Q. B. D. 674; 49 L. T. 249; 31 W. R. 668, considered; Powell v. Hiltgen, 16.

Queen v. Stafford, 1 Can. Crim. Cas. 239, discussed; King v. Ames, 492.

Rayson v. South London Tramway Co., 62 L. J. Q. B. 593; (1893) 2 Q. B. 204; 4 R. 522; 69 L. T. 491; 41 W. R. 21; 17 Cox C. C. 691; 58 J. P. 20, considered; Powell v. Hiltgen, 16.

Regina v. Black, 43 U. C. Q. B. 180, followed; The Queen v. McLeod, 245.

Regina v. Howson, 1 Terr. L. R. 492, followed; Regina v. Mellon, 301.

Regina v. Spooner, 32 O. L. R. 451; 4 Can. Crim. Cas. 209, discussed; King v. Ames, 492.

Shepherd v. Harrison, (1871) L. R. 5 H. L. 116; 40 L. J. Q. B. 148; 24 L. T. 857; 20 W. R. 1; Asp. M. C. 66, considered; Imperial Bank v. Hull, 313.

Valpy v. Gibson, 16 L. J. C. P. 241; 4 C. B. 837; 11 Jur. 826, referred to; Calder v. Hallett, 1.

Wagstaff v. Bentley, (1901) 71 L. J. K. B. 55; (1902) 1 K. B. 124, followed and applied: Imperial Bank v. Hull, 313.

Wheeler v. The United Telephone Co., (1884) 13 A. R. D. 597; 53 L. J. Q. B. 466; 50 L. T. T. 49; 33 W. R. 295, followed and applied; Imperial Bank v. Hull, 313.

Wilkie v. Jellett, 26 S. C. R. 282; 2 N. W. T. R. No. 1, p. 125, applied: In re Kerr, 297.

Wishart v. City of Brandon, 4 Man. R. 453, considered; Pease v. Town of Moosomin, 207.

Wood v. Leatham, (1892) 61 L. J. Q. B. 215, followed and applied; Imperial Bank v. Hull, 313.

Zimmer v. G. T. R. Co., 19 O. A. R. 693, considered; Findlay v. C. P. R., 143.

CERTIORARI.

See MEDICAL PROFESSION..

COMPANY.

See RECEIVER.

COMPOSITION WITH CREDITORS.

See LIQUOR LICENSES.

CONSTABLE.

See MUNICIPAL LAW, 1.

CONSTITUTIONAL LAW.

See LIQUOR LICENSES.

CONSTRUCTION OF STATUTES.

See ASSESSMENT AND TAXATION — CRIMINAL LAW—LORD'S DAY OBSERVANCE—MUNICIPAL LAW— TAX SALES.

CONTRACT.

See LANDLORD AND TENANT — CONSIDERATION — SALE OF GOODS — SALE OF LAND—DOMINION LANDS ACT—RECTIFICATION.

CONTRIBUTION.

See INDEMNITY.

CONTROVERTED ELECTIONS.

Controverted Elections Ordinance—*Election — Petition—Examination for Discovery.*] — Section 18 of The Controverted Elections Ordinance, C. O. 1898, c. 4, provides as follows: "The said petition and all proceedings thereunder shall be deemed to be a cause in the Court in which the said petition is filed, and all the provisions of the Judicature Ordinance in so far as they are applicable and not inconsistent with the provisions of this ordinance shall be applicable to such petition and proceedings:"—Held, (1) That the provisions of the Judicature Ordinance respecting examinations for discovery come within the above section. (2) That where particulars of the charges had been ordered the examination could not be completed until after the delivery of the particulars. *Leblanc* v. *Maloney*, *No.* 1. (Scott, J., 1902), p. 341.

Controverted Elections—*Corrupt Practices — Intoxicating Liquor in Vicinity of Polls—Treating — Treating Habit — Corrupt Intent — Agency.*]—Where a person who was held to be an agent gave two bottles of whiskey to an elector two days before polling day, the inference of fact was drawn that they were given with the corrupt intent of influencing the voter, although there is no direct evidence to shew the object for which they were given. Where a quantity of whiskey was obtained from one agent of the respondent and taken to the home of another in the vicinity of one of the polling places, where it was drunk freely on election day by the electors generally, the inference of fact was drawn that it was provided by both these agents for the purpose of influencing the electors, though there was not direct evidence to that effect, and it was held to be a corrupt practice notwithstanding that apparently it did not have that effect. The evidence also shewed that a quantity of whiskey was taken to a place in the vicinity of another polling place by an agent, where it was consumed by the agent and others on polling day: — Held, that this shewed a scheme on the part of the respondent's agents to influence the voters generally, and procure the election of the respondent by providing whiskey at each of the polling places. The following were held to be agents: One who accompanied the respondent on a canvassing trip during which he spent a day canvassing for the respondent and spoke on his behalf at an election meeting at which the respondent was also present and spoke. One who accompanied the respondent on a canvassing trip, acting as interpreter (the respondent being under the impression that he was one of his supporters), and actually worked and canvassed for him with his authority. The son of the respondent, who took an active interest in the election on behalf of the respondent with his knowledge, acted as scrutineer and was furnished with a sum of money by the respondent when leaving for the polling place at which he was to act. Quære: whether an agent accustomed to carry about with him a bottle of whiskey to treat those whom he should happen to meet, should not, if following this custom while actually engaged in canvassing a voter, be held to have treated with a corrupt intent. It is not necessary that proof should be given that the respondent had been returned as member. *Leblanc* v. *Maloney*, *No.* 2. (Scott, J., 1903), p. 402.

CONVERSION.

See BANK ACT—DETINUE.

CONVICTION.

Criminal Law — *Motion to quash conviction — Jurisdiction of single Judge — Certiorari — Disorderly house — Inmate—Pleading guilty — Form of conviction—Like effect—Summary Conviction or Summary Trial—Penalty imposed under Part LV., Cr. Code—Conviction in form under Part LVIII.—Construction favoring Conviction—Cr. Code, ss.* 207 (*j*), 208, 783 (*f*), 788—*Forms WW, QQ.*]—A single Judge in the Territories has jurisdiction under 54-55 Vict. (1891) c. 22, s. 7, ss. 2, to

hear and determine applications to quash summary convictions, whether the convictions have been brought into Court by certiorari or not. If the conviction has been returned to the Clerk of the Supreme Court, by virtue of s. 102 of the N. W. T. Act, the issue of a writ of certiorari is unnecessary. The defendant pleaded guilty before a magistrate of being an inmate of a disorderly house, an offence punishable under either Part XV. of the Criminal Code (Vagrancy), where the fine on summary conviction is limited to $50, or under Part LV. (Summary Trials of Indictable Offences), where the fine and costs together must not exceed $100. A fine of $90, with $6.25 costs, was imposed, but the conviction was in the Form WW prescribed under Part LVIII. relating to summary convictions, and not the form QQ prescribed under part LV., and did not contain the words "being charged before me the undersigned," which appear in the latter form. On an application to quash: The conviction was sustained as a good conviction under part LV., being of like effect to the form therein prescribed, the amount of the fine and the fact that the accused was not charged with or convicted of being a loose, idle or disorderly person, indicating the procedure adopted by the magistrate. The omission to recite that the accused had been charged with the offence before him, a fact which appeared from the proceedings, is a matter of form only and not sufficient to void the conviction. King v. Keeping, 34 N. S. R. 442; 4 Can. Crim. Cas. 401; Queen v. Stafford, 1 Can. Crim. Cas. 239; King v. Carter, 5 Can. Crim. Cas. 401; and Regina v. Spooner, 32 O. R. 451; 4 Can. Crim. Cas. 209, discussed. *King* v. *Ames* (Scott, J., 1903), p. 492.

See INDIAN ACT—JUSTICE OF THE PEACE.

COPYRIGHT.

Copyright—*Sole Right of Dramatic Representation — Infringement — Imperial Acts — Evidence — Examination for Discovery—Admissibility thereof as Evidence against Co-defendants.*]—Sec. 16 of the Imperial Copyright Act, 1842 (5 & 6 Vict. c. 45), provides that the defendant in pleading shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of the action. Sec. 26 allows the pleading of the general issue:—Held (Richardson, J.), that s. 16 is complied with if the objections intended to be relied on are taken in the statement of defence. Dicks v. Yates, 50 L. J. Ch. 809; 18 C. D. 76; 44 L. T. 660, followed. Where, under Rule 201 of the Judicature Ordinance, 1898, a party to the action has been orally examined before trial, Rule 224, which allows any party to use in evidence any part of the examination so taken of the opposite parties, does not limit the effect of such evidence, or provide that it may only be put in as against the party examined, and, therefore, any part of such examination is admissible as evidence against opposite parties other than the one actually examined, provided they had an oppottunity to cross-examine the party actually examined. At the trial of an action against the officers and members of the committee of management of an unincorporated society for infringement of plaintiff's sole right of dramatic representation of an opera, plaintiff put in as evidence parts of the examination for discovery of B., one of the defendants, the secretary-treasurer of the society. All the defendants were represented by the same advocate, who had attended such examination on behalf of all the defendants and cross-examined the witness:—Held, that the testimony given on such examination was admissible as evidence against all the defendants as well as against B. himself. Plaintiff proved that the opera in question, and an assignment to him of the sole right of dramatic representation thereof, had been duly registered at Stationers' Hall. On such examination B. testified that he knew the opera in question, and that the performances complained of were meant to be performances of this opera. He also identified one of the programmes used on the occasions in question, and what he thought to be a poster advertising the performances. Both programme and poster designated the opera by its registered name, and specified the author and composer thereof. L. also testified at the trial that he knew the opera in question, which he had seen and heard performed many times; that he had been present at one of the performances complained of, and that what had been performed on such occasion was the opera in question:—Held, that this was sufficient proof of the identity of what was performed by defendants with the opera in question, and consequently of the infringement. Per Wetmore, J.—Objection to secondary evidence of the con-

tents of a written document must be distinctly stated when it is offered, and if not objected to it is received, and is entitled to be proper weight, and the weight to be attached to it will depend upon the circumstances of each case. Per McGuire, J. — The rule excluding oral testimony of a witness of the contents of a written document which he had read was not applicable to the present case. What was sought to be proved was not the contents of any book or document, but the resemblance or identity of two performances, partly verbal, partly musical, and partly made up of dramatic action, gesture and facial expression. Sufficiency and admissibility of evidence of resemblance or identity of the performance or of copy with original discussed. Judgment of Richardson, J., reversed. *Carte* v. *Dennis*, (Richardson, J., 1900, Ct. 1901), p. 30.

COSTS.

Security for Costs — *Discretion — Affidavit of merits — Cross-examination of deponent.*]—The practice under R. 520 of the J. O. (C. 1898, c. 21), as to security for costs, differs from the English practice in making it obligatory upon the defendant to file the affidavit of himself or his agent alleging he has a good defence on the merits. Quere, whether it is necessary to set out the grounds of defence. This rule leaves the granting of the security to the discretion of the Judge under the circumstances of each case. The Judge may order the deponent to be cross-examined upon his affidavit as to the nature of the alleged defence before deciding the motion. Under the circumstances of this case the Judge was held to have exercised a proper discretion in refusing security. Judgment of Richardson, J., affirmed. *Clark* v. *Hamilton* (No. 1), (Richardson, J., 1901, Ct. 1901), p. 110.

Security for Costs—*Judgment dismissing Action for Default of Security—Assignment by Defendant for Benefit of Creditors during Currency of Order—Payment of Dividend by Assignee.*]—An order was made for security for costs to be given within 3 months. During this period defendant made an assignment for the benefit of his creditors. Plaintiffs filed their claim with the assignee and understood, apparently wrongly, that the claim was admitted. Judgment was afterwards signed by the defendant dismissing the action for non-compliance with the order for security. On motion by plaintiffs the judgment was set aside on terms. *McPherson Fruit Co.* v. *England* (Richardson, J., 1902), p. 388.

Practice — *Application for Security for Costs—Agent—Affidavit of Advocate Insufficient—Rule* 520.]—Rule 520 provides: "When the plaintiff in an action resides out of the Territories . . . and the defendant by affidavit of himself or his agent alleges that he has a good defence on the merits to the action, the defendant shall be entitled to a summons to shew cause why an order should not issue requiring the plaintiff within three months . . . to give security for the defendant's costs. . ." Held, that the agent must be some one having personal knowledge of the facts constituting the defence, and the allegation of the existence of a good defence must be positive. An affidavit by the defendant's advocate that he verily believes the defendants to have a good defence is insufficient on both grounds. *Stimpson* v. *Ross* (Scott, J., 1903), p. 485.

Practice—*Security for Costs—Summons to Shew Cause—Onus.*]—On an application for security for costs under Rule 520, the plaintiff, to have the summons discharged, must shew affirmatively that the defendant is not entitled to the order. Where, therefore, the defendant by his affidavit alleged a good defence to the action on the merits, which the plaintiffs sought to rebut by cross-examination, he was held entitled to the order, because his answers alleged certain facts not within his personal knowledge, shewing that it was not unreasonable to suppose that the plaintiffs might have been satisfied. *Griggs* v. *Grais* (Scott, J., 1904), p. 501.

See MUNICIPAL LAW, 1 — SALE OF LANDS—EXEMPTION UNDER EXECUTION —SMALL DEBT PROCEDURE.

COURT OF REVISION.

See PAYMENT.

CRIMINAL LAW.

Criminal Code, s. 360 — "*Valuable security*"—*Lien note.*]—An ordinary "lien note" is a "valuable security" within the meaning of s. 360 of "The Criminal Code, 1892." *Rex* v. *Wagner* (Ct., 1901), p. 119.

Criminal Law—*Trial by Jury, Right to—Assault, occasioning Actual Bodily Harm—Criminal Code, s.* 262—*N. W. T. Act, ss.* 66 *and* 67—*Construction of statutes.*] — A person charged with assault occasioning actual bodily harm contrary to s. 262 of the Criminal Code is not entitled, under s. 67 of the North-West Territories Act, to be tried with the intervention of a jury. Sec. 66 extends to all minor offences included in the several offences specifically enumerated therein. *The King* v. *Hostetter* (Ct. 1902), p. 363.

Criminal Law—*Obstructing School Trustee in Making Distress—Criminal Code, s.* 114 (2)—*Mailing of Notice of Assessment and Tax Notice, and of Posting of Tax Roll, Sufficiency of Evidence of — Entries on Tax and Assessment Rolls Initialled by Official Trustee — "Proceeding" — "Canada Evidence Act,* 1893, *s.* 2.]—Held, that on the trial of an accused on a charge of having unlawfully resisted and wilfully obstructing an official trustee of a school district in making a lawful distress or seizure, the production of the tax and assessment rolls of such school district with entries thereon of the dates of the mailing of the notice of assessment, and of the tax notice to the accused, and of the posting of such tax roll, initialled with what purports to be the initials of the official trustee of such school district, is evidence of the mailing of such notices and of the posting of such tax roll:—Held, that such prosecution was a "proceeding" within the meaning of s. 2 of "The Canada Evidence Act, 1893." *The King* v. *Rapay.* (Ct., 1902), p. 367.

Criminal Law—*Gambling—Plea of Guilty — Appeal, Right of — Criminal Code, s.* 879 — *Estoppel.*] — A person who has pleaded "guilty" to a charge, and has been summarily convicted, may raise a question of law in an appeal under s. 897 of the Criminal Code, but on such appeal his former plea of "guilty" estops him from calling upon the respondent to prove his guilt. So far as his guilt or innocence are concerned he is not a "party aggrieved" within the meaning of s. 879 of "The Criminal Code." *The King* (*inf. Fyffe*) v. *Brook* (Ct. 1902), p. 369.

Form of information: *See* MALICIOUS PROSECUTION, 1—CONVICTION.

CROWN.

See ASSESSMENT AND TAXATION.

CROWN PROSECUTOR.

See MALICIOUS PROSECUTION, 1.

DAMAGES.

See BANK ACT—MALICIOUS PROSECUTION, 1.

DETINUE.

Detinue—*Conversion—Demand and Refusal—Evidence.*]—In an action of detinue as distinguished from an action for conversion, a proof of demand and refusal is essential, if the detention be denied. *Gray & Smith* v. *Guernsey* (Richardson, J., 1902).

DEVOLUTION OF ESTATES.

Husband and Wife — *Devolution of Estates Ordinance — Married Women's Property Ordinance — Land Titles Act—Construction of Statutes—Imperial Acts in Force in the Territories.*] — The Devolution of Estates Ordinance, c. 13 of 1901 (assented to June 12th, 1901), provides: "1. The property of any man hereafter dying intestate and leaving a widow, but no issue, shall belong to such widow, absolutely and exclusively, provided that prior to his death such widow had not left him and lived in adultery after leaving him. (2) This section shall apply to the property of any person who died before the date of the coming into force of this Ordinance, in case no portion of the estate of such person has been distributed:"—Held, that s.-s. 2 does not apply to a case where the widow died previously to the passing of the Ordinance, although no portion

of the estate of the deceased husband had been distributed at the time of its passing. The Ordinance respecting the personal property of married women, C. O. 1898, c. 47, provides that "a married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but shall in respect of the same have all the rights and be subject to all the liabilities of a feme sole:"—Held, that notwithstanding this provision a husband is entitled to the whole of his deceased intestate wife's undisposed of personal property upon taking out letters of administration. Section 3 of the Land Titles Act, 1894, 57 & 58 Vict. (Dom.) c. 28, which provides that "land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate," does not convert realty into personalty, but refers only to the manner of distribution. Where, therefore, S. died on the 24th December, 1899, intestate and without issue, leaving as his next of kin his father, and also his widow, who having married B., died on the 22nd April, 1901, leaving a child by B., the property of S. was directed to be distributed as follows: one-half of the personal property to the deceased's father and the other half to B. for his own benefit, on his taking out administration to his deceased wife; one-half of the real property to the deceased's father and the other half to the administrator of the widow's estate to be distributed, one-third to B. and two-thirds to her child. *Re Estate Henry Steidel, deceased* (Scott, J., 1902), p. 303.

DISORDERLY HOUSE.

See CONVICTION.

DOMICIL.

See SCHOOL DISTRICT.

DOMINION LANDS ACT.

Covenant to Deliver Possession of Land — *Dominion Lands Act — Assignment or Transfer.*]—A covenant contained in an agreement for farming "on shares" to deliver possession of land to which covenantor has homestead rights only, is not an assignment or transfer within the meaning of Dom. Lands Act, R. S. C. 1886, c. 54, s. 42, as amended by 60-61 Vict. 1897, c. 29, s. 5. Rectification of contract for mistake discussed. *Spence* v. *Arnold* (Richardson, J., 1901), p. 176.

ELECTION.

Of Exemption: *See* EXEMPTIONS UNDER EXECUTION.

ESTOPPEL.

See EXEMPTIONS UNDER EXECUTION — CRIMINAL LAW.

EVIDENCE.

Declarations against Interest: *See* LANDLORD AND TENANT, 1.

Affidavit—Cross-examination on: *See* COSTS, 1.

Corroborative, against deceased's estate: *See* ADMINISTRATION.

Examination for discovery: *See* CONTROVERTED ELECTIONS — COPYRIGHT: *See* CRIMINAL LAW — DETINUE.

Opinion Evidence: *See* SALE OF GOODS.

EXECUTIONS.

Renewal—Expiry: *See* LAND TITLES ACT — EXEMPTIONS UNDER EXECUTION—INTERPLEADER.

EXEMPTIONS UNDER EXECUTION.

Exemptions Ordinance — *Alien — Tools and Implements of Trade — More than one Trade—Election—Land and Buildings—Division or Sale—Incumbered Land—Exemption out of Excess—Assignment for Benefit of Creditors — Executions—Mechanic's Lien—Priorities — Estoppel — Costs —Advocates Undertaking to Refund.*] — A

general assignment for the benefit of creditors was made of all the assignor's real and personal estate, except what was exempt from seizure and sale under execution. The land was not especially described, but the assignment contained a covenant on the part of the assignor to execute such instruments as should be required to effectuate the assignment. An order for the administration of the estate was subsequently made, and this was followed by the sale of the land under the direction of a Judge, and a transfer by the assignor to the purchaser. The land was subject to two mortgages; and $1,530, the surplus of the price in excess of the mortgages, was paid into Court. The assignor was an alien friend resident in the Territories:—Held, per Richardson, J.—(1) That an alien friend resident in the Territories is entitled to the benefit of the provisions of the Exemptions Ordinance, notwithstanding the provisions of the Naturalization Act, R. S. C. (1886) c. 113, s. 3. Affirmed on appeal to Court in banc. The assignor being by trade a repairer of watches and jewelry, and having received the tools and implements appertaining to that trade, exempt under the Exemptions Ordinance, C. O. 1898, c. 27, s. 2, s.-s. 7. (2) That he could not maintain a claim for such tools and implements as were used in connection with a steam laundry run for him by an expert, "though he sometimes tinkered about the laundry," he himself not being by trade a laundryman. (3) That the assignor was entitled as an exemption to the extent of $1,500, out of the $1,530, the excess of the price of the land beyond the mortgages to which it was subject. Affirmed on appeal to Court en banc. Ontario Bank v. McMicken, 7 M. R. 203; 11 C. L. T. 18, followed. (4) That an execution creditor whose execution was registered subsequent to the mortgages, and was the only one registered prior to the assignment, though other executions were registered prior to the administration order and the execution of the transfer by the assignor, was entitled to the $30 in priority to these subsequent executions. On appeal to the Court en banc the whole sum of $1,530 was held to be subject in priority to the first execution creditor, to the claim of the holder of a mechanic's lien, who had obtained judgment, and to his costs, which exhausted the $30. The subsequent execution creditors claimed to be entitled to be paid out of the $1,500 in view of s. 4 of the Exemptions Ordinance, which excepts from its effect "any article . . the price of which forms the subject matter of the judgment upon which the execution is issued." Their action was upon promissory notes made by the assignor to the plaintiff. These notes were given to and discounted by the assignor for the purpose of paying certain moneys, for which the C. P. R. withheld delivery of certain machinery which went into the building on the land as fixtures, and were sold as part of the land; and the moneys so raised were partly so applied. (5) That the subsequent execution creditors did not come within the provisions of s. 4. (6) That the $1,500 was subject to the payment of a claim under a mechanic's lien which was registered, and on which action was commenced before the date of the assignment; but that it was not subject to the payment of either of two other claims under mechanics' liens registered before the assignment, on the ground (without deciding on the objection that no action to enforce these liens had been commenced, it appearing, however, that the time limited for that purpose had not expired at the date of the assignment), that the claimants had, in their statutory declarations proving their claims against the estate, stated that they held no security for their claims, no fund being left to pay the general creditors. (7) That the petitioning creditors were entitled to their costs out of the $1,500, as it was in consequence of their proceedings, which the assignor's conduct forced them to take, that the rights of the various parties were determined and the fund distributed; that the assignee was entitled out of the same fund to his costs and his compensation and expenses as assignee; that the execution creditor, who was entitled to the excess $30, was also entitled to his costs in these proceedings out of the same fund; and that the assignor's advocate was entitled to a lien for his costs as between advocate and client on the same fund. On appeal to the Court in banc it was:—Held, per Curiam, reversing the decision of Richardson, J., that the petitioning creditors and the assignee must bear their own costs; that the petitioning creditors were liable to pay the costs of the assignor and the assignee, both before the Judge and in appeal; and that the assignor was entitled to the $1,530 after payment thereout of the amount of the claim and costs of the lienholder whose claim had been allowed. The costs allowed to the various parties by the Judge having been paid out to their

respective advocates upon their undertakings filed to repay the same if so ordered, the Court, in giving judgment on the appeal, ordered payment accordingly. The Exemptions Ordinance discussed as to the right to call for and the obligation to submit to a division of land and buildings claimed to be exempt. Per McGuire, J.—The sheriff is bound to leave a debtor what is exempt, the debtor having the right, if he chooses to exercise it, to a choice from a greater quantity of the same kind of articles as are exempt. If he does not see fit to make the choice, it is probable he would not be heard to complain that the sheriff had not made the choice most favourable to the debtor. *In re Demaurez.* (Richardson, J., 1899, Ct. 1901), p. 84.

Exemptions Ordinance—*Sale of Homestead — Mortgage taken in Part Payment.*] — The Exemptions Ordinance, C. O. 1898, c. 27, s. 2, s.-s. 9, declares the following real property of an execution debtor and his family free from seizure by virtue of all writs of execution, namely: — (9) "The homestead, provided the same is not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon:" — Held, that mortgage moneys, forming part of the proceeds of the sale of the defendant's homestead, do not come within this provision. This provision exempts the homestead only so long as it remains a homestead, and where the debtor has voluntarily disposed of it the language of the ordinance is not wide enough to extend the exemption to the proceeds unless they are reinvested in other exempt property before a creditor has acquired a charge or lien upon them. Receiver order, as equitable execution, discharged. *Massey-Harris Co.* v. *Schram.* (Scott, J., 1901), p. 338.

EXEMPTIONS FROM TAXATION.

See ASSESSMENT AND TAXATION.

EXTRADITION.

Extradition — *Foreign Warrant—Proof of—Proof of Warrant being in Force—Return—Discharge.*] — A warrant under The Extradition Act (R. S. C. 1886, c. 142, s. 6), for the apprehension of a fugitive, was issued upon duly authenticated copies (1) of an indictment found by a grand jury in a foreign country charging the accused with an extradictable offence; (2) of a bench warrant issued upon the said indictment, accompanied by a copy of a return thereto by the sheriff dated 10th April, to the effect that he could not find the accused and believed that he was without the jurisdiction, and (3) of depositions of witnesses tending to shew that the accused was guilty of the offence charged. On the hearing the proceedings above mentioned were put in as evidence subject to objection, and the said sheriff gave evidence that he, identifying the accused, had been in custody from about the 1st May until the sittings of the Court at which he was indicted, and that he was at that sittings discharged from his custody:— Held, (1) That, in order to give jurisdiction to a Judge to issue such a warrant, either a foreign warrant of arrest must be proved or an information or complaint must be laid before the Judgt at or before the time of the issue of the warrant. (2) That, in case of a foreign warrant, it must be shewn to be outstanding and in full force, and that the evidence tailed to establish this. Semble, that in case of a foreign warrant, the original must be produced. The accused was therefore discharged. *In re Bongard.* (Scott, J., 1900), p. 10.

FORFEITURE.

See SALE OF LANDS.

FRAUD AND MISREPRESENTATION.

See LIQUOR LICENSES.

GAMBLING.

See CRIMINAL LAW.

HOMESTEAD.

See DOMINION LANDS ACT — EXEMPTIONS UNDER EXECUTION.

HUDSON'S BAY COMPANY.

See ASSESSMENT AND TAXATION.

HUSBAND AND WIFE.

Husband and Wife—*Suit by One against the Other—Married Women's Property Ordinance—Land Titles Act.*]—In an action by a husband against his wife for a declaration that certain real and personal property claimed by both parties, belonged to him, and for an injunction to restrain the wife from disposing of the same:—Held, that a husband can sue his wife in respect of both real and personal property as if she were a feme sole. Semble, the law in the Territories is practically the same as that in England as to suits between husband and wife, except that in the Territories one may sue the other in respect of torts, while in England this is not so. *England* v. *England.* (Richardson, J., 1901), p. 204.

See DEVOLUTION OF ESTATES.

IMPERIAL ACTS IN FORCE IN THE TERRITORIES.

See DEVOLUTION OF ESTATES.

INDEMNITY.

Of officer by municipality: *See* MUNICIPALITY. *See* MUNICIPAL LAW, 1—INTERPLEADER—PRACTICE.

INDIAN ACT.

Criminal Law — *Indian Act—Intoxicant — Sale — Indian—Halfbreed —Mens Rea.*]—Section 94 of the Indian Act (R. S. C. 1886, c. 43), provides that, "Every person who sells, exchanges with, barters, supplies or gives to any Indian or non-treaty Indian, any intoxicant . . . shall on summary conviction . . . be liable to imprisonment for a term not exceeding six months . . . :"—Held, following Regina v. Howson, 1 Terr. L. R. 492, that a halfbreed who has "taken treaty" is an Indian within the meaning of the Indian Act. A conviction of a person, licensed to sell liquor, for the sale of an intoxicant to such halfbreed was, however, quashed because the licensee did not know and had no means of knowing that the halfbreed shared in Indian treaty payments. Mens rea must be shewn. *Regina* v. *Mellon.* (Rouleau, J., 1900), p. 301.

INJUNCTION.

See RECEIVER.

INTEREST.

See PRACTICE.

INTERPLEADER.

Interpleader—*Property Liable to Seizure—Seizure of Books of Account —Debtor and Creditor—Assignment of Debts.*]—A ledger or account book containing a list of debts which have been assigned in writing and which are described in the writing as "All the debts in a certain ledger marked A." is a mere incident to the debts, and is no longer a chattel as it was before the entries were made in it. It is, therefore, not seizable in execution against a judgment debtor, the former owner of the debts, as against the person to whom they have been so assigned by him. *Corticelli Silk Co.* v. *Balfour & Co.* (McGuire, C.J., 1902), p. 385.

Interpleader — *Sheriff — Delay —Indemnity.*]—A delay of three weeks after receipt of claimant's notice before making interpleader application will not disentitle sheriff to relief unless party has been prejudiced. Quære, whether a sheriff who has taken indemnity from one of the parties after seizure would now be held by that fact alone to have lost his right to interplead:—Held, that in any event it is not open to the party giving the indemnity to take such objection. *McCallum* v. *Schwan. Gould* v. *Schwan.* (Scott, J., 1903), p. 471.

JUDGMENT.

See PRACTICE.

JURY.

See CRIMINAL LAW—PRACTICE.

JUSTICE OF THE PEACE.

Justice of the Peace—*Collection of Fine and Costs — Presumption of Proper Disposition — Duty of where Conviction Quashed.*]—Held, in an action against a Justice of the Peace to recover the sum of $15 paid to him as fine and costs, upon a conviction under a Territorial Ordinance, which was afterwards quashed, that it must be presumed in the absence of evidence that the moneys were properly applied, i.e., the fine transmitted to the Attorney-General, and the costs paid over to the complainant for whom they were received as agent. There is no duty imposed on the Justice in such case to obtain a refund. The Justice's personal fees when retained by him are in effect paid to him by the complainant against whom he had the right to retain them. *Kaulitzki* v. *Telford.* (Scott, J., 1903), p. 488.

See MASTER AND SERVANT.

LACHES.

See SALE OF LANDS—INTERPLEADER.

LAND TITLES ACT.

Land Titles Act—*Amendments of* 1900 — *Executions—Filing Renewal—Expiry—Memorandum on Certificate of Title—Sheriff's Certificate of Expiry, etc.—Judge's Order.*]—The Land Titles Act, 1894, s. 92, provides for the delivery by the sheriff of a copy of a writ of execution against lands to the registrar, until the receipt by whom no land shall be bound by the writ. It also provides that "no certificate of title shall be granted . . . except subject to the rights of the execution creditors under the writ while the same is legally in force," and also that the registrar on granting a certificate of title . . . . shall by memorandum thereon express that it is subject to such rights. This section was amended by 63-64 Vic. 1900, s. 21, s. 52 (which came into effect on being assented to the 7th July, 1900), by adding a proviso to the effect that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the registrar, unless before the expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him:—Held, that this proviso applies only to writs of execution filed with the registrar after the passing of the amending Act, and, therefore, among other consequences, a writ of execution filed with the registrar before the passing of the amending Act and regularly renewed does not require to be refiled with the registrar. The Land Titles Act, 1894, s. 93, provides that upon the delivery to the registrar of a certificate by the sheriff or a Judge's order shewing the *expiration* or satisfaction or withdrawal of the writ, the registrar should make a memorandum on the certificate of title to that effect. 63-64 Vic. 1900, c. 21, s. 3, substituted for the above section a provision that upon the satisfaction or withdrawal from his hands of any writ the sheriff should transmit a certificate to that effect to the registrar, and that the registrar on its receipt or on receipt of a Judge's order shewing the expiration, satisfaction or withdrawal of the writ, should make a memorandum on the certificate of title to that effect:—Held, that now a sheriff cannot give a certificate of the *expiry* of a writ of execution; that unless the proviso added to s. 92 applies and the writ appears by the force of that proviso to have expired, the registrar can make a memorandum of its expiry only upon a Judge's order. If the sheriff has begun to execute a writ, e.g., by seizure, it does not require a renewal. The delivery by a sheriff to the registrar of a copy-writ pursuant to s. 92 is not a seizure or other inception of execution which will prevent the expiry of the writ. *In re Land Titles Act, 1894, and Blanchard Estate.* (Ct. 1901), p. 240.

See APPEAL—DEVOLUTION OF ESTATES.

LANDLORD AND TENANT.

Landlord and Tenant — *Lease—Option to Purchase—Specific Performance—Tender, Consideration for—Revocation of by Death—Evidence—Declarations against Interest, Admissibility of — Consideration, Inadequacy of.*]—A provision in a lease, whereby the lessor grants to the lessee an option to purchase the leased property within

a limited time, is not a nudum pactum. Such an option is, within the time limited, binding on a deceased's lessor's personal representatives, though not so expressed. Statements, whether written or verbally made, by the lessor as to the terms of the lease or not, after the death of the lessor, admissible as evidence in favour of his successor in title as being declarations against the deceased's interest. Per McGuire, C.J. Such statements merely amount to statements of an agreement which must be supposed to be made on fair terms, and, consequently, as much in favour of the maker's interest as against it. Where a tender is made in current bank bills, and objection is made only to the amount tendered, the objection cannot subsequently be taken that the tender was not made in "legal tender." The questions of the necessity for a formal tender, a contract under seal, importing a consideration, the inadequacy of the consideration in an action for specific performance, discussed. Judgment of Rouleau, J., affirmed. *H. C. Yuill* v. *Kate White, Administratrix of A. White, deceased.* (Rouleau, J., 1901, Ct. 1902), p. 275.

Landlord and Tenant—*Notice to Quit—Waiver.*]—A lease at a yearly rent payable in even portions, in advance, on the first day of each and every month, contained a provision entitling the landlord to give the tenant three months' notice to quit in case the landlord received an offer to purchase which he was willing to accept. On the 22nd August the landlord gave the tenant notice to quit three months' thereafter. On the 2nd November the applicant, the original landlord's successor in title, accepted the rent due in advance the previous day for the whole of the month of November, though the time limited by the notice to quit would expire on the 22nd November:—Held, that the notice to quit was waived, Held, also, that the acceptance on December 3rd of a cheque for that month's rent, although it was not presented for payment, would also be a waiver. A notice to quit in pursuance of such a special provision may be given for any broken period of the term, and need not expire at the end of a month of the tenancy. *Smith* v. *MacFarlane* (*No. 2.*) (Scott, J., 1904), p. 508.

LIMITATIONS.

On quashing by-laws: See MUNICIPAL LAW, 1.

In action against railway company: *See* RAILWAYS.

LIQUOR LICENSES.

Liquor License Ordinance — *Ultra vires — Absence of Jurisdiction, Waiver of.*]—A Territorial Ordinance enacting that no appeal shall lie from a conviction under a Territorial Ordinance unless the appellant shall within the time limited for giving notice of appeal, make an affidavit before the Justice who tried the cause that he did not by himself or otherwise, commit the offence, is not ultra vires of the Legislative Assembly. The omission to make such affidavit within the time prescribed is fatal to the jurisdiction of the Court to which the appeal is given, and is an omission which cannot be waived so as to confer jurisdiction. *Cavanagh* v. *McIlmoyle,* (Ct. 1901), p. 235.

Conviction — *Appeal — Liquor License Ordinance—Application by Attorney-General to Expedite Hearing—"Court to which such Appeal is made" —Imprisonment for Offence of Another Person—Prior Conviction.*] — Notice having been given of an appeal from a conviction for an infraction of the Liquor License Ordinance, a consequence of which conviction was a forfeiture of the license of the person convicted, to "the presiding Judge sitting without a jury at the sittings of the Supreme Court for the judicial district of Western Assiniboia, to be holden at the town of Regina on Tuesday, the 25th day of March, 1902," the Attorney-General applied to a Judge, Ordinances 1901, c. 33 (amending the Liquor License Ordinance), s. 21, s.-s. 3, to expedite the hearing:—Held, that the appeal was to the Supreme Court for the Judicial District named, generally, and not merely to a Court coming into existence only on the day mentioned, and that a Judge had jurisdiction to hear the application:—Held, on the hearing of the appeal, that s. 64, s.-s. 5, of the Liquor License Ordinance was intra vires, although the effect might be to inflict imprisonment (on non-payment of fine) upon a person who had not personally violated the Ordinance:—Held, also, following Reg. v. Black, 43 U. C. R. 180, that forfeiture of license results under s. 82 from a second or any subsequent offence against s. 64, notwithstanding the conviction occurred

in different licensing years. *The Queen v. McLeod* (Richardson, J., 1902), p. 245.

Liquor License Ordinance — *Partners—License to One Member of Vendor Firm — Illegal Sale — Bill of Exchange—Judgment for Legal Part of Consideration—Debtor and Creditor—Composition Arrangement — Misrepresentation.*]—Where a firm sold intoxicating liquors in quantities for which, under s. 78 of the Liquor License Ordinance (C. O. 1898, c. 89), action may be brought, but the only license under which the firm purported to sell was one issued to one of the members of the firm in his own name:—Held, that the plaintiffs could not recover in respect of the liquors; but the action being upon a bill of exchange, and an additional open account, judgment was given for the portions of each which were not for intoxicating liquors. A composition arrangement made with a creditor induced by a misstatement by the debtor to the creditor of the amount of assets and liabilities, will be set aside, if repudiated on the discovery of the falsity of the statement, and before any benefit has been taken under the arrangement, even though the misstatement be not shewn to have been fraudulently made. Derry v. Peek, 14 Ap. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 488, applied. *Plisson et al. v. Skinner* (Richardson, J., 1902), p. 391.

See INDIAN ACT.

LIEN NOTE.

See CRIMINAL LAW.

LOCAL IMPROVEMENT DISTRICTS.

See ASSESSMENT AND TAXATION.

LORD'S DAY OBSERVANCE.

Lord's Day Ordinance—*Appeal from Conviction—Farmer—Construction of Statutes—Ejusdem Generis.*] — The Ordinance to Prevent the Profanation of the Lord's Day, C. O. 1898, c. 91, provides: (1) No merchant, tradesman, artificer, mechanic, workman, labourer or other person whatsoever shall on the Lord's Day sell or publicly shew forth or expose or offer for sale or purchase any goods, chattels, or other personal property, or any real estate whatsoever, or do or exercise any worldly labour, business or trade of his ordinary calling, travelling or conveying travellers or Her Majesty's mail, seling drugs and medicines and other works of necessity and works of charity only excepted:—Held, that the words "or other persons whatsoever" are applicable only to persons who are ejusdem generis with those specifically named and do not include a farmer engaged in farm work. *Hamren v. Mott* (Scott, J., 1903), p. 400.

MALICIOUS PROSECUTION.

Malicious Prosecution —*Reasonable and Probable Cause—Information Bad in Law—Assisting in Prosecution—Crown Prosecutor Laying Charge.*] — The trial Judge found the following facts: The defendant went before a Justice of the Peace with the intention of laying an information against the plaintiff for stealing the defendant's calf. He asked the Justice to take such an information, but the Justice declined, and prepared one disclosing no criminal offence, charging the plaintiff with unlawfully taking the defendant's calf into his possession. The defendant swore to the information, and the plaintiff, as the result of the preliminary investigation, at which the defendant and a number of witnesses subpœnaed at his request appeared, was held to bail to appear for trial. The defendant intended to prosecute, and believed he was prosecuting the plaintiff for a criminal offence. He honestly believed the calf to be his (though the Judge found it to be, in fact, the plaintiff's), but did not honestly believe that the plaintiff was guilty of a theft; and, though he did honestly believe him guilty of some criminal offence in relation thereto, his belief was not based upon a conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would lead an ordinary prudent and cautious man, placed in the position of the defendant, to the conclusion that the plaintiff was probably guilty of a criminal offence. The Crown Prosecutor at the next sittings of the proper Court, after examining the papers transmitted to the magistrate, and without having had an interview

with the defendant, laid a charge of theft. The defendant, when the charge was preferred to the Court, was then at least aware that the charge was one of theft, and he lent his aid and assistance in endeavouring to secure a conviction for the offence so charged. The defendant was, both in laying the charge and in aiding the prosecution before the Justice of the Court, actuated by actual malice. On the facts so found by himself, as the trial Judge, Wetmore, J.:—Held, 1. That the defendant, without reasonable and probable cause, laid the information before the Justice as for an indictable offence and procured the plaintiff to be prosecuted for theft before the Court, and was liable in damages to the plaintiff. 2. Against the contention that, inasmuch that the information disclosed no criminal offence, the defendant could not quoad that information be held liable for malicious prosecution; that though no action will lie for maliciously and without reasonable and probable cause bringing a civil action, such an action will lie where the procedure is criminal in form, though the charge be bad in law. Jones v. Gwynn (1713), 10 Mod. R. 148; Gilb. K. B. 185; Attwood v. Moringer (1653), Sty. 378; Quartz Hill Mining Co. v. Eyre, 52 L. J. Q. B. 488; 11 Q. B. D. 674; 49 L. T. 249; 31 W. R. 668 C. A.; Rayson v. South London Tramway Co., 2 L. J. Q. B. 593; (1893) 2 Q. B. 204; 4 R. 522; 69 L. T. 491; 41 W. R. 21; 17 Cox C. C. 691; 58 J. P. 20 C. A., considered. 3. That the defendant was liable for the part he took in prosecuting the charge before the Court. Fitzjohn v. MacKinder, 9 C. B. (N. S.) 505; 30 L. J. C. P. 257; 7 Jur. (N. S.) 505; 30 L. J. C. P. 257; 7 Jur. (N. S.) 283; 4 L. T. 149; 9 W. R. 477, followed. 4. Against the contention that the laying of the charge by the Crown Prosecutor was an act of that officer for which the defendant was not responsible—that the defendant, having "set the stone rolling," was responsible for the consequences, inasmuch as he had not, as he should have voluntarily done, informed the Crown Prosecutor of the facts not appearing on the depositions which would have probably resulted in the proceedings being dropped. 5. That the following items should be allowed as special damages: — (*a*) Amount paid witnesses attending trial of criminal charge. (*b*) Amount paid for subpoenas and serving. (*c*) Counsel fee paid at trial of criminal charge. (*d*) Expenses of plaintiff and wife attending such trial. (*e*) Expenses of plaintiff and man attending preliminary examination. *Powell* v. *Hultgen*. (Wetmore, J., 1900), p. 16.

MANITOBA GRAIN ACT.

Manitoba Grain Act—*Application for Cars—Order Book—Distribution of Cars—Elevators— Loading Platforms.*] —The Dominion Statute, 63-64 Vic. 1899, c. 25, amending the General Inspection Act, R. S. C. 1886, c. 99, enacts (schedule) that the whole of Manitoba and the North-West Territories, and that portion of Ontario west of and including the then existing District of Port Arthur, should be known as the Inspection District of Manitoba. The Manitoba Grain Act (the short title of 63-64 Vic. 1900, c. 39, intituled "an Act respecting the grain trade in the Inspection District of Manitoba"), contains, as indicated by sub-headings, provisions respecting a warehouse commissioner—elevators and terminal warehouses—country elevators, flat warehouses and loading platforms—commission merchants — general provisions. This Act is amended by 2 Edw. VII., 1902 c. 19:—Held (1), on admission of counsel, where a farmer who is not an elevator owner, lessee or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped, and has also grain stored in another elevator at the same point in common with other grain, for which he holds storage tickets; that it is not a violation of the Manitoba Grain Act for the station agent to refuse to recognize such farmer as an applicant, or to recognize his order in the order book for a car or cars to ship his said grain. (2) Where a farmer has made order for cars in the order book at the station, and all applicants for cars who had made order prior to his order in such book, had each obtained one car, but the cars so distributed were not sufficient to fill the orders of such prior applicants, while the farmer had not yet been allotted a car by reason of the shortage; and the agent, out of the next lot of cars which arrived, refused to award the farmer a car, but there being a sufficient number of prior applicants, whose orders had not been entirely filled to exhaust the such next lot of cars, awarded out of such cars one to each such prior applicants, who had already received one car—that this was a violation to the Act. (3) If each of the prior applicants as above mentioned had been

supplied with one car at the time when the farmer gave his order, but on the day previous to the farmer's application there had been a surplus of cars after each prior applicant had been given one car, and the agent, in the distribution of the surplus cars, had begun with the first applicant, and distributed the cars so far as they would go, giving two or three to each of the prior applicants, but their order nevertheless remained unfilled, and if on the day of the farmer's application additional cars arrived to be loaded, and the agent declined to allot a care to the farmer, but allotted a car to each of the prior applicants, thus exhausting the supply—that this was not a violation of the Act. (4) Where a farmer having grain to ship made order for one car in the order book, requiring it to be placed at the loading platform for the purpose of being loaded, and the agent allotted a car to each of the elevator companies having elevators at the same station, but whose orders were subsequent to those of the farmer—that this was a violation of the Act. *King* v. *Benoit*. (Richardson, J., 1903), p. 442.

MARRIED WOMEN.

See HUSBAND AND WIFE—DEVOLUTION OF ESTATES.

MASTER AND SERVANT.

Master and Servant—*Dismissal—Servant's Wrongful Accusations against Master—Master's Knowledge of the same.*]—Where a servant, upon unfounded suspicion, endeavoured to make his fellow-servants believe that his master had committed a criminal offence:—Held, that the master was justified in dismissing his servant.—Held, also, that though the defendant may have been unaware of these acts of his servant at the time of dismissing him, he was entitled to rely upon them as a defence to an action for wrongful dismissal. Semble, it was sufficient to justify the dismissal that the servant falsely informed customers of the master that he, the servant, had been placed in his position by other persons for the purpose of straightening out the business. *McGeorge* v. *Ross*. (Scott, J., 1901), p. 116.

Justice of the Peace—*Powers of—Master and Servant—Complaint for Non-payment of Wages—No Rate of Wages Fixed.*]—When a servant is employed by a master without any agreement having been made either before entering upon his employment or during the course of it as to the rate of wages to be paid to him, a Justice of the Peace has power under the Ordinance respecting Master and Servant (C. O. 1898, c. 50, s. 3) to fix the rate of wages to be paid to the servant. Upon appeal the rate fixed by the magistrate was varied. *Holness* v. *Neibergall* (McGuire, J., 1902), p. 250.

Master and Servants Ordinance—*Improper Dismissal of Servant—Additional Wages for—Jurisdiction of J. P.*]—A bar-tender employed by an hotel-keeper at a monthly salary from the 1st of December, became temporarily incapacitated through illness on the 5th of June, and, procuring a substitute, left the hotel, returning to work again on the 10th, whereupon he was discharged by his employer, being paid $10 for wages up to the time he had left. He claimed the balance of two months' wages for improper dismissal, and on an information before a J. P. under the Master and Servants Ordinance (C. O. 1898, c. 50, s. 30), was awarded five days' further wages from the 5th to the 10th, the date of dismissal, and an additional month's wages expressed to be in lieu of notice:—Held, on appeal from this order, that the hotel-keeper was not entitled to discharge the bar-tender, under the circumstances, without notice; also that the latter was entitled to be paid wages up to the time of his dismissal. But held further, that the Justice had no jurisdiction under the Ordinance to order payment of the additional month's wages, which could not be said to be wages due, but damages for improper dismissal. *Goode* v. *Downing* (Scott, J., 1904), p. 505.

See MUNICIPAL LAW, 1.

MECHANICS' LIEN.

See EXEMPTIONS UNDER EXECUTION.

MEDICAL PROFESSION.

Motion to quash conviction—*Practice—Duty of Justice to return Depositions—Certiorari—Medical Profession Ordinance—Practising midwifery.*]

—Section 888 of the Criminal Code provides for the return of convictions by justices into the Court to which the appeal is given. Semble, apart from this provision it is the duty of justices to make return also of the depositions upon which the conviction is founded: —Held, that papers purporting to be the depositions relating to the conviction having been returned therewith, they should be assumed to be such depositions; that they were properly before the Court, and a writ of certiorari was unnecessary. Section 60 of the Medical Profession Ordinance (C. O. 1898, c. 52), provides: "No unregistered person shall practise medicine or surgery for hire or hope of reward; and if any person not registered pursuant to this Ordinance, for hire, gain, or hope of reward, practises, or professes to practise medicine or surgery, he shall be guilty of an offence, and upon summary conviction thereof he liable to a penalty not exceeding $100:—Held, that midwifery is not included within the terms "medicine and surgery," and therefore no penalty can be imposed for the practice of it by an unlicensed person. *The King* v. *Rondeau*. (Scott, J., 1903), p. 478.

MENS REA.

See INDIAN ACT.

MISTAKE.

See BILLS, NOTES AND CHEQUES—PAYMENT—DOMINION LANDS ACT.

MORTGAGE.

Mortgage—*Action on the Covenant —Foreclosure—Re-opening Foreclosure —Consolidation — Building Society — Lien on Shares—Adding Parties*]—On 27th December, 1893, the defendant K. gave a mortgage to a loan company to secure repayment of $400 and interest. On the 10th March, 1894 K. entered into an agreement to sell the mortgaged property to the defendant L., and the defendant L. paid the purchase price and became entitled to a conveyance from K. On the 4th June, 1895, the defendant K. gave a mortgage to the same company on certain other property to secure repayment of $2,600 and interest. At the time of executing these two mortgages the defendant K. subscribed for certain shares in the loan company, which he thereupon assigned to the company as security for repayment of the loans, and the mortgages on the respective pieces of land were given as collateral. Each mortgage contained a proviso that the company should have a lien upon all stock then or thereafter held in the company by the defendant, as security for repayment of the sum secured by the mortgage. The defendant K. allowed the payments on both mortgages to fall into arrear. The loan company took proceedings against K. upon the second mortgage for $2,600, and on the 24th day of August, 1899, obtained an order vesting the title in the property covered by it in themselves and debarring K. from all right to redeem. Subsequently by an assignment executed by the mortgagees under the authority of the Act incorporating the plaintiff company the latter company became the owners of the assets of the mortgagees, including the two mortgages given by King and the land included in the second mortgage. On the 10th January, 1901, the plaintiff company brought action against K. upon his covenant to pay contained in the mortgage for $2,600, and in their statement of claim offered to "re-open the foreclosure," and claimed the right to consolidate the two mortgages, but did not add L. as a party. L. applied by counsel at the opening of the trial to be added as a party defendant, upon an affidavit setting forth the facts of his agreement with K. to purchase the property covered by the $400 mortgage, of his having paid the price in full and K.'s inability to give title owing to the refusal of the mortgagees to discharge the $400 mortgage until the $2,600 mortgage was paid:—Held, that L. was entitled to be added as a party defendant under s. 36 of the J. O. (1898). Held, also, that as L. had bought prior to the mortgage for $2,600, he was entitled to all the equities of the mortgagor existing at the date of his purchase, and that his rights were subject only to the equities of the mortgagees existing at that date, and that since the mortgagees had no right of consolidation at that date, the second mortgage not having yet been executed, they had no right at all to consolidate the mortgages as against the defendant L. The word "foreclosure" as applied to proceedings to enforce a mortgage under the Land Titles Act in the Territories, is apt to mislead if it is sought to treat those proceedings as identical with "foreclosure"

proceedings, where the mortgage conveys an estate in the land to the mortgagee with a defeasance clause in case payments are made as provided. In the Territories the mortgagee has merely a lien until payment, and in case of default he can proceed to get an order either to sell the land or to have the title thereto vested in himself, and care must therefore be taken when endeavouring to apply to mortgages in the Territories the rules and principles laid down in other jurisdictions. Held, therefore, that the plaintiffs having obtained an order vesting in themselves the absolute title to the property covered by the mortgage for $2,000, they were in the same position as a mortgagee who has taken from the mortgagor a transfer of the mortgaged property where nothing appears showing any intention to reserve the right to sue; that, as there was no evidence to show that the plaintiffs intended when they obtained the vesting order to reserve the right to sue upon the covenant, the proper presumption was that the plaintiffs intended to take the land in full satisfaction and to abandon that right. Held, further, that the fact that the plaintiffs had elected to take a vesting order rather than an order for sale, and the fact that they had waited sixteen months before beginning action, were circumstances tending to show affirmatively an intention to abandon their right to sue. Held, therefore, that the action should be dismissed with costs as against both defendants. The question of the right of mortgagees to re-open a foreclosure considered. *The Colonial Investment & Loan Co.* v. *King et al.* (McGuire, C.J., 1902), p. 371.

See EXEMPTIONS UNDER EXECUTION—PRACTICE.

MUNICIPAL LAW.

Municipal Ordinance—*Constable—Servant of Corporation—Liability of Corporation—Indemnity — Validity of By-law, Resolution, or Order—Declaration of Invalidity — Quashing—Limitation of Proceedings — Parties—Costs.*] —Where it was evident from the conduct of counsel on both sides that they each took it for granted that the trial Judge had knowledge of certain facts established in another action which had been previously tried before him with a jury, and out of which the present action arose, and that for that reason no evidence was given of these facts. Held, that the trial Judge might properly, and in this present case should, in deciding the case, make use of the knowledge of the facts which he was so assumed to have. Where a constable appointed as such by a by-law of a town corporation arrested a party claiming to have done so, an offence under the Criminal Code (s. 207 "Vagrancy") and the party sued him for false arrest and imprisonment:—Held (1) That the constable, in making the arrest for such an offence, was not acting as the servant of the corporation; and, therefore, that the maxim respondeat superior did not apply; that the corporation was not liable to the party arrested; that a resolution of the council retaining an advocate to defend the constable and agreeing to indemnify him was ultra vires, and that payment by the corporation to the advocate so retained of his costs and to the advocate for the party arrested of his taxed costs, were illegal. Wishart v. City of Brandon, 4 Man. R. 453, at p. 452, McSorley v. Mayor of St. John, 6 S. C. R. 531, at p. 559, Cornwall v. West Missouri, 25 U. C. C. P. 9, at p. 12, considered. (2) That the payment of a fee to an advocate for his opinion as to the liability of the corporation and of the councillors individually was a legal payment. (3) That, though possibly the resolution of the council and the payments made thereunder might amount to a ratification of the act of the constable, so as to render the corporation liable to the party wrongfully arrested, it could not make it legal or intra vires as against any complaining ratepayer. Kelly v. Barton, 28 O. R. 608, referred to. (4) That, inasmuch as it appeared that the resolution complained of was passed by the council at the instigation of the constable, and that notwithstanding a by-law (passed after the payment of the costs—the damages not having been paid) to the effect that no further payment should be made in pursuance of the resolution, the constable still maintained that the town was liable to indemnify him by reason of the resolution, the constable was a proper party to the action. (5) That the Municipal Ordinance C. O. 1898, c. 70, sub-tit. "Application to Quash By-laws," ss. 268 and 269, are merely permissive, and do not oust the jurisdiction of the Court to declare by-laws, orders, or resolutions invalid, nor, semble, to quash them on certiorari, and did not apply where the by-law, order, or resolution is invalid on its face, and the action is to enjoin proceedings thereunder. (6) That s. 273 affords protection for acts done under

the by-law, order, or resolution, but does not bar an action to restrain the corporation from enforcing it. Quære, as to the effect of s. 101, which applies, to by-laws only. (7) Against the contention that, as far as the claim for a refund of the moneys paid under the resolution was concerned, the action should have been brought in the name of the town or in the name of the Attorney-General—that a ratepayer suing on behalf of himself and all other ratepayers similarly situated had a right to bring the action. (8) That the town, having paid the moneys under the resolution, not under a mistake either of law or fact, though at the constable's request, and having, therefore, no right to recover them from him as money paid to his use, the plaintiff suing on behalf of all ratepayers, had no greater right. (9) The corporation, having set up the by-law of the council to the effect that no further payments be made under the resolution, and consented to judgment and payment of costs, and the constable, on the other hand, having contested the plaintiff's position throughout, the costs of the action were disposed of as follows: The constable to pay the plaintiff's costs of and incidental to his defence, including the costs of the trial; the corporation to pay the plaintiff's costs of the motion for judgment against the corporation, and the corporation and the constable to pay jointly the other costs. *Pease* v. *Town of Moosomin and Sarvis.* (Wetmore, J., 1901), p. 207.

Municipal Ordinance — *Licensing By-law—Laundry — Quashing — Ejusdem Generis — Oppressive and Unreasonable.*]—By s.-s. 33 of s. 95 of the Municipal Ordinance, municipalities may pass by-laws for "controlling, regulating and licensing livery, feed and sale stables, telegraph and telephone companies, telegraph and telephone offices, insurance companies, offices and agents, real estate dealers and agents, intelligence offices, or employment offices or agents, butcher shops or stalls, skating, roller or curling rinks, and all other business industries or callings carried on or to be carried on within the municipality." Held, that a by-law imposing a license of $25 per annum on every person carrying on a laundry business could not be supported under the foregoing provision, inasmuch as it was unreasonable and oppressive, as many women in destitute circumstances who earn a meagre support by taking in washing would be included within its terms. The application of the ejusdem generis rule discussed. *In re Song Lee and the Town of Edmonton.* (Scott, J., 1903), p. 466.

NEGLIGENCE.

Damages for injury on railway —*Motion for Non-suit — Evidence for Jury—Negligence—Railway Mail Clerk as Passenger—Passenger for Reward—Contractor — Principal and Agent — Master and Servant—Independent Contractor—Respondeat Superior—Misfeasance and Non-feasance.*] — The action for damages for injury caused by negligence of a common carrier of passengers is in tort. A duty is imposed by law upon a common carrier of passengers to carry them safely and securely so that no damage or injury shall happen to them by the negligence or default of the carrier. A breach of this duty is one for which an action lies which is founded on the common law, and requires not the aid of contract to support it. It is now settled law that corporations are liable for negligence whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed on them. If the passenger be carried in performance of a contract, it is immaterial whether he himself negotiated the contract or paid the fare, or whether any fare were paid, or if paid whether it went into the pocket of the defendants. The C. & E. Railway Company were the owners of a line of railway between the city of Calgary and the town of Edmonton, but owned no rolling stock and employed no staff for the operation of the road. They entered into an agreement with the C. P. R. Co., the defendants "for the regulation and interchange of traffic and the working of traffic over the railways of the said companies, and for the division and apportionment of tolls, rates, and charges, and generally in relation to the management and working of the railways" of the two companies; whereby the defendant company agreed to operate the railway line on behalf of the C. & E. Company "with a staff and organization appointed by the C. P. R. Co. (the defendants), and to provide a service of such efficiency and speed and operate the property of the C. & E. Co. as agents for and on account of the C. & E. Co., as may be required or directed by that company or its officer." The contract also provided that the defendant company should not be required to maintain the road "below a point of efficiency necessary to the safe and proper handling of such train service, as may

be required for the proper operation of the railway." All the expenses of operating the road were to be paid in the first instance by the defendant company, but were to be charged against the C. & E. Co. under a special clause in the agreement for the apportionment of the tolls and receipts. The rolling stock used in operating the road bore the name of the defendant company. The officials employed in operating it wore caps indicating that they were servants of the defendant company. The defendant company sold tickets entitling the holder to travel over the C. & E. line, and issued a "Time Bill" giving the time tables of the western division of the defendant company, in which the line between Calgary and Edmonton was referred to as the "Edmonton Section," and this time bill was endorsed with the names of the leading officials of the defendant company. The plaintiff was a railway mail clerk in the employ of the Government of Canada, whose duty it was to handle and attend to the Government mail matter being carried on the C. & E. line between Calgary and Edmonton. This mail matter and the plaintiff were both carried under a contract between the Postmaster-General of Canada and the C. & E. Co., and the C. & E. Co. received from the Government of Canada the moneys paid for carrying the mail matter, and no part of such money was received by the defendant company. While being carried on a train on the C. & E. line towards Edmonton, the plaintiff was injured by the derailment of the train, which fell into a ravine, and he brought action for damages against the defendants:—Held, that plaintiff being lawfully in the mail car with the knowledge and consent of the defendants, and a passenger under the charge and care of the defendants, of which there was evidence to go to the jury, a duty was imposed upon the defendants to carry him safely and securely, so that by their negligence or default no injury should happen to him; that for a breach of this duty an action would lie independently of any contract, and that the question whether or not the defendant company received a reward for carrying the plaintiff did not affect the rights of the parties. Held, also, against the contention that the defendant company were merely agents for the C. & E. Co., and that the officials and workmen operating the road were the servants, not of the defendants, but of the C. & E. Co., and that the latter company, if anyone, were responsible; that there was evidence to shew that the officials and workmen were the servants of the defendant company, and that the defendant company were not merely agents but were independent contractors:—Held, also, against the contention that the defendants were the agents of the C. & E. Co. in operating the road, and were therefore, liable for a misfeasance but not for a nonfeasance; that the omission to take proper care in respect to the condition of the bridge, and the track, and the running a train over the track and bridge while in an unsafe condition, would be a misfeasance and not a nonfeasance, and that, therefore, even if the defendants were merely agents of the C. & E. Co., they would still be liable. *Keany* v. *Canadian Pacific Ry. Co.* (McGuire, C.J., 1902), p. 420.

NOTICE.

See SALE OF LAND.

OPTION.

See LANDLORD AND TENANT, 1.

PARTNERSHIP.

See LIQUOR LICENSES.

PAYMENT.

Taxes Illegally Collected—*Repayment of — Voluntary Payment — Res Judicata.*]—Certain of the plaintiff's lots were by by-law of the defendant municipality "exempted from payment of taxes" for the year 1899 and other years. The said lots were assessed for taxes for the said year for "school purposes only." Thereafter the plaintiff received from the defendant a statement and demand for payment within 30 days of the taxes on the said lots for the said year, and "in consequence of the said demand" paid the same:—Held, that, assuming the plaintiff was entitled to exemption from taxation for school purposes, this did not amount to such an involuntary payment as would entitle the plaintiff to recover the amount so paid. Effect of decision of Court of Revision discussed. *Spring—Rice* v. *Town of Regina.* (Ct. en banc, 1901), p. 171.

PAYMENT INTO COURT

See BANK ACT.

PLEADING.

Amendment: *See* BILLS, NOTES AND CHEQUES: *See* BANK ACT—COPYRIGHT—PRACTICE.

PRACTICE.

Third party notice — *Application for Directions—Right to Indemnity or Contribution — Warranty of Title.*] — Plaintiff brought action against the defendants for breach of warranty of title to a horse sold by the defendants to the plaintiff. Defendants, in pursuance of leave given, served a third party notice on Grieve, from whom they had bought the horse, claiming to be indemnified by him to the extent of any damages recovered against them by the plaintiff, on the ground of breach of warranty of title by Grieve: — Held, that upon the application for directions as to trial the Court should consider the defendants' right to contribution or indemnity, and if satisfied that he is not so entitled should refuse to give directions, which refusal will be tantamount to a dismissal of the third party from the action:—Held, also, that in the circumstances the defendants' claim against Grieve was not properly one for contribution or indemnity, and that no direction as to trial should be given. *Bolduc* v. *Larose and Stirrett* (Scott, J., 1900), p. 6.

Pleading—*Mortgage Action—Alternative Provisoes—Embarrassing or Unnecessary—Striking out.*] — The plaintiffs in paragraph 2 of their statement of claim alleged that the defendant by deed dated 13th November, 1888, in consideration of £1,003 lent him by one A. M., mortgaged his reversionary interest in his father's estate, and that in the said deed it was provided that if the defendant should within ten years after the date of the mortgage become entitled to the said reversionary interest by the death of the tenant for life, and should within 30 days after obtaining possession of the same pay the said A. M. $2,000, with compound interest at 10 per cent. per annum, then the mortgage should be void. In paragraph 3 it was alleged that it was further provided by the mortgage that if the defendant should at the expiration of 10 years from the date of the mortgage repay to A. M. the said sum of £1,003, with interest compounded yearly at 10 per cent., then the mortgage should be void. In paragraph 4 it was alleged that the defendant covenanted in the said deed to pay the mortgage money and interest and observe the provisoes therein contained. In paragraph 5 it was alleged that A. M. had duly assigned the mortgage to the plaintiffs; in paragraph 6, that the defendant did not within 10 years become entitled to the property mortgaged by the death of the life tenant, and in paragraph 7 that the defendant had not paid any sum whatever on the mortgage. The plaintiff claimed £1,003 and interest at 10 per cent. compounded yearly:—Held, on an application to strike out the whole statement of claim, or at any rate either paragraph 2 or paragraph 3 as embarrassing, that the pleading was not embarrassing, and should stand; that so far as any of the allegations might be unnecessary they merely anticipated a possible defence, and were not on that account embarrassing. *Vancouver Land & Securities Co.* v. *McKinnell* (Scott, J., 1901), p. 27.

Practice—*Jury—Counterclaim.*] — Where the claim is such that it cannot by reason of r. 170 of the Judicature Ordinance (C. O. 1898, c. 21), be tried by a jury, and there is a counterclaim which, if the defendant had sued in a separate action, he would have been entitled to have tried by a jury; if the counterclaim arises out of the same transactions as the claim, they must be tried together; and in that event the defendant, having accepted the forum chosen by plaintiff, a jury cannot be allowed. *Friel* v. *Stinton* (Richardson, J., 1902), p. 252.

Practice—*Counterclaim — Adding Parties by.*]—The practice of the Supreme Court of the Territories permits a defendant to set up a counterclaim which raises questions between himself and the plaintiff, along with other persons, and to add such other persons as parties by the counterclaim; the English practice respecting counterclaims contained in Order 21, rr. 11, 12, 13, 14 and 15, being in force in the Territories. *Robertson* v. *White* (Scott, J., 1902), p. 311.

Practice—*Chambers — Affidavits — Exhibits not filed.*]—It is not necessary

to file exhibits referred to in an affidavit filed on application in chambers. *Lassen* v. *Bauer* (Scott, J., 1903), p. 458.

Practice—*Order for Discovery of Documents—Non-compliance— Application to Dismiss Action—Failure to Indorse Notice on Order—Rule* 330.] — Rule 330 applies to orders for discovery of documents, not only where the remedy sought for non-compliance is attachment, but also where the remedy sought is dismissal of the action or striking out of the defence. Where therefore a copy of such an order served was not indorsed, as provided, an application to dismiss the action for non-compliance with the order was refused. *Leadley* v. *Gaetz* (Scott, J., 1903), p. 484.

Practice — *Chamber Application — Insufficient Affidavit — Amendment refused.*]—On an application by a landlord against his tenant for an order for possession, the applicant was refused leave to amend the allegations of his affidavit upon which the originating summons was issued. *Smith* v. *Macfarlane* (*No.* 1), (Scott, J., 1903), p. 491.

Practice—*Judgment by Default — Debt — Interest — Setting aside—Rule* 90.]—Where in an action for a debt or liquidated demand, there is also a claim for interest, as accruing prior to the issue of the writ, but no allegation in the statement of claim of any contract, express or implied, to pay it, it cannot, being an unliquidated demand, be included in a judgment signed by default under Rule 90. Such judgment will be set aside as irregular. *Ewing* v. *Latimer* (Scott, J., 1903), p. 499.

Examination for Discovery — *Officer of Corporation — Railway company — Station Agent — Section Foreman—Chief Clerk in Office of General Superintendent—Rule* 201.]—A station agent is an officer of a railway company within the meaning of Rule 201, and liable to be examined for discovery. A section foreman is not such an officer, nor is the chief clerk in the office of a general superintendent. *Eggleston* v. *C. P. R.* (Scott, J., 1904), p. 503.

See BANK ACT — PARTIES — MUNICIPAL LAW, 1—MORTGAGE.

Service: *See* CANADIAN PACIFIC R. CO.: *See* RECEIVER—SMALL DEBT PROCEDURE.

PRESCRIPTION.

See LIMITATION.

PUBLIC ADMINISTRATOR.

See ADMINISTRATION.

RAILWAYS.

Railway Act—*C. P. R. Act—Prescription—Limitation — Amendment—Vested Right—"By Reason of the Railway" — Commission or Omission.*] — The provisions of The Railway Act, 1888, s. 287 (as to limitations of actions for damages or injury sustained by reason of the railway) apply to actions founded on the commission of acts, not to those founded on the omission of acts, which it was the company's duty to perform. Kelly v. Ottawa R. Co., 3 O. A. R. 616; McWillie v. N. S. R. Co., 17 S. C. R. 571; Zimmer v. G. T. R. Co., 19 O. A. R. 693, considered. If, in an action against a railway company, an amendment of the statement of claim is asked for it should not be allowed if s. 287 applies, and the amendment sets up a new cause of action. *Findlay* v. *C. P. R.* (Richardson, J., 1901), p. 143.

See NEGLIGENCE.

RECEIVER.

Interim Injunction — *Receiver—Probability of Plaintiff being Entitled to Relief Asked—Balance of Convenience—Incorporated Company.*]—An application to continue until trial an interim injunction granted ex parte, and to appoint a permanent receiver, was dismissed, where the plaintiff's right of action was not entirely free from doubt, and it appeared that the injury that would be occasioned to the defendants by the granting of the injunction and the appointment of a receiver, if the plaintiff ultimately failed, would be very great, while that which would result to the plaintiff by its refusal, if he ultimately succeeded, would be comparatively small. Application of this principle to an incorporated company. *Reynolds* v. *Urquhart.* (Scott, J., 1902), p. 413.

See SALE OF LAND — EXEMPTIONS UNDER EXECUTION.

RESIDENCE.

See SCHOOL DISTRICT.

REVOCATION.

See LANDLORD AND TENANT, 1.

SALE OF GOODS.

Sale of Goods Ordinance — *Statute of Frauds—Memorandum in Writing—Omission of Term of Agreement—Connecting Documents—Evidence.*]—Plaintiff's agent took a verbal order for goods from the defendant, one of the terms of payment being that he should, in a certain event, have six months' credit. The plaintiff's agent signed a memorandum containing all but this term of the contract. The defendant subsequently wrote cancelling the order. This led to further correspondence. In none of the letters was any reference made to the term allowing six months' credit. The Sale of Goods Ordinance, Ord. No. 10, 1896, s. 4 (now C. O. 1898, c. 39, s. 6, substantially a re-enactment of the 17th section of the Statutes of Frauds), was pleaded:—Held, (1) That it was open to the defendant to prove, as he had, that the term as to six months' credit was part of the contract, and, as it did not appear in any of the documents submitted to constitute the note or memorandum in writing, the plaintiff was not entitled to recover. (2) That as the statement of claim alleged the term as to six months' credit to be part of the contract sued on, it was unnecessary for the defendant to have proved it, and he might have taken the objection immediately upon the written evidence of the contract being put in. (3) That a letter cancelling the contract for the purchase of goods cannot be taken to constitute an acceptance of the goods. Semble, (1) That parol evidence is admissible to connect several writings so as to constitute them together a note or memorandum under the Ordinance. Oliver v. Hunting, 44 Ch. D. 205; 59 L. J. Ch. 255; 62 L. T. 108; 38 W. R. 618, referred to. (2) That a memorandum of sale required to be in writing may be complete and binding, though silent as to price and to time and mode of payment, if no agreement in fact was made on these points, the omission being equivalent to a stipulation for a reasonable price and immediate payment in the usual mode. Valpy v. Gibson, 16 L. J. C. P. 241, App. 248; 4 C. B. 337; 11 Jur. 826, referred to. *Calder* v. *Hallett*. (Wetmore, J., 1900), p. 1.

Sale of Goods — *Passing of Property in the Goods thereunder—Right of Party to Waive the Performance of a Stipulation in his Favour.*]—Wright v. Shattuck, 4 Terr. L. R. 455, Rouleau, J., 1901, affirmed. Opinion evidence discussed. *Wright* v. *Shattuck*. (Ct. 1901), p. 264.

See BANK ACT.

SALE OF LAND.

Sale of Land—*Agreement—Time of Essence—Notice—Cession Forfeiture of Payments, &c.—Receiver — Accountability for Rents—Laches—Specific Performance—Costs.*] — Semble, that the acceptance by a vendor of a payment on account of a past due instalment of purchase money is a waiver of his right to take advantage of a provision in the agreement of sale making time of the essence thereof; but, if there be a subsequent default in payment of a subsequent instalment, that being a new breach, gives the vendor a right to insist on that provision:—Held, (1) That a vendor, if he gives to the purchaser a notice limiting a reasonable time within which to complete an agreement to purchase, and informing him that after the lapse of the time limited the agreement will be treated as at an end, and if he does not act subsequently to waive the effect of the notice, thereby legally rescinds the agreement, and the purchaser is not entitled to specific performance. (2) That mere delay in enforcing his rights consequently upon such a rescission does not disentitle the vendor to a declaratory order that the agreement is rescinded. (3) That in such a case payments on account of purchase money are forfeited to the vendor if there be a provision to that effect in the agreement, and, semble, even without such a provision. (4) That where, after such an agreement, the property in question passed into the hands of a receiver appointed by the Court, and he, as well as the purchaser, was given a notice in the terms above mentioned, the receiver was accountable to the vendor for the rents received subsequent to the date on

which the notice terminated the agreement. The receiver, on the grounds of his being an officer of the Court, and of the delay of the vendor in taking steps to enforce his rights, was not ordered to pay the costs of the application in which the above questions were raised. *Forfar v. Sage, Ex parte Wilkins.* (McGuire, J., 1902), p. 255.

For Taxes: — *See* ASSESSMENT AND TAXATION.

SCHOOL DISTRICT.

Erection of School District— *School Ordinance—District more than Five Miles Long—Consent of Ratepayers Affected — Meaning of "Affected" and of "Actually Resident" — Residence—Domicile—Construction of Statutes—Confirmatory Act.*]—The expression "all the resident ratepayers affected by such permission" as used in s. 12 of the School Ordinance, c. 75, C. O. 1898, means, not "all the resident ratepayers," but only those who are affected by the district being more than five miles long, and when the district purported to be erected is in fact over five miles long, the residents in each of the tiers of sections which lie at the extremities of the district must be considered as affected since it is impossible to say which tier should be regarded as the excess in length. Where a ratepayer owned real property in the district and had a house with furniture in it locked up on this property, but rented a house out of the district for the use of his wife and family, while he was prospecting in the mountains and for some time also working in a coal mine, both out of the district:—Held, that he was not an "actual resident" whose consent in writing could be required under s. 12. The meaning of "residence," "actual residence," and "domicile," considered. *Curren et al. v. McEachen et al.* (McGuire, C.J., 1902), p. 333.

See ASSESSMENT AND TAXATION.

SHERIFF.

See INTERPLEADER.

SMALL DEBT PROCEDURE.

Judicature Ordinance — *Small Debt Procedure — Counterclaim for Large Debt—Costs.*]—In an action under the small debt procedure, the defendant may under Rule 612, set up a counterclaim, the amount of which exceeds the small debt jurisdiction. Where such a counterclaim is dismissed with costs, the plaintiff is entitled to tax a fee of ten per cent. on the amount under Rule 617, which extends to counterclaims. *Cox v. Christie.* (Scott, J., 1903), p. 475.

Practice — *Conversion — Tort Waived—Goods Sold—Debt.*]—A claim for the value of goods converted by the defendant, the plaintiff expressly waiving the tort and suing as for goods sold and delivered, may be sued under the small debt procedure. The plaintiff in his statement of claim under the small debt procedure, alleged that the defendant had wrongfully taken possession of a horse and converted it to his own use, and expressly waived the tort and sued for goods sold and delivered, claiming $75, the value of the horse. An application to set aside the writ and service, upon the ground that the claim was not one for debt within the meaning of Rule 602, which brings all claims and demands for debt, whether payable in money or otherwise, where the amount claimed does not exceed $100 within the small debt procedure was refused. The word "debt is not restricted to a sum certain or capable of being reduced to a certainty by calculation," but includes a claim for the value of goods sold where no price is mentioned. *Henry v. Mageau.* (Scott, J., 1904), p. 512.

SPECIFIC PERFORMANCE.

See LANDLORD AND TENANT, 1—SALE OF LAND.

STATUTE OF FRAUDS.

See SALE OF GOODS, 1.

SUCCESSION.

See DEVOLUTION OF ESTATES

SUMMARY CONVICTION.

See CONVICTION.

SUMMARY TRIAL.

See CONVICTION.

TAX SALE.

Sale for Taxes—*Liability of Purchaser for Taxes Imposed in the Year of Sale—Construction of Statutes.*]—Certain lots in the city of Calgary were, on the 27th June, 1896, sold for arrears of taxes due thereon for certain years prior to 1896; the sales were duly confirmed by the Court, and on the 10th July, 1897, and 27th June, 1898, the purchaser received certificates of title in due form from the Registrar of Land Titles, and entered into and remained in possession of the lots as owner. The lots were duly assessed for taxes for the year 1896, but no rate was struck until after the sale. The said taxes for 1896 remained unpaid for two years. Section 81 of the Ordinance incorporating the city of Calgary provides that the transfer from the treasurer to the purchaser shall vest in the purchaser all the rights of property of the original holder of the land, and purge and disencumber it from all encumbrances of whatever nature other than existing liens of the city and the Crown:—Held, that the lots in question were liable to be sold for taxes for the year 1896, and that, under s. 51 of the same Ordinance, the purchaser was personally liable to the city for the amount of the taxes. Section 81 was amended by Ordinance 1900, c. 39, s. 4, by the addition after the word "Crown" of the words "including all taxes unpaid upon such land at the day of the date of such transfer, and whether imposed before or after the day of the date of the tax sale at which said lands were sold:"—Held, that this amendment did not raise the presumption that the section as it originally stood had not the same meaning; that the amendment was probably made to remove doubts that may have existed. *In re Lougheed and the City of Calgary.* (Scott, J., 1901), p. 200.

Municipal Law—*Sale of Land for Taxes—Corporation—Right to Redeem—Construction of Statutes—Retroactive Legislation—Vested Rights.*]—Section 80 of the charter of the city of Calgary (Ordinance 33 of 1893), provides that if land sold for taxes be not redeemed within one year after the date of the sale, the purchaser shall be entitled to a transfer, which shall have the effect of vesting the land in him in fee simple or otherwise, according to the nature of the estate sold, and s. 81 provides that the transfer shall not only vest in the purchaser all rights of property which the original owner had therein, but shall purge and disencumber such land from all payments, lien charges, mortgages, and encumbrances whatever, other than existing liens of the city and the Crown. Certain lots in the city of Calgary were sold for taxes on 16th April, 1900, and a transfer was given to the purchaser on 8th May, 1901, the owners not having offered to redeem within the year:—Held, that s. 2 of Ordinance 12 of 1901, "an Ordinance respecting the Confirmation of Sales of Lands for Taxes," passed 12th June, 1901, giving a right to redeem at any time before the hearing of the application for confirmation, is not restrospective, and that the original owners could not take advantage of its provisions:—Held, further, that ss. 80 and 81 of the charter of the city of Calgary are not ultra vires as being in conflict with ss. 54 and 57 of the Land Titles Act, 1894. Wilkie v. Jellett, followed. *In re Kerr.* (Scott, J., 1902), p. 297.

See APPEAL.

TENDER.

See LANDLORD AND TENANT, 1.

TIME.

Of the essence: *See* SALE OF LAND.

VESTED RIGHTS.

See ASSESSMENT AND TAXATION — RAILWAYS—TAX SALE.

VOLUNTARY PAYMENT.

See PAYMENT.

WAIVER.

See LANDLORD AND TENANT.

WEIGHTS AND MEASURES.

Dominion Weights and Measures Act, R. S. C. c. 104, s. 21—*Contract to Thresh Grain — Quantity Threshed Subsequently Ascertained by Cubic Measurement — Effect of upon Contract.*] — The defendant contracted with the plaintiff to thresh his grain at a price per bushel. The quantity threshed was not measured with a Dominion standard measure, or weighed, but was subsequently ascertained by the defendant by cubic measurement:—Held, that so measuring the grain was not a "dealing" within the meaning of s. 21 of the Weights and Measures Act, which could relate back and render the contract void, and that the defendant was not therefore disentitled to a lien under the Threshers' Lien Ordinance. Macdonald v. Corrigal (1893), 9 Man. R. 284; and Manitoba Electric and Gas Light Co. v. Gerrie (1887), 4 Man. R. 210, considered. Judgment of Wetmore, J., reversed. *Conn* v. *Fitzgerald.* (Wetmore, J., 1902. Ct. [illegible]), p. 346.

WARRANTY.

See BANK ACT — SALE OF GOODS — PRACTICE.